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REGULATORY GOVERNANCE IN THE PHILIPPINES: A PROFILE

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REGULATORY GOVERNANCE IN THE PHILIPPINES: A PROFILE[1]

INTRODUCTION

This paper maps out the terrain of regulatory governance in the Philippines. It is made up of four interrelated parts. The first section gives a short introduction to the country so that the context of the regulatory governance system can be better understood. This overview also defines the concepts of regulation, competition and regulatory governance as they are used in the paper. The second part describes the constitutional and legal frameworks of regulation in the economy. In the process, it shows the contrasting pull of nationalism on the one hand, and globalisation and liberalisation on the other, as the most significant forces shaping regulatory governance today. The third part discusses the institutional framework. It first describes the role of the three branches of government. It then dwells at length on the various means of organizing the regulatory agencies, this time looking primarily at how they tackle the joint pressures of involvement and independence. It also presents emerging regulatory mechanisms from the private sector and civil society. Drawing from all these, the fourth part pulls together the lessons learned from the discussion and suggests items for the research agenda for the next years of the project.

The Philippines: A Brief Socio-Economic Profile

The Philippines is the world's second largest archipelago, comprised of 7,107 islands located in the Southeast Asian region. It has a total land area of approximately 300,000 square kilometres, subdivided into three main geographical areas: Luzon, Visayas and Mindanao. According to the country's latest census (2000), the total population is about 76.5 million with an estimated annual growth rate of 1.99 percent.

The Philippines' economic system has evolved from the country's long experience of colonial rule. Following the Spanish conquest in 1521 fragmented native localities known as *barangays* were consolidated into a single political domain, and a unified economic system based on feudalism was established. The nearly four hundred years of Spanish colonisation was characterised by a mercantilist trading regime, initially limited to Chinese traders that supplied merchandise for the Manila-Acapulco galleon trade route. Towards the latter part of Spanish rule, the export agriculture strategy that shaped the existing agricultural regime in the country was implemented and the country was subsequently opened for trading to all nations.

With the American occupation at the advent of the 20th century, the colony moved from mercantilism to a free enterprise system. An "economy of special relations" with the United States was established, focusing on export agriculture for the American market. Due to this policy, the Philippine agricultural sector was almost entirely dependent on the US market until 1941.

World War II and the Japanese occupation of the Philippines took a significant toll on the country's economic prospects. It was estimated that the Philippines lost in excess of US$8 billion during the war, including physical and human resource losses and the costs of goods and services plundered by the Japanese Imperial Army. With many factories and establishments destroyed, unemployment increased and the industrial sector along with the entire economy suffered tremendously.

On the eve of Philippine independence in 1946 and practically as conditionality for it, the United States offered to help rehabilitate the country in exchange for the grant of parity rights to Americans. Parity rights meant that rights that the Constitution of 1935 reserved for Filipino citizens - to exploit and develop the natural resources, and to operate public utilities – were given also to Americans. The parity clause caused the amendment of the 1935 Constitution and remained in effect until July 4, 1974 as explicitly stated in the 1973 Constitution.

Even before the end of parity rights, President Carlos P. Garcia in 1958 adopted the "Filipino First Policy," a set of economic reforms and policies geared toward achieving national economic independence. Basically, President Garcia opposed the "move for a return to free enterprise in the Philippine economy," as he believed that this would only facilitate the continued domination of foreigners. Despite independence, the economy then was controlled by American, Chinese, and to a certain extent, Spanish, interests, way ahead of Filipino enterprises. The change in later decades would be in the new large share of multinational corporations but Filipinos would remain at the bottom rung of their economy. It is thus not surprising that nationalism pervades the economic provisions of all Philippine constitutions. It would also explain the continuing popularity of the Left among the peasant, labour, youth and intellectual sectors that trace the stark poverty and inequality in the country to neo-colonialism and other evils of capitalism.

The role of government in achieving national economic growth and stability and the attainment of economic liberty for the greater masses of the Filipino people, were the catchwords used by President Ferdinand E. Marcos in putting the country under martial law dictatorship in 1972. Under this vision of a "New Society," the Philippines embarked on an ambitious development plan anchored on import substitution, massive infrastructure projects funded by foreign borrowings, and the establishment of over 300 public enterprises. However, whatever vision Marcos had of rapid national development, it was overshadowed by his widespread corruption and crony capitalism, near-monopoly of the biggest enterprises, and human rights abuses. His regime fell in the first People Power Revolution in 1986, leaving behind a bloated bureaucracy and a severe foreign debt crisis.

Fabella (in Canlas and Fujisaki, 1999) traces the beginnings of the Philippine soft state[2] from the import substitution regime during the Marcos administration. Marcos had created a market for rules, wherein special laws and rules favouring certain individuals or groups, particularly those seen as the President's cronies, were enacted given the right considerations. This practice eventually led to control "over-reach" by the government, which in turn resulted in mediocre enforcement of rules and widespread corruption and open violation of rules in general. The level of governance thus suffered from the over-extension of the state into the affairs of the market.

Recent years have seen significant deregulation and liberalisation. The administration of President Corazon C. Aquino (1986-92) moved to "de-Marcosify" government by abolishing and/or privatising public enterprises, and sequestering or restoring to the original owners the enterprises attached by Marcos and his cronies. President Fidel V. Ramos (1992-98) followed with a more aggressive privatisation, deregulation and liberalisation strategy that included the country's accession to the World Trade Organization (WTO) in 1994[3]. The first years of Ramos' administration saw rapid economic growth that was however severely reversed by the Asian economic crisis of 1997. The country was unable to recover during the short-lived regime of Joseph Ejercito Estrada who was ousted from office by the second People Power Revolution of 2001. He was succeeded into the presidency by Vice President Gloria Macapagal Arroyo.

President Arroyo presides over an economy that the World Bank classifies as middle-income. Independent risk assessments and the government's own predictions show an economy

poised to recover economically. It is still beset by a very high proportion of people living in poverty, high unemployment and underemployment, concentration of wealth in a few families and multinationals, and a continuing peace and order problem compounded by a secessionist movement and terrorism in Mindanao, the country's second largest island. Other relevant information on the current state of the Philippine economy is in Table 1.

Table 1.The Philippine Economy

Gross National Product (GNP as of 2001)	Php[4] 3,860,260,000,000
GNP Growth (Annual, 2001)	3.7%
Gross Domestic Product (GDP as of 2001)	Php 3,642,820,000,000
GDP Growth (Annual, 2001)	3.4%
Balance of Trade (as of February 2002)	$ 421 Million
Inflation Rate (March 2002)	3.6 %
Median Family Income (as of 2000)	Php 88,782
Unemployment Rate (as of January 2002)	10.3%
Underemployment Rate (as of January 2002)	15.9%

Sources: National Statistical Co-ordination Board.

Key Concepts: Regulatory Governance, Regulation, and Competition

Regulatory governance

"Regulatory governance" encompasses the whole system by which regulation and competition are managed to achieve societal goals. The use of "governance" suggests a broad approach to the issue, indicating a multiplicity of actors, rules and processes to ensure goal attainment. Following this, Selznick's definition of regulation "as sustained and focused *control exercised by a public agency* over activities that are valued by a community"(1985: 363, emphasis supplied) is a prevailing[5] but may now only be a traditional notion.

The view of regulatory governance used in this paper does not contemplate such a monopoly of the state or only the act of control. In the first place, the actors involved in regulation have increased. From the rhetoric, the preferred actor is the unseen hand of the market that regulates the actions of firms. Other actors enter only when goals other than economic efficiency – such as redistributive or nationalistic considerations – are sought. In this case, a public agency alone may undertake regulation, or it may be performed by hybrids of public-private entities or organisations of civil society.

In the second place, the activities involved in regulation go much beyond control. Baldwin and Cave (1999) recognise as the first mode of regulation *"a specific set of commands,* where regulation involves the promulgation of a binding set of rules to be applied by a body devoted to this purpose," which might correspond to Selznick's "control." However, they are also quick to state that influence may also play a role. They call as *"deliberate state influence …* where regulation has a broader sense and covers all state actions designed to influence industrial or social behaviour, e.g., through economic incentives (taxes or subsidies), contractual powers, deployment of resources, franchise, supply of information or other techniques," and as "*all forms of social control or influence*, where all mechanisms affecting behaviour, whether state-derived or from other sources (e.g., markets) are deemed regulatory." In the governance literature, these actions by the state are not expected to control but rather "to enable and facilitate." Thus, it sets rules and provides infrastructure and other supports so that the private sector may play out its role "as the engine of growth" (a phrase used in many Philippine development plans). It may take on new functions and requirements to make competition and the play of market forces redound to the good of all, such as the acceptance of self-regulation by firms and of consultations with consumers and other interested citizens. Of course, backed up by the authority of the state, even influence contemplated to be passive or benign may be seen by private firms as control.

In the third place, the context of doing business – and thus also of regulation – has changed. Devolution has also meant that regulation may be made at the national as well as the local level. With the increase of globalisation, the role of international regional associations and inter-country agreements has also increased. At the same time, the citizens are no longer passive recipients of rules and may demand the consideration of their voices in their promulgation and application. All these suggest a wide variety of possible institutional arrangements and processes that together would make up an intricate system of regulatory governance.

Regulation

Regulatory governance is supposed to preside over regulation and competition. Thus while this paper will not discuss how the market actually works and the rules by which society governs it, it is useful to understand the scope of these two processes. Minogue (2001) expounds on the concept of regulation thus:

> Regulation is based on rules, which may give strict directives, or be broadly enabling in ways which permit further negotiation; rules may also be framed in ways, which concede discretion over their detailed negotiation.

Governmental regulation derives its justification from the need to protect the public interest and the creation or facilitation of conditions for effective markets. Its usual connotation is negative, i.e., to restrict, limit, prohibit, or prevent the occurrence of certain undesirable activities. However, regulation may also encompass many positive activities, such as promotion, facilitation and provision of incentives. An example of such a "green light" mode is when airwaves are regulated so as to allow broadcasting operations to be conducted in an ordered fashion rather than left to the potential chaos of an uncontrolled market (Baldwin and Cave 1999:2).

Government generally enters the market either as a direct producer or seller of goods and services or as regulator of a particular sector or industry. Regulation, in particular, economic regulation, is the means by which private firms are constrained from anti-competitive behaviour (Minogue, 2001). Regulation in this instance aims to bring about social outcomes (in price, quantity or quality) that approximate those of a competitive market, particularly in situations where there is market failure or imperfection as in a monopoly.

Competition

Competition has been referred to as the fundamental economic regulatory force (Milo, 2001). It is synonymous to words like rivalry, contention, opposition, struggle and, in the extreme sense, even conflict. Competition means vying with other players (e.g. manufacturers, retailers, processors, merchants and service providers) for business and trade in the market (FTACI, 1998). In the presence of competition, there is, in fact, no need for governmental regulation, except to ensure that it does not become "ruinous" or "excessive" (to the contending firms).

Regulation is closely intertwined with competition and competition policy. Where the objective of regulation is to ensure competitive outcomes, the goal of competition policy is to preserve and promote competition through the prevention of restrictive business practices by firms and through the correction of inefficient government regulations (Aldaba, 2001). More specifically, the objectives of competition policy may be seen as one of:

- Establishing a competitive order as an end in itself to safeguard economic freedom
- Maintaining a competitive order to foster economic efficiency and technological and economic progress
- Providing for a level playing field of fair competition
- Maintaining a decentralised structure of supply (Neumann 2001: 1).

THE LEGAL FRAMEWORK

The Constitution of 1987 and the entry of the Philippines into the World Trade Organisation are important landmarks in the evolution of the country's development of a scheme of regulatory governance. Often complementary but sometimes conflicting, they have set the tone for reforms in concept and practice of the workings of the Philippine economy. These reforms - it must be said at the outset - have both economic and political aims. They are conceived not only for the growth of the economy but also for the country's integrity as a sovereign state and as a democracy; they do not only contemplate changing the face of the market but seek also the participation of the citizenry in its fruits. In a country where the majority are poor and marginalised, this means putting these reforms in the service of poverty alleviation and social justice. It thus requires appraising the emerging system of regulatory governance against the lens of a wide range of values collectively defined as the public interest.

The Nationalistic Constitutional Framework

The philosophy of regulatory governance in the Philippines is ordained in the Declaration of State Policies of the Constitution of 1987 (Article II, Section 9):

> The State shall promote a just and dynamic social order that will ensure the prosperity and independence of the nation and free the people from poverty through policies that provide adequate social services, promote full employment, a rising standard of living, and an improved quality of life for all.

This is followed by Section 10, which speaks of the duty of the State to promote "social justice in all phases of national development" and Sections 14 to 18, which further underscore the duty of the government to:

- Ensure the fundamental equality before the law of men and women;
- Protect and promote the right to health of the people;
- Protect and advance the right of the people to a balanced and healthful ecology;
- Give priority to education, science and technology, arts, culture and sports to foster patriotism and nationalism, accelerate social progress, and promote total human liberation and development; and
- Protect the rights of workers and promote their welfare.

The economic policies of the State are set forth in sections 19 and 20. The former heralds the nationalistic bent of the Constitution. This will be discussed extensively below. The latter concerns other principles by which the economy may be regulated and will be the subject of the next section.

Section 19 provides that "The State shall develop a **self-reliant and independent national economy effectively controlled by Filipinos**" (emphasis supplied). Article XII (National Economy and Patrimony) further fleshes this out in the following provisions where the State is given the duty to:

- Protect Filipino enterprises against **unfair foreign competition and trade practices** (Sec.1)
- Enact measures that will **encourage the formation and operation** of enterprises whose capital is **wholly owned by Filipinos** (Par. 1, Sec. 10);
- Give **preference to qualified Filipinos** in the granting of rights, privileges, and concessions covering national economy and patrimony (Par. 2, Sec. 10);
- **Regulate and exercise authority over foreign investments** in accordance with its national goals and priorities (Par. 3, Sec. 10); and
- **Promote the preferential use** of Filipino labor, domestic materials and locally-produced goods, and adopt measures that help make them competitive (Sec. 12) (emphases supplied).

Moreover, only Filipino citizens or corporations that are 60 percent owned by Filipinos may receive a franchise to operate a public utility (Art. XII, Sec. 11). The same section further provides that:

> 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).

Even the practice of professions is limited to Filipino citizens, "except in cases prescribed by law" (Sec. 14, Art. XII).

From the foregoing, it is clear that the 1987 Philippine Constitution is very nationalistic. This is not a new development, as earlier Constitutions had articulated the same philosophy under very different political conditions. The Constitution of 1935 was written by Filipinos in preparation for Independence. Although it had to pass the scrutiny of the American overlords, it still deigned to reject *laissez faire*, "the prevalent economic philosophy during the American colonial period" (Sereno 2002: 8)[6]. The Constitution of 1973 was written under the

Marcos dictatorship, but it still "explicitly authorise(d) government entry into business, its maintenance of various social services, and its regulation of private interest to promote the public welfare" (Cortes 1984). The expanded governmental functions, performed by various government instrumentalities tasked with implementing laws and policies, left "hardly any aspect of social and economic life … untouched." (Cortes, 1984).

As already noted, the present Constitution makes this philosophy even more detailed and explicit. In this regard, because it is the ultimate recourse on issues regarding the practice of regulation in the Philippines, the analysis Sereno made of the interpretation of the Supreme Court of the Constitution's economic philosophy is worth quoting:

> First, the Court pronounced that the Philippine constitution after 1935 soundly rejected *laissez faire…*
>
> Second, the justices had defined the economic philosophy of the Constitution in terms of the "social justice" clauses of the Constitution, which in their view has a strong preference for redistributive and affirmative action legislation and programs.
>
> Third, that this social justice orientation … empowers an interventionist government, and that interventionism is the primary way by which the problem of mass poverty can be addressed.
>
> Fourth, that the redistributive preference of the Constitution has been affirmed and strengthened by the 1973 and 1987 Constitutions.
>
> Fifth, the Constitution has been invariably interpreted to be nationalist, as to opportunities, licenses, and rights in the economic sphere. The history of Philippine political economy would show that this long line of cases upholding the nationalist spirit of the Constitution went alongside legislation and executive policies based on the import-substituting model of development.
>
> Sixth, since the Constitution is strongly nationalist, in the cases decided by the Court, in effect, "nationality-indifferent" and "market-oriented" economic policies appear to bear the burden of having to be proven as not contravening the Constitution.
>
> Seventh, although the above seems to be the prevailing trend, there are "seeds" of thought in more recent jurisprudence which are open to a more market-oriented economic system. There have been recent pronouncements that the 1987 Constitution has embraced "the free enterprise system," a recognition of the constitutional protection to contracts in a labour-related case, and a recognition of the resurgence of laissez faire-type market mechanisms.

The Court's position on the nationalistic provisions of the Constitution has been manifested in three recent decisions:

1. Its reversal in 1990 of the decision of the Board of Investments (the regulatory body) to allow the Luzon Petrochemical Corporation to move from its existing site in Bataan in Central Luzon to a new site in Batangas, a Southern Luzon province. The Court justified its intervention in a relocation decision by, among others, the provision making it a duty of the State "to regulate and exercise authority over foreign investments within its national jurisdiction and in accordance with its national goals

and priorities" (Sec. 10, Art. XII). Other reasons adverted to the support of local production of raw materials and the significance of continuing its relationship with two public enterprises, if the plant were to remain in Bataan, and the raising of funds from local sources. Sereno's commentary (2002) termed these judgement calls rather than legal or constitutional decisions. As such, they manifested the Court's interpretation of the Constitution as in support of the local economy and of State enterprises.

2. Its award in 1997 of Manila Hotel to a Filipino consortium, instead of the winning bidder, a Malaysian group, by invoking the "Filipino First" policy in the Constitution.

3. Its award in 2000 of Philippine Shipyard and Engineering Corporation (PHILSECO) to a losing but Filipino bidder, instead of the winning foreign bidder, invoking another Constitutional provision that public utilities should be 60 per cent owned by Filipinos.

All these decisions have proven controversial, as it has raised questions about the government's sincerity in inviting foreign investments into the country and fears about the inviolability of contracts for those already in. The Bataan decision has resulted in the pullout of the Taiwanese investor from the Philippines (Vanzi, 2001).

Constitutional Provisions in (Limited) Support of Free Enterprise

As Sereno (2002: 9) showed in her analysis, even the Supreme Court had taken cognisance of another economic thread in the Constitution, this time one allowing for "the embrace of the free enterprise system" and "a recognition of the resurgence of laissez faire-type market mechanisms." It is explicitly provided by Section 20:

> The State recognises the indispensable role of the private sector, encourages private enterprise, and provides incentives to needed investments.

The embrace is not without its limitations. Thus, the Article on National Economy and Patrimony provides these further duties of the State:

- Ensure the right to own, establish, and operate economic enterprises, subject to the duty of the State to **promote distributive justice** and to **intervene when the common good so demands** (Sec. 6); and
- **Regulate or prohibit monopolies** when the public interest so requires, and prohibit combinations in restraint **of trade or unfair competition** (Sec. 19) (emphasis supplied).

In relation to franchises for public utilities, the second part of Section 11 gives the following restriction:

> Neither shall any franchise or right be granted except under the condition that it shall be subject to amendment, alteration, or repeal by Congress **when the common good so requires.**

Nevertheless, these provisions do justify the Philippine entry into the World Trade Organisation and its many efforts to give the leading role to the private sector. Perhaps the clearest statement in support of globalisation and liberalisation is found in the current Medium-Term Philippine Development Plan (MTPDP, 2000-2004) which identifies one of the four main thrusts of government as "Macroeconomic Stability with Equitable Growth Based on Free Enterprise." Recognising the increasing integration of the Philippines into the world economy, the MTPDP reiterates that "the philosophy of free enterprise shall continue to underpin government policies in stimulating business activities and promoting competition." At the same time, it enjoins the government to ensure that "the benefits from globalisation shall be balanced with stronger regulatory capability, more transparency and effective implementation of safety nets." MTPDP lists the following government strategies for improving the competitiveness of the Philippine industrial (and services) sectors:

1. *Accelerating the development of small and medium-scale enterprises (SME's)* - improving the capability of banks to understand and service the needs of small borrowers; creation of a National Business Registry to track all business firms from establishment to closure; review of existing SME laws, policies and programs in order to create a conducive environment for promoting competitiveness;
2. *Promoting competition* - continued trade and investment deregulation and facilitation; fostering competition in the telecommunications sector; encouraging entry of new technology; modernizing shipping; speeding up delivery and lowering cost of postal communications; liberalizing air transport;
3. *Improving the business environment* - simplifying and streamlining business procedures and the issuance of licenses and permits;
4. *Promoting investments* - creation of a stable policy environment and enhancement of investor services; investment laws to be interpreted in favour of the investors;
5. *Promoting an efficient and responsive banking system* - promotion of increased participation of foreign banks; introduction of prudential regulatory reforms; promotion of electronic banking;
6. *Developing and diversifying products and markets* - enhancement of product testing and quality control services of concerned government agencies; diversification of export products; encouragement of technological innovation;
7. *Improving productivity through research and development* - continuing implementation of programs that will attract students to pursue careers in mathematics and the sciences; protection of intellectual property rights; improvement of the country's innovation system; improvement of the technical skills and productivity of the labour force;
8. *Promoting industrial peace* - facilitation of labour-management coordination and cooperation;
9. *Promoting consumer welfare* - establishment of a nationwide consumer assistance and enforcement network to monitor compliance with quality standards; amendment of the Consumer Act to clarify and strengthen the consumers' advocate function of the Department of Trade and Industry;

10. *Enhancing the participation of women* - generation of sex-disaggregated data to help in the proper formulation of sound policies enhancing the participation of women;
11. *Promoting sustainable development practices* - promotion of environmental management systems and the use of more environment-friendly materials; employment of clean production technologies.

These strategies show the expected direction of regulatory governance at this time. The broad scope of its coverage certainly cannot escape notice as it manifests the continuing tension between the society's embrace of free enterprise and its other political and social commitments.

Major Laws Regulating the Economy

The regulatory regime is shown in three types of laws: laws on the regulation, supervision and even control of the whole economy or specific portions of it; laws restricting entry and competition; and laws promoting agriculture, industry and social services. The last set of laws "necessarily intertwines" with the conduct of trade and commerce (Medalla 2000), but as they could encompass all existing Philippine law, cannot be tackled in this paper.

Regulation of the Conduct of Business. The first law regulating trade and investment in the Philippines was the extension of Spain's *Codigo de Comercio* to its colony by the Royal Decree of August 6, 1888. Some of its provisions, such as those relating to commercial contracts, joint accounts, and the conduct of maritime commerce, are still in force (Catindig 2001). Some provisions have been repealed or superseded by the Corporation Law (Act No. 1459, approved March 1, 1906) and other laws introduced during the American regime. The Corporation Law itself was subsequently amended by (1935), and the Corporation Code of the Philippines (*Batas Pambansa Blg.* 68, approved May 1, 1980). These laws govern the conduct of trade and commerce in general, covering all industries and including even not-for-profit entities (called non-stock corporations). Stock corporations are further regulated by the Securities Regulation Code (SRC, Republic Act No. 8799, approved July 19, 2000). The SRC was passed in the context of certain allegations of fraud[7] and with the desire to "regain investor confidence in the increasing competitive market for global funds." Lilia Bautista, the new head of the Securities and Exchange Commission describes the SRC as one that "incorporates international best practice standards" (September 2000). Its Declaration of State Policy provides that:

> The State shall establish a socially conscious, free market that regulates itself, encourage the widest participation of ownership in enterprises, enhance the democratisation of wealth, promote the development of capital market, protect investors, ensure full and fair disclosure about securities, minimise if not totally eliminate insider trading and other fraudulent or manipulative devices and practices which create distortions in the free market.

Other laws on the regulation of the entire economy include the following:

- Executive Order[8] Nos. 133 and 242 (1987), creating the Department of Trade and Industry as the primary coordinative, promotive, facilitative and regulatory arm of the government for the country's trade, industry and investment activities
- Republic Act 4109 (June 1964) for the protection of consumers, the formulation and monitoring of programs for the effective enforcement of trade laws, the accreditation of establishments, and the development, promotion and implementation of standards, and
- The Tariff and Customs Code for the investigation, adjudication and advice on trade in goods and in tariff and trade remedy laws.

Complementary to these are laws for the liberalisation and reform of specific industries and institutions. Banking and finance laws[9] have effected decontrolling interest rates, domestic licensing of some foreign banks, lifting of the moratorium on new commercial banks and relaxing regulations on bank branching. In the insurance industry, 100 percent foreign-owned insurance companies are now allowed to operate in the country (RA 8179). Telecommunications has been deregulated (RA 7925, 1995) through compulsory interconnection of all telecommunications facilities, expansion of the mobile telephone industry, and a spate of new telecommunications franchises, thereby abolishing the PLDT monopoly. The maritime industry has liberalised entry of new operators, deregulated entry of newly acquired vessels into routes already services by currently franchised operators, deregulation of shipping rates, and privatisation of government ports. In civil aviation, government controls on airfares and charges and restrictions on domestic frequencies and routes have been eliminated EO 125 (1987) and at least two international carriers have been designated (EO 219, YEAR). The energy industry reforms are embodied in the Electric Power Industry Reform Act of 2001 (RA 9136) and the Downstream Oil Industry Deregulation Act of 1998 (RA 8479). And the Metropolitan Waterworks and Sewerage System (MWSS) was the object of the largest privatisation effort in the world (RA 8041, 1985).

Significant reforms have also been undertaken in the investments sector[10]. The Foreign Investments Act of 1991 (RA 7042) allows 100 percent foreign equity participation, except in certain specified sectors. In 1996, the provisions in the Act were amended in order to allow greater foreign participation in some of the previously prohibited sectors. At this time, only two areas have remaining restrictions on foreign participation: those sectors reserved for Filipinos by the Constitution and other laws (Negative List A); and sectors related to matters of security, health and morals, and the protection of local industries (Negative List B). The reforms have resulted in an increase in the value of the country's Foreign Direct Investment (FDI), although it still lags behind other countries in the region in terms of attracting FDI (Austria 2000).

Catindig (2001) has classified these foreign investment laws, along with the Build-Operate-and-Transfer Law[11], the already cited deregulation acts on telecommunications, oil and electric power, the Special Economic Zone Act of 1995 (RA 7916) and the Retail Trade Liberalisation Act of 2000 (RA 8762), as "the new laws to maintain the country's competitive edge."

Reflective of the new mood of the country, the Retail Trade Liberalisation Act deserves special treatment. It reverses almost half a century of prohibiting non-Filipinos from engaging in the retail business. The Retail Trade *Nationalisation* Law (RA 1180, 1954) was born in the fear of alien domination prevalent in the 1950s. It aimed not to create a public enterprise (as "nationalisation" connotes in the United Kingdom) as to protect the thousands of small Filipino *sari-sari* ("Mom-and-Pop") stores from the incursion of Chinese retailers all across the country. It did not contemplate the rise of giant supermarkets in every urban area nor the continuing Filipino passion for PX (Post Exchange) goods streaming out of the towns surrounding American military bases. President Marcos started to restrict the operation of RA 1180 by permitting many exceptions to the law (such as special duty-free stores). RA 1180 was repealed in the year 2000, in Catindig's terms, with the country "finally succumbing to the strong winds of trade liberalisation" (2001: 2-2).

The repeal follows several major reforms to remedy the adverse social and economic effects of the country's long history of protectionism and import-substitution. The first phase of the Tariff Reform Program (TRP) was implemented in 1981-1985, resulting in a decrease in the average nominal tariff level from 42 percent to 28 percent (Austria, 2001). Although the

second phase of the TRP was temporarily postponed due to the political and economic crises of the late 1980s, the Import Liberalisation Program (ILP) was instituted in the meantime, gradually removing non-tariff restrictions. The program resulted in the reduction in the number of regulated items from 34 percent of the total PSCC lines in 1985 to 3 percent in 1996 (de Dios 1997, cited in Austria 2001). Implementation of the TRP resumed with Phase II (1991-1995), resulting in clustered tariff rates of 10, 20 or 30 percent. The current phase of the TRP (Phase III, 1996-2003) aims to achieve a uniform tariff rate of 5 percent by 2004.

Trade liberalisation has increased the competitiveness of the manufacturing industry (particularly export industries) based on the decrease in the ratio of domestic resource cost with the shadow exchange rate (DRC/SER) from 1.5 in 1988 to 1.2 in 1994. The more efficient establishments have also increased their share in the total value of production, indicating better allocation of scarce resources. Liberalisation, however, has yet to result in the desired industrial growth in the manufacturing sector.

Other laws are direct results of government's commitments to WTO and other international organisations. These include: the Intellectual Property Code of the Philippines (RA 8923, 1997), the Electronic Commerce Act (RA 8792, 2000), the Safeguard Measures Act (RA 8800, 2000) and the Anti-Money Laundering Law (2001).

The country's response to demands of globalisation is dramatically illustrated in the passage of the last law, which, in a sense, was passed with the country under the gun. The Financial Action Task Force (FATF) established by the G-7 Paris summit in 1989 had recommended that its member-countries apply counter-measures to the Philippines if it failed to pass such a law by September 30, 2001. The government met the deadline, but barely, with President Arroyo promising to amend certain provisions even as she signed the bill into law. The criminalisation of money laundering is part of the Philippines' global commitments: its membership in the United Nations, its ratification of the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, and its participation in the Asia-Pacific Group on Money Laundering (Catindig 2001).

The Philippines has further commitments to trade liberalisation due to its membership in multilateral and regional trade organisations. With the World Trade Organisation (WTO), the country has committed to, among others: convert quotas on agricultural imports into tariffs;

bind tariff rates at 10 percentage points above the 1995 applied rate for 63 percent of the total tariff lines; bind all current restrictions on market access in financial, communications, transport and tourism sectors; and zero tariff rates certain IT product lines.

The ASEAN Free Trade Area (AFTA), which counts the Philippines as one of its original signatories in 1992, imposes a Common Effective Preferential Tariff (CEPT) scheme that aims to reduce intra-regional tariffs to 0-5 percent within the 15-year period beginning 1993. Other measures toward liberalisation under the AFTA regime include harmonisation of standards, reciprocal recognition of tests, certification of products, removal of barriers to foreign investment, etc. Of major concern at this time is the country's commitment to eliminate tariffs on 60 percent of its product lines by 2003, given that as of 1999, it was at the 1.4 percent level (Teh, 1999 cited in Austria, 2001).

The country is also a member of the Asia-Pacific Economic Co-operation (APEC). The long-term goal of APEC is to achieve free and open trade and investment in the Asia-Pacific region by 2010 for developed member-economies, and 2020 for developing member countries like the Philippines (Austria, 2001). In terms of tariffs, the Philippines is targeting a gradual decrease to a uniform rate of 5 percent in all areas excluding sensitive agricultural products by 2004. On investment, based on the 1999 Philippine Individual Action Plan, the country has already complied with seven of the twelve APEC Non-Binding Investment Principles (Austria 2001).

Despite these efforts, economic analysts see that the Philippines needs to implement further reforms to improve its competitive position and receive more fruits from liberalisation. Austria (2001) suggests expansion and deeper participation particularly in regional trading arrangements as well as a fully articulated competition policy. Intal and Basilio (1998), meanwhile, seek the creation of a more facilitative macroeconomic environment. Their recommendations include such measures as savings mobilisation and investment facilitation, productivity-wage rate-exchange rate nexus, agricultural development, better infrastructure support, skills, technology and SME facilitation and greening the domestic economy.

Restrictions to Entry and Competition

Restrictions in the Philippines may be classified into two types: limitations for nationalistic reasons, and all other restrictions. As regards the first: the Constitutional preferential

treatment of Filipino citizens in various aspects of economic life has already been discussed. Indeed, recent Supreme Court decisions manifest that the absence of enabling laws is not necessarily a hindrance to the implementation of this constitutional intent. In addition, RA 8800 (2000) has just been passed with the intent to protect local industries from increased imports which cause or threaten to cause serious injury to those domestic industries and procedures. RA 8751, amending the Tariff and Customs Code (1999) likewise seeks "to protect domestic industries from unfair trade competition." Under this measure, countervailing duties will be imposed on imported subsidised products, commodities or articles that have caused or threaten to cause material injury, retardation of growth or prevents the establishment of domestic industry.

That being said, the repeal of the Retail Trade Nationalisation Act and the passage of the Foreign Banks Law, among others, show that "strong winds of globalisation" are lifting entry restrictions to foreign corporations in at least these sectors.

Non-nationalistic restrictions to entry and competition include public utility franchises[12], monopoly rights given to public enterprises, licensing, and rules to remove barriers to competition.

Congress provides a franchise, which is a privilege for particular firms to do business under specific conditions. Sometimes, only one franchise is given in an industry, thus creating a monopoly, such as that virtually[13] enjoyed by the Philippine Long Distance Telephone Company (PLDT) for domestic and long distance telephone services until the industry was deregulated in the mid-1990's. Since each franchise is enacted individually by Congress, all other firms receiving a franchise in that industry would not necessarily enjoy privileges granted to one firm in a particular industry. This point was brought home recently in a murky controversy that purported to involve the President's husband Miguel Arroyo. Congress had given a franchise to the Philippine Communications Clearinghouse, Inc. "to construct, establish, install, maintain and operate wire and/or wireless telecommunications systems throughout the country." President Arroyo had vetoed it for, among others, a provision that seemed to give the telecommunications firm a monopoly as the backbone of the industry. Shortly after, Mr. Arroyo was accused of receiving a bribe to get her to lift her veto. However, the fact is that she never rescinded the veto (thus providing no reason for the bribery). Besides, the alleged source of the information has disowned such a statement.

Meanwhile, suspicion also fell on the legislators who had sponsored the offending franchise. Thus, while the president and her family seem to come out clean in this case, it does show both that equality of privileges of franchise-holders is not foreordained, and that franchising can be a corruption-ridden process.

In other instances, monopoly may be granted to a public enterprise. Thus, the National Power Corporation (Napocor or NPC) is the sole producer of power. These sectors of the economy were assumed to be natural monopolies. The Philippine government has also created agencies specifically to virtually monopolize marketing of agricultural products. Such agencies include the National Food Authority (NFA) and the Sugar Regulatory Administration (SRA).

Other forms of restriction to entry involve licensing regimes and other similar arrangements that limit the number of producers and/or the volume of production. Entry into a particular market may also be limited by the imposition of minimum product or service standards, industry-specific regulatory regimes, and imposing restrictions ranging from price control mechanisms to generally accepted ethics and business practices for consumer protection and increased competition (Cabalu, et. al., 1999). While the Philippines has no overall legislative scheme for licensing of business, it does license certain industries and activities. For instance, the Insurance Code provides for the regulation of entry into the insurance business and the General Banking Act requires banks to comply with prudential requirements. The Department of Trade and Industry (DTI) and its attached agencies, particularly the Bureau of Trade Regulation and Consumer Protection (BTCRP) and the Bureau of Product Standards (BPS), undertake licensing and standard-setting activities.

Another form of regulation aims to remove restrictions on competition set up by the firms themselves. Such activities are aimed toward maximizing profits at the expense of the other players in the market and are generally associated with oligopolies and cartel-like arrangements. These may either be horizontal (i.e. between competitors who supply similar products) or vertical (i.e. between/among organizations at different stages of production or distribution. Cabalu, et al. (1999) identifies a wide variety of such arrangements, including price fixing, geographic market division, limiting or boycotting dealings with a customer or class of customers, tie-in arrangements and resale price maintenance. Some actions rarely have positive side effects and may be prohibited outright through a per se rule. Nevertheless,

since some of these practices may actually increase efficiency, blanket prohibitions may be counter-productive. For these, a *competition test* may be used to determine the practical and beneficial effects of these practices in order to determine the level of regulation necessary in a particular case (Cabalu, et. al., 1999).

Devolution of Regulation

With devolution in 1991, some powers and functions that used to be performed by the national government were transferred to local government units (LGUs). Their explicit regulatory powers include the "power to reclassify agricultural lands, enforce environmental laws and the Building Code, process and approve subdivision plans, inspect food products and regulate the operation of tricycles" (Legaspi, 2001). Local governments may also regulate the provision of health, agriculture, social welfare and other services already devolved to them. LGUs also have the power to tax real property, give business licenses and permits, and collect business taxes. A few progressive local units are vying with each other as the locale of business, particularly multinational, firms. Potentially the area of local government regulation can be much broader as more LGUs become more capable to take up the following broad responsibility:

> … Within their respective territorial jurisdictions, local government units shall ensure and support among other things, the preservation and enrichment of culture, promote health and safety, enhance the right of the people to a balanced ecology, encourage and support the development of appropriate and self-reliant scientific and technological capabilities, improve public morals, enhance economic prosperity and social justice, promote full employment among their residents, maintain peace and order, and preserve the comfort and convenience of the inhabitants.(RA 7160, Chapter 5, Sec. 16).

However, there seems to be less concern on regulation and more interest in the local governments undertaking activities towards economic development themselves.

Pending Legislation

The legal framework for regulation continues to evolve as more bills are being considered in Congress. Pending in the Senate are five bills that want to re-open the debate on long-standing issues that seemed to have been resolved in two recent legislation – securities regulation and investments. There is an anti-trust code along with four other bills all purporting to enhance free trade. Against this, there is one bill protecting domestic industries from unfair foreign competition and two others that seem to restrict entry into certain businesses. Concern for consumers is evident in two bills seeking to control the high price of drugs and to regulate pre-need companies and lending companies. The promotion of small

business is shown by at least seven bills. Moving away from self-regulation is an act aiming to regulate chambers of commerce.

Meanwhile, the House is seeking a review of the country's laws on banking and securities to further protect the rights of investors and avoid closure of banks. The alleged pyramiding activities of G. Cosmos Philippines and the closure of Unitrust Development Bank (Media Affairs Service, March 2002, http:\\www.congress.gov.ph) triggered this move. There is also a resolution to investigate the monopoly, cartel, or collusion by cellular phone companies. In addition, seven bills seek the creation of free ports and economic zones, and one desires the promotion of small-scale enterprises. The collection of pending bills in both Houses sends mixed signals as to the congressional sense on the direction of the economy.

INSTITUTIONAL FRAMEWORK

Economic policy-making is the shared responsibility of the three branches of government. The executive power is vested in the President of the Republic, the legislative power in both houses of Congress (the House of Representatives or Lower House and the Senate or Upper House), and the judicial power in the Supreme Court and other lower courts. This section discusses how regulatory governance takes place within this framework. It will start with a discussion of role of the legislative and judicial branches, which respectively enact and interpret the laws that regulate the economy. The executive branch recommends the enactment of such laws, with the President having Constitutional power to certify priority bills and to veto those s/he considers not in the national interest. The greater bulk of regulatory governance rests in the Executive as s/he presides over the institutions and processes of rule application and implementation. Thus, the bulk of this section will be on the work of the executive branch. Finally, the work of regulatory mechanisms at least partly outside government will also be explored.

Legislative and Judicial Involvement in Regulation

This section will deal with how the legislative and judicial branches get involved in regulation. As the results of congressional actions become laws that are implemented by the Executive, their content has already been discussed in the legal framework and may also be inferred from the discussion of the institutional framework to be made below. Thus the focus of the legislative section is on the committees directly involved in regulation and the process a bill undergoes to become a law. The discussion then shifts to the judiciary, particularly its

role in interpreting economic policies in the light of the Constitution. This section ends with a short discussion of how the system of checks and balances has worked in a specific case involving an economically relevant law.

The Legislature

Congress is composed of the Senate and House of Representatives. The Senate has 24 members elected at large nation-wide, while the House has 200 members elected by districts. At most 25 percent of the House may be "party-list representatives," that is, members representing organisations chosen at large by the voters, following a constitutional formula. Congress has powers not only to make laws, but also, in aid of legislation, to make investigations into any aspect of the economy and society. As regards economic regulation, the Constitution provides that the Congress may, "by law, authorise the President to fix within specified limits, and subject to such limitations and restrictions as it may impose, tariff rates, import and export quotas, tonnage and wharfage dues, and other duties or imposts within the framework of the national development program of the Government." (Sec. 28 (2), Art. VI). The same section and article also provides that: "No law granting any tax exemption shall be passed without the concurrence of a majority of all Members of the Congress." These two provisions explicitly state the power of the two Houses of Congress to set trade and taxation policies that will serve as basis of the Executive Branch in the promulgation of regulatory policies.

The House of Representatives has four regular committees and a special committee tasked to consider laws pertaining to economic affairs. The House Committee on Legislative Franchises exercises jurisdiction over "all matters relating to the grant, amendment, extension or revocation of franchises." The grant of franchises is a potent item in trade and economic regulation. The fact that an applicant has to go through Congress is a formidable requirement, and probably a disincentive to investors knowing the usual politicking that it has to go through and the waiting time before franchise is granted. The applicant for franchise has to get the needed documents and accreditation papers from the concerned administrative/regulatory agencies, submit them to the House of Representatives, which will in turn forward the franchise bill to the Senate if approved. The Conference Committee of both Houses of Congress will then craft a compromise bill amenable to both, and finally forward it to the President for approval.

The other House Committees are the following:

- The Committee on Trade and Industry which has jurisdiction over "all matters relating to domestic and foreign trade; intellectual property rights, patents, trade names and trade marks; standards, weights and measures; designs, quality control; consumer protection; prices and marketing of commodities; handicrafts and cottage industries; and the development, co-ordination, regulation and diversification of industry and investments." The scope of this Committee is indeed far-ranging as it concerns both domestic and foreign trade, including the protection of intellectual property rights, a hot item in view of the advances in technology in recent years.
- The Committee on Banks and Financial Intermediaries exercises jurisdiction over "all matters relating to banking and currency; government-owned or controlled financial institutions; private corporations; and insurance, securities and securities exchange."
- The Committee on Economic Affairs has jurisdiction over "all matters relating to economic or socio-economic studies, planning, programming and development."
- The Special Committee on entrepreneurship development.

In the Senate, bills related to economic regulation pass through one of four Committees:

- The Committee on Economic Affairs with jurisdiction over "all matters relating to economic planning and programming; the planning of domestic and foreign public indebtedness; general economic development; and co-ordination, regulation and diversification of industry and investments."
- The Trade and Commerce Committee exercising jurisdiction over "all matters relating to domestic and foreign trade and private corporations; patents, copyrights, trade names and trademarks; standards, weights, measures and designs; quality control; control and stabilisation of prices of commodities; consumer protection; handicraft and cottage industries; and marketing of commodities."
- The Committee on Public Services, which has jurisdiction over "all matters affecting public services and utilities; communications; land, air, river and sea transportation including railroads, inter-island navigation, and lighthouses; and the grant or amendment of legislative franchises.

- The Committee on Banks and Financial Institutions which covers "all matters relating to banks, financial institutions, government and private currencies, capital markets, mutual funds, securitisation, coinage and circulation of money. "

A bill that a committee deliberates on may emanate solely from a legislator, or it may come from outside Congress. The Executive may draft a bill, and certify it as a priority bill) to Congress. Other interested parties such as an agency, private firm or industry group, and citizen associations may formulate their own bills and have it sponsored by a friendly legislator. After sponsorship, the bill is deemed approved at first reading. It then goes to committee which undertakes public hearings, inviting groups and individuals that may be affected by its passage to make statements or shed light on its positive or negative repercussions on them. The bill is then brought to the floor for plenary discussion by the House and approved on second reading. After all amendments on the floor have been incorporated, the bill is approved on third reading and sent to the other House where it undergoes the same process. If the versions of the two Houses are not the same, a conference committee composed of members from both hammer out a bill acceptable to both. It is sent to the President for approval, veto or lapse into law (after 20 days with no signature). After that, the President appoints a group to draft the implementing rules and regulations of the new law. Since 1987, the Congress has not left the IRR to the executive alone but has named its own representatives to the committee. Also, increasingly, Congress puts into a law an Oversight Committee headed by a member of Congress so that it can properly supervise how the law is implemented. Aside from this formal process of course, the halls of Congress are permeable and the involvement of interested parties and disinterested observers can take place at any part of the process.

The Judiciary

In a country full of lawyers, the court is a convenient, but not usually, efficient recourse for settling disputes on breach of contracts, legality of franchises, charges and fees, constitutionality, proper interpretation of laws, and the like. Requesting the courts to issue temporary restraining orders (TROs) against the order of an administrative or regulatory agency, is a common news item in the Philippines.

Judicial power is vested in the Supreme Court and in appellate and lower courts under its supervision. Judicial interpretation becomes particularly important in defining what constitutes unlawful practices like monopolies and oligopolies, combinations in restraint of trade, and unfair competition practices.

The Constitution provides that "Judicial power includes the duty of the courts to settle actual controversies involving rights which are legally demandable and enforceable, and to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any **branch or instrumentality of the Government**." (emphasis supplied) (Sec. 1, Art. VIII). This means that decisions of any agency, including regulatory institutions and independent constitutional commissions like the Commission on Audit may be brought to the Supreme Court for review.

In addition to the economic nationalism cases already cited, there are other cases that show the extent of judicial power over economic policies. One of these concerns the Oil Deregulation Law (RA 8180), which the Supreme Court declared unconstitutional in November 1997. The law was invalidated because the Court found that three key provisions intended to promote free competition had achieved the opposite. The Supreme Court found that RA 8180's "provisions on tariff differential, stocking of inventories, and predatory pricing inhibit fair competition, encourage monopolistic power, and interfere with the free interaction of market forces" (Ynares-Santiago, in Garcia vs. Corona, et. al., 17 Dec. 1999). Although, the law has a separability clause, the law was declared unconstitutional in its entirety, and its implementing Executive Order voided. This decision of the Court was basically anchored on section 19, article XII of the Constitution that provides that: "The State shall regulate or prohibit monopolies when the public interest so requires. No combinations in restraint of trade or unfair competition shall be allowed."

The decision of the Supreme Court on RA 8180 led to the enactment of RA 8479, a new deregulation law without the questioned provisions of the earlier one. But Congressman Enrique Garcia has again petitioned the Court to declare section 19 of this new law unconstitutional. The Court decided to junk this new petition in December 1999. Congressman Garcia has in turn filed a motion for reconsideration in early 2000, but as of May 2002, this motion has yet to be acted upon by the Court.

Checks and Balances in Practice

The system of checks and balances among the three branches occasionally results in inter-branch conflicts and policy gridlock. Such a case involving all three branches occurred in relation to the Expanded Value-Added Tax (E-VAT) law. One of the measures towards liberalisation, the bill was certified by the Executive and survived deliberations in both houses, mainly due to the domination of the ruling party. Members of Congress opposed to the bill then filed a case with the Supreme Court questioning the constitutionality of the proposed law. The Judiciary now has jurisdiction over policy-making, due to the expanded scope of judicial review pursuant to the 1987 Constitution (Sereno, in Canlas and Fujisaki, 1999). Whereas before it was limited by the application of the political question doctrine, the Court now has the duty to ensure that economic policies, or any other policy for that matter, designed by the legislative and/or executive are in accordance with the provisions of the Constitution. Ultimately, the Court cleared the law, but not before substantial delay (de Dios in Canlas and Fujisaki, 1999).

In analysing this and similar cases, de Dios found that small-group interests are able to influence economic policy-making particularly through the legislature. Interest groups have multiple channels of lobbying efforts through the different members of Congress. If one is unreceptive, other more accommodating members may be willing to question and distort the objectives of policies advanced by the executive that seem disadvantageous to certain interests. However, contrary to popular sentiment that the legislature wields excessive power that enables it to intervene and adversely affect the initiatives of the executive, de Dios argues that the legislature's obstructive behaviour is mainly due to its subordination in relation to the executive. The legislature may find it in its best interest to play the nuisance role in order to preserve the system of checks and balances, advance local interests and even partake in the "benefits" of interest-group competition. De Dios therefore suggests that the executive power needs to be weakened, preferably though devolution of powers and the development of a stronger bureaucracy to enable the legislature to internalise all contending interests, both local and national, and ultimately disregard particularistic interests.

The Executive Branch and Regulation

Regulatory institutions in the Philippines were established at the start of American colonial administration. One of the first institutions established primarily for economic regulation was the Securities and Exchange Commission (SEC), which was created in 1936 but has forebears

dating back to 1906. As of 2002, there are eighteen (18) government agencies engaged primarily in economic regulation, as practically every law touching on an industry or process has prompted the creation of a corresponding regulatory agency. Regulating banking and finance are the *Bangko Sentral ng Pilipinas* (BSP, the new Central Bank), Securities and Exchange Commission (SEC), the Philippine Deposit Insurance Corporation (PDIC), and Office of the Insurance Commissioner (OIC). The sector of trade and commerce is being regulated by institutions like the Department of Trade and Industry (DTI) and the bureaux under it, the Tariff Commission and the Board of Investments (BOI). Likewise, the Manila Waterworks and Sewerage System (MWSS), the Department of Energy (DOE) and the Department of Transportation and Communication (DOTC) and their attached agencies regulate public utilities. Virtually all have been either recently created or recently transformed to align them with the current liberalisation thrust.

Table 2 shows the agencies found in each economic sector, their respective powers and personnel and financial resources. Only agencies primarily regulatory in their functions are included in the table.

Regulatory institutions need a balance of involvement and independence to be able to operate effectively. Involvement requires that they are knowledgeable about the industry and capable of delving into its many technical and political intricacies. They are fully aware of the market and other forces besetting the industry they are presiding over, so that their decisions may be realistic, even sympathetic to the problems the regulated are facing, even as they strive to uphold the public interest in their decisions. To maintain such involvement, the law may require that members of the governing body have some experience in the industry or have qualifications that allow them acquire to competence in the area as soon as possible. It is

Table 2: Regulatory Agencies in the Philippines

SECTOR/AGENCY	MANDATE	LEGAL BASIS	NO. OF PERSONNEL	BUDGET	INCOME
FINANCIAL SECTOR					
1. SEC	It has absolute jurisdiction, supervision, control, over all corporations, partnerships, and associations in the Philippines. It also administers and enforces more than 40 laws and other related acts.	CA # 83 (Oct. 26, 1936) & RA 8799 (Securities Regulation Code 2000)	after the reorganization, the number of personnel was trimmed down to 428	Php 520M (FY 2000)	Php 883M (FY 2000)
2. Insurance Commission	A government agency attached with the DOF, charged with the regulation and supervision of the insurance industry in the Philippines.	PD 612 (Insurance Code/Dec. 18, 1974)	236 filled permanent positions (102 vacant); 164 of which are technical while the remaining 72 are non-technical (as of Jan. 2002)	Php 63,643,000 (FY 2002)	P10,527,719 (FY 2001)
3. BSP	A central monetary authority that shall function and operate as independent and accountable body corporate in the discharge of its mandated responsibilities concerning money, banking and credit.	RA 7653 (The New Central Bank Act) (June 1993)	total filled: 4828 regular: 4613 casual/contractual: 215 (as of March 2002)		Php2569.00M
4. PDIC	Insures the deposits of all banks which are entitled to the benefits of insurance under RA 7400.	RA 7400 (April 1992)	758 personnel (127 officers and 631 rank and file)	Php 6 billion (FY 2000)	Php 2 billion (FY 2000)

TRADE & COMMERCE					
1. Tariff Commission	It shall be investigatory, adjudicatory, and advisory government agency on trade in goods and in tariff and trade remedy laws.	RA 911 (1953) EO 143 (1999) Tariff and Customs Code	160 positions all having permanent/ regular status of appointment	P43,965,000 (FY 2002)	(N/D)
2. DTI	The primary coordinative, promotive, facilitative and regulatory arm of the government for the country's trade, industry and investment activities.	EO 133 (1987) EO 242 (1987)	has a total of 2511 personnel (permanent: 2303; contractual: 144; casual: 23; temporary: 16 and co-terminus: 23)	Php 1,812,732,000 (FY 2002)	(N/D)

3. BOI	It is an attached agency of the DTI with the mandate to encourage and facilitate investments.	RA 5186 (Sept. 1967)	out of the 405 plantilla positions, 336 are filled and is being complemented by 3 casual/contractual employees	Php 198,738,000 (FY 2002)	(N/D)
4. BTRCP	To protects and safeguard interest of consumers and the public; formulate and monitor implementation of programs for the effective enforcement of trade laws; monitor registration of business names, accreditation of establishments and licensing of realty service practitioners.	RA 4109 (June 1964) EO 133	permanent: 24 & casual: 1 (as of Jan. 31, 2002)	under DTI's budget	(N/D)
5. BPS	Develop, implement, coordinate standardization activities in the Philippines. It is primarily involved in standards development and standards implementation/promotion.	RA 4109 (1964) EO 133 (1987)	permanent: 83 & casual: 1 (as of Jan. 31, 2002)	under DTI's budget	(N/D)

EMPLOYEES WELFARE					
1. POEA	It is responsible for optimising the benefits of the country's overseas employment programs.	EO 797 (1982) EO 247 (1987) RA 8042 (1995)	as of Feb. of 2002, the total # of employees in the POEA is 458404 of whom are permanent while the remaining 54 are temporary/casual	Php 204,837,000 (FY 2002)	Php 276,075,159.46 (as of Dec. 2001)
2. OSHC	Nationally recognized authority on research, training, information and technical expertise on occupational safety and health.	EO 307 (1997)	follow-up	from the State Insurance Fund of the ECC	N/D

WATER RESOURCES					
1. MWSS (REG. OFF.)	Responsible in ensuring that all of the provisions and the performance targets specified in the Concession Agreement are met and all the sanctions required therein on case of failure by the Concessionaires to meet said provisions are properly applied.	RA 8041 (1985) EO 311 (1996)			

2. NWRB	Responsible for coordinating & regulating all activities related to water resources management including water utilities operations.	PD 1067 (1976)	As of March 2002, the total number of employees of the NWRB is 105, all of which have permanent appointment status.	Php 54,931,000 (FY 2002)	N/D

TRANS. & COMM.					
1. CAB	Regulates the economic aspect of air transportation, and shall have the general supervision and regulation of the jurisdiction and control over air carriers as well as their property, property rights, equipment, facilities and franchise.	RA 776 (1952)	The board has a total of 68 personnel, 57 of whom are permanent and the remaining 11 are casual/contractual.	Php 24,745,000 (FY 2002)	N/D
2. MARINA	Has general jurisdiction and control over all persons, firms or entities in the MARITIME industry and shall supervise and regulate in accordance with PD 474	PD 474 (1974)	Out of the 544,461 are filled permanent positions of which a total of 471 positions which are permanent are being occupied by personnel with business and other related courses as their educational background.	Php 201,395,000 (FY 2002)	Php 178,429,207 (FY 2001)
3. LTFRB	Rationalization, regulation and supervision of all motorized land-based public transportation services.	EO 202 (1987)	In the central office alone, 132 plantilla positions are provided for the agency.	Php 124,099m,00 (FY 2002)	
4. ATO	Implements rules and regulations in civil aviation to assure safe, economic and efficient air travel.	EO 125 (1987)	As of Dec. 1999, there are 3827 employees wherein 2885 of which are permanent while the remaining 972 are casuals.	Php 1,398,103,000 (FY 1999)	Php 1,644,255,000 (FY 1999)
5. NTC	Promulgates such rules and regulations as public interest may require to encourage more effective use of communications and broadcasting facilities and to maintain effective competition among private entities.	EO 546 (1979)	472 personnel.	PhP 139,619,000 (FY 2002)	Php 821,657,643 (FY 2000)

also one reason for giving them long-enough terms in which to learn the ropes and acquire some expertise in the field.

On the other hand, the involvement must be disinterested, since regulators must be at arm's length from the focus of their regulation. No industry exists in a social vacuum where the interests of its individual members necessarily correspond to the public interest. Within the industry, the competitors will plead their specific demands and will rarely have a united front unless the whole industry is threatened. Beyond the industry itself are other publics – consumers, the local areas where the firms are located, upstream and downstream-related businesses, political officials, civil society organisations, the citizenry, and increasingly, stakeholders outside the country. To develop this independence, regulatory agencies must enjoy elements of autonomy not granted to a service-providing department. The agency may also be given quasi-judicial powers, which makes it practically independent of the executive, with decisions subject only to the rulings of appellate or higher courts. Regulatory agencies usually have multi-member boards at the top, collegial decisions being expected to take more perspectives into account than decisions of a single executive. Members of governing bodies may enjoy fixed terms, so that their decisions are in some way protected from the whims of politicians, and even cross presidential terms. These may be staggered so that members will not have the same level of relationship with stakeholders. Different qualifications for different members have the same effect; some boards even include representatives from the general public to forestall regulatory capture. In addition, board members and staff are all bound to observe RA 3019 (the Anti-Graft and Corrupt Practices Act, 1960) and RA 6713 (Ethical Standards Act, 1990) which have strict conflict-of-interest and anti-corruption provisions. How Philippine regulatory agencies capture these characteristics is discussed in the next section.

Organisational Status

In general, the extent of autonomy expected to be enjoyed by a regulatory agency may be indexed by where it is placed in the Executive branch. The Bangko Sentral enjoys the highest status, having been established as "an independent central monetary authority" with substantial administrative and financial autonomy (RA 7653). The Chair of the Monetary Board, its governing authority, is its own Governor, not the Secretary of Finance as it was mandated by the old Central Bank Act (RA 265, YEAR). In fact, the only other ex officio member (after the Governor) is a cabinet official designated by the President who serves as

vice chair; at present, that is the Secretary of Trade and Industry, not of Finance. Originally there were two other ex officios, the heads of two government banks.

Regulatory bodies "attached to a department" occupy the second level. "Attachment" in Philippine legal parlance is the lateral relationship between a department and the attached agency or corporation for policy and program co-ordination. Most of the time, the department has its representative in the governing bodies of its attached agencies. The representative provides the alignment of the policies and programs of the department. However, the department's representative cannot interfere with the internal operation of the attached agency (Tendero). Attached boards or commissions have regulatory and adjudicatory powers outside the control of the department to which they are attached.

Variations exist in the terms of attachment. For instance, attached agencies regulating banking and finance, such as SEC and PDIC, have compensation and position classification systems like the BSP. This puts them beyond the pale of the Salary Standardisation Law and makes positions in them much more attractive than the rest of the civil service. On the other hand, other attached agencies still have to follow pertinent civil service laws, rules and regulations such as those involving appointment, promotion and dismissal of employees.

The next level finds regulatory agencies that are under the administrative supervision of a department. This pertains largely to the alignment of their personnel and financial resources and policies with the department and does not extend to control over their regulatory and adjudicatory powers, just like the attached agencies. This is the relationship of the Board of Investments with the Department of Trade and Industry, and the National Water Resources Board with the Department of Public Works and Highways.

Finally, a department may exercise control and supervision over a regulatory agency. The authority of the department includes, among others, directing performance of duty; reviewing, approval or modifying acts and decisions of subordinate units and officials; and prescribing standards, guidelines and determining priorities in executing plans and programs (Tendero). This type of jurisdiction can be observed in the DTI's exercise of control over its bureaux such as the Bureau of Product Standards (BPS) and the Bureau of Trade Regulation and Consumer Protection (BTRCP). However, such control may also be exercised on a

regulatory board, such as that exercised by the Department of Transportation and Communications over the Land Transportation Franchise and Regulatory Board.

Table 3. Organisational Status of Regulatory Agencies

AGENCY	ADMINISTRATIVE RELATIONSHIP
Banking and Finance	
1. BSP	independent
2. SEC	attached to the DTI
3.Insurance Commissioner	attached to the DOF
4. PDIC	attached to the DOF
Trade and Commerce	
1. Tariff Commission	under the supervision and control of the NEDA Board
2. DTI	under the control and supervision of the Office of the President
3. BOI	under the administrative supervision of the DTI
4. BTRCP	under the supervision and control of the DTI
5. BPS	under the supervision and control of the DTI
Water Resources	
1.MWSS-Regulatory Office	under the control and supervision of the MWSS Board of Trustees
2. NWRB	under the administrative supervision of the DPWH
Transportation and Communication	
1. CAB	attached to the DOTC
2. MARINA	attached to the DOTC
3. LTFRB	under the control and supervision of the DOTC
4. ATO	under the control and supervision of the DOTC
5. NTC	attached to the DOTC

Governing Structure

Bodies called commissions or boards, acting collegially generally govern the regulatory institutions in the Philippines. (See Table 4.) The members of the boards or commissions are appointed to a certain number of years in office, and such terms are usually staggered. The law creating them may require particular qualifications from the membership. Three are completely composed of ex officio government officials and three others have ex officio members, including the Chair[14]. These suggest a close linkage between government policies and those of the respective boards. Since those who are not ex officio presumably come from

outside government, the fact that two – BSP, and PDIC – require members to be from the private sector seems to imply an expectation of independence from them.

Only the members of four boards – BSP, SEC, PDIC and BOI – have terms fixed by law. These agencies are then relatively insulated from external pressure since the concerned authority cannot threaten a member of that body with removal from office. They may also span presidential terms. On the other hand, most other board members are appointed by the President to a fixed term. However, since that is not set by law, the appointee has less security of tenure and may be more easily persuaded to vacate the office in case of policy disagreements with the board or the President, especially after the incumbency of the original appointing power.

The stated qualifications of members generally relate to "recognised competence" in an academic field. The most popular requirement used to be law; it is still required in four boards, and lawyers continue to be appointed to boards even though their profession is not required to be represented. This may be traced to a legalistic orientation in the country, the preponderance of lawyers among lawmakers, and the mistaken assumption that quasi-judicial proceedings require competence in law. However, broader qualifications, e.g., in "economic and social disciplines" (in 2 laws) or a combination of disciplines (in 3) have now overtaken it. Civil engineering has made its first appearance (in LTFRB). This suggests a new recognition that matters of regulation have wider societal underpinnings than just law.

Two other important qualifications are manifested in only one law each. Only the BSP has an explicit provision regarding conflict of interest: RA 7653 requires that no member of the Monetary Board must be connected with the banking industry for at least a year prior to appointment. Only the BOI gives a direct role to civil society since the President can only choose members from a list of nominees of business and other organisations. However, explicit mention is made only of the Chamber of Commerce rather than organisations of labour, consumer and the poorer sectors.

Regulatory agencies do not always have collegial decision making bodies. There are important exceptions, notably three departments that perform also primarily as regulatory agencies. These are the Department of Trade and Industry, and its component bureaux, the Bureau of Trade Regulation and Consumer Production, and the Bureau of Product Standards,

the Department of Energy, and the Department of Transportation and Communication. A department, the primary sectoral subdivision of the Executive branch of the Government, performs the result-producing functions of the bureaucracy. A department does not have an independent nature, separate budget or independent set of powers (Tendero). It operates under the Department Secretary, who reports directly to the President. A Secretary is a member of the Cabinet and is considered an alter ego of the President. With no fixed term, he or she serves at the pleasure of the President.

The Air Transportation Office and the Office of the Insurance Commissioner are the only other regulatory agencies headed by a single executive. Both are treated like line bureaux of their respective departments.

Table 4. Governing Bodies of Regulatory Agencies

	GOVERNING BODY
Banking and Finance	
1. SEC	5-member collegial commission with members serving 7year term each (staggered). The members must be of recognised competence in social and economic disciplines. Provided that the majority of the Commissioners, including the Chairperson, must be members of the Philippine bar.
2.Insurance Commissioner	1 commissioner
3. BSP	7-member collegial board all of whom are appointed by the President for a term of 6 years (staggered). The members are: the Governor of BSP as chairman; the Secretary of the DTI; and five (5) representatives from the private sector. Members must be of recognised competence in social and economic disciplines and must not have been connected with any banks within one (1) year prior to their appointments.
4. PDIC	5-member collegial board appointed for a term of 6 years (staggered) by the President of the Phils. The members include Secretary of Finance (ex-officio chairman); BSP Governor (ex-officio); PDIC President (vice-chairman); and two (2) members from the private sector. Members must be of recognised competence in economics, banking and finance, law, management administration or insurance.
Trade and Industry	
1. Tariff Commission	3-member collegial commission whose **members** are appointed by the President with the consent of the CA. (The members of the present Commission are comprised of 2 lawyers and an economist.)
2. DTI	Cabinet Secretary appointed by the President
3. BOI	The Board is composed of full-time and ex-

	officio members. It has five (5) full time members with recognised competence in the field of economics, finance, banking, commerce, industry, agriculture, engineering, management, law and labour. The said members are appointed by the President, with the consent of the CA, from a list of nominees submitted by business organisations such as the Chamber of Commerce of the Phils. And other organisations that the Pres. may request nominees. Each of them is serving a six- (6) year term (staggered).
4. BTRCP	Director
5. BPS **Water Resources**	Director
1.MWSS-Regulatory Office	It is composed of five (5) members appointed for five (5)-year terms (the two initial members were appointed for 3 years). The Office acts as committee acting collegially.
2. NWRB **Energy**	8-member governing board, all members serving in ex-officio capacity. The members of the Board are: DPWH Secretary (as chairman), NEDA Director-General, DENR Sec., DA Sec., DOH Sec., DTI Sec., MWSS Administrator, NPC President, NIA Administrator and LWUA Administrator.
1. Department of Energy	Secretary, appointed by the President
2. Energy Regulatory Board	
Transport and Communications	
1. DOTC	Secretary appointed by the President
2. CAB	5-member collegial board composed of the DOTC Secretary as chairman; the ATO Assistant Secretary as vice chairman; and 3 board members appointed by the President.
3. MARINA	7-member collegial board, all members are serving in ex-officio capacity. The members are: DOTC Secretary as Chairman; MARINA Administrator as Vice Chairman; Executive Secretary; DND Secretary; DTI Secretary; Philippine Ports Authority General Manager; and the Chairman of the Development Bank of the Philippines as members.
4. LTFRB	3-member collegial board composed of a Chairman and two (2) members all of whom are appointed by the President of the Philippines upon the recommendation of the Secretary of the DOTC. One member of the Board must be a lawyer, another a civil engineer and the other a holder of degree in economics, finance or management. The members must have at least five (5) years of professional practice.
5. ATO	Assistant Secretary for Air Transportation appointed by the President
5. NTC	3-member collegial commission. One of the members must be a lawyer and the other one an economist.

Fiscal autonomy

Most regulatory agencies generate income from operating fees, fines and charges. The BSP and the PDIC are the only ones that are independent from outside control concerning the management of their financial resources. Only a part of their collections is remitted to the National Treasury. The balance (half, in the case of BSP) is retained and used as funds for their operations.

At the other end are those that are dependent on the annual appropriations of the National Government. Although they generate income, they still depend on appropriations because all their collections are remitted to the National Treasury. They have to follow the process of preparing and defending their proposed budget in the deliberations from the agency level up to the Legislature. It should be acknowledged, however, that collections of some agencies would not suffice to support and fund their operations.

Appeal from decisions

The independence of an agency is also indexed by where appeals to its decisions may be lodged. (See Table 5.) For some agencies, the petition for review or appeal is to the next higher authority while for the others, the appeal can only be made in the proper judicial courts. Generally, all the decisions/actions promulgated as part of quasi-judicial or adjudicatory functions are appealable either to the Court of Appeals or to the Supreme Court. It is not clear why an agency is subject to judicial or administrative review since the system of appeal is not related to organisational status or to the scope of its functions. Part of the answer may lie in the political context when the law was passed, but this research has not been able to establish that.

Decisions of three agencies may be brought for appeal only before the Supreme Court. These are the Securities and Exchange Commission, the National Telecommunications Commission and the Civil Aviation Board. Although only having the status of attached agencies, their respective department secretaries cannot thus intervene in their decision making nor interfere with the performance of their quasi-judicial functions.

Table 5: The System of Review Over Decisions of Regulatory Agencies

AGENCY	APPELLATE BODY
A. FINANCIAL SECTOR	
1. SEC	Supreme Court
2. INSURANCE COMMISSION	Court of Appeals
3. BSP	Proper judicial court
4. PDIC	Proper judicial court
B. TRADE & COMMERCE	
1. TARIFF COMMISSION	Court of Tax Appeals and/or Court of Appeals
2. DTI	Exhaustion of administrative remedies (Office of the President)
3. BOI	Proper Judicial court
4. BTRCP	Exhaustion of administrative remedies (DTI Secretary)
5. BPS	Exhaustion of administrative remedies (DTI Secretary)
C. WATER UTILITIES	
1. MWSS-RO	- MWSS Board of Trustees - Appeals Panel (appointed by the International Chamber of Commerce)
2. NWRB	Proper judicial court (e.g. Court of First Instance as provided for by PD 1067)
D. TRANSPORTATION & COMMUNICATIONS	
1. CAB	Supreme Court (as provided for by RA 776 creating the CAB)
2. MARINA	Court of Appeals
3. LTFRB	Exhaustion of administrative remedies (DOTC Secretary)
4. ATO	Exhaustion of administrative remedies (DOTC Secretary)
5. NTC	Supreme Court

Where appeal is to a court, even the President cannot inquire into a decision of a regulatory body. Thus, when former President Estrada intervened in the investigations being conducted at that time on the BW Resources Corporation, it was said to be a clear interference with the functions of the Commission, and prohibited by its charter and other pertinent laws. As such, it was incorporated into the impeachment charges against Estrada.

The appeal process can become very complicated. The Tariff Commission, although it is described as "an investigatory, adjudicatory, and advisory government agency on trade in goods and in tariff and trade remedy laws" acts only as a recommending authority or adviser to the NEDA and the Office of the President in certain cases. For instance, the findings of its investigations are passed on to the NEDA Board and/or to the Office of the President for the latter to make final decisions. However, its findings under its anti-dumping investigation function are considered final and executory. Appeals concerning temporary restraining orders may be filed at the Court of Tax Appeals (CTA) but not appeal for the review of the Commission's findings.

Meanwhile, agencies such as the LTFRB and the bureaux under the DTI have to follow the principle of exhausting administrative remedies before any resort to a court. The decisions of such agencies are appealable to the next higher office/authority. For example, decisions of the Land Transportation Franchising and Regulatory Board (LTFRB) may be appealed to the DOTC Secretary. A new development is that the DOTC Secretary may review the decisions of the LTFRB *motu propio*. Before, the DOTC could not interfere with the decisions of the LTFRB but that rule was repealed supposedly to avoid graft and corruption.

Accountability

As government agencies, aside from performing their designated functions, the regulatory institutions are accountable to their clients, who, in this case, are the public. Financial accountability, reporting to next-in-rank authorities and setting key result areas or performance indicators are examples of such accountabilities. As regards financial accountability, every agency of the government has a resident auditor from the Commission on Audit (COA) to ensure that the financial and other resources of the agencies are managed and expended well. No agency is exempt from COA scrutiny.

The Resident Auditors perform audit on transactions, accounts and operations in a post-audit basis on the government agencies they are assigned. They undertake financial, compliance and performance audit.

Moreover, as a form of check, these institutions submit accomplishment reports annually to the authorities concerned. For instance, the PDIC and the BSP are mandated to submit annual reports to the President and the Congress. All agencies are responsible for accomplishment

targets and performance indicators. Most agencies publish their accomplishment reports in order for the public to be informed.

Other regulatory agencies such as the DTI and the NTC also have their customer/client service centres. The centres accept complaints and comments from the public. For instance, the DTI provides assistance in resolving consumer complaints and has established consumer welfare desks. Moreover, it facilitates the formation and strengthening of consumer groups such as the Women's Consumer Groups.

In addition, these regulatory institutions are being guided by RA 6713, otherwise known as the Code of Conduct and Ethical Standards for Public Officials and Employees, with regards to responding to the interest of the public. The said law mandates the officials and employees to promote the public over their own personal interests. In pursuance of this law, agencies release administrative and/or memorandum orders pertaining to the ethical conduct of their employees. In addition, the recently enacted Securities Regulation Code (RA 8799) has provisions on the proper conduct of its officials and employees.

Overlapping Jurisdictions: The Case of the Cement Industry

Perhaps the first question raised by the long discussion on institutional framework is the question of jurisdiction. Each agency tends to focus on the sector that it is supposed to regulate, almost neglecting the impact of its actions on the other sectors "outside" its purview. In this light, it is evident that there is no holistic approach in addressing the concerns of regulation.

This problem surfaced in an issue involving the cement industry recently[15]. The Philippine Commercial Cement Corporation (Philcomcer) petitioned the Secretary of Trade and Industry to issue a provisional tariff as a safeguard measure against foreign-manufactured cement. (The provisional tariff was to be paid in the form of cash bonds to be collected by the Bureau of Customs, under the Department of Finance.) The DTI Secretary, after conducting a preliminary investigation, granted the petition and then asked the Tariff Commission (which is under NEDA) for a formal investigation. The Tariff Commission found that no safeguard measure was necessary and sent its recommendation back to the DTI for promulgation. DTI refused and sought the opinion of the Secretary of Justice as to the legality of the Commission's action. The Secretary of Justice opined that without the intervention of the

President, the TC's recommendation would prevail. The DTI Secretary then decided to bring the matter up to the President, through the Committee on Tariff and Business Matters that he himself chairs.

In the meantime, the Court of Appeals issued a temporary restraining order preventing the DTI Secretary from implementing the recommendation of the TC. This was what he wanted in the first place. However, a new controversy was brought up in that the proper venue for appeals for tariff is supposed to be the *Court of Tax Appeals,* not the Court of Appeals.

Beyond the issue of jurisdiction, this case shows how the public interest may be defined from different perspectives. The DTI Secretary sought to issue a provisional tariff to protect the economy from dumping and unfair foreign competition and to safeguard jobs. The Tariff Commission did not see any injury to the local cement industry or to employment. The Citizens Alliance for Consumer Protection (CACP), a civil society group, sided with the Commission, as it declared local cement as substandard and high-priced, thus against the interests of consumers. Other groups denounced the local manufacturers as a price-fixing cartel. From this viewpoint, nationalism and globalisation seemed to be on the same side, while DTI and Philcomcen saw differently. The media got involved in front-page stories and in printing full-paged advertisements supporting one or the other viewpoint. As this paper is being written, it remains unclear which decision truly supports the public interest. It brings home the point that it is possible that the national interest does not depend on *who* is already in the country. If the contentions of the TC and citizen groups are true, then the interests of domestic consumers and foreign distributors may coincide even domestic construction labour would not be served by the substandard quality of cement. Moreover, the domestic industry is not necessarily a Filipino industry to be protected by nationalism. On the other hand, if dumping is indeed taking place, the citizenship of the domestic producers does not matter, since they are the object of unfair competition that even a liberalising world does not condone.

Non-State Regulatory Mechanisms

Bearing in mind that the end-goal of all regulation is the safeguarding and attainment of the public interest, the Philippines has attempted to ensure that no stone is left unturned in the creation of regulatory agencies. In addition to commissions or boards created by law for every aspect of the economy, it has also sought to give to the private sector some powers of

regulation. This has introduced two relatively new regulatory forms, the self-regulatory organisation, and the organisation created out of privatisation. The merits and weaknesses they give rise to are discussed below.

Self-regulating organisation

In a country where poverty and inequality reign, the state will tend to see itself as the guardian of the people's interest unless the private sector is able to show that it can regulate itself. A few such mechanisms are in place in the Philippines today. Three cases will be discussed here: the Philippine Stock Exchange and the Philippine Council for NGO Certification, on self-regulation, and the MWSS Regulatory Office, on a private-sector regulatory set-up.

The Philippine Stock Exchange[16]

One of the underpinnings of any capitalist economy is the integrity of its securities market. Always a private sector organisation, the Philippine Stock Exchange emerged from the union of the Manila and Makati Stock Exchanges, with no small push from Fidel V. Ramos, then President of the Philippines. In a sense, the status of the stock exchange has always been that of a self-regulatory organisation. However, reforms in the securities market of the country necessitated by a series of scandals of fraud, insider trading and other anomalies made imperative the explicit declaration of PSE's status as an SRO. It was as if the government said to it: "Regulate yourself well, or else…." In the speech of Lilia Bautista, new head of the SEC, to securities analysts (August 2000), she stressed that the solutions of the market problems "lie not solely upon the SEC as the regulator but also upon you as the market participants."

Two requirements of a self-regulatory organisation were written into the Securities Regulation Code (SRC). First, the composition of the Board. Section 33.2(g) states that the Board of the PSE (or any other Exchange) shall include "the (i) president of the exchange, and (ii) no less than fifty-one percent (51%) of the remaining members of the board to be comprised of three (3) independent directors and persons who represent the interest of issuers, investors, and other market participants, who are not associated with any broker or dealer or member of the Exchange for a period of two (2) years prior to his /her appointment."

Second, the exchange must be de-mutualised. This means transformation of the PSE from a non-stock to a stock corporation, wherein a broker or a dealer does not automatically become a member of the Exchange, or vice versa, that a person need not be a stock broker or dealer to be a member. In essence, de-mutualisation was a step to professionalise the PSE and regulate its activities, including its composition and membership (interview with SEC Assistant Director Meonee, April 2002). Such transformation would also mean that the PSE will sell its shares to institutional investors, and undertake initial public offering (Atty. Leonardo, May 2002, also of the SEC).

The self-regulatory nature of PSE got into the news early in 2002 on two occasions. First was the election of officers of the Exchange, in which all eight non-brokers in the Board voted for the same (and winning) candidate. This was a clear signal to brokers that their dominance in the Exchange has ended, as the law had clearly stipulated. Instead, those representing the interests of issuers, investors and other market participants were supposed to comprise a majority in the Board. There were two issues that needed clarification: whether or not the non-brokers could vote for the officers (they clearly did), and where the non-brokers came from. A newspaper called them "nominated by the Philippine President" but this was denied by SEC officials, who, however, could not clarify who actually nominated them.

The second issue concerned a problem about a new seeming manipulation of stocks. In this, the SEC was more definitive. Chair Bautista said PSE should clean up its own house, or else SEC will step in and they will lose their SRO status. SEC had in fact suspended the SRO status of the PSE on March 7, 2000 after the PSE's own Compliance and Surveillance Group resigned in protest of the alleged whitewashing by the Board of Governors of its investigative report. The SRO status was restored only on September 8, 2000, after passage of the Securities Regulation Code and compliance by the PSE with the terms and conditions the SEC set (SEC 2001).

It is clear that an organisation can enjoy self-regulation only if it clearly follows principles of the market accepted by the state. In Bautista's terms, the market should be FELT (fair, efficient, liquid and transparent) (Bautista August 2000).

The Philippine Council for NGO Certification (PCNC)

When the Comprehensive Tax Reform Act (CTRA) was being deliberated upon in Congress, a group of civil society organisations lobbied for the inclusion of a self-regulation mechanism in the law for organisations seeking tax exemption. Although CTRA did not actually incorporate such a provision (but did not prohibit it), the Bureau of Internal Revenue (BIR) was interested enough in the idea to continue discussions with the organisations. BIR is primarily a tax-collection agency, but has some regulatory powers, including granting tax-exemptions to certain firms under certain conditions. For scientific, technical and research organisations, it shares that power with the Department of Science and Technology, which passes on the scientific merits of a company or organisation before recommending to the BIR the grant of tax exemption. Granting exemptions is only a small part of BIR's operations but it can affect its tax collection efforts, as many entities seeking it can be big players in their particular market. From the civil society side, such exemptions would encourage corporations to give donations to their programmes, a source of NGO income largely untapped in the Philippines.

With the consent of the BIR and initial funding provided by the Ford Foundation, the civil society groups established the Philippine Council for NGO Certification (PCNC) in 1999. The groups are some of the biggest organisations of civil society and represent a whole spectrum of concerns of citizens. Among them are the Association of Foundations (composed of fund-granting and –receiving local foundations), the Caucus of Development Organisations (CODE-NGO, the largest coalition of development organisations with some 3,000 organisations nation-wide), and the Philippine Business for Social Progress (PBSP, a social development agency funded by 1% pre-tax income of arguably the biggest corporations in the country). The PCNC Board is composed of representatives of the founding organisations, including the BIR. It has set criteria for accreditation of organisations for their exemption from tax, and for the corresponding exemption from tax of donations provided by corporations and individuals. It examines the credentials of organisations for a small fee that barely covers costs, and recommends the grant of exemption to the BIR, which usually upholds its recommendations. The work itself is completely undertaken by volunteer auditors and accountants recruited from their respective professional associations, including the Philippine Institute of Certified Public Accountants (PICPA). After two years of operations, PCNC has accredited less than 200 organisations, most of them from Metro Manila. Although unhappy about this development, PCNC is also apprehensive

about the influx of NGOs from outside the metropolis, as this could trigger financial problems on their side. The low fee they have set seems unable to support the organisation in the long run, after Ford funding. However, to increase it now may make participation in its program less attractive.

On the plus side, the strict implementation of requirements has allowed PCNC to sift out pseudo-non-profit groups, notably an enterprise of the son of the former president that masqueraded as a cultural organisation. In addition, practically all the big not-for-profit hospitals, schools and similar firms have undergone the process and received their certifications.

The going is slow for probably two interrelated reasons. First, tax exemption is not a big incentive for firms that do not pay the correct taxes anyway, and do not entertain requests for donations from citizen groups in any case. Second, most civil society organisations tend to rely on grants from government and international organisations and have not tapped corporate philanthropy. Thus they do not as yet see the need for the PCNC certificate. While primarily seen today as a social device, PCNC may have more economic impacts later through its repercussions on attitudes towards taxes and corporate philanthropy. However, it can provide lessons as an institutional device for regulation. First, it shows that an SRO can exist even if not explicitly provided by law, as long as it is not explicitly prohibited. Second, even a low-level civil service unit can negotiate with the private sector or civil society groups to run and maintain such an organisation. Third and perhaps most importantly, it shows that civil society and volunteer citizens have a role to play in regulation. This is very much in keeping with the governance paradigm and needs further analysis.

Independence of the regulators

Another issue concerns the independence of the regulators. An example is the Regulatory Office of the MWSS[17]. The Metropolitan Water and Sewerage System was privatised in 1998 and its functions of providing water to Metropolitan Manila were divided between two concessionaires: Maynilad for the Western sector, and Manila Water for the East. MWSS retained ownership of the water system itself and of other assets, including the land and building where the two concessionaires hold office. The terms of the concession were set forth in a Concession Agreement signed by MWSS, Maynilad and Manila Water.

The Concession Agreement created the MWSS Regulatory Office (MWSS-RO) so that the government can continue to maintain some form of control over a basic and vital public good such as water. The Regulatory Office is organisationally placed under the Board of Trustees. This gives rise to the first problem. In theory, the Board should not have any clout over the Regulatory Office because it is a party to the Concession Agreement that the RO is supposed to enforce. In reality, however, the Board of Trustees can practically dictate what actions and decisions the Regulatory Office should make.

This is due to a number of reasons. First, as mentioned earlier, the Office was only created through the Concession Agreement, not by an Act of the Philippine Legislature. Under Philippine jurisprudence, any agency created by means other than legislation does not have a legal character or legal personality. Since the Regulatory Office was created by a contract between the government and private companies, it does not have such legal character, cannot own property and may not enter into official agreements and/or contracts. Due to this impediment, the Regulatory Office has to rely on the MWSS Board of Trustees when entering into agreements and contracts of any sort, thereby limiting its independence from the latter. Moreover, all decisions made by the RO are subject to the approval of the Board. The Regulatory Office may validate or review petitions for water rate hikes but approval is at the Board's discretion.

The second problem is the RO's relation to the concessionaires. Under the Concession Agreement, the private operators equally finance the RO's annual operating budget during the entire concession period through concession fees, thus making the Office totally financially reliant on them. This is in sharp contrast to the Argentine model where the regulatory office is maintained by user fees and does not come directly from the concessionaires.

A recent controversy further elucidates the problems of the Regulatory Office. In October 11, 2001, the MWSS Board of Trustees terminated the services of two deputy regulators purportedly after losing the "trust and confidence" of the MWSS Board. Incidentally, the respective company presidents of the private operators also signed the termination letter. Coincidentally, or not, the two fired regulators were opposed to Maynilad's petition for water rate hikes.

The regulators' dismissal is still in question, since one of those dismissed wants to take up the issue in Court, invoking the provision in the Concession Agreement that appointed regulators may only be removed through action by an Appeals Panel with representation from an international arbitration body. However, the fact that the Board can coerce members of the Regulatory Office to resign from their posts clearly shows its control and influence over the RO. This unwritten and unofficial power of the Board circumvents the provisions in the Concession Agreement which are in place to ensure the regulators' independence, thereby limiting the RO's effectiveness.

Another problem involves the RO's powers and functions. In specifying the Office's initial and transitional powers, the Concession Agreement uses passive terms such as "monitoring" and "review." The entire section pertaining to the powers of the Office never uses the words "regulation" or "regulate." While it can be argued that these terms may be used interchangeably, "regulation" connotes a more pro-active course of action than the terms used in the contract. Nevertheless, the Concession Agreement recognises that the RO's functions "will change over time as the regulatory regime is established and developed", although it is unclear how and when these functions can be amended and/or modified.

There already is an attempt to improve the existing regulatory environment in the form of a pending legislation to create an independent, central regulatory body for the entire water sector in the country, the proposed Water Regulatory Commission. However, even if such an agency is created, it may not be able to exercise any authority over the concessionaires in the MWSS service area as the provisions in the Concession Agreement, including the regulatory aspects, are supposed to be valid and binding until the end of the concession period, in 2022. Any changes in the Agreement can only be introduced with the concurrence of all parties concerned. It is highly unlikely that the concessionaires will agree to measures strengthening the regulatory framework, thereby compromising their present advantageous position.

WHAT DO WE NOW KNOW ABOUT REGULATORY GOVERNANCE? LESSONS LEARNED AND GAPS TO BE FILLED

This paper has discussed many of the dilemmas and challenges the Philippines has faced in its search for answers on how to regulate the Philippine economy. Some of these have no permanent resolution but must be faced anew as different forces realign at particular historical junctures. These relate particularly to questions of the public interest in the light of

the differential pull of nationalistic and global-capitalistic considerations. Other issues may seem more tractable in that they relate to more pragmatic and less philosophical concerns. Nevertheless, they also have a bearing on the public interest and thus call for more than just administrative decisions. At its end, this paper then pulls together the concerns raised in the different sections and draws lessons learned from profiling regulatory governance in the Philippines. It then enumerates the remaining gaps in knowledge and suggests more in-depth research on these issues. They are divided into the following themes: philosophical and ethical underpinnings, modes of regulatory governance, and issues in the political economy of regulation.

Philosophical and Ethical Underpinnings

Nationalism versus Globalisation

As a colonial society and even as an independent state, the Philippines has suffered from the domination of alien interests in its economy, politics and society. It is thus understandable that Philippine Constitutions drafted while a colony, a dictatorship and a re-democratising state all have a strong nationalistic tone, reserving to its nationals vital sectors of the economy and seeking to protect them not just from unfair competition, but from unfair *foreign* competition. The strength of Filipino enterprises in their own land would be a strong source of national pride, even as it provides jobs and quality goods to the people. On the other hand, if nationalism were only to shield inefficient firms, as seems to have occurred in all the years of protectionism, then Filipinos, indeed, poor Filipino consumers who are the country's majority, are not served by keeping out the aliens.

The country has shifted back and forth between these two extremes, moving closer to liberalisation as global pressures increase, and moving back to nationalism in matters of national heritage (the Manila Hotel case) and relative to public utilities (the Philseco case). International commitments may force more concessions as the process of passing the money laundering law has shown. The problem may lie not so much in embracing one or the other philosophy, as in taking a holistic view of the economy instead of seeing it cut up into separate pieces as dividing the work into several agencies is wont to do. An economic strategy that articulates how the two philosophies may complement each other seems to be required. This has not been adequately tackled in this paper.

Regulation should also be concerned with ascertaining that any losses incurred from globalisation – or nationalism – do not fall on the poor and that benefits also accrue to them. This requires a study of safety nets and social regulation that was beyond the scope of this paper.

Corruption and Regulation

Regulation, as it gives benefits to some and withholds them from others, is an ideal setting for rent-seeking. Even a president was not immune from interfering in securities regulation for private gain. Some decisions of the Court have fuelled controversy because of a widespread acceptance of "hoodlums in robes," using Estrada's colourful phrase. This paper has alluded to the rumours of corruption regarding a vetoed franchise. Such rumours have flourished despite their apparent lack of logic because of unequal application of laws. Fabella (1999) notes that while the enforcement of welfare-improving rules are ensured and guarded closely by the public, the enforcement of narrowly beneficial rules is largely disregarded, and in fact, the public seeks ways of subverting these for their own advantage. Thus, the attitude toward rules in general gradually deteriorates, with rules transgression becoming a widespread practice. As this paper has largely discussed the laws and not their implementation, the extent of corruption going on as part of regulatory governance was not analysed here.

Modes of Regulatory Governance

Good Practices in Regulatory Governance

The Philippines has a wide array of mechanisms with variations in organisational status, governing structure, fiscal autonomy, appeal from decisions, and accountability. The paper has indicated where autonomy and independence may be achieved in each of these factors. However, the variables do not operate singly but the proper combinations have not been shown. Moreover, since the paper has only looked primarily at the laws and have only a few cases of actual implementation, the advantages of any factor in the arrangement are only hypothetical and not demonstrated. The same may be said of the different forms of regulation which were mentioned rather than examined here.

Self-regulation

Self-regulation may be regarded as the natural direction of regulation in a deregulated economy. Thus the powers an SRO may exercise, its relationship with the state regulator, its commitment to the cause it is regulating, its public accountability and its financial

independence need further observation. Some of these issues were brought up in the two cases discussed here.

The PSE raises the issue of public accountability since an SRO could emphasise private over public considerations. Two questions have already arisen as regards the PSE after only less than two years after the enactment of the Securities Regulation Code. One relates to brokers seeing themselves as the only participant in the market and the other to the Exchange's ability to keep the market free and open. Ironically, it may require the strong hand of the regulator to maintain the PSE as a self-regulatory organisation.

On the other hand, the accountability issue has not been raised of the PCNC. This has been due to a multiple of factors: the strictness of their accreditation procedures, the high professional standards of the PCNC and their accreditors, and the voluntary nature of their involvement, which stresses commitment and ethics. Where it could fail lie in its rather ad hoc nature, not being ordained by law, and in its lack of sustainable financing. These are concerns that would not be limited only to the PCNC, and may keep arising as more SROs of such a voluntary nature come forward to be participants in regulation.

Local Government Regulation

Like self-regulation, devolution is an idea whose time has come. Although the Local Government Code has been in effect for over a decade, few local governments have paid much attention to their regulatory role. More have focused on prosecuting local economic development themselves, a phenomenon that may lead to the same sad effects as involvement in the economy by the central state government. Thus, the way local governments will take up this task bears watching.

The Political Economy of Regulation

Focus on Specific Sectors

Regulation and competition alter and affect the distribution of economic resources among individuals and groups, who thus exert influence to affect their policy outcomes and decision-making processes. The policy and implementation processes already allow for their formal participation as board members or in public hearings, court cases and consultations. This paper cited a few instances of involvement of affected groups, as in the cement case, but could not gauge the extent of influence they had on the regulator, and how the agency

balanced their demands against the interests of other stakeholders. Such an analysis of the actual involvement of groups in the regulatory process would complement and deepen the profile of regulatory governance outlined here. This could be a study of how interest groups (such as "big business") capture – or do not capture - the process of policy, on one hand, and the regulatory process of enforcement and implementation, on the other. It would also show how acts of regulation benefit the poor, through increase of access, lower rates and the like. For any analysis in depth, focus on the political economy of specific industries, such as energy, telecommunications and the retail trade, may be necessary.

Privatisation and Regulation

Privatisation is a complementary program with deregulation in the government's efforts to reform the way the state deals with the economy. Public enterprises that have been sold off or divested have included not only those that compete with private firms in the market, but also those providing public goods. In the latter case, society maintains a clear interest in their regulation. The only case described here of privatisation is of the MWSS and its rather anomalous legacy of the regulatory office. This may not be a typical intersection of privatisation and regulation and it would be useful to study how the regulatory governance of similarly privatised public utilities have been framed and carried out. In a broader context, however, privatisation may also be studied as an alternative to regulation where government in fact sets the sector free from state control. It would be theoretically useful to know how they have fared vis-à-vis retained corporations or their competitors in the now freed market using the market criteria of efficiency and profitability and such governance criteria as transparency and accountability to society.

Notes

[1] First draft of the Philippine Country Paper for the Centre for Regulation and Competition, Institute for Development Policy and Management, University of Manchester, May 2002. It was prepared by the team headed by Ledivina V. Cariño (University Professor), and includes Jose P. Tabbada (Professor and Director, Center for Executive Development), Ma. Fe V. Mendoza (Assistant Professor), Erwin Gaspar Alampay (Assistant Professor), Minerva Baylon (University Researcher), Rene Lopos (Research Assistant), Rommel Banal (Research Assistant), and Mark Anthony Gamboa (Research Assistant), all of the National College of Public Administration and Governance, University of the Philippines.

[2] The soft state is characterised, among others, by "widespread disobedience by public officials on various levels to rules and directives handed down to them, and often their collusion with powerful persons and groups of persons whose conduct they regulate" (Fabella in Canlas and Fujisaki 1999).

[3] Aside from the WTO, the Philippines is also a member of other regional trading arrangements such as the Asia-Pacific Economic Cooperation (APEC) and the ASEAN (Association of Southeast Asian Nations) Free Trade Are or AFTA.

[4] Php is the Philippine Peso; the current exchange rate is approximately Php 50 = US$1 (as of May 10, 2002 the prevailing exchange rate is Php 49.990 = US$1

[5] Majone (1996) and Hood et al (both cited in Minogue 2001) both refer to a public agency or authority as the principal actor in regulation. According to Majone, regulation is the "sustained and focused *control, exercised by a public agency,* on the basis of a legislative mandate, over activities that are generally regarded as desirable to society" (emphasis supplied). For their part, Hood et al define regulation as "the use *of public authority* to set and apply rules and standards" (emphasis supplied).

[6] In *Edu v. Ericta,* the Court said: "The Constitutional Convention (of 1935) saw to it that the concept of laissez-faire was rejected. It entrusted to our government the responsibility of coping with social and economic problems with the commensurate power of control over economic affairs. Thereby it could live up to its commitment to promote the general welfare through state action. No constitutional objection to regulatory measures adversely affecting property rights, especially so when public safety is the aim, is likely to be heeded, unless on the clearest and most satisfactory proof of invasion of rights guaranteed by the Constitution. On such a showing, there may be declaration of nullity, *not because the laissez-faire principle was disregarded,* but because the due process, equal protection or non-impairment guarantees would call for vindication. (Quoted from Sereno 2002: 8).

[7] Among these was the BW scandal of stock manipulation that implicated no less than President Joseph Ejercito Estrada. This charge was among the articles of impeachment filed against him in Congress in November 2000-January 2001.

[8] These executive orders have the force of law since President Corazon Aquino made them in her capacity as sole legislator during the one-year revolutionary government following the ouster of Marcos (1986-87). In all other years, an EO is an implementation of an Act or law.

[9] The New Central Bank Act, RA 7653 (1993), the Philippine Deposit Insurance Corporation Act, RA 7400 (1992), Financing Company Act of 1998 (RA 8556), the General Banking Law of 2000 (RA 8791), and the Foreign Banks Law (RA 7721, 1994).

[10] Republic Act 5186 creating the Board of Investments (1967), the Omnibus Investments Code of 1987 (EO 226) as amended by RA 8756 (1999), the Foreign Investments Act of 1991 (RA 7042), as amended by RA 8179 (1996) and the Investors' Lease Act (RA 7652, 1993).

[11] RA 6957 (1990), as amended by RA 7718 (1994).

[12] But note that by Constitutional directive, all franchises for public utilities can be given only to Filipinos or to firms 60% owned by them.

[13] PLDT's only rival until deregulation was the Government Telephone Service (GTS), later, the Telecommunications Office (TELOF), which operated in less popular ("missionary") routes and was tiny relative to the private firm.

[14] Note, however, that the ex officio chair of the Bangko Sentral (BSP, the Central Bank) is not an outsider but the governor of the Central Bank himself.

[15] A full discussion of the Case is in Appendix A.

[16] A longer discussion of this Case is in Appendix B.

[17] This case is further discussed in Appendix C.

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APPENDIX A
THE THREE ANGLES IN IMPOSING TARIFFS ON CEMENT

The Tariff Commission (TC) has recommended that there be no definitive safeguard measure imposed on the importation of cement, specifically the Gray Portland Cement, last March 2002. The said recommendation was made as a result of the formal investigation conducted by the TC claiming that there was no basis for tariffs to be imposed. This negative finding of the TC scrapped the provisional tariff imposed by the Department of Trade and Industry (DTI) last November 2001, which was supposed to last until the early days of June. The importers of cement who had paid the provisional tariff could refund their payment at the Bureau of Customs, which amounted to more than Php 80 million.

DTI Secretary Manuel Roxas II ordered the said provisional tariff (Php 20.60 per 40kg bag of cement), in the form of cash bonds, as an answer to the petition of the Philippine Cement Manufacturers Corp. (Philcemcor) to impose provisional tariff on the imported cement flooding the local market. Philcemcor claimed that the local cement manufacturers have been disadvantaged by the recent surge of imported cement. They claimed that the local industry has suffered losses due to the proliferation of cheaper imported cement which might then result to closure of local manufacturers leading to loss of jobs of thousands of Filipinos. Heeding the petition of Philcemcor, and as a result of the preliminary investigation performed by the DTI, the safeguard measure was issued by Secretary Roxas. The findings from the preliminary investigation were then transmitted to the TC for the latter to conduct a formal investigation.

After conducting a formal investigation on the petition of the local manufacturers, the TC counteracted the findings of the DTI rejecting the safeguard measure being demanded. The Tariff Commission thus recommended that no safeguard measure be imposed against the imported cement. Among the findings of the TC were (1) no threat of serious injury is imminent from imports and (2) no link was found between employment and imports. It found out that "the industry has not suffered and is not suffering a significant impairment in its overall market position, production and sales, capacity utilization, and profitability". The said recommendation was then transmitted back to the DTI for the latter to promulgate an order that would remove the Php20.60 provisional tariff against the imported cement.

However, at first, the DTI did not want to heed the recommendation of the Commission and has even decided to extend the provisional tariff which was supposed to last only until June 8. The DTI Secretary asserted that the ruling of the Commission was merely a recommendation for the DTI to issue an order. Moreover, Secretary Roxas said that it is for the interest of the local industry that he decided to protect them by pursuing to impose such tariff. Notwithstanding his position, he was forced to follow the commission's findings when a DOJ opinion was released stating that without the intervention of the President of the Philippines, the Tariff Commission's decision prevails. With this, Secretary Roxas plans to elevate the case to the President though the Committee on Tariff and Related Matters being chaired by Roxas.

A recent development on the said issue however, was the issuance of the Court of Appeals of a temporary restraining order preventing the Secretary of the DTI to implement the recommendation of the Tariff Commission scrapping the provisionary measure which was earlier ordered. With this, the implementation of the provisional measure will be continued and the importers will not be allowed to refund the cash bonds that they paid earlier.

Final and Executory Or Not?

One of the contentions of Secretary Roxas regarding the ruling of the Tariff Commission was that the latter is a purely recommendatory Commission. But was the Commission really a mere recommendatory body?

The Philcemcor, employing the provisions of the Safeguard Measures Act of 2000 also known as the RA 8800, petitioned the issue of imposing a provisionary tariff. Likewise, it was with this statute that Secretary Roxas contended that the Commission's ruling is not final and executory.

The law provided that the Secretary of the DTI (and of the DA as the case may be) shall conduct preliminary investigations upon the initiation/petition of a representative of the concerned industry. The Secretary himself may likewise initiate such investigation if there is enough evidence that increased imports threaten or causes injury to the domestic industry. Upon the positive determination based on the preliminary investigation, the Secretary may impose a provisional safeguard measure, in the form of a tariff increase paid through cash bonds, to avoid further damage to the domestic industry. Likewise, the Secretary transmits the result of its preliminary investigation to the Tariff Commission which will then conduct its formal investigation. The Secretary of Trade and Industry "after formal investigation and affirmative finding of the Tariff Commission, shall cause the imposition of an anti-dumping duty equal to the margin of dumping on such product imported in the Philippines".
As with the case of the Philcemcor's petition, Secretary Roxas issued a provisionary tariff against the imported cement. He likewise transmitted the results of his investigation to the Tariff Commission. After the formal investigation conducted by the Commission, it reversed the DTI's earlier decision. The Commission's investigation indicated that the imported cement is not causing injury to the local cement industry.

Because of the fact that the result of TC's investigation was negative (that is, there was no causal link between the imports and serious injury to the domestic industry), the DTI Secretary had to scrap the provisionary measure that he ordered earlier. For the said reason, he instructed, through the Finance Secretary, the Customs Commissioner to refund the payment made by the importers of cement. At first, Secretary Roxas asserted that the Commission is just a purely recommendatory body therefore he was not willing to cancel the provisionary measure he ordered. However, it was later cleared that the Commission's negative finding was final and conclusive.

With regard to the preceding discussion of the events and of the provisions of RA 8800, the ruling of the Tariff Commission that no safeguard measure be imposed is clearly executory. As what is provided for by the law, the decision whether or not to impose a definitive anti-dumping duty remains the prerogative of the Commission. Moreover, the Secretary could only impose safeguard measure if the final determination of the Tariff Commission is positive meaning, there is a causal link between the increases of imports of the cement and the serious injury or threat to the domestic cement industry. The appropriate definitive measure of the Tariff Commission obligates the DTI Secretary to follow. If the affected party would want to make an appeal for review, he/she could make such to the Court of Tax Appeals.

However, with the case of the Philcemcor, they appealed to the Court of Appeals and not to the Court of Tax Appeals. Heeding their appeal, the CA issued a temporary restraining order favoring the Philcemcor. With this in consideration, there is an apparent ambiguity in the issue of who has jurisdiction over the appeal for the review of the Commission's ruling. The lawyers of the Philcemcor argued that they filed the said petition to the CA, and not to the CTA, because RA 8800 is not clear with regards to the appeal for the review of the negative findings of the Commission. What is only clearly provided for by the law is that those who are adversely affected by the imposition of provisional tariff may file a petition for review to the CTA. This concerns only the positive ruling of the Commission and not the negative one as with the Philcemcor's case. Thus, they filed the petition to the CA and not to the CTA. However, former Senator Enrile, one of the authors of RA 8800, said beforehand that the petition for review should be filed with the CTA, whether the Commission's ruling is positive or negative. Notwithstanding the ambiguity, the Secretary of the DTI has to follow the said order issued by the CA.

Manufacturer vs. Consumer Protection

Whose interest does Secretary Roxas protect? Is it the consumers' or the manufacturers'?
Consumers and other groups involved in the cement industry have conflicting views regarding the issue of provisionary safeguard measure issued by Roxas. Others claim that the said measure would further protect the alleged cartel existing in the Philippine cement industry. It was for the account that the measure would remove the competition between the locally produced cement and the imported ones. They further argued that without the presence of imported cement, the local cement manufacturers would again have a tendency to cartel price fixing. At present, the price of the cement ranges from P135 to P145 per 40kg bag, which is still beyond the reach of the local consumers. They claim that it is only through the presence of imported cement that the prices would remain at a relatively constant competitive range. They stated that in order to discourage the consumers from choosing the imported cement over its local counterpart, the domestic manufacturers must lower their prices. The price range, as declared by some consumer groups, is still among the highest in the region. Therefore, they believe that Roxas' order was against the consumers especially when arguing on the basis of the cement's price.

On the contrary, the manufacturers and other consumer groups were convinced that Roxas' issuance of the provisionary measure was for the interests of both the manufacturers and the consumers. They claim that the cement industry is vital to the country's economy because of the billions of pesos of investments and the approximately 75,000 jobs that the industry has produced directly and indirectly. They said that the landed cost of the imported cement is only Php 80 and yet the importers are still selling them at the price comparable to the locally manufactured cement. They further argued that if the importers wanted to protect the interest of the consumers, they should have sold their products at a much lower price. However, that was not the case because the imported cement is sold at the price similar to its local counterpart.

Moreover, consumer groups such as the Citizen's Alliance for Consumer Protection said that the Tariff Commission's ruling negating Roxas' order was against the interests of the consumers because it would lead to the failure of the companies consequently resulting to job losses. However, the findings of the Tariff Commission showed that there was no causal relationship with the increase in imports and employment. The Commission claimed that the decline in employment by 21% in 2000 could not be attributed to the increase in imports

during that year. It is because of the fact that employment even increased in 1999 despite the twofold increase of imports in that year as compared to the preceding year.
The cement industry asserted in their petition that there had been an upsurge of imported cement from Taiwan, Japan and Indonesia. Importation of cement has been allowed to compensate the gap in the demand of the consumers during the financial crisis that plagued the country. According to them, the total imports for the years 1999 and 2000 increased to 433% and 372% respectively (PDI, July 18, 2001). This lead to the decline of the production of the local industry due to the reduction of demand and the rising costs of operation. These were among the reasons why the local manufacturers filed a petition for the imposition of a safeguard measure against the imported cement.

It was in this light that Secretary Roxas ordered the imposition of the said provisionary measure. In contrast with Roxas, the Tariff Commission recommended to scrap the measure because of the absence of the causal link between the increased imports of the cement and serious injury or threat to the domestic industry. Although there has been an upsurge of imported cement for the last few years, the local manufacturers still have the majority of the market share. The local industry had the 80% of the market in 2001 and had even have a higher share in the previous years. With 80% share of the market, it is said to be enough to be considered as having significant dominance of the market especially in a liberalized environment. The said influx, according to the investigation conducted by the Commission, was insignificant to injure the local industry. Thus, the petition of the local manufacturers was denied.

With the preceding discussion, which agency protects whom? If the allegation of the presence of cartel is true, then the ruling of the Tariff Commission is, in one way or another, protecting the local consumers since non-imposition of a safeguard measure would entice competition among the locally produced and the imported cement. Presence of imported cement would provide alternative for the consumers. Some consumer groups contradicted the claim of the Philcemcor that imported cement increased their losses. They stated that the losses of the local cement industry were due to the increased interest payments that the local cement manufacturers pay to the foreign groups that invested in their plants. They further claimed that the Philcemcor should not attribute their losses to increasing operating costs since their costs of operation have been relatively constant in the last five (5) years. On the other hand, their interest payment has increased immensely in that same 5-year duration.

On the contrary, the presence of stiff competition between the two products might lead to closures of the local plants, which might be detrimental to the people employed by them. The local producers claim that they would be at a disadvantaged position if the imported cement were allowed to enter the Philippine market freely.

Protectionism amidst Globalization
The stance of Secretary Roxas might be considered as a form of protectionism because the imposition of tariff regulates the entry of foreign products. The Philippines has become part of globalization through multi-lateral agreements such as the GATT-WTO and the APEC. The Philippines has committed to gradually phase down restrictions to foreign products, specifically tariff. Globalization, which is said to be irreversible and inevitable, eliminates barriers to trade. However, even as part of such agreements, the Philippines still has the right to impose restrictions in order to protect its local industry.

In Philcemcor's case for the imposition of the provisionary tariff, their intention was to protect the local industry and to recover its losses due to the entry of imported cement. Losses were claimed to be incurred because the local industry could not compete with the foreign-manufactured cement. Thus, Roxas heeded their petition. He claimed that the local cement industry is a strategic industry which helps to enhance the country's global competitiveness. The government will help the industry and would not allow it to succumb to imported cement.

Points have been raised regarding globalization especially in the case of the Philippines. Firstly, the Philippines has yet to prepare herself before entering globalization. Moreover, our country has yet to be equipped with several safety nets against the negative impacts of globalization. Such safety nets include regulation such as the Anti-Dumping and Safeguard Measures Act. These statutes provide for the imposition of measures protecting the local industry.

Assuming that the local cement industry has yet to prepare for the global competition, when would it be prepared? For how long shall the government protect them?

Proponents of globalization claim that through competition, our domestic industry would be forced to produce according to the global quality standards. This, in turn, would benefit the consumers. Moreover, protectionism makes our local industry complacent and dependent from government regulations imposed against the imported products. This results to production below the accepted quality standard.

Some consumer groups have questioned the quality of the local cement. They said that consumers prefer the imported cement to the locally produced not because the former is cheaper but because it has higher quality than the latter. They also claimed that if only the local cement was of high quality, the local consumers would prefer that ignoring the price involved. If this allegation is true, Secretary Roxas is protecting an industry that produces below the quality standards accepted by the consumers. He is protecting an inferior industry and encouraging the industry to continue its production of low quality cement. In this regard, Roxas order opposes the intention of the government to transform the Philippine industries in becoming globally competitive.

Moreover, Philcemcor, the one that represented the cement industry in its petition for provisionary measure, is said to be comprised of manufacturer giants owned by foreigners. It is dominated by big foreign groups namely, the Lafarge Group, the Cemex Group and the Holcim Group. Roxas was charged with protecting the foreign-dominated industry. Neal Cruz, an Inquirer columnist claimed that although the cement is mined and processed by Filipino labor, its price is still higher when sold here than when the same are exported to other countries. In this light, the question of nationalism might be irrelevant. It is because protecting the local industry still means protecting the interests of foreign investors. However, if the issue of protecting the local laborers comes in, then the said order of Roxas might be thought of as protecting Filipinos' interests.

Conclusion

In conclusion, the issue of the provisional measure issued by Secretary Roxas, which was later, reversed by the Tariff Commission covers a complex matter. It covers not only the question of whether the Tariff Commission is a purely recommendatory body or not. The question of who is being protected by the provisional tariff is another. Does this protect the

consumers or the alleged cartel? One thing is clear though, Roxas is protecting the local laborers that would possibly be losing their jobs if the cement factories were forced to shut down. Another issue involved is the one pertaining to protectionism and globalization. Given that the local cement industry has suffered from the supposed influx of the imported cement, the provisionary measure is necessary but only for a definite period. The period of 200 days in this case was assumed to be enough for the industry to recover its losses. However, after the allotted period, the tariff must be brought back to its normal range to again level the playing field between the local and the imported cements. In addition to that, non-tariff barriers are in effect against the imported cement therefore, even if the provisionary tariff is removed, the domestic industry would still be protected.

It is accepted that we have to protect our local industry. However, anything that is beyond necessary would be detrimental to the economy. Overprotection of the local industry might hinder their transformation into a globally competitive industry. The government might be protecting an inefficient and monopolistic/oligopolistic industry.

Finally, it is evident in the cement industry issue that some agencies of the government, due to its highly fragmented nature, are sometimes working against each other. The DTI and the Tariff Commission are both under the Executive Branch and yet they did not agree on how to settle the said issue. They do not have coherence in settling and responding to issues that are pertinent to their functions. Moreover, there is an apparent overlapping of functions and ambiguities in the jurisdiction of the agencies concerned. In the issue of jurisdiction, the appearance of the Court of Appeals in the issue made the concern on who has the jurisdiction over the appeals more ambiguous.

APPENDIX B
SECURITIES REGULATION WITH A CASE ON THE BEST WORLD RESOURCES SCAM

1. THE SECURITIES REGULATION CODE OF 2000

The Securities and Regulation Code of 2000, hereinafter referred to as SRC, was signed into law on July 19, 2000. This law strengthened the old SRC "to be able to achieve a free market that is self-regulating. " The SRC was created with the following as its overriding objectives: "encourage wide participation of ownership in enterprises; enhance democratization of wealth; promote development of capital market; ensure disclosure about securities; minimize or totally eliminate insider trading and other devices and practices which distort free market" (Senate Accomplishment Report, www.senate.gov.ph).

The House version of the SRC bill underwent four Committee deliberations (under the Committee on Banks). The first one was held on December 16, 1998. The last deliberation with the Committee on Banks was on May 18, 1999. It also underwent a single deliberation under the Committee on Appropriation on the following day.

It was sponsored on the floor on September 14, 1999, and thereafter underwent a series of interpellation and debates, which ended on April 12, 2000. It was certified as an urgent bill by President Estrada, thus it was passed on second and third reading, also on April 12, 2000.

In the sponsorship speech of Cong. Macario Laurel IV (in sponsoring HB 8015) , he said that:

> "given the national economic objective of democratizing wealth and the competition offered by stock markets in the region for investible funds, there is an urgent need to review the philosophies underlying our securities laws and giving more emphasis to full disclosure as the principal method for investor protection. We need to overhaul this existing legal framework that will provide for the development of a capital market that is credible, fair and transparent."

According to Cong. Laurel, the primary thrust of this bill are as follows:

1. "to establish fair and equitable dealings in the marketplace by assuring that adequate and full disclosure is made of facts affecting stocks traded in an Exchange";
2. "to plug loopholes in the existing law to curtail malpractices which derail the development of a wholesome trading environment."; and
3. "to make the law more responsive to current market practices."

Unlike the Senate version of the SRC, that of the House version was deliberated and passed, while the Senate was investigating the BW Scandal, and a similar resolution was filed in the House of Representatives seeking a House investigation. Thus, it may be said that the House version was more affected by the BW Scandal. In fact,

there are certain provisions in the House version that were not included in the Senate version (which was passed earlier).

Based on the minutes of the two Bicameral Conference Committee Meetings, although, the Senate version became the point of reference, generally, the provisions in the House version were included in the final version, that became the SRC 2000.

Under the Declaration of State Policy of the SRC, it provides that:

> "The State shall establish a socially conscious, free market that regulates itself, encourage the widest participation of ownership in enterprises, enhance the democratization of wealth, promote the development of capital market, protect investors, ensure full and fair disclosure about securities, **minimize if not totally eliminate insider trading and other fraudulent or manipulative devices and practices which create distortions** in the free market." (emphasis supplied)

It is evident in the foregoing provision that in view of the BW Scandal, which was an example of large-scale insider trading and market manipulation, the newly enacted SRC deliberately provided mechanisms to address its future occurrence. In fact, one entire chapter (Chapter VII) of the SRC, is devoted on the "Prohibitions on Fraud, Manipulations and Insider Trading."

To prevent the so called "old boys regime" in the Exchange, and to protect investors, Self Regulating Organizations (SROs), have been demutualized, and the Board Composition have been regulated. The majority of the Board is mandated to be comprised of non-brokers. So, in the case of the Philippine Stocks Exchange (PSE), of the 15-member Board, 8 are non brokers.

Non-Broker Directors

The eight non-broker Directors of PSE were not appointed by the President. This was the word of the SEC Market Regulation Department Assistant Director Meonee, when asked about the non-brokers in a phone query. He said that these non-brokers are nominated, and go through a qualification process. Section 33.2 (f) of the SRC provides a limit to the number of Broker directors to the Board. This section states that: "the brokers in the board of the Exchange shall comprise of not more than forty-nine percent (49%) of such Board and shall proportionately represent the Exchange membership in terms of volume/value of paid up capital…" This provision leaves the remaining 51% to non-broker directors.

Section 33.2(g) states that the Board of the PSE (or any other Exchange) shall include in its Board composition "the (I) president of the exchange, and (ii) no less than fifty-one percent (51%) of the remaining members of the board to be comprised of three (3) independent directors and persons who represent the interest of issuers, investors, and other market participants, who are not associated with any broker or dealer or member of the Exchange for a period of two (2) years prior to his /her appointment."

De-Mutualized Exchange
Assistant Director Meonee said that this simply means a transformation of the PSE from a non-stock to a stock corporation, wherein a broker or a dealer does not automatically become a member of the Exchange. Similarly, a person need not be a stock broker or dealer to be a member. In essence, de-mutualization was a step to professionalize the PSE and regulate its activities, including its composition and membership.

This was seconded by Atty. Leonardo, also of SEC, that essentially, demutualization is the transformation of the PSE from a non-stock to a stock corporation. Such transformation would also entail that the PSE will sell its shares to institutional investors, and undertake initial public offering.

THE CONSUMER AND OIL PRICE WATCH
I learned from Zaldy, Mr. Concepcion's researcher, that this entity does not have any written profile. According to him, Price Watch is a creation of Mr. Concepcion that is solely financed by the Concepcion Industries. He said that, only a handful of staff helps Mr. Concepcion. He further said that they got a briefing from the Department of Energy (DOE) in doing their price computations. The DOE also supply them some of the data they need.

He suggested though, that we interview the guy himself to get substantial information.

Appendix B
2. THE BEST WORLD RESOURCES CORP. SCAM

The BW Scam, as it is more known, placed in the limelight the following issues and concerns:

1. Insider trading and market manipulation;
2. The "old-boys club mentality" in a self-regulatory organization, particularly in the Philippine Stock Exchange (PSE);
3. Undue intervention and abuse of power by the President; and
4. The power and independence of a regulatory body, particularly the Securities and Exchange Commission (SEC).

On Insider Trading and Market Manipulation
This started on the allegation that the sharp rise of the BW stock price from Php2 to Php100 in a span of eight months, happened due to insider trading. The report of the Compliance and Surveillance Group (CSG) of the PSE stated that it has found "more than sufficient evidence for the SEC to initiate and establish a prima facie case for price manipulation and insider trading" against Dante Tan, a friend of then President Estrada. The CSG also found that 8 brokers took part in Tan's "manipulative schemes and devices" and another 3 brokers were found to have committed less serious crimes in relation to the scam.

This report of the CSG was then submitted to PSE's 15-man Board, 12 of which are also brokers. As a self regulatory organization, the PSE is empowered to regulate itself and its brokers and market players in accordance with its rules, that were approved by the SEC.

The "old-boys club mentality" in the PSE
The problem worsened when the PSE's Board disagreed with the findings of the CSG. The Board seemed prepared to gloss over the allegations of fraud. This reaction of the PSE Board appeared understandable in view of the fact that 12 of the Board Members are also brokers, thus to accept the findings and recommendations of the CSG meant entertaining the possibility of penalizing people from their own profession. Lopez (2000) reported that "the PSE is just running true to form. In more than 60 years as Asia's oldest stock exchange, no broker, trader nor businessman has ever been convicted of stock market fraud."

Because of this, the entire CSG personnel, led by Atty. Ruben Almadro, resigned en masse on March 7, 2000. This led Perfecto Yasay, Chair of the SEC to shut down the stock exchange on March 8, 2000, only to be overturned by his 4 commissioners who claimed that the act was illegal.

Lopez (2000) also reported that Almadro went to Yasay on March 9, 2000 and asked for four reforms in the PSE. These are: "1) that the majority of the PSE's 15 governors be non-brokers; 2) that three of the PSE's five person Business Conduct and Ethics Committee (BCEC) be non-brokers; 3) that no member of the CSG's professional staff be removed without SEC approval; and 4) that no broker can be member of the PSE's professional management, from the president, vice president, and down to unit managers." Yasay ordered the PSE to adopt the said reforms, but this was ignored. In response to this, Yasay imposed a

P50 thousand daily fine on the PSE until it complies with the said reforms.

Undue Intervention and Abuse of Power

Yasay reported that then President Estrada called him five times on the BW Scam. He said that the President asked him "to end the SEC's inquiry into the insider trading activity and to clear Mr. Tan of any wrong-doing." In the Senate Hearing on BW on January 19, 2000, Yasay admitted that then President Estrada called him to complain about the BW investigation. This was followed by another call, wherein the President allegedly told him to immediately terminate the investigation and clear Mr. Dante Tan. This was allegedly followed by three other calls, all initiated by Estrada.

In March 2000, President Estrada made a call at the Mare at Pare TV Program, where Yasay was a guess. Estrada angrily warned Yasay *_huwag kang magsinungaling, baka tamaan ka ng kidlat*. In this same call, Estrada finally admitted that it was he who first brought up the name of Tan in the phone conversation with Yasay. Estrada stated that, I also told him (Yasay) that Dante Tan called, saying he is the victim in the whole fiasco and yet he is the one being investigated . That_s why I told Yasay, if possible, to expedite the case of Tan and if he is guilty then he should be punished. But if he is not, then it would be good so he can clear his name. (Carpio, April 2000).

According ton Carpio (April 2000), this conduct of Estrada bordered on the criminal. He said that the _Anti-Graft Law declares as a crime the act of any public officer in _persuading, inducing or influencing another public officer to perform an act constituting a violation of rules and regulations xxx or an offense in connection with the official duties of the latter xxx._

A document from the SEC also said that if Yasay_s allegations are true, then the acts of Estrada manifest a clear intervention of the Executive into the quasi-judicial function of the SEC. This document also said that Mr. Yasay was correct in pointing out that it is clearly stated in the Administrative Code that the general supervision exercised by the government in the SEC does not include the control of the SEC_s day- to-day operations. Thus, asking the SEC Chair to expedite or to terminate the investigation and clear Mr. Tan, is an abused of the power of the President to exercise general supervision over the SEC. This is similarly a violation of the Anti-Graft Law, as was cited by Carpio.

The Power and Independence of the SEC

This scam also brought to light the power of the Chief Regulator, which in this case is the SEC, over a self-regulatory organization, such as the PSE. As was mentioned earlier, the PSE ignored the order of Yasay to adopt the 4 reforms requested by the CSG.

Another issue that was shown by this scam is the collegial set up of the SEC, wherein the 4 commissioners overturned the order of Yasay to temporarily suspend the stock trade in view of the resignation of the entire CSG personnel. The SEC Chair was helpless when the other commissioners nullified his order on the ground that it was illegal.

Finally, the BW scam also brought to light the problematic set up of a supposedly independent chief regulator with quasi-judicial functions, but is attached under the Office of the President. Thus, though it is supposed to be independent, it cannot escape the intervention of the President, in as much as it is within his organizational jurisdiction.

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The MWSS Regulatory Office
The primary mechanism for regulating the privatized provision of water and sewerage services in Metropolitan Manila, and other adjoining areas comes in the form of the MWSS Regulatory Office. The MWSS-RO was specifically created by the Concession Agreement for the government to maintain some form of control over a basic and vital public good such as water. However, the Regulatory Office is confronted with significant issues and challenges that need to be addressed in order to improve RO's organizational capabilities and enable it to implement meaningful and effective regulation.

Ideally, a regulator should at all times be independent, in the sense that its decision-making processes and operations cannot be influenced by anyone, especially those who have vested interests in the parties that the Office is supposed to be regulating. In the case of the MWSS-RO, organizational independence is definitely an issue. This is due to a number of reasons: First, as mentioned earlier, the Office was only created through the Concession Agreement, not by an Act of the Philippine Legislature. Under Philippine jurisprudence, any agency created by means other than legislation does not have a legal character or legal personality. Since the Regulatory Office was created by a contract between the government and private companies, it does not have such legal character and cannot own property and may not enter into official agreements and/or contracts. This can be considered as a basic flaw in the creation of the Office. Due to this impediment, the Regulatory Office has to rely on the MWSS Board of Trustees when entering into agreements and contracts of any sort, thereby limiting its independence from the latter.

Perhaps a more glaring example of the Regulatory Office's dependence on the MWSS Board is the fact that all decisions made by the RO are subject to the approval of the Board. Even petitions for water rate hikes can only be validated and/or reviewed by the Regulatory Office but approval is at the Board's discretion. This is due to the existing setup wherein the Regulatory Office is organizationally placed under the Board of Trustees. The said organizational structure is questionable at best, since in theory the Board should not have any clout over the Regulatory Office because it is a party to the Concession Agreement that the RO is supposed to enforce. Under this framework, the RO's ability to enforce the provisions in the Concession Agreement becomes limited as the MWSS, through the Board of Trustees, can practically dictate what actions and decisions should be made by the Regulatory Office.

While the Regulatory Office is organizationally dependent and subservient to the Board, it is also dependent in a different aspect to the concessionaires, Maynilad and Manila Water. Under the Concession Agreement, the RO's annual operating budget during the entire concession period shall be equally financed by the private operators through concession fees thus making the Office totally financially reliant on the concessionaires. At the very least, this practice does not convey an image of a strong and independent regulatory body, and may in fact lead to suspicions of corruption and collusion between the RO and the concessionaire(s). In this aspect, it may have been more prudent if the Philippines followed the Argentinean model of regulating its privatized water utility. An independent body, Ente Tripartito de Obras Servicios Sanitarios (ETOSS), also regulates Aguas Argentinas, the private concessionaire in the Argentina. However, the regulatory agency is financed exclusively by a user fee levied directly on the consumers. Although the end-result may be the same, the independent image of the regulator and its accountability to the public is better highlighted in the Argentinean model than the current setup in the Philippines.

A recent controversy further elucidates the problems experienced by the Regulatory Office in terms of its supposed independence. In October 11, 2001, the Board of Trustees through the then MWSS Administrator Jose Mabanta terminated (effective November 2 of the same year) the services of two deputy regulators in the Regulatory Office. Attorneys Elena Alojipan and Virgilio Ocaya, deputy administrators for financial regulation and legal administration, respectively, were dismissed after losing the "trust and confidence" of the MWSS Board. This came after a Board Resolution issued on May 23, 2001 directed Alojipan and Ocaya, along with two other deputy administrators and Chief Regulator Rex Tantiongco to resign from their respective posts because of the Board's dissatisfaction with the Regulatory Office. The roots of the entire controversy can be traced from the contentious signing of a Memorandum of Agreement (MOA) between the MWSS and Maynilad, effectively allowing the concessionaire additional means for increasing water tariffs and causing renewed public uproar directed not only at the private operators but also at the MWSS and the Regulatory Office. Coincidentally, or not, the two fired regulators were opposed to Maynilad's petition for water rate hikes.

The regulators' dismissal is still in question, with Alojipan intending to take up the issue in Court, invoking the provision in the Concession Agreement that appointed regulators may only be removed from their post through action by an Appeals Panel with representation from an international arbitration body. However, the fact that the Board can coerce members of the Regulatory Office, including its highest official, to resign from their posts clearly shows its control and influence over the RO. This unwritten and unofficial power of the Board circumvents the provisions in the Concession Agreement which are in place to ensure the regulators' independence, thereby limiting the RO's effectiveness. More curiously, the letter terminating the services of the two mentioned deputy regulators was also signed by the respective company presidents of the private operators: Antonino Aquino of Manila Water and Rafael Alunan III of Maynilad. Although this may just be a show of support for the Board's opinions and recommendation, it does not project the right image for the regulatory framework governing water and sewerage services. The Regulatory Office is made to appear powerless to prevent possible collusion between the MWSS and the concessionaires, as collective action on the part of these parties can practically dictate the actions of the RO, and/or affect its administration and decision-making processes.

The Concession Agreement also expressly provides that the MWSS Regulatory Office should be situated in a "suitable office space in Metro Manila at a location separate from any other office or establishment of the MWSS or either concessionaire." At present, however, more than 4 years after privatization, the RO is still located at the old MWSS Building in Diliman, Quezon City. The Office is situated in the third floor of the building with the MWSS Corporate Offices occupying the fourth floor; Manila Water occupying the first and second floors, while Maynilad is located in an adjacent wing. Needless to say, the RO's current location violates every aspect of the Agreement's provisions for physical distance from the parties concerned. Physical distance of the regulator is necessary can help in preventing, or at least limiting, the opportunities for anomalous or illegal interactions with the parties to the Agreement. Also, the public image of an independent Office can be promoted by its physical separation from those that it should be regulating. Physical separation of the Office will help promote a public perception of independence on the part of the regulators and also diffuse suspicions of collusion and underhanded transactions.

In terms of personnel independence, the Concession Agreement explicitly states that all employees of the Regulatory Office should not have been affiliated with either

concessionaire, as well as the MWSS in any capacity for at least five years prior to employment in the RO. This provision draws from the lessons of the Argentinean experience, wherein the employees of the new regulatory agency (ETOSS) who were former employees of the public water utility, had difficulty accepting their new roles as regulators. It appears that the MWSS-RO is most independent in this aspect that in any other as clearly illustrated by the circumstances mentioned above.

Another basic flaw in the creation of the Regulatory Office involves its mandated powers and functions. In specifying the Office's initial and transitional powers, the Concession Agreement uses more passive terms such as "monitoring" and "review". The entire section pertaining to the powers of the Office, never uses the words "regulation" or "regulate". While it can be argued that these terms may be used interchangeably, "regulation" connotes a more pro-active course of action than the terms used in the contract. However, the Concession Agreement recognizes that the RO's functions "will change over time as the regulatory regime is established and developed", although it is unclear how these functions can be amended and/or modified.

The passive nature of the Office's powers has prompted its officials and employees to say that the RO is practically "toothless and spineless", in the sense that it cannot even impose the penalties and sanctions for violations of the provisions in the Concession Agreement. Further, the Regulatory Office is also prone to "regulatory capture" as the concessionaires have a tendency to provide misleading information thereby making effective regulation difficult because of the RO's dependence on the accuracy and truthfulness of the information provided to them.

The Regulatory Office also has certain problems involving human resources. First, top-level officials believe that the Office is understaffed. As of February 2002, the RO has a personnel complement of 69 employees, an inadequate number considering the Office's wide range of functions, according to the officials. There is also a problem in terms of leadership in the Office. Since the resignation of former Chief Regulator Tantiongco, a permanent replacement has yet to be appointed and the current Acting Chief Regulator, Atty. Herman Cimafranca, has to split his time between being head of the Regulatory Office and attending to his other duties in the Office of the Government Corporate Counsel (OGCC). The nature of the duties and responsibilities of the Office requires strong and stable leadership, particularly at this time when the first rate rebasing period (in the year2003), expected to be a tumultuous time for the RO, is fast approaching.

Another major issue is the actual capacity of the RO officials and employees to regulate. Top-level officials from the RO admit that the Office experiences problems with regulatory concepts and practices. This can be attributed to the relative freshness of the idea of regulation in the country, particularly considering that the concerned privatized utility has been traditionally viewed as a public good. Thus, there is a limited amount of experience that may be drawn upon in the country in terms of regulating private provision of basic goods and/or services. The only comparable regulatory bodies that govern the provision of basic services in the county are the Energy Regulatory Commission (ERC) for the electricity sector and the National Telecommunications Commission (NTC) for telecommunications. But even these agencies are encountering their own problems in terms of effective regulation and the industries concerned are not as basic and vital to the public as water.

The combination of organizational weaknesses, information handicap and limited experience in terms of regulation has rendered the MWSS-Regulatory Office practically impotent in performing its functions and raises serious doubts regarding the capability of government to maintain some semblance of control over such a basic and vital resource as water. There already is an attempt to improve the existing regulatory environment in the form of a pending legislation to create an independent, central regulatory body for the entire water sector in the country, the proposed Water Regulatory Commission. However, even if such an agency is created, it may not be able to exercise any authority over the concessionaires in the MWSS service area as the provisions in the Concession Agreement, including the regulatory aspects, are supposed to be valid and binding until the end of the concession period, in 2022. Any changes in the Agreement can only be introduced with the concurrence of all parties concerned and it is highly unlikely that the concessionaires will agree to measures strengthening the regulatory framework, thereby compromising their present advantageous position.