PHILIPPINE GOVERNMENT CORPORATE SECTOR: *QUO VADIS?**

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I. INTRODUCTION

Government-Owned or Controlled Corporations ("GOCC"), better known in other jurisdictions as State-Owned Enterprises ("SOE"), are usually established either to decentralize some key public sector activities or to move others from the private sector to the public domain.[1] The mandate and purpose of GOCCs vary, ranging from the provision of basic services to the public, such as transportation, water, energy, and housing, to engaging in developmental and pioneering activities, as well as involvement in socially-oriented responsibilities. GOCCs have also succeeded as commercial ventures, contributing to public revenues and playing important roles in nation-building.[2]

Under the Philippine Constitution, GOCCs are established "in the interest of the common good and subject to the test of economic viability."[3] In contrast to mere "financial viability,"[4] economic viability is measured not only by financial criteria, but also by economic returns or benefits that are not

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[1] The World Bank, *World Development Report 1988*, at 10 (1988).

[2] *Id.*

[3] CONST., art. XII, § 16.

[4] Financial viability has been defined to mean "the ability of the corporation to support its operation from its own internal cash generation without operating losses from the national government can be reasonably expected." *See* Letter of Instruction No. 1520, Feb. 4, 1986.

quantifiable. It is determined by a cost-benefit ratio that takes into consideration all benefits, including economic and internal ones.[5]

The creation of GOCCs in certain industries is supported by several justifications:

(1) Natural Monopoly. – One common justification is that the industry involves a situation of a natural monopoly. According to economists, a natural monopoly is a situation where the increasing returns to scale would require significant production of goods or services in order to reach the cheapest average cost per product. The costs entailed by a single supplier providing the entire goods or services would be cheaper compared to several suppliers providing it.[6] When a natural monopoly exists, the supplier is able to earn high profits by charging high prices, , and at the same time results in economic inefficiency as the monopolistic firm produces less than the socially desirable amounts of output.[7] As the exploitation of this situation is detrimental to the public, the government may opt to take over production through a government corporation.

(2) Capital Market Failure. – In some industries, private sector investors are reluctant to invest due to the high risk involved. The returns, although high, are only to be reaped in the long run. This risk-averse behavior is said to be the general behavior of people.[8] In order to make the goods or services in that industry available to the public, the government itself might have to invest in it.

(3) Externalities. – There are instances when an action of an individual benefits another who does not pay for it. This is called a positive externality.[9] According to economists, individuals will only minimally engage in acts that generate positive externalities as they do not enjoy the full benefits of those acts. Hence, if the private sector is not willing to invest, especially when such

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[5] *See generally* Record of the Constitutional Commission (1986).
[6] J. Stiglitz, Economics of the Public Sector 78 (3rd ed. 2000).
[7] Ha-Joon Chang, *State Owned Enterprise Reform,* at 12, Policy Notes 4, United Nations, Department of Economics and Social Affairs (2007).
[8] P. Samuelson & W. Nordhaus, Economics 193 (16th ed. 1999).
[9] STIGLITZ, *supra* note 6 at 80.

investment will benefit other industries or investors, governments may decide to engage in these activities.

(4) Equity. – In order to make goods and/or services in certain industries available to the poor or to the public in general at a lower cost, the government sometimes creates government corporations. This is most true for profit-driven firms in industries engaged in the provision of basic goods and services, which may not choose to serve less profitable customers, such as poor people living in remote areas.[10]

II. THE PHILIPPINE GOVERNMENT CORPORATE SECTOR

The growth in the Philippine government corporate sector began after World War II, when the Philippine economy was undergoing rehabilitation. However, by the 1950's and 1960's, the government undertook a divestment program on account of the poor performance of these enterprises. It was in 1950 that President Elpidio Quirino created the Office of Economic Coordination.[11] It was headed by the Administrator of Economic Coordination, who was tasked with the function of carrying out the policies and measures formulated, and projects recommended by the National Economic Council and duly approved by the President of the Philippines, affecting GOCCs.[12] But more importantly, the Administrator of Economic Coordination was also tasked with the supervision – as a vigilant stockholder – of corporations owned or controlled by the government, for the purpose of insuring efficiency and economy in their operations, and effective accomplishment of the objectives for which they were created. To this end, the Administrator of Economic Coordination performed the following:

(1) vote the shares of stock owned by the government and by its instrumentalities and exercise all the rights of a stockholder in stock corporations owned or controlled by the government, and recommend to the President of the Philippines changes in, and the persons to be selected as, members of the boards of

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[10] Ha-Joon Chang, *supra* note 7, at 12.

[11] Exec. Order No. 386, s.1950; *see also* Exec. Order No. 399, s.1951 ("Uniform Charter for Government Corporations").

[12] Exec. Order No. 386, § 3.

directors and managing heads of both stock and non-stock corporations and instrumentalities;

(2) pass upon new development programs and projects, and upon programs of activities and annual and supplemental budgets of income and expenditures approved by the respective boards of directors of the said corporations;

(3) cause periodic checks, analyses and appraisals of accomplishments and financial operations and condition of the said corporations[13]

By 1970, only 55 GOCCs remained.[14] During the administration of former President Ferdinand Marcos, however, the number of GOCCs once again began to rise.[15]

A. The Marcos Administration (1965-1986)

By 1984, the government under President Marcos could no longer ignore the reality that the government corporate sector was consuming a large amount of government budgetary resources and substantial domestic and external borrowings.[16] "The growth of the government corporate sector, especially in terms of the attendant claims on scarce government and national resources, and the proliferation of subsidiaries, [had] become a matter of serious concern."[17] Faced with an economic crisis, with the unregulated

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[13] § 3.

[14] Cesar Villanueva, Philippine Corporate Governance 358 (2011).

[15] *See* GOVERNANCE COMMISSION FOR GOVERNMENT-OWNED OR CONTROLLED CORPORATIONS (GCG): THE FIRST 200 DAYS REPORT 31 (2012). Citing a study conducted by ADB in 2008, it was estimated that there were thirty seven (37) GOCCs in 1965. By 1984, the number had ballooned to three hundred three (303).

[16] According to a 1995 World Bank Report, during the first half of the 1980s, the SOE savings-investment deficit in the Philippines was greater than 5 percent of GDP, even though the state-owned enterprises accounted for only 2 percent of GDP.

In 1984, public enterprises accounted for 30.4 percent of outstanding public sector internal debt divided evenly between financial and non-financial GOCCs. On the other hand, government corporations accounted for 71.1 percent of outstanding public sector foreign debt with 45 percent of this amount attributed to non-financial public enterprises and the rest to government financial institutions. [Rosario Manasan, PUBLIC ENTERPRISE REFORM: THE CASE OF THE PHILIPPINES, 1986-1987 (1995)]

[17] Letter of Inst. No. 1454, Apr. 8, 1985.

proliferation of GOCCs in the period leading to the crisis being viewed to be one of the major contributing elements to the fiscal imbalance of the economy, President Marcos began the movement to rationalize the allocation of government resources in the government corporate sector and improve the financial productivity of GOCCs. Among the strategies of the President was to dismantle GOCCs that were losing money and that were not essentially service-oriented.[18]

During this time, there was yet no central agency tasked to monitor and supervise the activities of the government corporate sector. Instead, supervision was carried out at two levels: first, by the ministry (department) to which the GOCC was "attached," and second, by inter-departmental supervision. It was then that President Marcos created the Government Corporate Monitoring Committee ("GCMC").[19] The GCMC was the first entity created to carry the primary responsibility of monitoring and coordinating the operations of GOCCs. It was tasked with the following duties and functions:

> (1) Developing appropriate guidelines on the monitoring of the operations of government-owned and controlled corporations, including their wholly-owned or majority-owned subsidiaries, such monitoring to include:
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> (a) The utilization of General Appropriations funds from the national government, whether as equity contributions, program support, or otherwise;
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> (b) The contracting and utilization of borrowed domestic and external funds, whether as loans, suppliers' credits, deferred payments, or otherwise; and
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> (c) The financial and operational conditions of the corporations, including the status of major projects and programs
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> (2) Formulating the necessary recommendations on policies and guidelines relevant to government corporate operations

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[18] Letter of Inst. No. 1454(1985).

[19] Exec. Order No. 936 (1984),"Providing for the Establishment of a Government Corporate Monitoring and Coordinating System".

for submission to and approval by the President through the Cabinet; and

(3) Determining the priorities, on the basis of the policies and guidelines approved by the President through the Cabinet, on acting upon the various claims of the government corporations for:

(a) national government funding;

(b) domestic and external borrowing, whether as loans, suppliers' credits, or otherwise;

(c) major projects, and programs of government corporate entities, such as capital projects and subsidy programs; and

(d) such other matters as may be approved.[20]

With respect to the rationalization of the government corporate sector, President Marcos issued Letter of Instructions No. 1454,[21] which directed the Special Presidential Reorganization Committee ("SPRC")[22] to conduct and complete its studies on the government corporate sector, and submit its recommendations on each GOCC (i.e. retention, merger, divestiture, or abolition). Among the recommendations of this committee were (1) to limit the use of the government corporate form to certain areas/activities (2) the abolition, privatization, merger and/or retention of certain GOCCs, and (3) the institutionalization of effective supervision, coordination, and control of government corporations.

Subsequently, on February 4, 1986, President Marcos issued Presidential Decree No. 2029, which defined government owned or controlled corporations and identified their role in national development. The Decree recognized the role of the government corporate sector and prescribed the criteria for the use by the government of the corporate form. On the same day, Letter of Instruction No. 1520 was issued, which provided guidelines for the

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[20] § 2.

[21] "Directing the Conduct and Completion of Studies to Improve and Rationalize the Government Corporate Sector."

[22] Created through Exec. Order No. 703, s.1981. The SPRC was abolished by President Corazon Aquino through Exec. Order No. 5, s.1986. Its functions and responsibilities were transferred to the Presidential Commission on Government Reorganization (PCGR), created also through Exec. Order No. 5.

rationalization of the government corporate sector by defining the areas of operation in which the corporate form may be used, as well as prescribed policy measures to achieve such rationalization.[23]

B. The Aquino Administration (1986-1992)

The efforts of President Marcos to rationalize the government corporate sector were short-lived, as he was overthrown through the EDSA Revolution in 1986. The policy of rationalization itself, however, was actively pursued by President Corazon Aquino, who immediately reconstituted the Government Corporate Monitoring and Coordinating Committee ("GCMCC") on May 19, 1986.[24] On July 22, 1987, President Corazon Aquino issued Executive Order No. 236,[25] which reaffirmed and further strengthened the existence of the GCMCC as the "monitoring and coordinating body for all government-owned or controlled corporations attached to the different Departments which are represented in the Committee and which demand a heavy burden on the National Treasury."[26] The GCMCC was created for the purpose of:

> (1) Enhancing public accountability in the operations of the affected government-owned or controlled corporations;
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> (2) Promoting efficient allocation and use of resources;
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> (3) Instilling financial discipline and promoting financing self-sufficiency among the affected government owned or controlled corporations; and

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[23] *See also* Pres. Dec. No. 2029 (1986).

[24] Memo. Circ. No. 10.

[25] Exec. Order No. 236 (1987), "Strengthening the Government Corporate Monitoring and Coordinating Committee and for Other Purposes"

[26] Subsequently, in § 2 of President Fidel Ramos' Memorandum Circular No. 64 which was issued in 1993 to streamline the operations of the reconstituted GCMCC, the term "heavy burden on the national treasury" was used to relate to:

(a) Actual financial exposure of the National Government to a GOCC in the form of equity, advances, current subsidies or collectible taxes and fees, the magnitudes of which constitute a significant proportion to that of the government corporate sector vis-à-vis other GOCCs;
(b) Loans and liabilities, whether domestic or foreign, which are guaranteed by the government; and
(c) Losses incurred by GOCCs.

> (4) Integrating the plans and programs of the affected government-owned or controlled corporations with the requirements and goals of government policy.[27]

Consequently, the GCMCC was given the following powers and functions:

> (a) Establish with the concurrence of affected government-owned or controlled corporations, performance criteria, targets and standards, and conduct periodic review and appraisal of performance in accordance with such agreed criteria, targets and standards;
>
> (b) Recommend to the President financial sanctions and restrictions such as, but not limited to, withholding of budgetary releases and imposition of additional financial controls on affected government corporations;
>
> (c) Monitor the implementation by the affected government-owned or controlled corporations of audit recommendations issued by the Commission on Audit to the extent that such audit recommendations are applicable to the evaluation and review functions of the Committee;
>
> (d) Issue appropriate guidelines, rules and regulations, subject to the approval of the President, implementing the provisions of this Executive Order;
>
> (e) Provide guidelines and guidance to the affected government-owned or controlled corporations in the preparation of corporate plans;
>
> (f) Perform such other related functions as may be necessary to carry out its responsibilities. [28]

While Executive Order No. 236 solidified the status of the GCMCC as the central monitoring, coordinating, and performance evaluating unit for GOCCs,[29] the subsequent issuance of Administrative Order No. 59,[30]

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[27] Exec. Order No. 236, § 3 (1987).
[28] § 3.
[29] Exec. Order No. 236 s.1987, § 4.

however, reiterated the continuance of the two-level supervision. The Department to which the GOCC is attached remained *ipso facto* responsible for ensuring that the policies and programs (such as budgets & operations, production, financial & other corporate targets, and disposition of profits) of such GOCC were consistent with sectoral policies and programs.[31] The GCMCC performed the second level of inter-departmental supervision of GOCCs.

Furthermore, when the GCMCC was reconstituted, the Aquino administration had already undertaken a program for the rationalization of the government corporate sector through Presidential Proclamation No. 50,[32] adopting as its twin cornerstones:

> (a) The judicious use of the corporate form of organization in the creation of government bodies for the production and distribution of economic goods and services to the public, and the need to rationalize and monitor the operations of government corporations to help bring about improved performance, assure more efficient use of resources and in general to re-orient their activities and priorities in a manner consistent with national objectives, to the end that the private sector is given primacy and the Government assumes a supplemental role, in entrepreneurial endeavors under a climate of fair competition; and
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> (b) Reducing the number of government corporations which has proliferated to unmanageable proportions; circumscribing the areas of economic activities within which government

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[30] Admin. Order No. 59 (1988) "Rationalizing the Government Corporate Sector".

[31] Admin. Order. No. 59, § 8(1988).

[32] Subsequent to Proc. No. 50 ("Proclaiming and Launching a Program for the Expeditious Disposition and Privatization of Certain Government Corporations and/or the Assets thereof, and Creating the Committee on Privatization and the Asset Privatization Trust"), President Corazon Aquino issued Admin. Order No. 59 (Rationalizing the Government Corporate Sector) on Feb. 16, 1988.

Proc. No. 50 was subsequently amended by Rep. Act. No.7181, Rep. Act. No. 7661 and R.A. 8758. Pursuant to Rep. Act. No. 8758, the life of the COP and APT expired on Dec. 31, 2000. Exec. Order No. 323 (Dec. 6, 2000) created the Privatization Council (PrC) and the Privatization and Management Office (PMO), effective Jan. 1, 2001, in line with Rep. Act. No. 8758. The PrC and PMO assumed all the powers and functions of the former COP and APT earlier created under Proc. No. 50.

> corporations may operate; and aiming to achieve these goals through the privatization of a good number of government corporations, and the disposition and liquidation of the non-relevant and non-performing assets of retained corporations as the logical first step to their rehabilitation.[33]

In the rationalization program of the Aquino administration, the GCMCC was reconstituted to pursue the first cornerstone while another inter-ministerial body, the Committee on Privatization ("COP"), was created to pursue the second cornerstone.

In addition, the Aquino administration had already come up with the 1987-1992 Medium Term Development Plan wherein the use of the government corporate form would be limited to situations that called for its justification: natural monopolies, capital market failure, etc. As a measurable criteria for the use of the government corporate form, the Plan proposed the following: (i) flexibility and autonomy in operations (ii) financial viability (iii) limited liability of the national government, and (iv) possibility of private sector participation.[34]

Finally, to implement the Performance Evaluation System ("PES") provided for under Executive Order No. 236, President Aquino issued Executive Order No. 486,[35] which was later amended by Executive Order No. 518.[36] The Order established a performance-based incentive system for GOCCs in order to encourage efficient performance. The incentives consisted not only of cash rewards and bonuses to deserving GOCC officers and employees,[37] but also presidential citations for GOCCs exhibiting outstanding performance.[38] These bonuses were to be given "based on an evaluation of individual performance and relative contribution to the attainment of the corporation's goals and targets" and the maximum allowable amount for such incentive bonus was not to exceed three months the basic salary of the officer

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[33] Proc. No. 50 (1986).

[34] *See* Manasan, *supra* note 16, at 6.

[35] Exec. Order No. 486, *Establishing a Performance-Based Incentive System for Government-Owned or Controlled Corporations and for Other Purposes*, Nov. 8, 1991.

[36] Exec. Order No. 518, "Amending Certain Provisions of Executive Order No. 486 Dated 8 November 1991 Establishing a Performance-Based Incentive System for Government-Owned or Controlled Corporations and for Other Purposes," May 29, 1992.

[37] Exec. Order No. 486(1991) as amended by Exec. Order No. 518, § 4(b) (1992)..

[38] § 4(a).

or employee.[39] Together with the incentive, a disincentive system was also put in place such that "any GOCC that fails to achieve at least a Satisfactory performance rating in two consecutive evaluation periods shall [have been] subjected to whatever measures and sanctions by the GCMCC."[40] Among the allowed measures was the immediate replacement of the member(s) of the GOCC's Board of Directors and/or any or all of its key officers.[41]

C. The Ramos Administration (1992-1998)

Considering that in the early 1990s, there was estimated to be 300 GOCCs in existence,[42] President Fidel Ramos continued and reaffirmed the privatization policy of the government. The President issued Executive Order No. 37 ("E.O. No. 37"),[43] enumerating the government corporations that have been approved for retention on the one hand, and those approved for divestment on the other.

President Ramos also reconstituted the GCMCC created by his predecessor, [44] and issued Guidelines in the discharge of its functions.[45] The GCMCC was given a dual role: (1) as the central coordinating, monitoring, and performance evaluation entity for GOCCs for purposes that are resoundingly similar to those stated in President Corazon Aquino's Executive Order No. 236, and (2) as the policy formulating and recommending body for the President on matters concerning the government corporate sector.

As the central coordinating, monitoring, and performance entity, the powers and functions of the reconstituted GMCC were similar to those vested by Executive Order No. 236 with the addition of: (1) preparing an annual list of GOCCs to be monitored for approval by the President,[46] and (2) requiring GOCCs to prepare and submit regular reports and conduct periodic review and appraisal of performance.[47]

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[39] § 4(b).

[40] § 6.

[41] § 6.

[42] *See* VILLANUEVA, *supra* note 14 at 358.

[43] Exec. Order No. 37 (1992), "Restating the Privatization Policy of the Government".

[44] Exec. Order No. 55 (1993), Reconstituting and Further Strengthening the Government Corporate Monitoring and Coordinating Committee and for Other Purposes.

[45] Memo. Circ. No. 64 (1993), "Guidelines to Implement Executive Order No. 55".

[46] § 6.1.4.

[47] § 6.1.5.

For its second role as a policy formulating and recommending entity, the GCMCC was given the following powers and functions:

> (1) Formulate policy recommendations and guidelines on the operations of GOCCs for approval by the President;
>
> (2) Review and evaluate all proposals, recommendations and studies pertaining to the government corporate sector before they are submitted to the President; and
>
> (3) Advise the President on proposed government corporations to be created by legislature.

Also, there were other (new) functions assigned to the GCMCC:

> 6.3.1 Devise an Integrated Corporate Reporting System (ICRS) for GOCC reports to oversight bodies to avoid duplication and combine the essentials into a single set of reports. In addition, the following related functions are also provided:
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> > 6.3.1.1 Review compliance and recommend to the President sanctions and administrative penalties on GOCCs relative to compliance with ICRS;
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> > 6.3.1.2 Provide clearance for possible amendments to the ICRS; and
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> > 6.3.1.3 Undertake regular review of the ICRS to ensure its continuing relevance.
>
> 6.3.2 Coordinate the classification of GOCCs according to functional and sectoral groupings relative to the formulation of differential treatment of GOCCs by various oversight agencies; and
>
> 6.3.3 Review and evaluate conversion into equity of loans previously extended by a GOCC to a private corporation, which will result in majority ownership by the GOCC.

It was during the term of President Ramos that significant privatization events took place in the fields of power, telecommunication, and transportation, which were credited to be one of the main reasons for the modest take-off of the Philippine economy during the time.[48]

D. The Estrada Administration (1998-2001)

In the rather short-lived term of President Joseph Estrada, who was forced [to resign] out of office by the EDSA Revolution II, the privatization policy of the previous administrations continued. President Estrada restated the government's privatization policy of "promot[ing] an orderly, coordinated, and efficient privatization of remaining government corporations, assets, activities and idle properties which have been identified as unnecessary and inappropriate for the government sector to maintain."[49]

E. The Arroyo Administration (2001-2010)

When President Gloria Macapagal-Arroyo succeeded the presidency in 2001, she abolished the GCMCC and transferred its functions to the Department of Finance ("DOF").[50] The Corporate Affairs Group ("CAG") of the DOF took charge of the monitoring of GOCCs. President Corazon Aquino created the DOF-CAG in 1987 for the specific purpose of assisting the Ministry of Finance in facilitating the rationalization, privatization, and public accountability of corporations and assets owned, controlled or acquired by the government.[51] Monitoring efforts primarily focused on the financial performance of GOCCs and the financial viability of their project, loan, and guarantee proposals. Effectively, however, the DOF only closely monitored the GOCCs which were heavily dependent on the government for financial support.[52]

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[48] *See* VILLANUEVA, *supra* note 14 at 358.

[49] Exec. Order No. 323, s.2000.

[50] Admin. Order No. 16, "Transferring the Functions of the Government Corporate Monitoring and Coordinating Committee to the Department of Finance and for Other Purposes," Aug. 21, 2001.

[51] Exec. Order No. 127-A, "Creating the Corporate Affairs Group and for Other Purposes," Jul. 22, 1987.

[52] DTI OFFICE OF POLICY RESEARCH, *DTI Position on House Bill 5986*, Apr. 3, 2009.

President Arroyo also implemented a fiscal austerity program, which included the suspension of tax expenditure subsidies to GOCCs (except for those approved by the Fiscal Incentives Review Board).[53]

The financial profile of the government corporate sector from 2010 to 2012 is summed up as follows:

	2010	2011	2012
Total Assets:	₱4.73 Trillion	₱4.83 Trillion	₱5.134 Trillion
Total Liabilities:	₱2.822 Trillion	₱2.807 Trillion	₱2.805 Trillion
Net Worth:	₱1.917 Trillion	₱2.028 Trillion	₱2.329 Trillion
Equity Infusion:	₱647 Million	₱2.26 Billion	₱900 Million
Subsidies:	₱19.40 Billion	₱50.44 Billion	₱40.48 Billion
Net Lending:	₱9.25 Billion	₱17.88 Billion	₱27.26 Billion
Net Income:	₱109.83 Billion	₱127.28 Billion	₱224.14 Billion
Dividends:	₱12.01 Billion	₱28.7 Billion	₱19.9 Billion

*** Source: Governance Commission for GOCCs**

III. STANDARDS FOR PUBLIC ENTERPRISE REFORM

In 2008, an Asian Development Bank ("ADB") technical assistance report described the performance of Philippine GOCCs from the year 2000 to 2004 as "problematic due to weaknesses in the institutional and regulatory frameworks, low capacity, and inadequate coordination of GOCCs working in the same sector. As a result, most GOCCs have been incurring financial losses, which had to be covered by the budget directly (e.g., subsidies) or indirectly (e.g., credit guarantees)."[54] While the income generated by GOCCs significantly contributes revenues to the national government, this is offset by the expenditures of the national government for these GOCCs in the form of

[53] Admin. Order No. 103, "Directing the Continued Adoption of Austerity Measures in the Government," Aug. 31, 2004.

[54] Asian Development Bank (ADB) Technical Assistance Completion Report (2008).

lending, equity infusion, and subsidies. The ADB identified the following areas for key reforms:[55]

(1) Further privatization of non-essential GOCCs;

(2) Sound corporate governance with clear accountability including well-defined rules of conduct and independence;

(3) Systematic and periodic review of GOCC roles and mandates;

(4) Effective central oversight and monitoring system;

(5) Clear role of government as "owner";

(6) Appointments of Board members and CEOs, as well as their qualifications, training, responsibilities, and accountabilities.

Much like the research undertaken by ADB, several studies on government corporations have been made by various organizations, institutions, and individuals. Despite having been made at different times, these studies yield the same key elements necessary for successful reform in the government corporate sector.

(1) Adopting the Government as "Owner" Perspective

A prevailing explanation as to why government corporations do not perform well is twofold: the *principal-agent* and the *free-rider* problems.[56] Both of these problems run on the premise that the owners (principal) of these enterprises are the citizens themselves, and the directors and managers of these enterprises are their agents. Moreover, these problems assume that humans are inherently self-seeking. Since directors and managers do not own the enterprise, they cannot be expected to run it as efficiently as a manager would run his own. Indeed, it has been a long-accepted standard that the degree of

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[55] See Asian Development Bank (ADB), Republic of the Philippines: Policy and Advisory Technical Assistance (PATA): Government Owned and Controlled Corporations Reform (GOCC) (2008).

[56] Ha-Joon Chang, *supra* note 7, at 14.

care and diligence required of directors is usually that which men, prompted by self-interest, generally exercise in their own affairs.[57]

The *principal-agent* problem posits that monitoring of agents by principals will always remain imperfect, as it is inherently difficult for the principals to ascertain whether the poor performance of the enterprise is due to the inefficiency of management or to circumstances truly beyond its control. The *free-rider* problem, on the other hand, puts forward that individual citizens, as principal, simply have no incentive and means to effectively monitor their agents. Any individual citizen-owner who undertakes to monitor these enterprises would solely bear its costs, while the benefits of improved management would inevitably spill-over to the other owners. In the end, no one monitors the enterprises. Viewed in another way, because no individual citizen or group can claim full ownership of a state enterprise, no one has a clear stake in the benefits of monitoring, and therefore no one has the motivation and responsibility to set clear performance goals and to assure they are attained.[58]

These problems can be averted by a shift in perspective on who is the "owner" and therefore responsible for the monitoring of government corporations. By viewing the government – the elected representative of the entire citizenry – as the sole owner, the *free-rider* problem can be done away with, as the sole actor is also the sole beneficiary. Such benefits would then extend to the government's constituency. The *principal-agent* problem is also solved as the government has all the means and capability to obtain information relating to the performance of these enterprises and to exact compliance from its directors and managers, who can be duly compelled to perform well as they are appointed and re-appointed by the Departments of government.

The first step to good corporate governance, therefore, is that the government should clearly emphasize its role as "owner." This is in fact also prescribed under the OECD Guidelines on Corporate Governance of State-Owned Enterprises ("OECD Guidelines")– specifically, that "government should develop and issue an ownership policy that defines the overall

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[57] Hun v. Cary, 82 N.Y. 65 (1880), *cited in* Jose Campos, Jr. & Maria Clara Lopez-Campos, Corporation Code 643 (1990).

[58] World Bank, Bureaucrats in Business: The Economics and Politics of Government Ownership, at 36 (1995). This is a World Bank Policy Research Report.

objectives of state ownership, the state's role in the corporate governance of SOEs, and how it will implement its ownership policy."[59]

(2) A Central Oversight and Monitoring Body

Establishing an effective oversight and monitoring system is an ultimate manifestation of the government's role as the owner and master of government corporations.[60] According to the OECD Guidelines, the exercise of ownership rights should be clearly identified within the state administration, which may be facilitated by setting up a coordinating entity or, more appropriately, by the centralization of the ownership function.

The disappointing performance of Philippine public enterprises may be traced to a number of weaknesses in the institutional framework within which GOCCs operate. Among them is "the multiplicity of government entities exercising some form of control, supervision, and coordination of the various aspects of the operation of public enterprises."[61] Thus, it becomes desirable to institute a central oversight and monitoring body to act as a "*panopticon*,"[62] so to speak. As one study noted:

> [T]he establishment of a single, competently-staffed agency dedicated to SOE supervision could also improve monitoring. In some countries, SOEs are monitored by multiple agencies. In

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[59] *See also* Recommendation II.2, OECD Policy Brief on State-Owned Enterprises in Asia (2010).

[60] See Organisation for Economic Co-Operation and Development, OECD Guidelines on Corporate Governance of State-Owned Enterprises, at 26 (2005).

[61] Manasan, *supra* note 16, at 3.

[62] The Panopticon is an architectural structure conceived by Jeremy Bentham, wherein a central tower stands at the center of an annular building, and a supervisor is then placed at the central tower to guard the occupants of the building. Michel Foucault relates that "whenever one is dealing with a multiplicity of individuals on whom a task or a particular form of behavior must be imposed, the panoptic schema may be used." "It makes it possible to observe performances, to map aptitudes, to assess characters, to draw up rigorous classifications and, in relation to normal development, to distinguish 'laziness and stubbornness' from 'incurable imbecility'; among workers, it makes it possible to note the aptitudes of each worker, compare the time he takes to perform a task…" [MICHEL FOUCAULT, DISCIPLINE & PUNISH: THE BIRTH OF THE PRISON 195-228 (1995)] But beyond the ability to observe performance, it induces the observed to constantly perform well because in his mind, he is constantly being watched by an authority at the center. This is the disciplinary power of an effective central authority tasked with supervision.

> practice, this can often mean that they are not meaningfully supervised by any agency. Alternatively, it can put an unreasonable demand on the SOE managers by subjecting them to almost constant inspection. Consolidation of monitoring responsibilities into a single agency could increase monitoring efficiency either by making it impossible for the agency to "pass the buck" or by liberating the SOE managers from excessive inspection. However, in consolidating the monitoring responsibilities, it is necessary to ensure that there are adequate checks and balances on such an all-powerful agency.[63]

Such a monitoring body must be empowered to acquire relevant information regarding the performance of GOCCs as well as augment its ability to process and act on such information. To improve the transparency[64] of the financial situation of GOCCs, up-to-date data on actual and planned spending and revenues as well as changes in assets and liabilities must be systematically compiled in an accounting framework and assembled regularly by a central agency.[65] One mechanism that may be used is a definite schedule of reporting by these GOCCs to the monitoring body. This will enable it to closely supervise their performance without the government engaging in external micro-management.[66]

(3) Review of GOCC Mandates

A critical, systematic, and periodic review of the goals and mandates of GOCCs should be conducted. This is not only to ensure that these mandates are clear and still relevant, but also to ensure that these enterprises are not burdened by the task of having to serve too many goals. Furthermore, the OECD Guidelines prescribe that "there should be a clear separation between the state's ownership function and other state functions that may influence the

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[63] Ha-Joon Chang, *supra* note 7, at 21-22.

[64] Transparency – the ability *to assess* the financial implications of public sector activities in advance, to evaluate them after the fact, and to identify who bears the costs and who receives the better pricing can have many benefits. It is necessary if decision-makers are to be accountable for their actions [World Bank, *World Development Report,* at 173 (1988)].

[65] World Bank, *World Development Report 1988*, at 175 (1988).

[66] Ha-Joon Chang, *supra* note 7, at 21-22.

conditions for state-owned enterprises, particularly with regard to market regulation."[67]

Multiplicity of goals may have negative effects on GOCCs in several ways: (1) it can adversely affect enterprise performance if the goals and their relative priority are unclear[68] (2) multiple objectives may be accompanied by multiple constraints which increase transaction costs and distort the incentives of GOCC managers, thereby decreasing managerial efforts,[69] and (3) it may result in conflict of roles or policies, which in turn may have consequences on the financial viability of the GOCCs as well as their relevance in the prevailing macro-economic environment.[70] Moreover, this review can aid in clearly defining the role of GOCCs in the development process.

(4) Privatization

To ease the burden of monitoring, reducing the number of GOCCs through the privatization, liquidation, or merger of non-essential GOCCs has always been one of the more widely-used options. This reduction will also help improve the monitoring of GOCCs performing more essential functions as they can be more closely supervised by the government.[71] Further, divestiture can bring other benefits such as reduced state sector deficits, increased investment in the privatized enterprise, better quality and price of goods and services for consumers, and possibly substantial one-time revenue from privatization proceeds.[72]

To effectively carry out privatization, it must be accompanied by a rationalization of the GOCC portfolio.[73] There must be a clear and well-

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[67] See also Recommendation I.2, OECD Policy Brief on State-Owned Enterprises in Asia (2010).

[68] Ha-Joon Chang, *supra* note 7, at 21-22 (2007).

[69] World Bank, *supra* note 59, at 36.

[70] ADB, *supra* note 56.

[71] Ha-Joon Chang, *supra* note 7, at 21-22.

[72] World Bank, *supra* note 59, at 72.

[73] *See also* Recommendation II.1, *OECD Policy Brief on State-Owned Enterprises in Asia* (2010). It prescribes that "governments might define and implement a privatisation programme which would allow for an appropriate decrease in the state sector or more relevant focus in terms of sectors. Reducing the scale and scope of the state sector will allow a greater focusing on governance reform efforts and oversight."

defined policy on when a corporation should be in the public sector.[74] In accordance with the justifications of having GOCCs in the first place, it is only when the private sector is not able or willing to provide certain goods or services that a GOCC be maintained. This would allow the disposal of GOCCs that do not have a clear *raison d'etre*.

(5) Relationship of Mutual Interest between Government and GOCC Managers

One recurring assumption underlying studies on public enterprise reform is that managers of state-owned enterprises have no incentive to act unless the government systematically evaluates their performance and delivers fitting rewards and punishments.[75] Repeating the discussion on the *principal-agent* and the *free-rider* problems, the assumption is that given the inherent self-seeking nature of managers who do not own the enterprise, they cannot be expected to run it as efficiently as a manager would run his own.[76]

Thus, there is a need to improve the incentive system, not only for the managers and directors of GOCCs, but for ordinary rank-and-file personnel as well. This incentive system should be designed to reward the managers and employees for improvements in efficiency, productivity, and client satisfaction.[77] These rewards may not only be in the form of bonuses, but also of citations and commendations. Accordingly, performance indicators and targets (a performance evaluation system) must be clearly established and put into place. Effective monitoring, together with a rewarding incentive system,

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[74] ADB, *supra* note 56.

[75] World Bank, *supra* note 59.

[76] Note, however, the statement of 1978 Nobel Economics Laureate Herbert Simon: "If human beings were as selfish as depicted in orthodox economics textbooks, it would be impossible to run any company. In such a world, companies would collapse under the burden of monitoring and bargaining costs."

Ha-Joon Chang further adds: "Individual self-interest is not the only thing that drives humans. People working in an enterprise are motivated not simply by "selfish" things like their own salaries and power but also by loyalty to the enterprise, a sense of obligation to their colleagues, commitment to workmanship, honesty, dignity, a work ethic, and many other moral values. When it comes to SOEs, there may be additional motives that need to be taken into account, such as nationalism, dedication to public service, concern for social justice, pride in working for a "leading" company, and so on. These motives matter and we ignore them at our peril." (Ha-Joon Chang, *supra* note 7, at 15).

[77] Ha-Joon Chang, *supra* note 7, at 21-22.

not only improves the accountability of GOCC managers, but also leads to better cost control.[78] This is in line with "[e]nsuring that remuneration schemes for SOE board members foster the long term interest of the company and can attract and motivate qualified professionals," which are among the primary responsibilities of the State as active owner, under the OECD Guidelines.

To further improve government corporate management, the structure and composition of the board of directors should also be rationalized. This includes the implementation of appropriate reforms for the appointments of directors and managers of GOCCs.[79] According to the OECD Guidelines, establishing well-structured and transparent board nomination processes in fully or majority owned SOEs,[80] and actively participating in the nomination of all SOEs' boards, are primary responsibilities of the State as active owner. Possible reforms include the creation of an independent professional body for the selection of directors and/or managers, which provides a transparent process that ensures the qualifications and expertise of those appointed as directors and/or managers.[81]

(6) Hard Budget Constraints

Public enterprises, as part of the government, are usually subject to *soft budget constraints* – meaning, they are "able to secure additional finances if they make losses and get rescued with public money if they are threatened with bankruptcy."[82] Such access to subsidies, transfers, or government guaranteed loans, encourages inefficient management, as it eliminates the threat of bankruptcy.[83] To preclude this moral hazard, *hard budget constraints* (i.e. no easy government subsidies or guarantees) should be applied. Under the OECD Guidelines, "SOEs should face competitive conditions regarding access to finance. Their relations with state-owned banks, state-owned financial institutions and other state-owned companies should be based on purely commercial grounds."

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[78] World Bank, World Development Report 1988, at 173.

[79] ADB, *supra* note 56.

[80] See also Recommendation II.5, OECD Policy Brief on State-Owned Enterprises in Asia (2010).

[81] ADB, *supra* note 56.

[82] Ha-Joon Chang, *supra* note 7, at 15.

[83] World Bank, *supra* note 59. at 36.

In highly competitive markets, the hard budget constraint together with the pressure of competition will compel managers to improve their performance as they will not be able to compete in the market without improving their efficiency.[84] This, however, presupposes that there is in place a working monitoring and evaluation system that assesses the performance of both the enterprise and its managers, and assures them of punishment for poor management.[85]

(7) Human Rights Considerations

Another emerging movement in public corporate governance is the UN Guiding Principles on Business and Human Rights, which prescribes that:

> States should take additional steps to protect against human rights abuses by business enterprises that are owned or controlled by the State, or that receive substantial support and services from State agencies such as export credit agencies and official investment insurance or guarantee agencies, including, where appropriate, by requiring human rights due diligence.

This norm is of particular significance given the observation that government corporations have been one of the worst offenders in terms of safety and environmental standards in many countries.[86] Hence, when the nature of business operations or operating contexts pose significant risk to human rights, requiring the conduct of human rights due diligence is appropriate.[87]

IV. THE GOCC GOVERNANCE ACT OF 2011

When he assumed the presidency in 2010, President Benigno Aquino III pledged to institute reforms in the public corporate sector, after he disclosed in his first State of the Nation Address that staggering amounts in bonuses and allowances have been institutionalized in certain GOCCs. The

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[84] World Bank, *supra* note 59, at 81.

[85] Ha-Joon Chang, *supra* note 7, at 16.

[86] Ha-Joon Chang, *supra* note 7, at 13 n.4.

[87] *See* Annex to the Report of the Special Representative of the Secretary-General, John Ruggie, on the issue of human rights and transnational corporations and other business enterprises, 21 March 2011 (A/HRC/17/31).

Senate of the Philippines, through its Finance Committee chaired by Senator Franklin M. Drilon, conducted hearings in aid of legislation to determine the irregularities in GOCC affairs and to enact measures correcting them. The inquiry culminated with the sponsorship of Senate Bill No. 2566 – the proposed GOCC Governance Act of 2011. The measure was certified urgent by the President.

The measure was by far the most comprehensive legislative proposal regarding GOCC supervision as it contains not only the [re]creation of a centralized committee, but also provisions relating to the compensation packages of GOCC officials & employees, as well as provisions on the exercise of supervision over its board of directors/trustees/officers. Further, it had a very encompassing coverage,[88] as the Act shall be applicable to all GOCCs, Government Instrumentalities with Corporate Powers/ Government Corporate Entities,[89] and Government Financial Institutions ("GFI"),[90] including their subsidiaries.[91]

Prior to the signing of the proposed legislation into law, President Aquino issued Executive Order No. 7[92] and Executive Order No. 19,[93] which

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[88] Rep. Act. No. 10149, § 4(2011)..

[89] § 3(n) defines "Government Instrumentalities with Corporate Powers (GICP)/ Government Corporate Entities" (GCE) as "any instrumentality or agency of the government, which is neither a corporation nor an agency integrated within the departmental framework, but vested by law with special functions or jurisdiction, endowed with some if not all corporate powers, administering special funds, and enjoying operational autonomy usually through a charter…"; *See also* Manila International Airport Authority v. Court of Appeals, G.R. No. 155650, Jul. 20, 2006.

[90] § 3(m) defines "Government Financial Institutions (GFI)" as "any financial institutions or corporations in which the government directly or indirectly owns majority of the capital stock and which are either (1) registered with or directly supervised by the Bangko Sentral ng Pilipinas; or (2) collecting or transacting funds or contributions from the public and places them in financial instruments or assets such as deposits, loans, bonds and equity, including, but not limited to, the Government Service Insurance System and the Social Security System."

[91] § 3(z) defined "Subsidiary" as "a corporation where at least a majority of the outstanding capital stock is owned or controlled, directly or indirectly through one or more intermediaries, by the GOCC."

[92] Exec. Order No. 7 (2010), "Directing the Rationalization of the Compensation and Position Classification System in the GOCCs and GFIs, and for other purposes."

[93] Exec. Order No. 19 (2010), "Extending the Suspension of All Allowances, Bonuses, Incentives and other perks to Members of the Board of Directors or Trustees of GOCCs and GFIs except reasonable per diem."

reviewed the executive compensation structure in GOCCs and GFIs and suspended the grant of bonuses, privileges, and other benefits enjoyed by trustees and directors other than reasonable *per diems*. Subsequently, the President issued Executive Order No. 24 ("E.O. No. 24"), s.2011,[94] which standardized the pay and other benefits received by board members and trustees of GOCCs. The Executive Order was intended to limit the excessive pay and bonuses for board members and trustees of such enterprises, until a law mandating such is passed.

On June 6, 2011, President Aquino finally signed into law the banner reform measure of his administration – Republic Act No. 10149 ("R.A. No. 10149"),[95] which sought to usher in substantial reforms in the government corporate sector. Describing the essence of the law, the President said:

> *Ang bagong batas na ito ang kukumpuni at magsasa-kongkreto sa mga plano nating pagbabago sa pamamahala sa GOCCs. Sa pamamagitan nito, mas mapapalawig natin ang pambansang reporma upang mas gawing bukas at tapat ang GOCCs; bigyang-pananagutan sila sa gobyerno at sa mamamayan; bigyang-katuwiran ang kompensasyon ng kanilang mga opisyal at empleyado; at siguruhing makapagtrabaho ang GOCCs sa abot ng kanilang makakaya para sa mamamayan at sa bansa.*[96]

From a perusal of the provisions of R.A. No. 10149, it would appear that the law integrates key components earlier identified to successfully overhaul the government corporate sector.

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[94] Exec. Order No. 24 (2011), "Prescribing the Rules to Govern the Compensation of Members of the Board of Directors/Trustees in GOCCs, including GFIs."

[95] Rep. Act No. 10149 (2011), "Promoting Financial Viability and Fiscal Discipline in GOCCs and to Strengthen the Role of the State in its Governance and Management and to Make Them More Responsive to the Needs of the Public Interests, and for other purposes."

[96] Speech of His Excellency Benigno S. Aquino III delivered during the ceremonial signing of Rep. Act No. 10149 on Jun. 6 2011, Malacañang Palace, Manila. Trans.: "This new law will fix and concretize our plans of changing the governance of GOCCs. Through this, we can broaden national reform so that GOCCs will be more transparent and honest; accountable to the government and the citizenry; provide reasonable compensation to its officers and employees; and ensure that GOCCs will do their best for the people and the country."

(1) The Government as "Owner" Perspective

The paradigm shift in the government corporate sector under the GOCC Governance Act begins with a shift in policy perspective. Prior to the enactment of R.A. No. 10149, the policy of the government with respect to the government corporate sector centered on the judicious use of the corporate form of organization and the privatization of non-essential GOCCs. Under the regime of the GOCC Governance Act, the policy of the State is to actively exercise its ownership rights in GOCCs.[97] In essence, the government has adopted a more holistic approach to government corporate sector reform.

As the Owner representing the sovereign people, the State constitutes the controlling interest in, or is the majority stockholder of, GOCCs and their subsidiaries.[98] Privatization is the exercise by the State of its right to dispose of its equity investment in the GOCC. However, this is only one of many rights that may be exercised by the State as Owner. Under the Ownership and Operations Manual Governing the GOCC Sector,[99] the prerogatives of ownership in every GOCC include:

i. *Right to Register* its equity holdings in the books of the GOCC for all its equity investments therein, together with the right to be issued certificates of stock representing the investments in the GOCC;[100]

ii. *Right to Dividends*, when declared, pertaining to its equity holdings in the GOCC;[101]

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[97] Rep. Act No. 10149, §2.

[98] Art. 5, GCG Memo. Circ. No. 2012-06.

[99] GCG Memo. Circ. No. 2012-06.

[100] *See* CORP. CODE, § 74: "xxx… Stock corporations must also keep a book to be known as the "stock and transfer book", in which must be kept a record of all stocks in the names of the stockholders alphabetically arranged; the installments paid and unpaid on all stock for which subscription has been made, and the date of payment of any installment; a statement of every alienation, sale or transfer of stock made, the date thereof, and by and to whom made; and such other entries as the by-laws may prescribe. The stock and transfer book shall be kept in the principal office of the corporation or in the office of its stock transfer agent and shall be open for inspection by any director or stockholder of the corporation at reasonable hours on business days…xxx"

[101] *See* Rep. Act. No. 7656, § 1: "*Declaration of Policy.* — It is hereby declared the policy of the State that in order for the National Government to realize additional revenues, government-owned or -controlled corporations, without impairing their viability and the

iii. *Right to Dispose of its equity investment* in the GOCC, including the right to pursue the reorganization, merger, streamlining, abolition or privatization of GOCCs under a set of criteria provided for in the Act;[102]

iv. *Right to Representation* in all stockholders' or members' meetings of the GOCC, and the *Right to Vote* on its shares in all meetings where the stockholders' vote is obtained or necessary to undertake corporate activities, contracts or transactions;[103]

v. *Right to Representation*, namely to nominate, elect or appoint,[104] and remove and replace,[105] the members of the Board of every GOCC;

vi. *Right to Formulate and Enforce Governance Standards* to realize its Ownership Policy for GOCCs;[106] and

vii. *Right to Receive a Proportional Share in the Net Assets* of the GOCC upon its dissolution.[107]

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purposes for which they have been established, shall share a substantial amount of their net earnings to the National Government."

102 Rep. Act. No. 10149, § 5(a).

103 Adopted from the OECD Guidelines – "The State Acting as an Owner," II-F(1), p. 13.

104 Rep. Act. No. 10149, § 15: "*Appointment of the Board of Directors/Trustees of GOCCs.*— An Appointive Director shall be appointed by the President of the Philippines from a shortlist prepared by the GCG."

105 *See* § 17.

106 *See* § 5(c).

107 *See* Sec. 122, CORP. CODE : "SEC. 122. *Corporate liquidation.* – Every corporation whose charter expires by its own limitation or is annulled by forfeiture or otherwise, or whose corporate existence for other purposes is terminated in any other manner, shall nevertheless be continued as a body corporate for three (3) years after the time when it would have been so dissolved, for the purpose of prosecuting and defending suits by or against it and enabling it to settle and close its affairs, to dispose of and **convey its property and to distribute its assets**, but not for the purpose of continuing the business for which it was established. (Emphasis supplied)

At any time during said three (3) years, said corporation is authorized and empowered to convey all of its property to trustees for the benefit of stockholders, members, creditors, and other persons in interest. From and after any such conveyance by the corporation of its property in trust for the benefit of its stockholders, members, creditors and others in

However, notwithstanding its status as Owner, the OECD Guidelines nonetheless prescribes that the government should not be involved in the day-to-day management of the corporation and should allow full operational autonomy for the corporation to achieve its defined objectives.[108] Nevertheless, the foregoing principle under the OECD Guidelines does not preclude the State to pursue its declared policy under R. A. No. 10149 to ensure that:

i. The corporate form of organization through which government carries out activities is utilized judiciously;

ii. The operations of GOCCs are rationalized and monitored centrally in order that government assets and resources are used efficiently and the government exposure to all forms of liabilities including subsidies is warranted and incurred through prudent means;

iii. The governance of GOCCs is carried out in a transparent, responsible and accountable manner and with the greatest level of professionalism and effectiveness;

iv. A reporting and evaluation system, which will require the periodic disclosure and examination of the operations and management of the GOCCs, their assets and finances, revenues and expenditures, is enforced;[109]

v. The governing boards of every GOCC and its subsidiaries are competent to carry out its functions, fully accountable to the State as its fiduciary, and acts in the best interest of the State;

vi. Reasonable justifiable and appropriate remuneration schemes are adopted for the directors/trustees, officers and employees of GOCCs and their subsidiaries, to prevent or deter the

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interest, all interest which the corporation had in the property terminates, the legal interest vests in the trustees, and the beneficial interest in the stockholders, members, creditors or other persons in interest."

[108] OECD Guidelines – "The State Acting as an Owner," II-B, p. 13.

[109] *See also* OECD Guidelines – "The State Acting as an Owner," II-F(3), p. 13.

granting of unconscionable and excessive remuneration packages;[110] and

vii. There is a clear separation between the regulatory and proprietary activities of GOCCs, in order to achieve a level playing field with corporations in the private sector performing similar commercial activities for the public.

To operationalize the manner by which the State shall actively exercise its ownership rights over GOCCs, the GOCC Governance Act mandated the immediate adoption of an Ownership and Operations Manual ("Ownership Manual").[111] In November 2012, the Governance Commission for GOCCs ("GCG") promulgated the Ownership Manual through its Memorandum Circular No. 2012-06. This is in accordance with the OECD Guidelines that prescribes that the "government should develop and issue an ownership policy that defines the overall objectives of state ownership, the state's role in the corporate governance of SOEs, and how it will implement its ownership policy."

Significantly, the Ownership Manual adopted the previous policies implemented by the previous administrations. Among these policies is the provision of adequate operational flexibility to GOCCs that is consistent with the requirements of public accountability, which was originally found in Administrative Order No. 59, s.1988.[112] To implement the concept of adequate operational flexibility, GOCCs are to be accorded Differential Treatment by the various service-wide agencies of the National Government.[113] This operational flexibility is one of the advantages of the corporate form of organization, as opposed to the regular bureaus and line agencies of the government. In providing differential treatment to GOCCs, the GCG is mandated to group them under classifications based on parameters as it may find relevant or material, such as, but not limited to, industry type.[114]

However, while GOCCs should be treated differently, they should not be accorded preferential treatment. In this regard, the Ownership Manual

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[110] This also fosters the long-term interest of the companies that would attract and motivate qualified professionals. *See* OECD Guidelines – "The State Acting as an Owner," II-F(5), p. 13.

[111] Rep. Act. No. 10149, § 5(c).

[112] GCG Memo. Circ. No. 2012-06, art. 10.

[113] Art. 10.1.

[114] Art. 10.2; *See also* Rep. Act. No. 10149, § 5(b); Admin. Order No. 59 s.1988, § 5.

speaks of "competitive neutrality,"[115] which serves as the counterpart of the non-preferential treatment provision of Administrative Order No. 59.[116] Pursuant thereto, government agencies are directed to avoid granting competitive advantages and benefits to GOCCs, especially to those that directly or indirectly compete with the private sector. This is to encourage fair competition and to achieve a level playing field with corporations in the private sector performing similar commercial activities for the public.[117]

(2) A Central, Oversight, and Monitoring Body

To facilitate the State's exercise of its ownership rights and to clearly identify it within the state administration,[118] the GOCC Governance Act created a *super-commission* called the Governance Commission for GOCCs – a central advisory, monitoring, and oversight body with authority to formulate, implement and coordinate policies in the government corporate sector.[119] While there have been committees created before to oversee the government corporate sector (i.e. GCMC, GCMCC), they were in the nature of *ad hoc* bodies. This can be easily gleaned from the composition of these committees wherein the members are part of the President's cabinet. Oversight of the government corporate sector is merely an additional function designated to these officials. Moreover, these committees were not permanent and therefore did not have permanent personnel to effectively carry out the oversight of GOCCs. This is in stark contrast to the GCG, which is a permanent body created by statute, with its own personnel, and created for the purpose of GOCC oversight.

Much can be said about the reason for existence of the GCG, but ultimately, this Commission is fundamentally mandated to reassert the ownership of the State over GOCCs, GFIs, and the smaller corporate entities they spawned. According to R.A. No. 10149, the GCG, acting for and in behalf of the National Government, must exercise certain prerogatives of ownership over GOCCs, such as:[120]

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[115] Sec. 11, GCG Memo. Circ. No. 2012-06.
[116] Sec. 6, Admin. Order No. 59 s.1988.
[117]*See also* Rep. Act. No. 10149, § 2(g)
[118] *See* OECD Guidelines – "The State Acting as an Owner," II-D, p. 13.
[119] Rep. Act. No. 10149, § 5.
[120] GCG Memo. Circ. No. 2012-06, Art. 8.2.

(a) Evaluate the performance and determine the relevance of GOCCs, and pursue the re-organization, merger, streamlining, abolition, or privatization of GOCCs;[121]

(b) Provide for the classification and sub-classification of GOCCs;[122]

(c) Adopt an Ownership and Operations Manual and Government Corporate Standards governing GOCCs, in consultation with the relevant Government Agencies and Stakeholders;[123]

(d) Recommend to the Governing Boards the suspension of any of their members who participated by commission or omission in the approval of an act which constitutes a violation or noncompliance with the Ownership Manual or a breach of their fiduciary duties to the GOCC and/or its Stakeholders;[124]

(e) Promulgate, with the approval of the President of the Philippines, and implement the Fit and Proper Rule that shall identify the necessary skills and qualifications required of Appointive Directors;[125]

(f) Establish and implement Performance Evaluation Systems, including Performance Scorecards, applicable to all GOCCs in general, and to the various GOCC classifications, in particular;[126]

(g) Conduct periodic study, examination, evaluation and assessment of the performance of the GOCCs, receive, and in appropriate cases, require reports on the operations and management of the GOCCs including, but not limited to, the management of their assets and finances of the GOCCs;[127]

(h) Provide technical advice and assistance to the Supervising Agencies to which the GOCCs in setting performance objectives and targets for their attached GOCCs, and in

[121] Rep. Act No. 10149, § 5(a).
[122] § 5(b).
[123] § 5(c).
[124] § 5(d).
[125] §§ 5(e) and 16.
[126] § 5(f).
[127] §5(g).

monitoring such GOCC's performance *vis-a-vis* established objectives and targets;[128]

(i) Conduct compensation studies and, pursuant thereto, develop and recommend to the President a competitive Compensation and Position Classification System (CPCS) which shall apply to all officers and employees of GOCCs, whether covered by or exempt from the Salary Standardization Law;[129]

(j) Formulate the *per diems,* allowances, incentives and compensation structure for the members of the Governing Boards;[130]

(k) Coordinate and monitor the operations of GOCCs to ensure their alignment and consistency with the national development policies and programs,[131] and render semi-annual progress report to the President and to Congress, providing for the performance assessment of the GOCCs and recommending clear and specific actions;[132]

(l) Review the functions of each of the GOCC and, upon determination that there is a conflict between the regulatory and commercial functions of a GOCC, recommend to the President, in consultation with the Supervising Agency, such plan of action, such as privatization of the GOCC's commercial operations, or the transfer of the regulatory functions to the appropriate Government Agency, to ensure that commercial functions of the GOCC do not conflict with such regulatory functions;[133]

(m) Request through the GCG Chairman, a special COA audit of any GOCC for any specific purpose or, when authorized by law, request authority from COA to allow an audit by independent auditors;[134] and

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[128] § 5(i).
[129] § 5(g) and 8.
[130] § 23.
[131] § 5(j).
[132] § 5(k).
[133] § 5(l).
[134] § 26(b).

(n) Review and recommend to the President of the Philippines for approval the plan by any Government Agency:

(1) For the establishment and incorporation of a GOCC or a Related Corporation pursuant to the provision of the Corporation Code of the Philippines;[135] or

(2) To purchase a corporation or acquire controlling interest in any corporation.[136]

Despite its status as the central advisory, monitoring, and oversight body, the GCG is nonetheless accountable to, and/or has clearly defined relationships, with the following:[137]

(a) President of the Philippines, to whose Office the GCG is attached, and to whom GCG is mandated to submit quarterly reports, a semi-annual progress report, and an annual report (within 120 days from the close of the year) on the performance of GOCCs;

(b) Congress, as the GCG is mandated to submit to Congress a semi-annual progress report, and an annual report (within 120 days from the close of the year) on the performance of GOCCs;

(i) Commission on Audit (COA), as the GCG is authorized by law to seek the periodic special audit of the thirty (30) GOCCs with the highest total assets;

(ii) Securities and Exchange Commission (SEC), since no new GOCC or Related Corporation can be registered and organized under the Corporation Code of the Philippines unless the application or registration is accompanied by an endorsement from the GCG stating that the President has approved the same;

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[135] § 27.

[136] § 28.

[137] GCG Memo. Circ. No. 2012-06, art. 17.2; *See also* OECD Guidelines II-E, at 13 ("The coordinating or ownership entity should be held accountable to representative bodies such as the Parliament and have clearly defined relationships with relevant public bodies, including the state supreme audit institutions.")

(iii) Supervising Agency of each GOCC, with which GCG has (i) to coordinate in pursuing the privatization of the commercial operations of GOCCs when they conflict with their regulatory functions; (ii) to purchase a corporation or acquire controlling interest therein, as the law requires them to submit its proposal to the GCG for review and approval of the President; or (iii) to extend technical advice and assistance in setting performance objectives and targets for their attached GOCCs and in monitoring their performance as part of the PES; and

(iv) Privatization Council (PC) and the Privatization and Management Office (PMO), as the law requires the GCG to take-over the privatization of GOCCs that have been identified by the PC and approved for privatization by the President at the end of two (2) years after the effectivity of R.A. No. 10149 (*i.e.*, 27 July 2013).

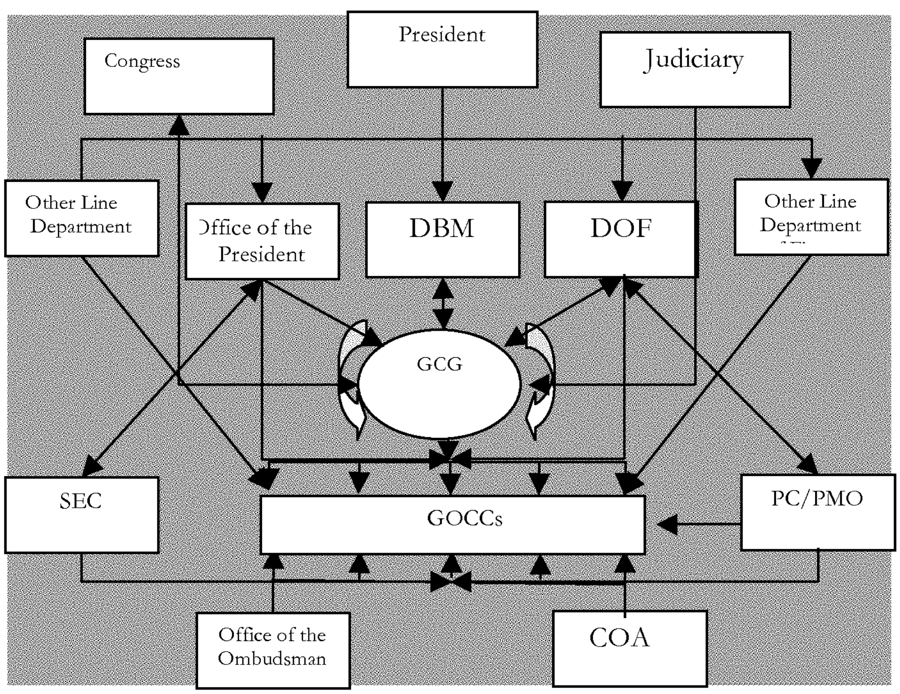

Figure 1: GCG Oversight Structure

(3) Review of GOCC Mandates

Under the GOCC Governance Act, the GCG is mandated to review the functions of each GOCC.[138] The stated purpose is to determine whether there is a conflict between the regulatory and commercial functions of a GOCC.[139] If there is, the GCG shall recommend to the President of the Republic, in consultation with the government agency to which such GOCC is attached, the privatization of the GOCC's commercial operations, or the transfer of the regulatory functions to the appropriate government agency, or such other plan of action to ensure that the commercial functions of the GOCC do not conflict with such regulatory functions.[140]

However, the review of GOCC mandates is also a necessary antecedent for the GCG's exercise of its power and function to determine the relevance of a GOCC, or to ascertain whether such GOCC should be reorganized, merged, streamlined, abolished, or privatized.[141] This can be gleaned from the standards by which the exercise of this power shall be guided,[142] which noticeably focuses on the purpose of the GOCC, to wit:

> (1) The functions or purposes for which the GOCC was created are no longer relevant to the State or no longer consistent with the national development policy of the State;
>
> (2) The GOCC's functions or purposes duplicate or unnecessarily overlap with functions, programs, activities, or projects already provided by a Government Agency;
>
> (3) The GOCC is not producing the desired outcomes, or no longer achieving the objectives and purposes for which it was originally designed and implemented…
>
> . . .
>
> (5) The GOCC is involved in an activity best carried out by the private sector; and

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138 Rep. Act. No. 10149, § 5(l).
139 *See also* § 2(g).
140 § 5(l).
141 § 5(a).
142 § 5(a).

(6) The functions, purpose or nature of operations of any group of GOCCs require consolidation under a holding company.

Multiplicity of goals is one of the evils that a review of GOCC mandates seeks to remedy. GOCCs must have a clear priority and direction in order for them to realize their maximum potential as tools for economic development. This is the aspect where the power of the GCG to reorganize or streamline GOCCs finds importance. By being empowered to alter the organizational structure and staffing pattern of a GOCC, the GCG can enable (or compel) the GOCC to focus its efforts and resources on its vital/core services, thus ultimately improving its performance (at least in that specific area). The power to reorganize not only includes the power to streamline/downsize the GOCC, but also the power to expand the organizational structure and staffing complement of the GOCC to allow it to effectively pursue programs covered by the mandate stated in its Charter.

The GCG is further empowered to provide technical advice and assistance to the government agencies to which the GOCCs are attached in setting performance objectives and targets,[143] and coordinate and monitor operations of GOCCs, ensuring alignment and consistency with the national development policies and programs.[144]

(4) Privatization

After a review of the respective mandates of existing GOCCs, an inevitable consequence is the determination of whether the same should be retained as a GOCC. When the GOCC Governance Act was signed into law, it was estimated that there was a universe of 148 GOCCs within its coverage.[145] Included in this universe are GOCCs that have already been identified for divestiture[146] or were demanded to be abolished.[147] If the GCG determines that it is to the best interest of the State that a GOCC should be reorganized, merged, streamlined, abolished or privatized, it shall:

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[143] § 5(i).

[144] § 5(j).

[145] Governance Commission for Government-Owned or Controlled Corporations: The First 200 Days Report 3 (2012).

[146] *See* Exec. Order No. 37, s.1992.

[147] *See* H. No. [MISSING]

> (i) Implement the reorganization, merger or streamlining of the GOCC, unless otherwise directed by the President; or
>
> (ii) Recommend to the President the abolition or privatization of the GOCC, and upon the approval of the President, implement such abolition or privatization, unless the President designates another agency to implement such abolition or privatization.[148]

Cesar Villanueva defines "privatization" in two ways: (1) in the narrow sense, it is the sale or transfer of state-owned assets or public enterprises to the private sector, and (2) in the broad sense, it is the gradual decline in the interventionist role played by the public sector and the roll-back of state involvement in economic activity.[149] Privatization, both in the narrow and broad sense, has been the centrepiece of the government's decades-old program to rationalize the government corporate sector. This remains as one of the strategies and policies underlying the GOCC Governance Act.

To underscore the "unfinished business" in the privatization program of the government, E.O. No. 37 ("Restating the Privatization Policy of the Government"), issued by former President Ramos in 1992, is worthy of note. This Executive Order reaffirmed the privatization policy of the Government, initiated under Presidential Proclamation No. 50, s.1986, "to promote an orderly, coordinated and efficient program for the privatization of government entities, assets or activities which are better managed, undertaken or owned by the private sector."[150] Section 2 of E.O. No. 37 makes reference to GOCCs that have already been approved for divestment, *to wit*:

> Sec. 2. *Privatization of GOCCs approved for Disposition.* — Pursuant to the principles provided in Proclamation No. 50, s. 1986, the Committee on Privatization (COP) designated disposition entities shall submit to the COP a privatization action plan for all GOCCs approved for divestment as listed in Annex "A" within one month (1) from issuance hereof; Provided, that said action plan must contain a description of the privatization process to be adopted and a time frame for each step thereof. Said action plan shall include an

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148 Rep. Act. No. 10149, § 5(a)(6).
149 Villanueva, *supra* note 14 at 352.
150 Exec. Order No. 37, § 1. (1992).

offer to sell the company's shares/assets within five (5) months from its approval by the COP.

A study of Annex "A" referred to in E.O. No. 37 shows that several GOCCs listed therein are still part of the universe of GOCCs under the jurisdiction of the GCG, such as:

Corporation	**Area of Activity**
APO Production Unit, Inc.	Printing Services
Batangas Land Company, Inc.	Land Ownership
DBP Data Center, Inc.	Development and Management of DBP Computer Systems and Commercial Banking Personnel
Food Terminal Inc.	Food, Trading, Processing, Storage, Real Estate Management
GY Real Estate, Inc.	Land Ownership
Integrated Feed Mills Corp.	Feed Production
Kamayan Realty Corp.	Land Ownership
Marawi Resort Hotel, Inc.	Hotel Operation
Meat Packing Corp. of the Philippines	Meat Processing / Canning
NIA Consult, Inc.	Consultancy, Management and Special Services of Projects
Northern Foods Corporation	Tomato Paste Production
Philippine Aerospace Development Corp.	Aircraft Management, Maintenance Engineering, Selling
Philippine Amanah Bank	Commercial Banking
Philippine Fruit and Vegetable Industries, Inc.	Tomato Paste Production
Philippine Sugar Corp.	Finance Acquisition, Rehabilitation / Expansion of Sugar Mills
Phividec Panay Agro-Industrial Corp.	Plantation Farming / Fertilizer Production and Trading
Pinagkaisa Realty Corp.	Land Ownership
San Carlos Fruit Corp.	Fruit Puree Production

The industries to which the foregoing GOCCs operate are clearly being serviced by the private sector. Considering that the foregoing GOCCs have already been previously identified for privatization in 1992 – more than 20 years ago – an assessment/review of the said GOCCs ought to be undertaken to determine whether appropriate actions on the same should be prioritized by the GCG.

(5) Relationship of Mutual Interest to Government and GOCC Managers

The reform proposal to build a relationship of mutual interest between the government and GOCC managers is based on the premise that the managers are inherently self-seeking in nature, and to capitalize on the situation, a system of incentive and disincentive should be in place in order to ensure that such managers always act in the best interest of the GOCC.

A. Highest Standards of Corporate Governance

It bears emphasis that the officers and representatives of the government in the Governing Boards of GOCCs are public officials. Under the Code of Conduct and Ethical Standards for Public Officials and Employees ("R.A. No. 6713"), "public officials" include appointive officials and employees, permanent or temporary, whether in the career or non-career service.[151] Under the same law, the "government" includes the National Government, the local governments, and all other instrumentalities, agencies or branches of the Republic of the Philippines including government-owned or controlled corporations, and their subsidiaries.[152] As public officials, they are already bound by the Constitutional principle that public office is a public trust, and thus, public officers and employees must, at all times, be accountable to the people, and serve them with utmost responsibility, integrity, loyalty, and efficiency.[153]

The GOCC Governance Act further elevates the standards of governance in GOCCs by expressly requiring that the "members of the Board and the Officers must exercise extraordinary diligence in the conduct of the business and in dealing with the properties of the GOCC. Such degree of diligence requires using the utmost diligence of a very cautious person with due regard for all circumstances."[154] It also categorizes the members of the Board and Officers of GOCCs as fiduciaries of the State, and as such, they "have the

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[151] Rep. Act. 6713, § 3(b).
[152] § 3(a).
[153] CONST., art. XI, § 1.
[154] Rep. Act. No. 10149, § 21.

legal obligation and duty to always act in the best interest of the GOCC, with utmost good faith in all its dealings with the property and monies of the GOCC."[155] In accordance therewith, the members of the Board and Officers are mandated to:

> (a) Act with utmost and undivided loyalty to the GOCC;
>
> (b) Act with due care, extraordinary diligence, skill and good faith in the conduct of the business of the GOCC;
>
> (c) Avoid conflicts of interest and declare an interest they may have in any particular matter before the Board;
>
> (d) Apply sound business principles to ensure the financial soundness of the GOCC; and
>
> (e) Elect and/or employ only Officers who are fit and proper to hold such office with due regard to the qualifications, competence, experience and integrity.[156]

Furthermore, the GOCC Governance Act mandated the adoption of government corporate standards governing GOCCs.[157] In compliance, the GCG adopted a Code of Corporate Governance for GOCCs ("Code"),[158] which the Governing Board and officers of GOCCs must abide. It bears emphasis that the Code adopts the "highest standards principle."[159] This means that the provisions of the Code apply on top of already existing standards as it does not relieve or excuse GOCCs, and their directors and officers, from complying with more rigorous standards of corporate governance as those required by regulatory agencies having jurisdiction over their business enterprises or the industry in which they operate, such as the Philippine Stock Exchange ("PSE") or the Securities and Exchange Commission ("SEC") for

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[155] § 19.

[156] § 19.

[157] § 3(l) defines "Government Corporate Governance Standards" as "a set of principles derived from law and practices, rules and standards prescribed by the Governance Commission for Government-Owned or Controlled Corporations (GCG) that generate long-term and desirable economic value for the State. It shall also refer to a system whereby shareholders, creditors, and other stakeholders of a corporation ensure that management enhances the value of the corporation as it competes in an increasingly global marketplace."

[158] GCG Memo. Circ. No. 2012-07.

[159] § 48.

GOCCs that are listed companies or public companies as provided for in the Securities Regulation Code, the *Bangko Sentral ng Pilipinas* ("BSP") for GOCCs that are banking institutions, and the Insurance Commission ("IC") for GOCCs which are insurance companies or insurance intermediaries.[160]

The implication of the foregoing is that despite the presumed self-seeking nature of individuals, the managers of GOCCs must necessarily overcome such nature once they assume public office.

Considering the high standards imposed on the Governing Board of GOCCs, the Code in turn requires each GOCC to provide the members of its Governing Board with reasonable support staff and office facilities to allow them to properly discharge their duties and responsibilities.[161]

Further, having imposed the highest level of responsibility and accountability on the members of the Board and Executive Officers, i.e. that of extraordinary diligence, the Code also deemed it only fair that when the GOCC itself and/or the members of the Board and Management are brought before tribunals on matters that are within their official functions and capacity, and on matters where business judgment has been exercised in good faith, there be proper recovery of the costs of litigation and the judgment liability imposed.[162] In line with this, the Code prescribes as a prudent measure that every GOCC obtain "Directors and Officers Liability Insurance" ("DOLI")[163] coverage for itself and the members of the Governing Board and Executive Officers against contingent claims and liabilities that may arise from the actions that may be filed against the GOCC arising from the actions of the Governing Board and/or Management that may cause loss or damage to third parties, as well as expenses that may be incurred in the prosecution of such actions.[164]

However, beyond the elevation of standards of governance in GOCCs, the GOCC Governance Act also puts into place incentive and disincentive mechanisms to ensure that the Board and officers of GOCCs perform to the best of their abilities.

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[160] *See also* Rep. Act No. 10149, § 5(c).
[161] GCG Memo. Circ. No. 2012-07, § 31.
[162] § 32.
[163] *See* GCG Memo. Circ. No. 2012-10.
[164] GCG Memo. Circ. No. 2012-07, § 32.

B. Compensation and Position Classification System ("CPCS")

Like in the private sector, the foremost incentive mechanism is the compensation package provided by the corporation. To attract and motivate qualified professionals,[165] the GOCC Governance Act mandates the GCG to "develop a *Compensation and Position Classification System (CPCS)* which shall apply to all officers and employees of the GOCCs whether under the Salary Standardization Law or exempt therefrom and shall consist of classes of positions grouped into such categories as the GCG may determine, subject to the approval of the President."[166] Through the CPCS, all positions "shall be allocated to their proper position titles and salary grades in accordance with an Index of Occupational Services, Position Titles and Salary Grades of the [CPCS], which shall [also] be prepared by the GCG and approved by the President."[167] The CPCS to be developed by the GCG is further mandated by R.A. No. 10149 to be governed by the following principles:

> (a) All GOCC personnel shall be paid just and equitable wages in accordance with the principle of equal pay for work of equal value. Differences in pay shall be based on verifiable Compensation and Position Classification factors in due regard to the financial capability of the GOCC;
>
> (b) Basic compensation for all personnel in the GOCC shall generally be comparable with those in the private sector doing comparable work and must be in accordance with prevailing laws on minimum wages. The total compensation provided for GOCC personnel shall be maintained at a reasonable level with due regard to the provisions of existing compensation and position classification laws including Joint Resolution No. 4, Series of 2009, and the GOCCs operating budget; and
>
> (c) A review of the GOCC compensation rates, taking into account the performance of the GOCC, its overall contribution to the national economy and the possible erosion in purchasing power due to inflation and other factors, shall be conducted periodically.[168]

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[165] *See* Rep. Act. No. 10149, § 5(h).

[166] § 8.

[167] § 9.

[168] § 9. These principles are by no means novel, as it is a substantial replication of the principles governing the Compensation and Position Classification System of the Government under R.A. 6758 and Joint Resolution No. 4.

The CPCS is intended to institute a rational and uniform compensation system in the government corporate sector. This is clearly emphasized by the statute when it provided in its Section 8 that the CPCS "shall apply to all officers and employees of the GOCCs whether under the Salary Standardization Law or exempt therefrom," and reiterated the same in Section 9 that "any law to the contrary notwithstanding, no GOCC shall be exempt from the coverage of the Compensation and Position Classification System developed by the GCG."[169] Once the CPCS is in place, the dichotomies that defined GOCCs before will cease to be relevant. The CPCS to be developed by the GCG shall apply to all GOCCs, whether chartered or non-chartered, Salary Standardization Law ("SSL")-covered or exempt therefrom, and governmental or proprietary.[170]

For the members of the Governing Board of GOCCs, the GOCC Governance Act provides that the Charter of the GOCC to the contrary notwithstanding, their compensation, *per diems,* allowances, and incentives shall be determined by the GCG.[171] In making such determination, the GCG may use as reference E.O. No. 24.[172] This executive order laid down rules regarding the compensation of members of the Board of Directors/Trustees, identified the components of the compensation, and set maximum amounts of *per diem* for Board and Committee meetings actually attended by such members. Moreover, for the purpose of determining the maximum allowable compensation of such members, E.O. No. 24 classified the GOCCs by size, based on its assets and revenues. Notably, until the GCG provides for such determination of appropriate compensation, E.O. No. 24 remains in full force and effect.

On top of the compensation package provided by the CPCS, the GCG is further vested with authority to recommend to the President of the Republic, incentives for certain position titles in consideration of the good

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[169] § 9.

[170] *See* GCG Memo. Circ. No. 2012-13, "Commencement of the Development of the CPCS for GOCCs covered by R.A. No. 10149."

[171] Rep. Act No. 10149, § 23.

[172] "Prescribing Rules to Govern the Compensation of Members of the Board of Directors/Trustees in Government-Owned or Controlled Corporations including Government Financial Institutions." The E.O. was issued by President Aquino on February 10, 2011, in the middle of the deliberations on Senate Bill No. 2566, proposing the GOCC Governance Act of 2011.

performance of the GOCC.[173] In this regard, the GOCC Governance Act institutionalizes a "performance-based" culture and system in the government corporate sector.[174] Taking the premise that individuals act on their self-interest, providing incentives for good performance serves the mutual interest of the government and the GOCC managers.

To determine performance, the GCG is mandated to establish performance evaluation systems,[175] including performance scorecards,[176] which shall apply to all GOCCs in general and to the various GOCC classifications.[177] The GCG is further mandated to "conduct periodic study, examination, evaluation and assessment of the performance of the GOCCs."[178] Notably, the use of performance evaluation systems and scorecards are widely used, and are among the best practices, in the private corporate sector.

C. Competent Governing Board and Management

The use of the PES and the "performance-based" culture and system mandated by the GOCC Governance Act extends beyond matters of compensation. It also goes into the appointment of the Directors/Trustees themselves.

Among the paradigm shifts introduced by the GOCC Governance Act is the standardization of the tenure of the Appointive Members[179] of the

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[173] Rep. Act No. 10149, § 10.

[174] *See* GCG Memo. Circ. No. 2012-11 ("Interim Performance-Based Incentive (PBI) System for the Officers and Employees of GOCCs Covered by R.A. No. 10149"); GCG Memo. Circ. No. 2012-14 ("Interim Performance-Based Incentive (PBI) System for Appointive Directors/Trustees of GOCCs Covered by R.A. No. 10149").

[175] Rep. Act. No. 10149, § 3(t) defines "Performance Evaluation System" as "the process of appraising the accomplishments of GOCCs in a given fiscal year based on set performance criteria, targets, and weights."

[176] § 3(u) defines "Performance Scorecards" as "a governance and management tool forming part of the performance evaluation system which consists of a set of measures, targets and initiatives that facilitate the achievement of breakthrough results and performance through the effective and efficient monitoring and coordination of the strategic objectives of the GOCC."

[177] §5(f).

[178] § 5(g).

[179] Appointive Director refers to:

(1) In the case of Chartered GOCCs, all members of its Board of Directors/Trustees who are not *ex officio* members thereof;

Board of Directors/Trustees of all GOCCs to a uniform term of oneyear.[180] Prior to the GOCC Governance Act, the term of the Directors/Trustees varied depending on their respective Charters. By adopting the private corporate sector practice that Directors shall serve for a term of one year,[181] the accountability of Directors in the government corporate sector significantly increased. This is further buttressed by the requirement that an Appointive Director may be nominated by the GCG for reappointment by the President only if he/she obtains a performance score of above average or its equivalent or higher in the immediately preceding year of tenure as Appointive Director based on the performance criteria for Appointive Directors for the GOCC.[182]

The GOCC Governance Act also instituted other appropriate reforms in the selection and appointment of the directors and managers of GOCCs. With its enactment, all Appointive Directors shall now be appointed by the President of the Philippines from a shortlist prepared by the GCG.[183] To provide a transparent process in the selection of Appointive Directors, the GOCC Governance Act required the GCG to formulate its rules and criteria in the selection and nomination of prospective appointees and to create search committees to achieve the same.[184] Pursuant thereto, the GCG issued its Memorandum Circular No. 2012-04,[185] which provides guidelines in the nomination and appointment of Appointive Members of the Board of Directors/Trustees of GOCCs, subsidiaries, and affiliates.

Another reform instituted by the GOCC Governance Act is the selection of the Chief Executive Officer ("CEO") of the GOCC. The rule now is that the CEO shall be elected annually by the members of the Board from

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(2) In the case of Non-chartered GOCCs, members of its Board of Directors/Trustees whom the State is entitled to nominate, to the extent of its percentage shareholdings in such GOCC; and

(3) In the case of subsidiaries and affiliates, members of its Board of Directors/Trustees whom the GOCC is entitled to nominate to the extent of its percentage shareholdings in such subsidiary or affiliate.

[180] Rep. Act. . No. 10149, § 17.

[181] Corp. Code, § 23.

[182] Rep. Act. No. 10149, § 17.

[183] Rep. Act. No. 10149, § 15.

[184] § 15

[185] Entitled "Nomination and Appointment of Appointive Members in the Board of Directors/Trustees of GOCCs, Subsidiaries and Affiliates."

among its ranks.[186] This reform is especially important in GOCCs with special charters, which normally provides that the CEO (e.g., Administrator, General Manager, President, etc.) shall be appointed by the President of the Philippines. Such special charter also sometimes provides that the CEO shall thereafter sit as *ex officio* member of the Governing Board. With the enactment of the GOCC Governance Act, the process has been reversed in that the individual must first be appointed to the Board by the President of the Philippines, and thereafter elected as CEO by the members of the Board. By doing so, the CEO is clearly made accountable to the Governing Board, and not to the President of the Philippines. That the CEO is accountable to the Board is further supported by the proviso that "the CEO shall be subject to the disciplinary powers of the Board and may be removed by the Board for cause."[187]

While the statute provides that the CEO of a GOCC shall be selected from the members of the Board of Directors, the best practice in the private sector separating the Office of the Chairman from the Office of the CEO was not statutorily provided. R.A. No. 10149, as it is presently worded, does not preclude the possibility of a Chairman being appointed as the concurrent CEO of a GOCC. This is a situation recognized by the GCG, as in fact addressed in its Memorandum Circular No. 2012-09.[188]

Before being appointed to the Board, all nominees included in the mandated shortlist are required to meet the "Fit and Proper Rule,"[189] which is determined by the GCG and approved by the President of the Philippines,[190] and such other qualifications which the GCG may determine taking into consideration the unique requirements of each GOCC.[191] Section 16 of the GOCC Governance Act further provides that to maintain the quality of management, the GCG, in coordination with the relevant government agencies, shall, subject to the approval of the President, "prescribe, pass upon and review the qualifications and disqualifications of individuals appointed as

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[186] Rep. Act. No. 10149, § 18.

[187] § 18.

[188] Entitled "The Chief Executive Officer (CEO)."

[189] Rep. Act. No. 10149, § 3(j) defines "Fit and Proper Rule" as "the standard for determining whether a member of the Board of Directors/Trustees or CEO is fit and proper to hold a position in a GOCC which shall include, but not be limited to, standards of integrity, experience, education, training, and competence."

[190] § 16.

[191] § 15.

officers, directors or elected CEO of the GOCC and shall disqualify those found unfit." Notably, this provision was lifted from the "Fit and Proper Rule" found in the General Banking Law of 2000,[192] which again shows that the GOCC Governance Act adopts existing best practices to reform the government corporate sector.

In compliance with the mandate under the GOCC Governance Act, and to ensure the qualifications and expertise of those appointed to the Governing Boards of GOCCs, the GCG formulated the "Fit and Proper Rule" for Appointive Directors and CEOs of GOCCs,[193] which was approved by the President of the Philippines in November 2012. In addition to the qualifications set out in their respective Charters, the "Fit and Proper Rule" requires the following minimum qualifications of Appointive Directors and CEOs of GOCCs,[194] as well as grounds for disqualification, both permanent[195] and temporary.[196]

D. Ensuring GOCC Performance

The PES is also the tool used by the GCG in the exercise of its power to determine the relevance of the GOCC, and to ascertain whether the same should be reorganized, merged, streamlined, abolished or privatized. Note that among the standards by which the GCG shall be guided in the exercise of this power is that "the GOCC is not producing the desired outcomes, or no longer achieving the objectives and purposes for which it was originally designed and implemented, and/or not cost efficient and does not generate the level of social, physical and economic returns vis-à-vis the resource inputs."[197] This means that if the managers of the GOCC desire to keep the corporation a going concern, and consequently keep their job, they must ensure that the GOCC is performing its mandate.

In the PES contemplated by the GOCC Governance Act, the Performance Scorecard is the governance and management tool that facilitates the achievement of breakthrough results and performance through the

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[192] § 16.
[193] GCG Memo. Circ. No. 2012-05.
[194] Art. 5.
[195] Art. 6.1.
[196] Art. 6.2.
[197] Rep. Act. No. 10149, § 5(a)(3).

effective and efficient monitoring and coordination of the strategic objectives of the GOCC.[198]

Although not prescribed under the GOCC Governance Act, another possible tool that may be utilized by the GCG for determining whether or not the GOCC is cost efficient and does not generate the level of social, physical and economic returns vis-à-vis the resource inputs, is the Economic Value Added ("EVA") developed by Stern Stalwart Corporation in 1982 in order to measure overall organizational performance. The indicator is computed as follows:

> EVA = Net Operating Profit After Taxes – (Capital x Cost of Capital)

In this formula, the ability of a GOCC to generate operating profit will be deducted by the amount of working capital that it has multiplied by the cost of capital,[199] or the opportunity cost of the invested capital. The reference to opportunity cost is primarily important for the government since it shows, in this case in monetary terms, what the government could have gained if it were to invest the resources given to these GOCCs in another activity. Basically, EVA will measure the efficiency of use of capital in generating income. In computing the EVA, it would be advisable to deduct subsidies from the national government from the net operating profit, which is included in the balance sheet of some GOCCs as part of their operating income, in order to accurately capture their performance.

However, the indicator's limitation is its ability to capture the real opportunity cost for the society. The indicator might show that the government could have earned more by using the resources of inefficient GOCCs in some other earning activity, but it will not be able to capture the value that the society receives from the goods and services that they provide, especially when the private sector is not willing or not yet willing to provide the same. Nonetheless, it is a useful gauge of performance in monetary terms.

V. TOWARDS THE EVOLUTION OF PUBLIC CORPORATE SECTOR MANAGEMENT

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[198] Rep. Act. No. 10149, § 3(u).

[199] The formula uses Weighted Average Cost of Capital and Equity Capital for the "cost of capital" variable.

The majority who supported the enactment of R.A. No. 10149 did so under the expectation that it shall be a bridge legislation that would not only address the highly-publicized institutional issues and other immediate concerns in Philippine GOCCs, but also prepare the sector for more sweeping reforms in the foreseeable future. As the records of Congress would show, there was an understanding that the measure will just be a first of many other reform measures applicable to the government corporate sector, with the end in view of instituting a management structure inspired by Singapore Investment Corporation or the *Temasek* Holdings of Singapore – one of the best practice models in public corporate sector governance in the region. The Journal of the Senate of the Philippines pertaining to the legislative debates on the subject is helpful:

> Senator Osmeña clarified that he did not mean for the GCG to micromanage the GOCCs but to act like a holding company of the government, exercising the ownership powers of a big stockholder. He added that GCG must have the gravitas and the authority to speak up and fire anybody who does not perform his/her tasks well.
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> . . .
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> Senator Osmeña clarified that he was aware of the need for operational flexibility. But he pointed out that in the corporate sector, there are corporations like Ayala Corporation which own controlling shares, and put their members on the Board; at the same time, there are individual corporations that also have subsidiaries but are still able to operate in an efficient and effective manner. *He noted that lacking in the country is the idea of a holding company like Temasek Holdings in Singapore which operates like a government corporation and is able to oversee its investments in various corporations in and outside of Singapore.* [200] (Emphasis supplied)

In this section, we look into the two more advanced forms that the Philippine GOCC governance system may take in the future, with the GCG transforming into: (1) a presumably more powerful department; or (2) the nearly independent *investment house* such as the *Temasek*.

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[200] Journal of the Senate of the Philippines, Fifteenth Congress, First Regular Session, Session No. 69, Mar. 01 2011.

A. Department of Public Enterprises: Inspiration from India

In India, the country's public sector enterprises ("CPSEs") are managed by its Department of Public Enterprises ("DPE"). This institution traces back its roots to a policy shift in India in 1956, wherein an Industrial Policy Resolution gave greater autonomy to central public sector enterprises. In 1965, the Bureau of Public Enterprises was established to report on CPSE performance. This bureau was later converted into the DPE.[201]

i. Legal Framework

Indian CPSEs fall under the same legal framework as the private sector, although some laws have special provisions or exemptions for state-owned enterprises. CPSEs are chiefly governed by the Companies Act ("CA"),[202] Clause 49 of the Listing Agreement[203] and other DPE guidelines promulgated throughout the years.[204]

Under the CA, CPSEs and other companies in which the government of India has controlling interest are characterized as "government companies."[205] As government companies, the governance form and structure of these enterprises are governed by the CA and the companies' article of

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[201] D. Robinett, V. Marathe, and S. Kikeri, World Bank Report on the Corporate Governance of Central Public Sector Enterprises in the Republic of India (2010).

[202] Act of Parliament [India] No. 1 of 1956, An Act to consolidate and amend the law relating to companies and certain other associations, Jan. 18, 1956.

[203] The Securities Exchange Board of India (SEBI) added Clause 49 to the Listing Agreement on 21 February 2000. The clause was enacted with the aim of improving corporate governance of all companies listed on the Indian stock exchanges including. Clause 49 was revised in 2004 to bring it more in line with the Sarbanes-Oxley Act enacted by the United States government. Further revisions are about to be promulgated.

[204] DPE guidelines are divided into chapters on (i) accountability; (ii) personnel policies, (iii) financial policies, (iv) wage policies, (v) memorandum of understanding, (vi) price/purchase reference, (vii) permanent machinery of arbitration, (viii) voluntary retirement scheme, (ix) Maharatna/Navratna/Miniratna status OF PSUs, (x) counseling, retraining, redeployment, (xi) employee stock option scheme and (xii) miscellaneous. For the complete listing of DPE guidelines that are in effect today, please view them at http://dpe.nic.in/important_links/dpe_guidelines.

[205] § 617 of the Companies Act 1956 defines CPSEs as Government Companies, as not less than 51% share capital is held either by the Central Government or partly by the Central Government and partly by one or more State Governments.

association (incorporation). Exempted from the coverage are the statutory corporations,[206] whose rules and regulations are framed with the approval of the Parliament. The CA contains special modifications for government companies that differentiate them from other companies, including exemptions from the applicability of certain sections of the CA.[207]

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[206] These companies were formed by the special act of the state legislature or the parliament and are governed similarly. The three statutory companies referred to are the Industrial Finance Corporation of India (IFCI), the Life Insurance Corporation of India (LIC) and the Reserve Bank of India (RBI).

[207] The special provisions of the Companies Act relating to Government Companies are as follows:

I. **Audit** - The general provisions contained in Secs. 224 to 233 of the CA relating to audit and appointment of auditors do not apply to a Government Company:

a) The auditor of a Government Company shall be appointed or reappointed by the Central Government on the advice of the Comptroller and Auditor General of India, provided that the auditor so appointed or reappointed does not hold appointment as auditor in more than twenty companies, of which not more than ten could be companies, with paid-up share capital of Rs 25 lakhs or more. In the case of an audit firm so appointed the ceiling of twenty companies shall be per partner of the firm. The Auditor General will have the power to direct the company's auditor relating to the manner of audit and the performance of his duties. He shall also have the power to conduct a supplementary test audit of the company's account by persons appointed by him; and

b) The auditor is required to submit a copy of his audit report to the Comptroller and Auditor General, who shall have the right to comment upon the report. Any such comments shall be placed before the annual general meeting of the company along with the audit report (Sec. 619 as amended by the Amendment Act, 1974).

II. **Annual Report**

a) Where the Central Government is a member of a Government Company, the Central Government shall prepare an annual report on the working and affairs of the company within three months of its annual general meeting before which the audit report is placed. The annual report is to be laid before both houses of Parliament together with a copy of the audit report and any comments thereupon, made by the Comptroller and Auditor General of India [Sec. 619A(1)].

b) Where in addition to the Central Government, any State Government is also a member of a Government Company, that State Government shall place a copy of the annual report (prepared by Central Government) together with a copy of the audit report and the comments (referred to earlier) before the Houses or both Houses of the State Legislature [Sec. 619A (2)3].

Under Clause 49 of the Listing Agreement, listed CPSEs are covered by the securities regulations and the listing requirements issued by the Securities and Exchange Board of India ("SEBI"),[208] which typically involve

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c) Where the Central Government is not a member of a Government Company, every State Government which is a member shall cause an annual report on the working and affairs of the company to be prepared within the same time (as referred to above), and then soon after lay it before the House or both Houses of the State Legislature with a copy of the audit report and comments thereupon [Sec. 61 9 A (3)].

III. Application of the Companies Act.

A Government Company is to be registered under the Companies Act. It may be incorporated as a 'public' or 'private' company. The Central Government may, however, by notification in the Official Gazette, direct that any of the provisions of this Act shall not apply to any Government Company or shall apply only with such exceptions, modifications and adaptations, as may be specified in the notification.

The notification shall be effective to the extent to which it is approved by Parliament (Sec. 620). Subject to such notification, such companies are governed by the Companies Act like any other limited company without any discrimination. The Central Government has issued notifications (published in the Gazette of India, dated 11 February and 4 March, 1978) granting exemptions to Government Companies from the application of certain Sections of the Companies Act.

For example, they have been exempted from complying with the provisions of Sections 198,259,268, 269, 309, 310, 311, 387 and 388 relating to the appointment of Managing or Whole time directors and payment of remuneration to them. Similarly, Sections 255, 256 and 257 pertaining to appointment and retirement of directors, and Section 370 relating to making of loans, etc., to companies under the same management shall not apply to such Government Companies which are wholly owned by the Central or State Government.

[208] The Securities and Exchange Board of India was established on 12 April 1992 in accordance with the provisions of the Securities and Exchange Board of India Act of 1992. § 55A of the 1956 Companies Act of India, as amended, establishes the authority of the Securities and Exchange Board of India to govern the listing requirements and other relevant matters pertaining to CPSEs, to wit:

"Powers of Securities and Exchange Board of India.—The provisions contained in §§ 55 to 58, 59 to 84, 108, 109, 110, 112, 113, 116, 117, 118, 119, 120, 121, 122, 206, 206A and 207, so far as they relate to issue and transfer of securities and non-payment of dividend shall,—

(a) in case of listed public companies;

(b) *in case of those public companies which intend to get their securities listed on any recognized stock exchange in India, be administered by the Securities and Exchange Board of India*; and basic disclosure requirements and important corporate governance norms. Clause 49 contains compulsory provisions on board composition,[209] audit committees,[210] board procedures,[211] management discussion and analysis in the annual reports,[212] certificate of financial statements and internal controls,[213] and corporate governance reporting.[214]

(c) in any other case, be administered by the Central Government." (Emphasis supplied)

(*available at* http://www.sebi.gov.in/sebiweb/stpages/about_sebi.jsp, last viewed on Apr. 03, 2012)

[209] § I(A)(i) of Clause 49 provides, "The board of directors of the company shall have an optimum combination of executive and non-executive directors with not less than fifty percent of the board of directors comprising of non-executive directors. The number of independent directors would depend on whether the Chairman is executive or non-executive. In case of a non-executive chairman, at least one-third of board should comprise of independent directors and in case of an executive chairman, at least half of board should comprise of independent directors."

[210] § II(C) of Clause 49 states, "The audit committee shall have powers which should include the following:

1. To investigate any activity within its terms of reference.
2. To seek information from any employee.
3. To obtain outside legal or other professional advice.
4. To secure attendance of outsiders with relevant expertise, if it considers necessary."

[211] Section I(D) of Clause 49 provides:

(i) "The board meeting shall be held at least four times a year, with a maximum time gap of four months between any two meetings. The minimum information to be made available to the board is given in Annexure–IA.

(ii) A director shall not be a member in more than 10 committees or act as Chairman of more than five committees across all companies in which he is a director. Furthermore it should be a mandatory annual requirement for every director to inform the company about the committee positions he occupies in other companies and notify changes as and when they take place.

(iii) Further only the three committees viz. the Audit Committee, the Shareholders' Grievance Committee and the Remuneration Committee shall be considered for this purpose."

[212] § VII(E) of Clause 49 provides:

"As part of the directors' report or as an addition there to, a Management Discussion and Analysis report should form part of the annual report to the shareholders. This Management Discussion & Analysis should include discussion on the following matters within the limits set by the company's competitive position:

(a) Industry structure and developments.

(b) Opportunities and Threats.

(c) Segment–wise or product-wise performance.

In 2007, the DPE issued the Guidelines on Corporate Governance ("CG Guidelines"). Based on Clause 49, the CG Guidelines seek to enhance board practices and other elements of corporate governance in CPSEs, including non-listed enterprises.[215] The CG guidelines mainly focus on the

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(d) Outlook.
(e) Risks and concerns.
(f) Internal control systems and their adequacy.
(g) Discussion on financial performance with respect to operational performance.
(h) Material developments in Human Resources / Industrial Relations front, including number of people employed.

Management shall make disclosures to the board relating to all material financial and commercial transactions, where they have personal interest that may have a potential conflict with the interest of the company at large (for e.g. dealing in company shares, commercial dealings with bodies, which have shareholding of management and their relatives etc.)"

[213] § X of Clause 49 provides, "The company shall obtain a certificate from either the auditors or practicing company secretaries regarding compliance of conditions of corporate governance as stipulated in this clause and annex the certificate with the directors' report, which is sent annually to all the shareholders of the company. The same certificate shall also be sent to the Stock Exchanges along with the annual returns filed by the company."

[214] § IX of Clause 49 provides:

i. "There shall be a separate section on Corporate Governance in the annual reports of company, with a detailed compliance report on Corporate Governance. Non-compliance of any mandatory requirement i.e. which is part of the listing agreement with reasons thereof and the extent to which the non-mandatory requirements have been adopted should be specifically highlighted. The suggested list of items to be included in this report is given in Annexure-1B and list of non-mandatory requirements is given in Annexure –1C.

ii. The companies shall submit a quarterly compliance report to the stock exchanges within 15 days from the close of quarter as per the format given below. The report shall be submitted either by the Compliance Officer or the Chief Executive Officer of the company after obtaining due approvals."

[215] §2.3, Chap. 3, Guidelines on Corporate Governance for CPSEs provides:

"2.3 Each PSE should strive to institutionalize good corporate governance practices broadly in conformity with the SEBI guidelines. The listing of the non-listed CPSEs in the stock exchanges may also be considered within a reasonable time frame to be set by the Administrative Ministry concerned in consultation with the CPSEs concerned. The non-listed CPSEs may follow the Guidelines on Corporate Governance given in the subsequent chapters, which are voluntary in nature."

board of directors[216] and audit committees,[217] but they also govern issues on disclosure[218] and subsidiary companies.[219] Other laws issued in India pertinent to CPSE governance are: (a) the Right to Information Act of 2005,[220] which was hailed as a landmark initiative for enhancing transparency and governance of the public sector as a whole by mandating that various CPSE reports and statements be made available to the public (b) labor laws,[221] most of which pertain to employee relations and protection applicable to CPSEs (c) the 2002 Competition Act,[222] which applies to CPSEs, except those carrying out sovereign functions or activities necessary for the discharge of these functions, and (d) insolvency laws,[223] which mandates a similar treatment for insolvency[224] and liquidation as the companies in the private sector.

ii. Institutional Framework

The shareholding of the Government of India is held by its President in an *ex-officio* capacity. His shareholder power and rights are then delegated to 38 administrative ministries, which possess their own respective portfolio of CPSEs. The DPE serves as a nodal agency while a number of other

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[216] Guidelines on Corporate Governance for CPSE, Chap. 3.

[217] Chap.4.

[218] Chap. 6.

[219] Chap. 5.

[220] Under this law, the right to information includes an access to the information which is held by or under the control of any public authority and includes the right to inspect the work, document, records, taking notes, extracts or certified copies of documents/records and certified samples of the materials and obtaining information which is also stored in electronic form.

*Available at*http://www.sebi.gov.in/sebiweb/stpages/rtiact_2005.jsp, last visited Apr. 3, 2012)

[221] The Factories Act 1948, Apprentices Act 1961, Equal Remuneration Act 1976, Internal Disputes Act 1947, and the Industrial Employment Act 1946 contain special provisions for SOEs.

[222] Act of Parliament [India] No. 12 of 2003, *The Competition Act of 2002*, 14 January 2003.

[223] Personal Insolvency, which deals with individuals and partnership firms are governed by Provisional Insolvency Act, 1920 and Presidency Towns Insolvency Act, 1908 and Corporate Insolvency, which is covered by the CA of 1956.

[224] § 433 (e) of the CA of 1956 covers a company, which is "unable to pay its debts", and thus constitutes a ground for winding up of the company. Inability to pay its debts would be a case where, a company's entire capital is lost in in heavy losses and no accounts are prepared and filed and no business is done for one year.

governmental bodies have oversight, regulatory, and recommendatory functions.[225]

As delegated owners, the 38 administrative ministries represent the National Government in annual general meetings, board selection process, deliberations leading to major decisions, performance appraisal, and the restructuring of losing units. On the other hand, the DPE functions within the Ministry of Heavy Industries and Public Enterprises[226] and is led by a Secretary reporting to the Cabinet Minister and Minister of State. The DPE sets the policies and guidelines for CPSEs and acts as an interface between administrative ministries and CPSEs. In addition, it supports the board appointment process,[227] conducts an annual survey of CPSEs,[228] and provides reports to parliament and the public.[229]

On the other hand, the Cabinet approves an array of significant decisions through the High Powered Committee supervised by the Prime Minister, and makes the appointment decisions on CPSE board directors through the Appointment Committee of Cabinet ("ACC").[230] These decisions are later reviewed by the Ministry of Finance, and in case of investment plans amounting to over two million US dollars, by the Public Investment Board.[231]

The accountability of the CPSEs extends to a number of different bodies. Principally, the CPSEs are responsible to the Parliament, the committees of which review CPSE performance and related issues. Further,

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[225] Robinett, et al., *supra* note 201.

[226] For the organizational structure and officers of the Ministry, *Available at* http://dhi.nic.in/orgdhi.pdf, last visited Apr. 3, 2012.

[227] See **DPE O.M. No. 18(23)/2005-GM-GL-70**, Sep. 27, 2005,*available at* http://www.dpe.nic.in/important_links/dpe_guidelines/personnel_policies/glch2bindex/glch02b35..

[228] For the latest survey on CPSE conducted by the DPE, *available at* http://dpe.nic.in/publications/pesurvey_2010-11 (last visited Apr. 3, 2012).

[229] For copies of the annual reports covering the years 1998 to 2010, *available at* http://dpe.nic.in/publications/annual_reports/department_of_public_enterprises_annual_report (last visited Apr.3, 2012).

[230] The Appointments Committee of the Cabinet (ACC) is a committee which comprises of the Prime Minister of India (who is the Chairman), Home Minister of India and the Cabinet Minister in charge of the concerned Ministry.

[231] The Public Investment Board is headed by Secretary (Expenditure) and is an inter-ministerial committee of ministerial secretaries, authorizes major capital investments including those of public enterprises.

CPSEs which are controlled by the India's National Government are subject to the oversight of its supreme audit institution, the Office of the Comptroller and Auditor General ("CA&G").[232] The CA&G is a constitutional body akin to the Philippine Commission on Audit ("COA") tasked to: (i) appoint the statutory auditor and oversee and supplement his work (ii) conduct regular transaction audits of CPSEs (iii) conduct performance audits of CPSEs that focus on particular topics and issues, and (iv) report findings to the Parliament.[233] CPSEs are likewise accountable to India's Central Vigilance Commission ("CVC")[234] and its own Judiciary[235] for the same reasons that GOCCs are answerable to the Office of the Ombudsman and our own Courts.

Certain regulatory bodies oversee CPSEs in the same way as they supervise companies in the private sector. Among these regulatory bodies are: (i) the SEBI, which enforces securities rules for listed CPSEs (ii) the Ministry of Company Affairs ("MCA"), which oversees compliance with the CA,[236] and

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[232] The duties and powers of C&AG are spelled in India's *Comptroller and Auditor General's (Duties, Powers and Conditions of Service)*, Act 1971. C&AG has the duty of compiling the accounts of Union, States and Union Territories and is responsible for the audit of government accounts, government companies (CPSEs) and statutory corporations.

[233] § 148, chap. V, Constitution of India and chap.. 3 of the CA&G Act of 1971.

[234] The Central Vigilance Commission was set up by the Government in February 1964 on the recommendations of the Committee on Prevention of Corruption, headed by Shri K. Santhanam, to advise and guide Central Government agencies in the field of vigilance, (*available at* http://www.cvc.nic.in(last visited Apr. 3, 2012).

[235] Indian CPSEs fall within the coverage of Article 12 of the Constitution of India, which provides that, "the State includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India." CPSEs are therefore subject to judicial control for violation of Fundamental Rights guaranteed by Constitution and general principles of Administrative Law.

[236] The Ministry is primarily concerned with administration of the Companies Act, 1956, other allied Acts and rules & regulations framed there-under mainly for regulating the functioning of the corporate sector in accordance with law. The Ministry is also responsible for administering the Competition Act of 2002 which will eventually replace the Monopolies and Restrictive Trade Practices Act of 1969, under which the Monopolies and Restrictive Trade Practices Commission (MRTPC) is functioning. Also, it exercises supervision over the three professional bodies, namely, Institute of Chartered Accountants of India (ICAI), Institute of Company Secretaries of India (ICSI) and the Institute of Cost and Works Accountants of India (ICWAI) which are constituted based on three separate Acts of the Parliament for proper and orderly growth of the professions concerned. The Ministry also has the responsibility of carrying out the functions of the Central Government relating to administration of Partnership Act, 1932, the Companies

(iii) sector specific regulating bodies which set prices and resolve other issues for CPSEs.

Recommendatory bodies that manage the affairs of CPSEs include: (i) the Public Enterprises Selection Board ("PESB"), which oversees the selection process for board members[237] (ii) the Board for Reconstruction of Public Sector Enterprises ("BRPSE"), an independent entity that advises the National Government on the reorganization of dismal performing CPSEs,[238] and (iii) the Standing Conference of Public Enterprises ("SCOPE"), an interface between the National Government and CPSEs organized to oversee human resources development of CPSEs.[239]

Below is an illustrative diagram of the CPSE oversight structure in India.[240]

(Donations to National Funds) Act, 1951 and Societies Registration Act, 1980.,*available at* http://www.mca.gov.in/Ministry/about-us.html (last visited Apr. 3, 2012)

[237] The Public Enterprises Selection Board [P.E.S.B] is a body constituted by Government of India Resolution dated 03 March 1987 which was subsequently amended from time-to-time, the latest being on 11 November 2008. It has the objective of evolving a sound managerial policy for the Central Public Sector Enterprises and, in particular, to advise Government on appointments to their top management posts,*available at* http://pesb.gov.in/ , last visited-Apr. 3, 2012)

[238] The Board for Reconstruction of Public Sector Enterprises (BRPSE) was established in December 2004 as an advisory body to advise the Government on the strategies, measures and schemes related to strengthening, modernizing, reviving and restructuring of public sector enterprises,*available at* http://dpe.nic.in/brpse/about_brpse (last visited Apr. 3, 2012).

[239] The Standing Conference of Public Enterprises (SCOPE) was organized on 10 April 1973 to become the apex body for all Central Public Sector Enterprises. It was officially recognized by the Government of India on 08 November 1976 after a decision of the Union Cabinet,*available at* http://www.scopeonline.in (last visitedApr. 3, 2012).)

[240] Robinett, D., Marathe V., and Kikeri S., World Bank Report on the Corporate Governance of Central Public Sector Enterprises in the Republic of India (2010).

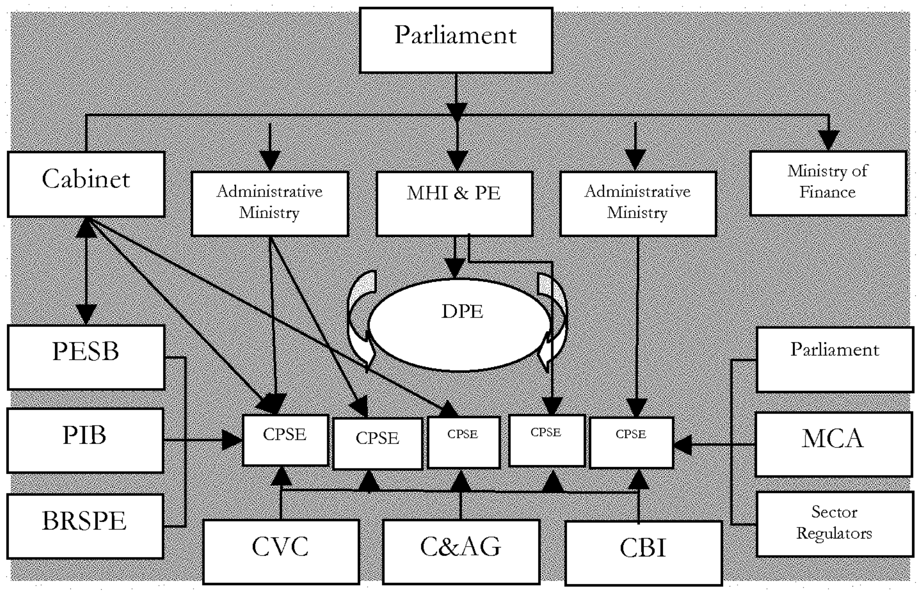

Figure 2: Structure of CPSE Oversight

The GCG and the DPE have strikingly similar characteristics. For instance, these agencies were constituted with vast enough mandates to impact the affairs of SOEs but their powers and functions remain limited compared to those possessed by "tier-one" government organizations in their respective countries namely, the Philippine line departments and Indian ministries. While both GCG and DPE, on behalf of their State principals, exercise ownership rights and functions over SOEs, they do not single-handedly oversee the affairs of these enterprises. Various other agencies operating within their governments shoulder crucial management functions so that monitoring and oversight is not strictly centralized in either GCG or DPE. For all intents and purposes, the GCG and DPE are more appropriately described as nodal agencies constituted to minimize the administrative rigors of SOE supervision.

Table 1. Comparison of the SOE governance systems in the Philippines and India		
Aspects of SOE Management	**Philippines**	**India**
Supervising Office	GCG under the Office of the President	DPE under the Ministry of Heavy Industry and Public Enterprises
Origin of Central Monitoring Agency	Statute, i.e. R.A. No. 10149	Statute, i.e. Companies Act
Nature of Supervising Office	Commission	Department
Foreign presence in Supervising Office	The Chairman and the Commissioners of the GCG must be citizens of the Philippines.	Officers of the DPE must be Indian nationals.
Appointment of Board Directors	Appointments are made by the President, acting on a shortlist submitted by the GCG.	Appointments are made by the Appointment Committee of the Cabinet, subject to the review of the Ministry of Finance.
Review of SOE Investment Decisions	National Economic Development Authority and Department of Finance	Public Investment Board
Annual SOE Audit	Commission on Audit	Comptroller and Auditor General
Propriety of decisions of SOE executives and directors	Office of the Ombudsman	Central Vigilance Commission
SOE Officer Selection	GCG	Public Enterprise Selection Board

Table 1. Comparison of the SOE governance systems in the Philippines and India		
Aspects of SOE Management	**Philippines**	**India**
Reorganization of SOEs	Generally, the GCG has the power. However in cases of abolition, the power is lodged in the President of the Philippines, acting on the recommendation of the GCG.	Board for Reconstruction of Public Sector Enterprises

Despite its non-status as a *department,* the GCG actually enjoys more latitude in SOE management than its Indian counterpart. As noted above, the DPE is not involved in the selection process of the officers of SOEs; neither is it involved in the reorganization, streamlining, abolition, merger or privatization of publicly-owned enterprises. Yet despite these limitations, the Indian model of public corporate governance deserves some praise for its SOE legal system within which measures on fair competition and right to information have been integrated, thereby creating a more transparent and equitable market where SOEs may operate and compete. Unfortunately, similar measures have not been enacted in the Philippines.[241]

Nevertheless, we concede that a simplistic approach to introducing further reforms in GOCCs is to convert the GCG into a line department with expanded powers and functions. Those who advocate this initiative may take solace from the fact that Congress seems less reluctant to constitute new line departments[242] in the form of the proposed Department of Information and Communications Technology ("DICT")[243] – a second lease to life of the now

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[241] In the Senate of the Philippines, several versions of the Freedom of [Right to] Information bill are pending. They are SBN 11, SBN 25, SBN 126, SBN 149, SBN 158, SBN 162, SBN 1254, SBN 1440, SBN 2086, SBN 2189, SBN 2283 and SBN 2354. On the other hand, there are two versions of the fair competition bills pending in the High Chamber, namely SBN 3098 and SBN 3109. Bills of the same intent are pending in the House of Representatives.

[242] The last time a line department was created was during the presidency of Corazon Aquino.

[243] As of writing, Senate Bill No. 50 and House Bill No. 4667 have been approved on third and final reading in the Senate of the Philippines and House of Representatives,

defunct Commission on Information and Communications Technology ("CICT").[244] Yet, a preliminary assessment of future initiatives to convert the newly constituted GCG to a line department will impact its existence and operations less than the law creating the DICT helped the CICT.

First, since the GCG was already constituted by law (unlike the CICT, which was created by a mere executive order), its existence is secured until an abolishing legislation is passed by Congress. Thus, the GCG may not be demoted to a bureau within a department or even abolished, just because of shifts in the policy of the executive department. Next, until the GOCC mandates are reviewed and the appropriate actions are taken to privatize, merge, streamline or otherwise reorganize GOCCs, there is little sense in expanding the organizational structure of the Commission or allocate more funds for its purpose.

B. Towards the One Master Model: The *Temasek* Example

i. Corporate Governance in *Temasek* Holdings

Temasek Holdings is the entity constituted under the Singapore Companies Act to manage the country's Government Linked Companies ("GLCs"). Incorporated in 1974 and presently supported by 12 affiliates and offices in Asia and Latin America, *Temasek* owns a diversified S$193 billion portfolio as of March 31, 2011, concentrated principally in Singapore, Asia, and other growth markets.[245]

Temasek is considered a Fifth Schedule company,[246] an entity whose existence is supported in the Singapore Constitution, by virtue of which it is

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respectively. The two chambers of Congress are expected to meet to reconcile the disagreeing provisions of the two bills in a bicameral conference committee.

[244] The CICT was created by Exec. Order No. 369(2004). In 2011, the CICT was dissolved and its functions transferred to the Information and Communications Technology Office (ICTO) under the Department of Science and Technology (DOST).

[245] *Available at* http://www.temasek.com.sg/abouttemasek/corporateprofile (last visited Apr 3, 2012).

[246] Fifth Schedule refers to the Fifth Schedule of the Constitution of Singapore, which was an amendment introduced in 1991 that created entities like the Central Provident Fund Board, Government of Singapore Investment Corporation Pte Ltd, and the Monetary Authority of Singapore.

able to exercise almost unbridled mandates subject only to a handful of government restrictions. The first of these restrictions apply to transactions which are likely to result in a draw of *Temasek*'s past reserves,[247] which require the concurrence of the President. The right to appoint, terminate or renew board members is likewise conditioned on the approval of the President of Singapore.[248] In certain government institutions and companies, *Temasek* is bound to protect the integrity of its key assets, by ensuring that any disposal of key investments is transacted at fair market value. Except for all of the above-mentioned matters, the Board and Management have full authority and responsibility for investment and other business decisions, reflecting a characteristic of a highly-independent private investment firm seeking to maximize profits.

Companies under the *Temasek* Group started out as government-owned enterprises and later incorporated and placed into *Temasek*. The leadership of the Singapore investment house consciously limits itself to influencing personnel decisions in its affiliates so that the most qualified individuals with the right skill sets are placed in the management of these enterprises. The Office of Corporate Communications of *Temasek* described the company's relationship with GLCs:

> The relationship of *Temasek*-Linked Companies with *Temasek* is not very different from their relationship with any other institutional investor. *Temasek* Linked Companies (TLCs) receive no favours from the government. They make their own investment and business decisions based on their best interests. Their management are answerable to their respective boards. They are subject to market discipline and strive to deliver value to their shareholders.[249]

In *Temasek*, the separation between the Office of the Chairman of the Board of Directors and the Office of the Chief Executive Officer is considered a major component of good corporate governance. Under the arrangement, the Chairman is provided with a working environment where he is able to

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[247] Reserves accumulated by Temasek before the term of the current Government form Temasek's past reserves. Current reserves are primarily profits accumulated after a newly elected government is sworn into power. The swearing-in of the new Cabinet on 21 May 2011 after the Singapore Parliamentary General Election marked the start of a new term of government.

[248] *Available at* http://www.temasek.com.sg/abouttemasek/faqs (last visited Apr 3, 2012).

[249] *Available at* http://www.temasek.com.sg (last visited Apr. 3, 2012).

develop meaningful and creative content in meeting agendas with the goal of pushing a well thought-out policy direction for the company; he is not limited to addressing routine matters involving short-term problems. Unlike in a *unified rule*[250] set up, this arrangement takes the Board of Directors away from an uncomfortable situation wherein its members have to question management decisions made by its own Chairman. We have to note, however, that this separation of power is not statutorily provided; it is merely a recommended best practice, which has been adopted by *Temasek* and most GLCs connected to it.

Another interesting aspect of public corporate governance displayed by Singapore's *Temasek* is the company's relatively tempered aversion to hiring and appointing foreign citizens to the board of directors of GLCs and even within the leadership of *Temasek* itself, including the Office of the Chief Executive Officer.[251] While this may be the natural consequence of the outward looking economic strategy of the country, the arrangement still deserves praise for it expands to the maximum the talent pool from which prospective managers and directors of GLCs will be selected. Further, as a private investment house looking to magnify its shareholdings abroad, *Temasek* stands to accentuate its reputation as a serious player in the international equities market by letting foreigners into its boardroom and those of its domestic GLCs.

Still, some sectors attribute the relative openness of Singapore in favor of foreign executives to the alleged dearth in talented and trustworthy individuals in the domestic pool. In support of this, the critics of *Temasek* refer to the unusually high degree of interlocking directorships in *Temasek* GLCs, wherein a director is permitted to hold as many as six principal appointments. In addition, the term of directors is longer than the best private practice of a one-year term; in fact, non-executive directors are allowed a term of two to three years. To mitigate conflicting interests, interlocking directors are simply required to make the appropriate disclosures at the proper time.

Despite the relative maturity of corporate governance in Singapore, the management of its GLCs is not entirely free from the negative perception of political patronage despite constant persuasions to that effect. In the case of

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[250] Unified rule pertains to the merger in one individual of the office of Board Chairman and Chief Executive Officer of a company.

[251] In 2009, Chip Goodyear, of *BHP Billiton and Goodyear,* was appointed Chief Executive Officer of *Temasek*. He is also the firm's first private sector investment manager.

Temasek Holdings, it is interesting to note that at one point, the highest ranked officers of the firm were individuals closely-affiliated with Singapore's ruling Lee family through blood, affinity, or politics.[252]

On the next page is an illustrative diagram of the accountabilities of each entity involved in the management of GLCs in Singapore.[253]

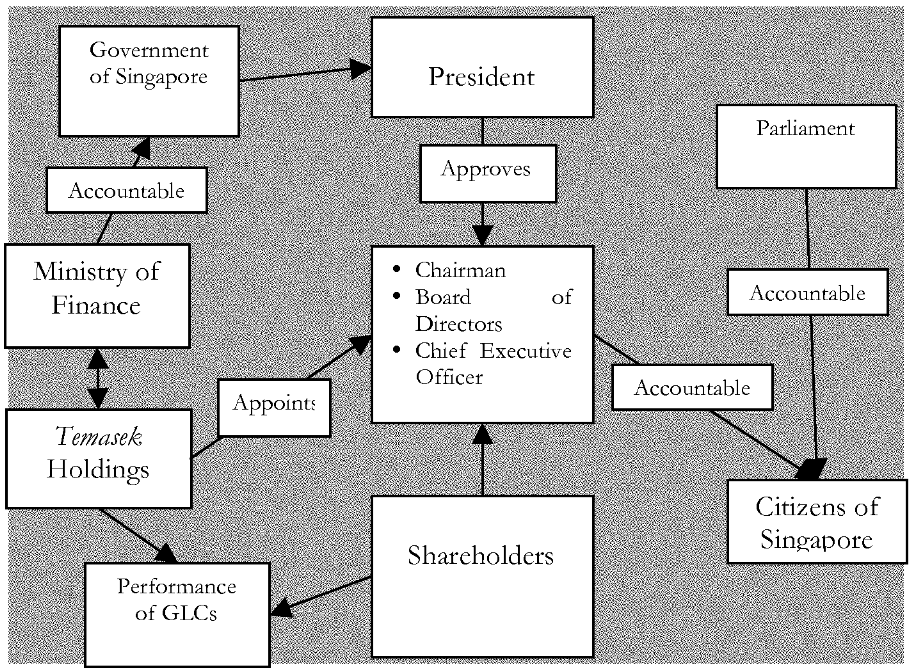

Figure 3: Chain of Responsibilities in Singapore SOE

[252] As an example, Ho Ching, appointed as the Executive Director in 2002 and CEO in 2008, is the wife of Prime Minister Lee Hsien Loong. Past and present civil servants who held senior positions at *Temasek* include S. Dhanabalan (Chairman of the Board, formerly a member of the cabinet), Lim Siong Guan (Deputy Chairman and concurrently Permanent Secretary of the Ministry of Finance), Sim Kee Boon (Director, formerly Head of Civil Service), Fock Siew Wah (Director, formerly Chairman of Land Transport Authority of Singapore), Ng Kok Siong (Director, formerly Chairman of the Monetary Authority of Singapore), and J. Y. Pillay (member of the Advisory Board and Chairman of the International Panel, concurrently Chairman of Singapore Exchange). From Tan, B. S, 2002, *Why it might be difficult for the government to withdraw from business*, available on: http://www.singapore-window.org.

[253] Ni Kai Leong Ho, *Corporate Governance Reforms and the GLCs*, Institute of Southeast Asian Studies (2005).

ii. GCG vs. *Temasek*

When the hallmarks of governance practices in the public corporate sector of the Philippines and Singapore are compared, we begin to understand why Filipino policy makers were so enamored with the management structure and approach applied by a private investment house like *Temasek* to the enterprises within its sphere of ownership and control. Under Philippine jurisdiction, the only government instrumentalities that enjoy such breadth of autonomy would be Congress itself, the Judiciary. and the three Constitutional Commissions namely: (i) the COA (ii) the Commission on Elections, and (iii) the Civil Service Commission. To some extent, the Monetary Board and the *Bangko Sentral ng Pilipinas* enjoy almost the same degree of functional independence.

Outside the best private practice on the term duration of directors and the extent of interlocking directorships, the Philippine model of public corporate governance is assuredly inferior to its Singaporean counterpart. The marked differences between the two paradigms may be *partly* attributed to the fact that while the powers of *Temasek* are anchored on its country's Constitution, those of the GCG are only provided by statute. Consequently, the constitutional origin of the functional prerogatives of *Temasek* enjoys greater permanence compared to the source of authority of the GCG, whose functions can be modified or even abolished by conforming to the far less stringent requirements of enacting a repealing statute.

Theoretically, *Temasek* is vested with the same set of rights and obligations that a private investment firm has, subject only to the three aforementioned restrictions. Simply put, it may do anything within the functions of an investment house except those which the Singapore Constitution explicitly prohibits. On the other hand, the functions of the GCG are comparatively limited in as much as the Commission may only perform the functions specifically enumerated in R.A. No. 10149 and nothing else.

As an investment house, *Temasek* was principally organized to ensure maximum long-run returns on SOE shareholdings. Further, its authority to streamline, merge, abolish or otherwise reorganize GLCs is subject to whether the business decision optimizes shareholder wealth. Thus, it is actively and more directly involved in value creation than the GCG, whose participation in SOE affairs is restricted to advisory, oversight, and monitoring functions. Indeed, the role of the GCG in SOE management decisions is almost nonexistent except with respect to the formulation, implementation, and coordination of policies on SOE compensation structure and compliance to statutory disclosure requirements. The Commission has soft authority to recommend members of the governing boards of GOCCs and the reorganization, streamlining, merger, abolition, or privatization of covered enterprises. However, the final decision on such matters still rests with the President.

Table 2. Comparison of the SOE governance systems in the Philippines and Singapore

Aspects of SOE Management	Philippines	Singapore
Supervising Office	GCG under the Office of the President	*Temasek* Holdings Company
Origin of Supervising Office	Statute, i.e. R.A. No. 10149	Originally created under the Singapore Companies Act but powers were expanded under the Singapore Constitution
Nature of Supervising Office	Commission/Government Instrumentality	Private Investment Firm
Appointment of Board Directors	Appointments made by the President, acting on a shortlist submitted by the GCG.	Appointments are made by *Temasek,* but subject to the concurrence of the President.
Term of Office of SOE directors	One year	Two to three years
Foreign presence in Supervising Office	The Chairman and the Commissioners of the GCG must be citizens of the Philippines.	Members of the *Temasek* Management and Board of Directors may be foreign citizens.
Extent of Interlocking Directorships	Two directorships, at most	Six directorships, at most

Table 2. Comparison of the SOE governance systems in the Philippines and Singapore		
Aspects of SOE Management	**Philippines**	**Singapore**
Review of SOE Investment Decisions	National Economic Development Authority and Department of Finance	*Temasek* Holdings Company, but with the concurrence of the President in cases of disposal of key assets or where the transaction drew from the past reserves of the firm.
Annual SOE Audit	Commission on Audit	Independent Private Auditors
Propriety of decisions of SOE executives and directors	Office of the Ombudsman	*Temasek* Holdings Company and the respective board of directors of GLC companies
SOE Officer Selection	GCG	*Temasek* Holdings Company
Reorganization of SOEs	Generally, the GCG has the power. However in cases of abolition, the power is lodged in the President of the Philippines, acting on the recommendation of the GCG.	*Temasek* Holdings Company

At this juncture, we note that the complexity of corporate governance practices employed in a country's public corporate sector is directly correlated with the institutional and financial stability of SOEs. Without the requisite financial health of these enterprises, any attempt to institute *Temasek*-like management practices in Philippine GOCCs will be ineffective, if not totally absurd. Undeniably, the courses of action to take must be carefully thought out and executed, for the paths to fiscal perdition and progress are very narrowly apart.

iii. Operationalizing the *Temasek* Blueprint in the Philippines

The velocity of the implementation and the breadth of meaningful reforms that may be implemented in Philippine GOCCs derived from the *Temasek* experience will have so much to do with the state of these enterprises.

As it is, R.A. No. 10149 seems to be a step in the right direction, particularly when it authorized the GCG to undertake a classification of existing GOCCs and submit recommendations on how to rationalize their operations, and when appropriate, propose their restructuring, including the abolition of certain GOCCs. However, the impact of a clear commitment of the State to win economic progress with the GOCCs as the country's main engine for development would better mirror the mind of the Singapore government when it conceptualized *Temasek* as the growth driver that it is today. With such a firm commitment to the public corporate sector, the Singapore government spared no resources to render efficient and profitable the operations of its key GLCs.[254]

As Singaporean GLCs flourished, the next step undertaken was to corporatize these entities by listing them in the Singapore stock exchange, presumably to access more capital from the public, and to invite, if not heighten, direct ownership of the GLCs by the citizens. Obviously, with the exception of very few Philippine GOCCs such as PAGCOR and certain GFIs like the DBP, no SOE at present will come close to attaining the required level of profitability, if not institutional efficiency, to duplicate the process under this stage of SOE development in Singapore. It took almost 20 years from the creation of *Temasek* or until the 1970s before Singapore listed its very first GLC in the stock exchange. It is not preposterous to assume that the Philippines will need at least the same amount of time to repeat the feat.

Perhaps what can be done at this point is to learn from the methodology with which Indonesia operationalized the *Temasek* model.[255] Under Singapore's blueprint, SOEs were classified not according to their functional attributes but rather in accordance with the capacity of the SOEs to be subsequently integrated into and managed by the country's own *Temasek*. As a result, the companies were categorized as (i) stand-alone or those with promise of internationally competitive operational and financial health that serve as "SOE champions" of Singapore (ii) focused holding companies or the aggregation of SOEs requiring synergy and strategy alignment to be considered internationally competitive in the foreseeable future, and (iii) roll-up companies or those that the government decided to abolish, privatize, or otherwise

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[254] L. Low, *Singapore's Developmental State between a Rock and a Hard Place* (2004); L. Low, (ed.), *Relevancy, States, Redundancy, or Reconfiguration*, Chap. 10, 161-177 (New York: Nova Science Publishers [DATE]).

[255] *Indonesia plans Temasek-style holding company.* REUTERS, May 31, 2007.

relinquish ownership and control of.[256] After the sectoral holding companies acclimatized to their new set-up, these entities, along with the SOE champions, will be housed under a super-holding company akin to Singapore's *Temasek*.

The GCG, as the office tasked to implement the classification of GOCCs, should take a look at the Singaporean model. While the Commission is statutorily mandated to classify GOCCs into (1) *Developmental/Social Corporations* (2) *Proprietary Commercial Corporations* (3) *Government Financial, Investment and Trust Institutions* (4) *Corporations with Regulatory Functions*, and (5) *Others*, it is also authorized to undertake further classifications as it may find relevant.[257] Perhaps a categorization similar to the Indonesian example should be considered by the GCG. After all, the GCG was vested with enough discretion in R.A. No. 10149 to consolidate functionally similar GOCCs into a single holding unit.[258]

Under present circumstances, GOCCs that would merit its own sectoral holding firms will be the (i) SSS, GSIS, and other trust fund GOCCs with combined gross income in 2010 of over 200 billion pesos[259] (ii) Landbank, DBP, and the subsidiary banks of other GOCCs with a combined gross income in 2010 of at least 60 billion pesos[260] (iii) the Civil Aviation Authority of the Philippines and other airport management GOCCs (iv) the Bases Conversion Development Authority and its subsidiaries, the Philippine Economic Zone Authority and the regional economic zone authorities, and (v) the shelter GOCCs led by the Home Development Mutual Fund, among others. On the other hand, the GOCCs outlined in E.O. No. 37 should be the first entities subjected to rationalization, privatization, or if necessary, abolition.

VI. CONCLUSION

One of the promises of the enactment of the GOCC Governance Act of 2011 is the ushering in of a strongly institutionalized framework that can overhaul the public corporate sector. The creation of the GCG with its

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[256] *Restrukturisasi BUMN Diutamakan Lewat Holding* (Restructuring SOEs Primarily Through Holding), *available at* http://www.detikfinance.com., last viewed on Apr. 03, 2012.

[257] Rep. Act. No. 10149, § 5(b).

[258] § 5(a)(6).

[259] COA Annual Financial Report on Government-Owned and Controlled Corporations (GOCCs) (2010).

[260] Id.

functions and delegated powers, the adoption of many best private practices in corporate governance, and the re-assertion of the State of its "*ownership*" of GOCCs are important breakthroughs that may very well undo the inertia that subdued the adoption of good corporate governance practices in GOCCs.

The shift to a holding company model like the *Temasek* in the Philippine context will be a radical and complicated process that may entail extraordinary and significant political, institutional, and legal considerations. Concentrating so much power in a single entity, especially considering the massive asset holdings and interests that Philippine GOCCs command, will inevitably attract opposition. Further, the persisting concerns on transparency and accountability will be accentuated even more when a single holding unit is vested with so much authority. Therefore, the *Temasek* template may not be the immediate solution that the Philippine government corporate sector requires. However, the idea must be kept as a medium to long term objective that must be revisited when most of our GOCCs show the requisite financial health and when the sector, as a whole, attains the independence and discipline that preceded the integration of GLCs in Singapore under the *Temasek* model.

In the interim, Philippine policy makers must be inspired to strengthen a legal system where GOCC affairs are transparent and the Governing Boards are more accountable. Under the Indian example, the perceived inadequacies of the current management system of the country's government corporations are mitigated by populist and complementary statutes liberalizing access to government-related information and promoting fair competition. Only by winning the public, and winning the public *now*, can the Philippine government inch closer to its ideal enterprise governance system. The immediate enactment of the Freedom of Information Bill and the proposed fair competition policy may perhaps have a surprising yet welcome effect to the state of affairs of GOCCs in the Philippines.

Without question, the impact of the successful implementation of R.A. No. 10149 on the economy cannot be underestimated. Improving corporate governance in public enterprises will result in substantial efficiency gains, improvement in the quality of public services, a reduction of fiscal burden, and eventually, economic growth. Other benefits will include enhanced valuation of state assets, which is crucial for potential privatization, and better access to capital, whether equity or debt, which is helpful in further expansion. These reforms, once implemented, by no means guarantee growth, but rather ensures that everything is set in place, which can possibly enable growth.

Finally, while there is nothing magical about fashioning a system of governance that shelters legitimate stakeholder interests and delivers incentives for managers to make value-increasing investments, we have to remember that the requisite steps to achieve this can be extraordinarily difficult. However, to quote an old World Bank saying, "there are no short cuts to development."[261]

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[261] William Megginson, Corporate Governance in Publicly Quoted Companies (2000).