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REGULATORY GOVERNANCE IN THE PHILIPPINES

LESSONS FOR POLICY AND INSTITUTIONAL REFORM

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REGULATORY GOVERNANCE IN THE PHILIPPINES

LESSONS FOR POLICY AND INSTITUTIONAL REFORM[1]

Ledivina V. Cariño[2]

The Philippines was one of the first developing countries to liberalize its economy, as part of the structural adjustment loan packages it accepted in the 1980s to avert economic collapse. Thus entering neo-liberalism under the gun, as it were, it has put a complex framework in place. In the midst of the first moves towards trade liberalization and privatization, it drafted a constitution that continued the nationalistic philosophy of all previous basic laws, reserving to Filipinos vital areas of the economy and shielding them from the onslaught of the emerging globalization. It continues to have debates on basic questions about the economic framework. Issues deemed resolved may be resurrected with a new Supreme Court decision, a new legislative proposal, a new decision by a regulator, a new move to privatize or create a new regulator. In this situation, any institutionalization is difficult and regulatory governance is a critical problem.

Though classified as a middle-income country, the Philippines is still grappling with unconscionable poverty and inequality. Fully one-third of the population fell under the official poverty line in 2000 (PIDS). There is great inequality in income with the highest quintile having 36.6 percent share of the income in 1997, while the lowest quintile only had 2.28 percent. (ADB 2001) Even poverty is unequally distributed. Only 8.7 percent of the National Capital Region population is poor, compared to 55.4 percent in Bicol and 62.8 percent in the Autonomous Region of Muslim Mindanao. While NCR had improved considerably from its 1985 poverty condition (23.0 %), Bicol had improved much less (from 60.5% in 1985) and ARMM had actually worsened in the 15 years under democratic regimes (46.8% in ARMM). Clearly the production and dispersal of economic benefits should remain top priority.

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Yet, there are some aspects of governance where the Philippines can claim some degree of advancement. From the decentralization movement of the 1960s that was stifled by the martial law of the 1970s and early 1980s, the country took the plunge towards stronger decentralization at the turn of the 1990s, earlier than most other developing countries. It has a multitude of citizen groups involved in local and national affairs despite the repression of the 1970s, and their commitment burst into full flower in the People Power Revolution of 1986.

Besides, the Philippines is home to the first public administration college in Asia. The National College of Public Administration and Governance, University of the Philippines has pledged to improve all aspects of governance since it opened in 1952. Unwilling to be fenced into the study of the civil service alone, its courses have always been full of "the politics and administration of" this program, and "the formulation and implementation" of that policy. It has also regarded the discipline as "governance for the public interest," a definition that has two implications vital to this study. The first is the inclusion of all institutions which purport to deliver public service, expanding its confines to civil society and private firms participating in governance. The second means that the impact of public services on the poor plays a great role in it. However, NCPAG had paid more attention to delivery of services, and had largely left regulation to lawyers and economists.

On a darker side, Philippine corruption may be at lower depths than when the College pioneered in the study of negative bureaucratic behavior in Asia in 1975. It was not called regulatory capture then, but the research brought to light the pernicious partnership of the regulator and the regulated, ignoring the public interest.

Given this background, it was thus exciting for us when the UP-NCPAG Center for Policy and Executive Development (CPED) joined the UM-IDPM Centre for Regulation and Competition in a partnership for research in regulation, competition and regulatory governance. This could fill a gap in our body of research while being able to contribute to an international research agenda. From the array of issues for research, we at CPED chose topics to which we could contribute lessons for policy and institutional reform, whether as role models, or even as negative examples, and often, as both, in varying degrees. We thought that because of the Philippines' early entry into neo-liberalism, privatization and globalization, we could provide cautionary tales as well as ways forward. We also recognized that since as country and college we have some degree of advancement in decentralization and civil society participation, we could infuse those research fields with the critical questions of

regulatory governance. What we wanted to learn about Philippine regulatory governance cut a wide swath, and we had to tame our appetites to bite only those that were most urgent to our country, chewable in terms of our inclinations and competencies, and productive of further studies, so that this could begin a long-term commitment to examine regulation and competition and assess how regulatory governance has proceeded in the Philippines.

The CPED-NCPAG CRC program consists of nine separate research projects. It was guided by the CRC's fundamental idea that "improved policies and institutions of regulation and competition will contribute to achieving more efficient markets and better development" (CRC 2004: 5). Development is broadly defined to encompass economic growth, poverty reduction and improved quality of life. The research was also cognizant of the environment of the governance and policy issue, and attempted to include, whenever possible, not only factors in the economy but also in politics, social structure, culture, history, and international commitments and pressures. The program included the following subprojects:

1. A general overview setting out the philosophies underlying regulation and the legal and institutional framework, including issues raised by the dual philosophy and multiplicity of modes of regulatory governance (Cariño 2004)
2. Two studies on the electric power industry. The first examined one hundred years of regulation of the Philippine electricity industry, why and how regulation has changed over that period, and the implications of these changes on the public interest and governance (Mendoza 2003). The second is an analysis of the political, legal and public management issues surrounding the reform of the power sector (Baylon 2005).
3. Two studies on the reform of other utilities. The first focuses on water regulation after the then-biggest water services privatization in the world, the political and legal issues surrounding the concession agreements received by the two winning private firms, the weak regulatory framework and the effects of these on the access of poor communities to affordable safe water (Cuaresma 2003, 2005). The second studies universal access policies on information and communication technologies (ICT) following the deregulation of the telecommunications industry (Alampay 2005).

4. An analysis of the performance of the agency both developing and regulating Philippine ports (Basilio 2005)[3]
5. A case study of regulatory capture that extends beyond the Philippines and involves top officials of two countries and several government agencies and private sector firms (Briones and Gamboa 2005).
6. A study of local regulatory governance following devolution, tracing changes made by local officials to regulate and promote economic development and business in their jurisdictions (Legaspi 2005).
7. A study of ethical trading and other regulatory mechanisms implemented by the private sector and civil society as alternative or complement to state regulation (Cariño and Heeks 2004).

The research program of the Center for Regulation and Competition (CRC) rests on three main pillars: analyses of the *policy framework* that conditions and produces economic reforms; the effectiveness of *policy response*, which examines the ways in which regulation and competition policies have developed, and their defects; and finally *policy performance*, which involves the examination of structures and processes of implementation, policy delivery and policy outcomes. The CPED program was classified under the CRC Theme "Institutional Change in Regulatory Governance." As such, it is expected to contribute primarily to the third pillar. However, since some of our studies touch on the first two pillars also, this synthesis paper takes a more comprehensive approach, as illustrated in the following diagram:

FRAMEWORK –guides → RESPONSE ---leads to→ PERFORMANCE

The overall Policy Framework sets the goals of regulation. These are operationalized in the Policy Response and Performance specific to the sector or case studied. These two pillars are analyzed in terms of policy theory or implementation success/failure. The first covers whether or not the policy as enunciated can substantively lead to the desired outcomes and impact (theory failure or success). The second is the area of regulatory governance. It assesses if the implementation of a policy (theoretically vigorous or not) can and would lead to desired outcomes (implementation failure or success). These would suggest the policy

[3] In a narrow sense, the study of the Philippine Ports Authority is not part of the CPED project. It came to our attention only when it was submitted to the international conference NCPAG-UP and CRC held in Manila in 2003. We have since incorporated it into our purview as it complements our team efforts in terms of sector, regulatory mode, and constraints on performance.

recommendations to be made, i.e., if the policy should be reformulated, or if aspects of regulatory governance must be reformed.

This paper attempts a synthesis of the projects CPED undertook under the CRC research program. As such, it is limited to the industries and mechanisms the CPED team intensively studied and cannot claim to be a comprehensive study even just of the Philippine situation. The main sources of information are the findings of the projects as well as available literature relevant to the selected industries. Nevertheless, it provides insights into a wide array of regulatory modes. As such, we hope it can be regarded as a good source of lessons for later policy and institutional reform.

THE POLICY FRAMEWORK

The Philippines, like other developing countries, is reforming its regulatory scheme under the dual philosophy of nationalism and liberalization. These are meant to be complementary goals but may conflict in certain cases. The nationalistic philosophy comes out of oppressive colonial experiences and the desire of Filipinos to be masters of their own country. This may lead to higher standards for goods carrying the Philippine name, give priority to issues that address Philippine needs or uphold protectionism, anathema to the efficiency of markets. Two cases illustrate the complexity of the policy framework. In a cement importation controversy, two Philippine regulators invoked nationalism, one in seeking a provisional tariff as a safeguard measure to protect Filipino producers, the other in branding them a cartel and in insisting on lower-priced imports to protect Filipino consumers. In the Manila Hotel privatization, after losing the bidding, a Filipino company matched the bid of the winning foreign firm and argued successfully before the Supreme Court that the Hotel is a national patrimony that should remain in Filipino hands.

Yet the Philippines has also embraced neo-liberalism, is a founding member of WTO, and has enacted as many as twenty laws since the mid-1980s to promote competition and market efficiency. Notably, it repealed the Retail Trade Nationalization Law of 1954, aimed at protecting small Filipino convenience stores from the incursion of Chinese retailers. "Succumbing to the strong winds of trade liberalization" (Catindig 2001: 2-3), the repeal opened the door not so much to Chinese dreaded in the 1950s (many of whom have since gained Filipino citizenship) but to global companies wanting a foothold in Asia. Laws now

allow greater foreign participation in all but two dwindling Negative Lists.[4] Monetary reform has been instituted, air and water transportation opened up, and tariff reformed to reverse the country's long history of protectionism and import substitution. The electric power industry has been restructured, telecommunications deregulated, and water services privatized. Reforms have shifted the locus of regulation from central offices to local governments, civil society and the private sector.

POLICY RESPONSES

In assessing the policy responses, we first identified the policy in question and, if possible, determined the reasons for its elements. Then we searched for the theoretical connections between the policy and the desired outcomes.

Successive Philippine governments enacted laws to enable the country to attain its goals, taking into consideration the opportunities and constraints of globalization and the demands of its Constitution's nationalistic philosophy. These have been brought about through four types of laws:

- Laws to further liberalize the entry of foreign investments and goods into the country,[5]
- Laws to mitigate the effects of globalization,[6]
- Laws to develop specific industrial sectors, and
- Laws to strengthen the regulation of other sectors, including those that have been privatized, deregulated and devolved.

Among the industries we studied, perhaps it is the electric power reform that was most explicit and conscious about the relationship of its package to the development of competition. It broke up the industry into four distinct sub-sectors: transmission and distribution, both of which have the character of public utilities and are natural monopolies; and generation and supply, which are to be open to competition, being "only affected with

[4] List A consists of sectors reserved to Filipinos by the Constitution, and List B, sectors related to security, health and morals, and protection of local industries.

[5] Foreigners are now allowed 100% equity in all sectors including retail trade and banking which had been closed to them before (RA 7042, Foreign Investments Act of 1991; RA 8179, Further Liberalizing Foreign Investments, RA 8762:, Retail Trade Liberalization Act of 2000; RA 7721: Foreign Banking Act). Only those in a negative list are not open to them. They are further allowed to lease land up to 75 years **(**RA 7652: Foreign Investors' Long-Term Lease Act). A new law expanded the Build-Operate-Transfer Act as new opportunities for the private sector (RA 7718: The Expanded Build-Operate-and-Transfer Act**).**

[6] RA 8751 which strengthens the mechanisms for the imposition of WTO-consistent countervailing duties on imported subsidized products; RA 8752 which protects domestic industries through an anti-dumping duty; and RA 8800, the Safeguard Measures Act, which allows the government to temporarily raise tariffs or impose quantitative restrictions under certain conditions.

public interest." The first two are subject to regulation, while the latter two have been deregulated (Mendoza 2003).

However, the law itself seems to have vitiated some of the competitive thrusts of the reform. This appears due to pressures exerted on decision makers during the formulation of the Electric Power Industry Regulation Act (EPIRA). First, international financial institutions (IFI) made passage of the law a conditionality for loans and assistance to be received by the Philippines. This pushed EPIRA to become in the main a policy transfer from the model of the developed countries, instead of one able to respond to peculiar Philippine circumstances as the nationalistic principle requires. The IFI advice hardly took into account the small size of the Philippine capital market, the small number of companies and people knowledgeable about the industry, the state of un-readiness of the economy for privatization (which meant that only the small Filipino elite group and foreign investors can participate in the process), the appropriateness of huge electric infrastructure in an archipelago where smaller resource and/or community-based approaches might be more relevant, etc. (Baylon 2005).

A second set of factors may be called political will, especially if exercised by the president. EPIRA was sponsored by three presidents, each from a different party as his or her predecessor. This is rare in a country where a successor rarely builds upon the work of the previous incumbent, often a fatal blow to any possible institutionalization. Yet although Congress was recalcitrant (the enactment process took seven years), the IFI's linkage of electric power reform to loans - which all presidents had already acquiesced to - finally carried the day.

The third set was the interlocking and familial connections of industry and government leaders, and even outright corruption. After the broad strokes of the conditionality were accepted, issues like stranded cost recovery, cross-ownership, and bilateral supply were decided in favor of those EPIRA was supposed to regulate. Fourth were the relatively smaller voices of civil society and consumer organizations whose advocacy for the wider public was drowned by the power of the big guns. What resulted was a law that had many provisions that effectively stilled possibilities of competition.

For telecommunications, the goal is universal access, or the availability of a minimum set of reliable and affordable telecoms services throughout the country. This was the goal even

when telephony was effectively a monopoly that the state could not force to serve "missionary routes."[7]

The new policy promulgated in the 1990s was deregulation (or more accurately, de-monopolization) which opened the industry to many more players, economic efficiency expected to serve the needs of social access also. The international role though present was muted: World Bank had only regularly recommended the deregulation of the telecommunications industry but did not appear to actively push it. The Telecommunications Deregulation Law, RA 7925 came after then President Fidel V. Ramos had effectively opened the door to other companies with two Executive Orders. The National Telecommunications Commission, the regulator, had likewise already promulgated the Service Area Scheme (SAS) under which each telecommunications company (telco) would serve a designated pair of profitable and unprofitable areas to make geographic access a reality. What was left was resolving the issue of interconnection. The law provided that the telcos should decide this among themselves, leaving the regulator out of the picture and effectively allowing the Philippine Long Distance Company, the dominant player, to dictate when and how it would take place. It also required all the players to roll out required infrastructure within three years, a capital nightmare for fledgling companies. These provisions were added by legislators friendly to the first telco, raising the same state capture issue as in the EPIRA. However, one legislator attributed his stand to a philosophical affinity for monopolies, on the grounds that bigness provides advantages. Some consumer advocates also got involved; lining up on the side of deregulation already embraced by the President, they were more successful than the NGOs of EPIRA (Coronel 1998).

The analysis of policy formulation has shown that four factors -international pressures, political will (autonomous in the case of telecommunications but not when talking of EPIRA), the influence and power of the regulated industry over regulators and policy makers, the actions of consumers and smaller stakeholders – interact in structuring the policy response. They were not equally influential in the two cases, suggesting that their effect can be manipulated by human action such as improvement of skills, use of more resources or superior power, and other processes.

[7] The government had its own telephone office (TELOF) which tried to compensate for its regulatory failure by its presence in a few underserved areas. There were sixty other small telephone companies although the dominant company accounted for 98 percent of total landlines.

POLICY IMPLEMENTATION AND PERFORMANCE

This section looks at both the structure of regulatory governance and the performance of the regulatory sector. It first looks at the comprehensiveness and coherence of the structure. Then it assesses the capacity of regulators to implement the policy. This covers questions of the powers, technical and political qualifications and independence of the regulators. It also includes the pressures and facilities that condition the resulting performance.

The regulator in the Philippines is primarily an agency in the executive branch, although some would call those vested with quasi-judicial powers as belonging to a fourth branch, between the executive and the judiciary. The judiciary and the legislature also play important roles in the implementation process. Some regulatory mechanisms have developed outside the state as an alternative or complement to its regulators. Despite sectoral specialization, it is rare that only one agency actually resolves a case, since there are layers of review, coordinating mechanisms and, often, recourse to the constitutional bodies, courts, the President or Congress.

In the Philippines, it is usual to say that regulation was the task of a single agency, the Public Service Commission, until the restructuring at the advent of liberalization. To say this, however, is to ignore the changes in the understanding of regulation over time. PSC indeed was supposed to take care of all "public services" since 1913. "Public services" meant "public utilities" and its task was to make sure they render safe, adequate and satisfactory services to the public regulating entry and rate-setting (Mendoza 2003). However, separate regulators for public utilities were created beginning with the National Telecommunications Commission in 1927 and the Civil Aeronautics Board (now Air Transportation Office) in 1931, perhaps in acknowledgment of the difficulty of including these fast-changing technologies under the same frame as electricity, water and transportation. In 1971, PSC was abolished and sectoral regulatory bodies were gradually established in its stead.

Outside public utilities, what we now consider regulation to implement monetary, trade, labor and consumer protection policies was assigned to different agencies, including some with quasi-judicial powers. The original Central Bank of the Philippines, Tariff Commission and Securities and Exchange Commission are examples of these early important regulatory agencies. Others created at about the same time have been abolished as the policies underpinning them have been discarded (for instance, the Import Control Commission in the era of import substitution).

Cabinet-level departments have always had regulatory functions in their area of assignment. For example, the Department of Commerce and Police, established in 1906 always had a role in the conduct of trade. However, its mandate in 1987, as the Department of Trade and Industry, is a far cry from that as it now has "the primary, coordinative, promotive, facilitative and regulatory arm of the government for the country's trade, industry and investment activities." Also, the Securities and Exchange Commission in its original 1936 incarnation was primarily a registration agency for corporations. In 2000, it is in charge of securities regulation and would probably be the core agency to implement the Philippine competition policy still in the works.

Much of the restructuring of the regulatory sector took place from the 1980s, ahead of many developing countries. It is justified in the need to protect the public interest and to create and facilitate the conditions for effective markets. When government withdraws from a particular industry, a regulatory mechanism is created to ensure that its social and economic goals are still pursued. Regulation of the economy is now entrusted to about twenty agencies, each concerned with a particular industrial sector[8]. They have functions other than rate-setting, give incentives in place of or in addition to sanctions, and include the promotion of competition in their perspective on the public interest.

There is no set institutional model. Regulators differ in terms of their position in the executive branch (independent of, attached to, or under the administrative supervision of, or being a cabinet-level department itself); judicial status (quasi-judicial, whose decisions are reviewed only by the Court of Appeals or the Supreme Court, or administrative, subject to review by the next higher bureaucratic level); single-headed or collegial, and if so, if with representatives from stakeholders); manner of their appointment (career, presidential discretion, recommendation by relevant stakeholders as ordained by law); with or without fiscal autonomy. The insulation of the regulator from undue external pressures and its ability to respond with appropriate technical standards are affected and enhanced by these institutional qualities.

Nevertheless, it should be accepted that regulation is also a political process. As a means of moving toward the public interest, it should be informed by a country's history, culture, and politics, based on the democratic theory that elections embody the will of the people and active citizenship is among their rights. An agency should therefore be encouraged to

[8] This includes regulatory agencies in the financial sector, trade and commerce, water utilities, transportation and communication, labour and energy.

consider not just technical factors but also their reading of what is in the public interest and who should benefit from their decisions. Nevertheless it is possible that these non-technical considerations may be borne on the wings of private-regarding intentions. The danger is that it is not easy to discern when politics and culture weigh in more on the side of the general welfare than on the side of private interests.

CPED studied policy implementation in six industries, each exemplifying a different mode of regulatory reform and institutional arrangement:

- The electric power industry which was restructured, with different organizations created either to provide the services or to regulate their provision.
- Telecommunications which were de-monopolized, while retaining the same regulatory institution.
- Water services which were privatized, with a new regulator to "monitor" and "review" (pointedly not to "regulate) the new private firms.
- Ports development which was given to a public enterprise, to improve the transport of goods and people in an archipelagic nation.
- Infrastructure investments which were encouraged with a family of build-operate-transfer (BOT) schemes for private sector participation. "Green light" regulation is in the hands of the National Economic and Development Authority (the central planning agency), the Board of Investments under the Department of Trade and Industry, and the relevant technical department.
- Entry into local business which has been streamlined, as devolution gave local officials a fresh mandate for local economic promotion.

Electric Power

The structure of electric power reform is the most complex. The power of PSC to grant franchises, issue certificates of public convenience or of public convenience and necessity, and fix rates and reasonable standards of safety in the electric power sector was passed on to the Oil Industry Commission in 1971, and to the Energy Regulatory Board in 1997 and to the Energy Regulatory Commission in 2001. This seemingly simple generational chain masks the complexity, for from 1936 when it was created to 1992 when its rate-fixing power was shared with the ERB, the National Power Corporation was both main provider and regulator of the industry. With EPIRA, it was forced to divest many assets and contracts

and to give birth to an alphabet soup of new offices: the Small Power Utilities Group (SPUG) for the missionary electrification function; the new public enterprise, Power Sector Assets and Liabilities Management, Inc. (PSALM) to dispose of NPC's generating assets, power contracts and other disposable properties; and the Transmission Company (TRANSCO) a new public enterprise expected to be speedily privatized. EPIRA also envisioned a Wholesale Electricity Spot Market (WESM) which has yet to work. Other agencies involved in the power sector are the Office of the President, the Department of Finance, the Department of Energy, the Department of the Environment and Natural Resources, the National Electrification Administration, the Commission on Audit, and the Joint Congressional Power Commission (JPC).

The current Energy Regulatory Commission inherited the function of rate fixing and protection of consumer interests. It gained new powers as the competition watchdog and is supposed to franchise and license new market participants, oversee mergers and consolidations, set technical, performance and service standards, encourage market development, ensure consumer choice and penalize abuse of market power. It is also overall supervisor for the restructured industry, being the chief regulator of the transmission, distribution and supply sectors of the industry.

Like PSC, the ERC is a quasi-judicial and quasi-legislative body, but gets its budget from general appropriations. Its decisions may only be appealed to the Court of Appeals (on questions of fact) and to the Supreme Court (in questions of law). While PSC had one Commissioner and four deputy commissioners with no fixed terms, ERC members have seven-year staggered terms with no reappointment. PSC only required that its members be professionals; ERC members are professionals – and then some: "of recognized competence in energy, law, economics, finance, commerce or engineering with at least three years' experience," with the Chair being a member of the Bar and another member being a Certified Public Accountant, both with at least ten years' experience. They or their relatives within the fourth civil degree are prohibited from holding any interest in a company in the energy industry. They have high status, receiving similar salaries and benefits as the justices of the Supreme Court. These incentives may not be sufficient since the first Chair resigned shortly after his appointment to go back to the Monetary Board (whose members' salaries are quadruple that of the Justices).

Except for lack of fiscal autonomy, ERC seems to have been given all the conditions necessary for independent decisions. It has used them to make several unilateral moves to

reach out to consumers. It has created the Consumer Affairs Service and put it at the same level as Legal, Regulatory and Market Operations Services. A website for the IT-initiated and posters in prominent public places for the masses aim not only to provide consumers timely and complete information on electricity matters affecting them but also to invite suggestions and even individual complaints. It promulgated in June 2004 a Magna Carta for Residential Electricity Consumers, stating the rights and obligations of both distribution utilities and consumers (Baylon 2000).

However, consumer advocacy groups still complain that its decisions are biased in favor of industry players and power utilities claim that they are dictated by political considerations (Baylon 2005). ERC was also perceived as leaning on the side of the Manila Electric Company, the political powerful energy supplier for Metro Manila, in the case the latter lodged against its predecessor agency, the ERB. Mendoza (2003) attributes this less as evidence of capture, and more as the birth pains of a new regulator.

Telecommunications

The provision of telecommunications services is regulated by the National Telecommunications Commission, formerly under the Department of Transportation and Communication and recently transferred to the new Commission for ICT. NTC has jurisdiction over landlines, cellphones and international gateway providers after franchises have been granted by Congress. NTC has a three-member collegial commission whose terms are not fixed by law nor is there a provision that these be staggered. This makes the Commissioners though required by law to have certain qualifications (one must be a lawyer and a second an economist) susceptible to political machinations. One president fired all three commissioners in a dispute in the allocation of cellular frequency; another fired the Chair over personal differences and probably an impending decision against PLDT. But then, most have gotten in through political connections, with commissioners often purported to have been nominated by or with ties to PLDT interests. President Ferdinand E. Marcos allegedly maneuvered to control it through a complex layer of dummies; this is the reason for the sequestration of the firm by the succeeding government of President Corazon C. Aquino. Again, family ties between political officials and its leaders got PLDT out of this hole. It was the determined effort of President Fidel V. Ramos that succeeded in deregulating it, coincidentally while the Chair was a telecoms expert, neutral but with political connections of her own. NTC's other major strength as a regulator is the fact that its decisions may only

be appealed to the Supreme Court, a judicial status it shares with only three other regulatory agencies.

Like almost all regulators, NTC relies on Congress for its budget. In 2002, it was P147 million (L2 million), although it collected fees of P1.16 billion (L15 million) the year before. The lack of fiscal autonomy means low funds for staff training, no attractiveness to high-caliber staff and inability to get equipment, these in an industry where technological developments are rapid and dazzling. Into the void comes the regulated, that, from time to time, provides capability building and equipment to the staff supposed to regulate it (Espos 2003, Coronel 1998).

The problems of NTC notwithstanding, telecommunications in the Philippines has certainly developed. The increase in the number of lines has been phenomenal, from 740,000 in 1992 to 6.9 million lines a decade later. Telephone density has also increased, from 0.9 in 1990 to 8.7 in 2002. Some targets of the National Telecommunications Development Plan for 2010 were close to achievement as of 2002.

Market structure has also changed considerably. Local exchange carriers have increased from 49, with PLDT as de facto monopoly, in 1993 to 74, with ten major players, in 2002, inter-exchange carriers from one to 14 in the same period, cellular phone providers from two to seven, and international gateway facilities from one in 1989 to three in 1993 and 11 in 2002. Still, government has not had private takers of 98 unprofitable digital telephone exchanges nationwide.

Part of the success can be traced to the deregulation and its SAS program. However, a larger part may be attributed to the development of convergence in telecommunication, broadcasting and computing technologies that have "allowed for real competition to be possible" (Laffont and Tirole 1999, quoted in Alampay 2005). Convergence in turn raises questions on what industry is to be regulated: "basic" services like voice only, or also value-added services like texting (SMS) which are more popular and are used for other than calling (such as gambling, interactive participation with radio and television, and so on)? Voice communication through only the telephone, or through the computer also?

Despite these developments, NTC has not evenly implemented its policies. First, PLDT when a monopoly was not required to serve in unprofitable areas while the new players coming in after deregulation were forced to. Second, SMART, a sister company of PLDT, has complied with the number of lines but has not been as meticulous in serving the unprofitable area

assigned to it, with verified installation efficiency of only 42 percent, while all its other rivals (except PHILCOM) ranged from 78 to 93 percent. The third problem may explain PHILCOM's non-compliance. NTC required it, an international gateway provider, to invest in a landline network that it was not originally designed to provide. Alampay calls this "an inherent flaw in the SAS" and may suggest that NTC is not fully abreast with the technology it is supposed to regulate.

The definition of "universal access" also needs to be looked into. SAS' "universality" seems to reckon only with geography. Alampay (2005) found that it did not bridge the digital income, age, and rural-urban divide. He found that at the bottom of the divide are persons who would not care about the contours of the policy, being unable to even appreciate the available technology. Further, NTC is clearly mandated by Executive Order 109 (s. 1993) to include in universal access not just availability (to which all its measures are geared), but also affordability and reliability.

Water Services

The privatization of the Metropolitan Water and Sewerage Services (MWSS) to two private concessionaires in 1997 had the goal of expansion of service coverage, improvement in the quality of service delivery and increase in operating efficiency. Manila Water Company appears to be moving positively toward these goals (Rivera 2003) but the Maynilad Water Services, Inc. unilaterally pulled out of the concession in 2002, a study in contrast of private sector participation.

MWSS has a regulatory office (RO) that oversees the two concessionaires. It is organizationally under the MWSS Board of Trustees, the government party to the Concession Agreement RO is supposed to enforce. Its decisions are reviewed by the MWSS board and the Department of Transportation and Communications (DOTC) to which it is attached. Maintained by fees from the concessionaires, the single-headed body's independence is also limited by the firms it is supposed to regulate. In 2001, the MWSS Board – *along with the concessionaires' presidents* – signed termination letters to two deputy regulators known to oppose a petition for water rate hikes. Consumers have voiced frustration over this cozy relationship. It is at least partly blamed for the quadrupled increase in water rates since 1998, contrary to the Concession Agreement which mandates "universal water services to be achieved without increase in real water tariffs over the first ten years."

Despite these shortcomings, both firms have interpreted "universal water services" to mean reaching out to the poor. This, although the Agreement between the two concessionaires and the RO contains no direct provisions requiring a pro-poor focus. Also, given the lack of mandate, the RO has not monitored how the poor are benefiting from the concessionaires' services. Yet both concessionaires have laudably implemented programs designed for the poor. Moreover, both have not required land titles to be produced before connecting households, effectively allowing squatters access to their services.[9]

It may be that this social initiative is not all altruistic, since with Metro Manila saturated, the poor represent the last area of expansion. Manila Water Company's (MWC) strategy was to bring water services to the poor in groups. Its *Tubig para sa Barangay* (TPSB, water for the community) program reached more people (since one tap serves five households) than Maynilad's *Bayan-Tubig* (community water) policy which installed individual water connections However, Cuaresma's analysis shows they were less convenient than individual connections, and the combined water use of five families brought poor households to the highest tariff level for residential customers, making their per-unit water cost more expensive than higher-income households. They also faced a greater liability, since the default of one cut the water services of all. In addition, if one of them had a small convenience store, they all rose to the semi-residential rates, while a household with a swimming pool was charged at residential rates.

The poor had also assumed more obligations. They pay for the cost of connections to the main by the group, or by individual households to the group tap unlike in the other households where these fees are shouldered by the concessionaire. Other options for the poor such as vended water are more costly, less sanitary and are beyond the reach of the regulator (Cuaresma 2003, 2005).

Ports Development

The Philippine Ports Authority is a public enterprise created during Martial Law to develop the ports and regulate their shipping, cargo handling and terminal operations (Presidential Decree 857). As such, it took over some of the functions of then still-existing PSC. Its board is composed of six cabinet members, two other ex officio government officials, with the ninth coming from the private sector. The high-level board may be a disadvantage, since cabinet members can hardly devote time to it and rarely attend meetings. This may have led the board to the practice of simply adopting the recommendations of the Board

[9] The land title requirement was a policy they inherited from MWSS and is still supposed to be operative.

Committee, composed of its Chair, the PPA president and one other member, without thorough deliberations as its review body.

PPA gets its operating expenses from a share of the fees it collects from wharfage, berthing/usage fees and cargo handling. This fiscal autonomy comes at the cost of conflict of interest. It approves petitions for rate increases "even where there are no petitioners, no public hearings…, and/or no financial statements" by which to assess their economic or financial justification. The increase of revenues is advantageous to the PPA since it never lacks for funds. Also, it is a benefit to the national treasury to which PPA gives fifty percent of its share in the revenues. Thus, government is itself a party in interest in PPA's revenue raising spree.

Conflict of interest gets into other concerns. To further increase revenues, PPA has encouraged multiple cargo handling that is not justified by efficiency considerations. Further, the twinning of development and regulation means that PPA gets into partnership with the firms it is supposed to regulate. At one point, it was able to persuade President Estrada to require all existing facility operators and service providers to unify into one corporation. This monopoly would be charged to develop the entire port and would reap the benefits of privatization without public bidding (Ex. Order No. 59, s. 1998). This Executive Order was widely criticized in Congress in three separate resolutions issued in September 1999 and August 2000. It was only revoked in October 2000 under the heat of the gambling revelations that ultimately led to Estrada's ouster from the presidency. The new Executive Order (308, s.2000) directed PPA to make privatization competitive, with public bidding. But PPA continued to implement the monopoly proposal until the new government of Macapagal Arroyo halted the North Harbor Modernization Program where this monopoly would have operated (Basilio 2005).

Infrastructure Development

The government promulgated the Build-Operate-Transfer schemes to make local industries more globally competitive through infrastructure development (The BOT Law of 1991, RA 6957 as amended by RA 7718, 194). The Philippine Infrastructure Privatization Program is also known as the Philippine BOT Program. It promises "a climate of minimum government regulations and procedures and specific government undertakings in support of the private sector" (RA 6957, Sec. 1). If initiated by the government, BOT schemes include direct government guarantees, such as the assumption of responsibility for repayment of debt.

Aside from financial incentives, private proponents were also assured of minimum government regulations and specific government undertakings in support of the private sector. However, an unsolicited proposal is not supposed to get a government guarantee. This point is an important bone of contention in the IMPSA case discussed below.

The law authorized all government infrastructure agencies, including public enterprises and local governments to enter into BOT contracts. The main agency to evaluate the proposal of the private sector is the Investment Coordination Committee of National Economic and Development Authority, the central planning agency, and the relevant technical agency (i.e. if in generation of electric power, the National Power Corporation). NEDA is chaired by no less than the President of the Republic, with the NEDA Director General as Secretary. It is composed of cabinet officials of the economic departments, and representatives of industry and labor.

During the period of President Corazon C. Aquino (1986-1992), the Philippines was hit by power outages so severe that it put the country into the dark ages in terms of investments and business confidence. BOT saved the day as independent power producers (IPPs) constructed power plants speedily and turned the light on again. The power purchase contracts were generous as the government shouldered practically all risks and accompanied them with a lot of incentives besides. For instance, the contracts included a "take or pay" provision which required the NPC to pay for the capacity made available by the IPP, whether it was actually utilized or not. Government also made a performance undertaking guaranteeing the NPC's payment of these obligations and recourse to government should the NPC be unable to do so. Aside from the emergency nature of the electric power provision, these incentives were justified because IPPs were required to sell their capacity exclusively to NPC since they have no direct access to consumers, having no franchises. IPPs were hailed for ending the power crisis in 1992 but in about ten years' time were damned for the high cost of electricity; NPC had to pay for as much as 25 to 80 percent of generated power even if it did not utilize it. This in turn was passed on to MERALCO and the consumers, raising protests and demonstrations. President Arroyo had to stay the increase of rates and review the contracts but the onerous power purchase adjustments (PPA) stayed in consumers' bills after the heat died down (Mendoza 2003).

There does not appear to be corruption in these transactions and the incentives seem appropriate even in hindsight. What it does show is the importance of the time horizon in divining the public interest. Electric light "at all costs" during brownouts would not be

acceptable once the costs actually had to be paid for. It appears the technical analysts overestimated the expansion of the demand for power and of the economy itself once the country went back to the light.

The dynamics of implementation where the political overrode technical necessity may be seen through a Build-Rehabilitate-Operate-Transfer (BROT) case. BROT is a "contractual arrangement whereby an existing facility is turned over to the private sector to refurbish, operate, and maintain for a franchise period, at the expiry of which it is turned over to the government" (RA 7718, Sec. 2). The BROT case involves the rehabilitation of a hydropower electric plant that would result in doubling its current capacity. Rehabilitation is supposed to reduce the cost of electricity which will in turn reduce the cost of machines, making Philippine production competitive with that of other countries.

The case involves a 25-year BROT Contract between Argentine-based *Industrias Metalurgicas Pescarmona Sociedad Anonima* (IMPSA) and the Philippine government through its National Power Corporation (NPC). The case has covered three Philippine administrations (that of Fidel V. Ramos, Joseph E. Estrada and Gloria Macapagal-Arroyo), and from outside the country, two Argentine Presidents, one Argentine firm (IMPSA), one American firm (Edison Mission Energy), and the governments of Argentina, Switzerland, United States, and Japan. IMPSA put forward the unsolicited BROT proposal in 1993. Government signed a Performance Undertaking (PU) in 1999 and a Government Acknowledgment and Consent Agreement in June 2000. The project commenced in February 2000.

Investigation of the case shows several flaws in the process. Among them were the following:

- According to NPC engineers, they could have undertaken the project at much lower cost with official development assistance. Thus it was not needed.
- The NPC Price and Non-Price Group held that the bids of IMPSA and its rival did not meet the Terms of Reference. Hence, nobody won the bid, but the contract process proceeded anyway.
- The NPC board qualified IMPSA despite questions on its track record, technical competence and the technical aspects of its bid.
- IMPSA itself allegedly drafted the BROT Contract and Supplemental Agreement, writing into it two apparent violations of the BOT law: a section implying that

government would assume the financial costs in case of project failure and another one freeing IMPSA of the requirement to provide 100 percent equity.

- The NPC board ratified the contract ex post facto. The NPC signatory did not have authorization from the Board when he signed the Agreement between NPC and IMPSA.
- NEDA stood firm in its position that the unsolicited project was not entitled to a PU from the Philippine government. Therefore the NEDA board did not approve the draft contract. However, it did not have the power to review and approve the final contract, which was between NPC and IMPSA only.
- Congress found the project was overpriced.

The BROT process had enough technical safeguards; the technical staff and NEDA did not show timidity in pointing out the problems of this particular case. However, this did not stop political officials from proceeding against the technical advice. It appears that the Philippine and Argentine presidents looked at the project as a quid pro quo, a Philippine firm having won a port privatization project in Argentina and personally intervened in the process. Beyond their concerns for their respective countries' capacity for globalization, however, in the Philippines there were insinuations of bribery in high places.[10]

The regulatory capture of this BROT Contract has shown that well-planned strategies designed to level the playing field could be circumvented to suit the interests of a few. Such capture could be seen as a sign of "internal weakness" and "bad governance." It is against the interest of the country in two ways, i.e., either to scare away potential investors or to invite those who would only exploit the vulnerability of the Philippine public sector for greater financial gains (Briones and Gamboa 2005).

Local Economic Development

Their powers strengthened by devolution, some local officials have reorganized and streamlined their operations to entice entrepreneurs to locate in their city. Two reform-minded mayors established one-stop shops, air-conditioned waiting lounges, computerization and shortened processing time to make getting the entry permits more convenient.

[10] Japanese involvement came about because one of its banks wanted confirmation of the government guarantee. The Swiss government came in when it requested Philippine legal aid in its investigation of the bank accounts of a Secretary of Justice, one instrumental in producing the PU and the GACA.

There is no question of their success. Quezon City was adjudged "the most business-friendly city" by the Philippine Chamber of Commerce and Industry in 2003, while doubling the number of new businesses and increasing by 276 percent the amount of business taxes collected between 1998 and 2002. Dagupan City had a 130 percent increase in the number of firms and a 146 percent increase in business tax collections between 1999 and 2003 (Legaspi 2005).

Yet, problems still remain. Despite streamlining, the shorter processes are still fraught with red tape. First, inspection offices (for fire safety, sanitary permit, mechanical inspection) tend to be understaffed and take a long time to inspect the premises of the business. Second are regulations of the national government which a city supposedly with local autonomy still has to follow. Third is the strategy of set-up licensing that the two cities both follow. Set-up licensing is a regulation that requires entrepreneurs to get a permit before they can start business operations. It is contrasted with independent licensing where start-up and licensing are separate procedures. Zhang and Ogus (2005) show that SSL cannot be justified on public interest grounds. It seems to lead, more than IL, to enticing business people to corruption or patronage, increasing the power of bureaucrats, or pushing the investors to operate underground. Thus, while the comprehensive regulations may have been made to provide safeguards to the public, they may have the unintended effect of promoting, not economic development, but the private interests of these stakeholders.

JUDICIAL AND LEGISLATIVE PARTICIPATION IN THE IMPLEMENTATION PROCESS

The judiciary as the final avenue of appeal is part of the normal regulatory process. The Court is supposed to rule on constitutionality and questions of law and to uphold "the time-honored principle of judicial non-interference."[11] A 1990 ruling on a telecommunications case states the doctrine clearly:

> An administrative agency possessed of the necessary special knowledge, expertise and experience … deserves great weight and respect…It can only be set aside on proof of gross abuse of discretion, fraud or error of law (as quoted in Espos 2003).

Mendoza made a meticulous study of a rate-setting controversy in electricity regulation. The case in question took ten years. Participants included four generations of energy regulators

[11] The quotation is from the decision of the Third Division of the Supreme Court on ERP 93-118 on November 15, 2002 (Mendoza 2003).

(whose decisions were not consistent with each other), the Commission on Audit, the Solicitor General, the Office of the President, the Court of Appeals and the Supreme Court, on the side of government; and the petitioner (the Manila Electric Company), as well as private citizens, consumer groups and industry organizations. She concluded that here, regulation became only a legal matter, not only because it reached the courts, but also because the regulators tended to serve only as a neutral, judge-like arbiter instead of using the regulatory process "to balance public and private interests, … an instrument of public policy through adoption of clear objectives, appropriate standards and means for exact and systemic administration."

The Philippines is similar to the US system "in its legal and procedural complexity, detailed statutes, formal rule making procedures, requirements for elaborate economic and scientific analyses and a great deal of legislative and judicial supervision" unlike in the United Kingdom and Europe where legislation is written "in schematic language," allowing regulators a great deal of discretion. Moreover, the Filipino penchant for going to court has made regulation "a significant process of judicialization," or what she calls "regulation by lawsuits" (Mendoza 2003). Public interest is further overshadowed by allegations of linkages between regulators and judges on one side, and the petitioner on the other. Similar alarums have been raised in many cases involving the PLDT (Espos, 2003; Coronel 1998).

The legislature is not only policy maker but has roles in implementation as well. The Philippine Congress determines entry of specific firms into some regulated industries through the grant of franchises. Franchising involves, probably with more intensity, the same pattern of politician-industry linkages of other regulatory legislation.

In addition, since 1987, many Philippine laws mandate a representative of Congress to be a member of the committee to draft implementing rules and regulations (IRR), an executive function. Moreover, the legislature has written into many laws an Oversight Committee headed by a legislator to supervise how a law is implemented. A case in point is the Joint Congressional Power Commission already mentioned in the discussion of EPIRA. Among its tasks are to endorse the privatization plan prepared by PSALM to the Office of the President, and review and evaluate the performance of industry participants relative to the objectives of the Act. It is also empowered to require ERC, PSALM, TRANSCO, the Department of Energy and all other EPI participants, including private companies to submit data and reports on their performance (Mendoza 2003).

These practices not only draw Congress into executive functions and curtail regulatory autonomy. They also are a way by which legislators intimidate regulators and give rise to the suspicion that these can provide them unrecorded income.

Constitutional Bodies

A set of agencies have been created by the Constitution to make public servants accountable. These are the Commission on Audit for all transactions involving use of government resources; the Civil Service Commission, for upholding the merit system; the Commission on Elections, for accountability through suffrage; Commission on Human Rights, which look into violations committed by public servants; and the Ombudsman, the people's watchdog. All are formally independent of the three branches and have institutional and fiscal autonomy despite being supported by government appropriations from taxes.

The Commission on Audit is at the forefront in cases of regulatory capture and corruption. Its reports were a principal basis of the Supreme Court in its decision regarding the ERB v Meralco controversy when it ruled in favor of refunding part of the electric fees to consumers. The ability of an all-female audit team to point out accounting distortions despite the offers from the regulated made them legend (Baylon 2005).

ALTERNATIVE REGULATORY MECHANISMS

There are three types of regulatory mechanisms carried out by or with non-state entities. The mode is self-regulation when a firm promulgates its own company code of conduct (CCC) to ensure that it upholds human, labor, gender and environmental rights in the conduct of its business. There is no independent check on a company's compliance, and workers do not feel comfortable with CCCs. Meanwhile, corporations sincerely practicing ethics may simply force local contractors to turn to non-CCC companies, leaving workers as vulnerable as before.

Other self-regulating companies may sign up with the United Nations' Global Compact Initiative (GCI), declaring their adherence to ten principles covering labor rights, human rights, environmental conservation and anti-corruption. The Employers Confederation of the Philippines (ECOP), which counts the top 500 corporations in its membership, promotes GCI and keeps a list of its adherent-companies, but does not monitor their performance. As with CCCs, this mode does not address labor's sense of vulnerability.

Self-regulation is also carried out by the Philippine Stock Exchange with its own Compliance and Surveillance Group to ensure the integrity of the securities market. With a series of fraud, insider trading and other anomalies in the 1990s, PSE itself needed reform. Unlike CCC and GCI, this self-regulatory organization has a regulator over it, the Securities and Exchange Commission. SEC's mandate is written into the Securities Regulation Code that also provides for the composition of the PSE Board and its de-mutualization. SEC suspended the self-regulatory organization (SRO) status of PSE in March 2000 when its CSG resigned to protest the alleged whitewashing by the board of its investigative report. It was restored only after compliance with the terms and conditions set by the SEC.

What this shows is that self-regulation may still need an independent verification body to assure its proper performance.

Co-regulation occurs in the Social Accountability Initiative (SAI), a global civil society organization formed by representatives of the private sector, labor unions and governments. SAI certifies that a firm has passed its stringent social audit to qualify for an SA 8000 seal. SA 8000 incorporates core labor standards embodied in ILO conventions, OECD guidelines, GCI, and national laws. In the Philippines, SAI focuses on the garment, textile and leather industry. The private sector is composed of firms that register with the SAI, mostly ECOP members. ECOP is the employers' representative. Labor is represented by the Philippine affiliate of the International Textile, Garment and Leather Workers Federation while government is represented by the Institute of Labor Standards, Department of Labor and Employment. SAI is a boon to all its stakeholders, recognizing corporations with ethical conduct, safeguarding labor rights and freeing government of the need to conduct inspections. Its major problem is its high cost, making it beyond the reach of all but the biggest corporations.

Stakeholder regulation takes the form of peer or advocate regulation. The Fair Trade Movement is an example of peer regulation which demonstrates that capitalism can be benign to labor and consumers. The Fair Trade Alliance (FTA) brings together buyers from the North with producers from the South. The Fair Trade Mark guarantees that a good was produced in cooperative workplaces (not sweatshops) by workers receiving fair wages under environmentally and culturally friendly conditions. FTA seeks to bring about alternative trading and "guilt-free shopping." The Fair Trade Foundation, which gives the FT mark, was set up by development organizations but producers and sellers are private sector firms or

cooperatives attuned to its principles. This part is advocate regulation. It is peer regulation as it pushes companies not in its network to also adhere to its fair trading principles. This has occurred to some extent. Fair trade has grown fast in European markets, and some products have significant (though still small) market shares, forcing some mainstream corporations to rethink their trade practices.

Other instances of peer regulation are the Philippine Council for NGO Certification (PCNC) and the voluntary accreditation organizations of higher educational institutions (HEIs). PCNC certifies to the donee status of an organization, allowing corporations that give it funds to receive tax exemption. PCNC is a creation of several large Philippine NGOs. Its recommendations are submitted to the Bureau of Internal Revenue, the tax collection agency which is empowered to grant such exemptions. Besides its formal function which is primarily in assistance to the BIR, PCNC in a sense is a standard setter for its peers in civil society. Its certification has become a "good housekeeping seal" not only for a CSO's donee status but also for its financial accountability and performance. However, the PCNC clientele has not grown as much as expected. This may be partly because of its costs (making it appropriate only for bigger CSOS). It may also be that, in a country with high tax avoidance, many CSOs think they can get corporations to donate to them even without PCNC certification because the former do not report all their revenues anyway.

HEI's accreditation attests to the compliance of a school to a minimum set of standards in curriculum, faculty, admission, and library and other educational resources. Like the BIR-PCNC linkage, the role of voluntary accreditation organizations is not written into the law, but the Commission on Higher Education (CHED) encourages their work and takes their recommendations into account in dealing with HEIs. CHED technical panels that set standards for different academic programs take into account the standards followed by these voluntary organizations. The panels have many stalwarts of these accreditation groups in their membership. These organizations gain strength like the PSE, in having the government regulator in their corner.

The ethical trading initiative (ETI) is a type of advocate regulation where civil society organizations from both ends of the global supply chain assess a firm's or an industry's business conduct. ETI does not certify or accredit companies. Instead, it raises awareness through workers' education in the South and consumer awareness and advocacy for ethically produced goods in the North. In Asia, ETI is sponsored by Working Women Worldwide, an intermediary organization affiliated with Christian churches. ETI in the Philippines was

conducted by researchers commissioned by WWW to track subcontracting in a multinational garment firm operating in the Philippines. In addition to raising workers' awareness, they confronted the multinational corporation with their findings. The MNC responded by creating a Global Compliance Department to monitor the performance of its subcontractors, and a Global Partnerships Program so that it can receive regular feedback on its performance from labor groups and community leaders (Cariño and Heeks 2005).

These alternative regulatory mechanisms have varying levels of credibility and capacity to deliver on their promises. CCC and GCI are truly responsible only to self, although public knowledge of its Code or GCI enrollment may subject a company to scrutiny beyond its walls. GCI has somewhat higher chances for this, with the backing of the United Nations and ECOP. PSE in a sense is a regulated self-regulator, whose actions must conform to SEC's standard or risk losing its independence, credibility or even its own existence.

SAI certification may have the highest credibility, but not so much because the state is party to it, as for its strict social audit process and the inclusion of the other important stakeholder, labour. Co-regulation's triangulation makes for a comprehensive review of a corporation's performance. It is an expensive process that probably can be afforded only by the richest corporations, who are its main targets, anyway. Its credibility would be enhanced if it reached beyond to the informal sector that connects to the company as out-sources.

Peer regulation focuses not so much on independence, as on the power of peers to set standards that can uphold the quality of the entire industry. FTA shows, for instance, that it is possible to be fair to labor and still be profitable. PCNC gives a similar message to CSOs: be accountable and you will get corporations to believe in you enough to invest in your mission. Voluntary accreditation organizations say: uphold the peer standards, and get CHED off your back, or more formally, be the college respected by your peers.

LESSONS FOR POLICY AND INSTITUTIONAL REFORM

Summary

The Philippines is an example of a middle-income country with some advantages – an adherence to democracy, decentralization ahead of its neighbours, a strong civil society, a capacity to innovate known throughout Asia. It accepted liberalization early but faces it with

nationalistic limitations in its Constitution, the strong influence (even tutelage) by international financial institutions, pervasive poverty, corruption, and yawning income and power inequalities. It has navigated this difficult terrain by fashioning, not necessarily intentionally, a system of regulatory governance that uses a wide array of regulatory modes, each seeking to attain a heady mix of political (basic freedoms as well as specific economic rights of Filipinos, justice to all stakeholders), economic (market efficiency and global competitiveness) and social (social access, poverty reduction, and quality life) goals.

The paper identified four types of laws constituting the regulatory policy response to the policy framework discussed above. To get at the dynamics, it studied the formulation of two laws. International pressures, the evident will of political officials, the power of the dominant firms in the regulated industry, and consumer and citizen advocacy operated in both instances but not at the same level of influence.

Philippine regulatory governance centres on the executive branch, but all branches plus an unnamed fourth branch of constitutional bodies, local government units, and non-state organizations also play roles. There are almost twenty regulatory agencies with varying reform modes, institutional structures, autonomy, and political skills. At the same time, many protagonists seek judicial judgment leading practically to a system of regulation by lawsuits. Meanwhile, legislators exercise functions related to entry and supervision that may detract from the autonomy of regulators.

This paper attempted to understand this system through a study of regulation in six industries and two local governments as well as of alternative regulatory mechanisms. The reform modes consisted of restructuring, de-monopolization, a concession agreement following privatization, resort to a public enterprise, private sector participation through BOT schemes and streamlining of processes following devolution. All were geared to increase efficiency of markets and competition. There were some evident successes in terms of making the sector more attractive to investors, as the BOT schemes did, even in the problematic cases we discussed, and in telecommunications, again despite the remaining dominant influence of the earlier monopoly. Good governance resulted from devolution as two cities streamlined their business permit operations as they became more focused on local economic development. Privatization produced a mixed bag, with Manila Water showing more efficiency than Maynilad, in cutting non-revenue water and delivering lower

cost water to more customers. However, Maynilad gave the preferred individual household connections to poor customers. The restructuring of the electric power industry clarified the loci of different problems. However, resolving these problems could not take place because of problems of finances, the poor capital market and other factors.

A reform mode that should be more closely linked to regulation and achieving the public interest is decentralization. Legaspi shows empowered local executives cutting red tape and changing structures to develop their economy. Basilio suggests that ports development would proceed better if the ports were decentralized and allowed to compete with each other. This implies that decisions made at points closer to the people may not only be politically correct but also more productive to the economy. However, as Legaspi shows, decentralization at the local level requires supportive national structures. Thus, it requires that national offices and agencies be changed also.

The goals of the reforms could not be achieved for various reasons. There were policy distortions in reforming the power industry, ports and telecommunications, the lack of readiness of the market in electric power. Some problems were conceptual in nature, for instance, the meaning of universality and social access or who is an adequate representative of a sector. In some, re-thinking of the policy itself may be in order, such as the application of foreign models to the Philippines. For instance, smaller infrastructure projects serving communities and capable of being financed locally may allow electrification, water services or the ports to be able to function better.

The Philippine style of regulatory governance is complex, with regulators adequately endowed with power and independence deferring or being forced to defer to higher or parallel authority. NEDA maintained its opposition to IMPSA but the NPC Board caved in. No matter. Both had to bow to preordained decisions that ignored their technical inputs. The system appears to be based on distrust and legalism, such that watching over regulators is a constant phenomenon, even though that process may lead not to less bias in decisions, but to more people in the corruption take. Arguments centre on fine points of the law and a search for loopholes, not a focus on who should be or has benefited, and if that benefit is appropriate and fair. Even a self-regulatory organization needs to be reminded that a higher external regulator watches over it, or, like the PSE in the first two years of the Securities Regulation Code, it will violate simple rules when it seems nobody is looking. A multiple

board may become not so much a means for more representation and more comprehensive discussions, as a means of spreading blame.

THEORETICAL INSIGHTS

Embedded Regulatory Autonomy

What we have seen of regulatory governance reminds us that the struggle of technical and political considerations is a constant, since what is in the public interest is not preordained. It is a process that emerges from the crucible of opposing interests, reconciliation and balance, and discretion and choice. Thus, the test of regulators' success is not that they have correctly fathomed the public interest (since there is no one measure of it), but that they have not abused their discretion and have followed processes that evince transparency and fairness.

In discussions about the role of the state, autonomy is defined as "independence from class and sectoral interests so that it (the state) stands for the interests of the people rather than of a powerful minority"[12] The desired autonomy is embedded, that is, the state is relatively independent from other social forces, relative because permeable and responsive to them.[13] It contemplates a state able to balance the demands of an independent nation with the challenges of a global economy. It is also a positive quality of aligning itself with deserving protagonists particularly among the poor and the previously excluded. This embedded autonomy may be applied also to regulators. Instead of focusing only on the development of regulators' technical capacity, and attempting to insulate them from the political and social realities that surround their sector, their country and the world, what may be required is embedded regulatory autonomy.

Embedded regulatory autonomy is independence plus. Since regulators are not robots and structures are permeable, there always exists a possibility of influence of forces outside the regulatory system. Some of these, it must be emphasized, may push for the public interest – such as discussions with customers, other small stakeholders or disinterested citizens - or for private interest – for example, more powerful voices in society seeking to safeguard unfairly their dominance over the rest of the people. To discern the public interest, the

[12] Gloria Macapagal-Arroyo,. State of the Nation Address. Batasang Pambansa, Quezon City, Philippines, July 22, 2002; http://www.philsol.nl/A02b/SONA02-text.htm (accessed Dec 2003).

[13] Joachim Ahrens, "Introduction: Market, State, and Economic Development." *Governance and Economic Development: A Comparative Institutional Approach*; Edward Elgar Publishing Limited: UK, 2002.

regulator must allow – even encourage - the competition of ideas and interests, and the bargaining and negotiation of all affected parties. Related concepts would be transparency and accountability and representation.

Regulatory Capture

Regulatory capture has been defined as "meant behaviours, active and passive, by responsible authorities, which behaviour acts to protect the same illegal, unethical, immoral or anti-public interest practices that those authorities are charged of policing" (McMahon 2002: 1). We have seen many instances of this in the almost regular way dominant industry players get unwarranted concessions from the state, meaning not just the formal regulatory agencies but high executive, legislative and judicial officials also. An attempt at capture will always occur when rents are less costly than scrupulous production of services. Private interests will always threaten to overwhelm public interest, with willing peddlers of influence, poor enforcement and, as in the ERC example, closed-door "public" hearings. McMahon may also be too harsh in his definition, because captor and capturer may learn to couch their mutual demands in neutral language and provide rationale that may seem acceptable on the surface. Recall one's legislator's recourse to philosophy in defending a valued monopoly.

What we would like to add to discussions of regulatory capture is a consideration of other parties in interest, and other factors that may push for it. On the first, capture is usually seen at the level of the regulatory heads and of higher officials. However, we may also witness capture much lower down, at the level of the bureaucracy. In the case of telecoms, for instance, technical personnel have been inured to the ways of the monopolist, and dependent on its assistance for staff development and new technology, that they may fall into giving "captured," not neutral, technical assessments. An analogous circumstance would be advice from international consultants that serve the interests of their agencies but are accepted without question by staff whose knowledge of new developments come mostly from the same source. A government which does not provide enough resources to its regulators would be prey to such bureaucratic capture.

Another type of capture comes not from the private sector, but from the state itself. A government may feel itself protected when it puts its highest officials in its regulatory boards. Basilio's analysis points out that the state is not necessarily a neutral party, but also

has interests and demands that taint the regulatory process. This, even in a situation where the officials did not seem to have individually profited from their zeal in approving ever higher rates to gain more revenues at the expense of the ports' clients.

On the second point. Representation of different interests and qualifications in the board has been offered to forestall regulatory capture. Representation is often a valuable input, but it is not a panacea. In a small economy, it could be difficult to find qualified individuals who would truly be disinterested. There might be too few persons who know the intricacies of an industry who would not come from a regulated firm or have political ties that can be harnessed for pernicious ends. In the telecommunications and electric power industries, a revolving door from the industry to the regulator and back again shows this problem in stark relief. Even labor representatives may not come with clean hands.

Structural Options

Structure is important if only because each type offers different possibilities. It would be expected that autonomy of the regulator would be enhanced the higher its position in the executive branch, the higher its judicial status, the more dominant the technical considerations in the appointment of its decision makers, the inclusion of stakeholder representatives in the board, and its exercise of fiscal autonomy. A single-headed regulator can generally make faster decisions than a multi-headed commission. On the other hand, multiple memberships can theoretically put into the discussions the perceptions of many minds and can potentially prevent any one private-regarding solution from being accepted. Even in alternative regulatory mechanisms, the most satisfying alternative seems to be co-regulation, where the interests of the corporation, labour and government are all represented.

As already mentioned, even self-regulators seem to perform better with another regulator maintaining close watch over it. However, that hierarchical guardianship becomes less necessary with other institutional handles: the provision of clear standards of conduct to the regulated, transparency, support of peer groups, and partnership with the regulator a la educational voluntary accreditation.

Unbundling seems to be a dominant thread in regulation reform. It is helpful in forcing focus on neglected tasks and in revealing latent conflicts of interest. EPIRA has broken up NPC because it tackles incompatible roles as provider and regulator. This is reinforced in the

negative example of PPA. The break-up of NPC into the alphabet soup of different agencies did not erase its monstrous debt but it has allowed each new organization to focus on a particular role. Particularly SPUG has made electrification of more remote areas an important mission that big lumbering NPC could never have made central. PSC as regulator of all public utilities is at a disadvantage relative to NTC or ERC which can go in depth into the intricacies of the particular technology and industry they are regulating, an issue that may become increasingly important with the rapid changes in those areas. However, unbundling should not deteriorate into a spree of new agency creation. In some cases, clarification of mandates and provision of more resources for neglected important tasks may be all that is necessary.

Globalization

One of the most important factors in the environment of regulation is the shrinking of the world and the growing influence of organizations and people outside a country on policies and decisions that are made there. Many more firms operate in more than one country. We have already seen how technical assessments and rules were ignored in IMPSA in the desire to please a foreign investor. This unwarranted international reciprocity tainted officials in two countries and drew participants in at least three others.

At the same time, it must not be ignored that the problem was made public in the Philippines because of the action of two governments – both to protect their banking systems. The participation of Switzerland may be highlighted because it came in as a corruption investigator of accounts of a high government official that the Philippine media was able to trace to the performance undertaking that person allegedly gave illegitimately. Globalization itself has awakened this European government to be more careful about its unnumbered accounts.

Beyond this, globalization has changed the terms of reference of the public interest. In the cement case, the interests of the foreign producer and the local consumer may have teamed up against the local producers, forcing consideration of the possibility that nationalism may call for protecting foreign producers instead.

Globalization also raises questions of how much international experience particularly in developed countries, should be exported to developing ones. The IFI's conditionality in the electric power loans produced a policy transfer that is not completely applicable – but had

some good results also. Besides, it is global civil society and international covenants using global standards that protect little people in remote Philippine villages through ethical and trading initiatives.

Globalization then is not always a pernicious process nor always a benign one. However, it is rarely neutral so that developing countries always need to be alert in embracing or rejecting it.

Regulation for the Poor

Regulatory reform these days includes an obligatory bow to increasing social access and reducing poverty. Two of our studies focused on this issue directly. In water services, the private firms voluntarily created special programs for the poor, without a directive from the regulator. This should not surprise because their reasons are quintessentially market-based. The poor are the last frontier for expansion. Besides, it is good business to serve the poor. However, although the poor were indeed benefited, it turns out that they were paying more than their richer counterparts because of the mode of service delivery and the fee structure used by the firms.

Meanwhile, in telecoms, the regulator implied a focus on the poor with the emphasis on universal access. However, while greater geographic spread has taken place, the poor have not been reached because they are, in a word, not accessible – by reason of remote residences, low incomes, and inability to take advantage of available services. The inability is both because of lack of awareness of telephones as well as of what it can do. However, the operators have expanded into the groups of the aware poor through offerings of low prepaid loads, shared loading and the like, again new products not out of bleeding hearts but of astute business sense.

In the other industries, the poor are largely unknown. Cross-subsidies through social pricing enjoyed by electric power consumers may soon be stopped because of EPIRA's blanket disapproval of subsidies. In general, the plight of the poor is not heard because they are not represented in decision making. At best they might get a labour representative, but a representative of the poorest consumer has never been in a board. Even the ARMs which are very socially oriented reach and can protect formal labour, but hardly those in the informal sector.

Role of Communication and Education

Information asymmetry gives undue power to dominant firms and the regulators themselves, vis-à-vis the less endowed among their customers and the general citizenry. Many complaints against regulators cite their closed-door decisions, their less-than-public hearings, their tilt toward the industry's representatives, even their inability to communicate simple information to their buyers and consumers. These suggest the importance of communication in regulation, an issue that commends the ERC's innovation of a customer relations office, a magna carta for electricity consumers. They are not as participative as citizens' charters but they do show more respect to the ordinary consumers than have been shown before. The media's role in the spread of this kind of information must be encouraged.

Role of Technology

The improvement of competition and access may be due less to the promulgated policy and the effectiveness of its regulator than to technological development, a rival hypothesis that scholars of regulation may test in other industries.

SUGGESTIONS FOR POLICY

Some of our policy suggestions would be evident from the insights we have discussed.

1. Regulation should be separated from service provision and sector development and be performed by different agencies. This would increase the agency's focus on their mission, allow it to develop the special skills of regulation and forestall regulatory capture.
2. Regulation for the poor would involve a greater concern for educating them to take advantage of modern technologies, and a reduction of information asymmetry through magna cartas or citizen charters. It may also incorporate the idea that the poor are good business, but the regulator must make sure they are not duped into paying higher than normal prices.
3. Civil society's foray into the regulatory field may be encouraged since they are less timid about acknowledging the importance of values in regulatory transactions and also can build bridges to access the poor. Their conscientization efforts may be broadened to include arming the poor to prevent or protest unfair regulations. A model case may be SOMPIS, an organization of marginalized individuals in Surakarta, Indonesia, that studies all local regulations and calls the attention of authorities to any rule that affects its constituents negatively (Cariño 2005). New organizations may expand this model by studying all proposed national and local regulations. Such a watch by organizations for the poor will keep the legislators and regulators alert to the effects of their decisions on the poor.
4. The incentive structure for private participation in development may need re-analysis. Incentives should not be equivalent to provision of risk-less investments.

The use of the private sector should be for increased efficiency, not to give them new methods of collecting rent.

5. Education and capability building for regulatory reform must be a mix of technical and substantial inputs, training in listening and negotiations, and exercises in discerning the public interest from these transparent transactions. Such programs should be beamed not only at regulators in the executive branch but those in the other branches also, particularly the legislature. Embedded regulatory autonomy suggests capability building for regulators not only to teach them new techniques or to hamstring them with technical rules. Rather it should develop substantial rationality, one's inclinations and stock knowledge tempered by willingness to listen to the demands and pressures from all stakeholders, not just influentials. Finally the decision will engage political and moral reasoning, a search for the spirit and not just the letter of the law they are implementing.

6. The effects of different modes of reform, and varied structures need closer analysis for greater appreciation of the difference structures make. We have already mentioned the characteristics that strengthen a regulator's autonomy, but the contours of "independence plus" should be subject to more analysis. We see stronger enforcement of anti-corruption policy and values education for politicians, implementers and civil society to be part of this. Some changes will need reinforcement from other fields, such as electoral and educational reform.

7. Devolution is a national policy. For its effects to be optimized, it should change not only regulation at local levels, but that of national agencies also.

REFERENCES

Alampay, E. G. (2005) *Rethinking Universal Access Using the Capability Approach: The Case of Access to Information and Communication Technologies in the Philippines.* Draft PhD dissertation submitted to the University of Manchester.

Asian Development Bank (2001) *Key Indicators of Developing Asian and Pacific Countries.* Oxford and New York. Oxford University Press.

Basilio, E. (2005) PPA: A Case of Regulatory Capture, in Martin Minogue and Ledivina V. Cariño (eds.), *Regulatory Governance in Developing Countries.* UK: Edward Elgar. Forthcoming.

Baylon, M. (2005) *The Political Economy of Regulation in the Philippine Power Industry*. Draft PhD dissertation submitted to the University of Manchester.

Briones, L. M. and Gamboa, M.A. (2005) *IMPSA: Regulatory Capture, Recapture and Rupture*, paper presented at the International Conference on "Challenges to Development: Innovation and Change in Regulation and Competition" sponsored by the National College of Public Administration and Governance, University of the Philippines and the Centre for Regulation and Competition, Institute for Development Policy and Management, University of Manchester. October.

Cariño, L. V. (2004a.) Regulatory Governance in the Philippines: A Profile, in Paul Cook, Martin Minogue, David Parker and Colin Kirkpatrick (eds.). *Leading Issues in Regulation.* UK: Edward Elgar.

Cariño, L. V. and Heeks, R. (2004b) *Alternative Regulatory Mechanisms for Ethical and Fair Trade: A View from the South*. Paper presented to the Conference on Competition and Regulation, Cape Town, South Africa.

Centre for Regulation and Competition (2000) Strategy Document. Submitted to the Department of International Development.

Coronel, S. S. (1998) Monopoly, in Sheila S. Coronel (ed.). *Pork and Other Perks: Corruption and Governance in the Philippines.* Pasig, Metro Manila: Philippine Center for Investigative Journalism, Evelio B. Javier Foundation and Institute for Popular Democracy: 112-149.

Cuaresma, J. C. (2003) *Water in Private Hands: Impact on Governance and the Poor*. Paper read at the International Conference on "Challenges to Development: Innovation and Change in Regulation and Competition" sponsored by the National College of Public Administration and Governance, University of the Philippines and the Centre for Regulation and Competition, Institute for Development Policy and Management, University of Manchester. October.

Cuaresma, J. C. (2005) Pro-Poor Water Services in Metro Manila: In Search of Greater Equity, in Martin Minogue and Ledivina V. Cariño (eds.), *Regulatory Governance in Developing Countries.* UK: Edward Elgar. Forthcoming.

Catindig, T. A. (2000) *The Major Laws of the Philippines Relating to Trade and Investment*. Paper presented at the ASEAN Legal Systems and Regional Integration International Law Conference. Kula Lumpur, Malaysia: SASEAN Secretariat and the Asia-Europe Institute and the Faculty of Law, University of Malaya.

Espos, E. A. (2003) Institutions, Regulation and Performance: The Case of Philippine Telecommunications, *Philippine Journal of Public Administration.*

Legaspi, P. E. (2005) Reforms and Practices in Local Regulatory Governance: The Case of the Philippines, in Martin Minogue and Ledivina V. Cariño (eds.), *Regulatory Governance in Developing Countries.* UK: Edward Elgar. Forthcoming.

McMahon, G. (2002) *Regulatory Capture: Causes and Effects.* A paper delivered at the International Institute for Public Ethics Biennial Conference 2002 held at Brisbane, Australia on 4-7 October.

Mendoza, M. F. V. (2003) *Regulation of the Philippine Electricity Industry: Lessons of the Past and Implications on Governance*, unpublished DPA dissertation submitted to the University of the Philippines.

Philippine Institute for Development Studies (2005) *Regional Poverty Incidence of Families, All Areas*, http://dirp.pids.gov.ph/cgi-bin/st2?povinc_fam_reg_new.tbl. Retrieved June 3, 2005.

Rivera, V. C. Jr. (2003) *Manila Water Company, Inc.: A Case Study on Private-Public Partnership*. Paper read at the International Conference on "Challenges to Development: Innovation and Change in Regulation and Competition" sponsored by the National College of Public Administration and Governance, University of the Philippines and the Centre for Regulation and Competition, Institute for Development Policy and Management, University of Manchester. October.

Zhang, O. and Ogus, A. (2005) Licensing Procedures in Developing Countries: Should They Be Part of the Set-Up Process?, in Martin Minogue and Ledivina V. Cariño (eds.), *Regulatory Governance in Developing Countries.* UK: Ed