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Regulatory Measures Affecting Services Trade and Investment: Distribution, Multimodal Transport, and Logistics Services

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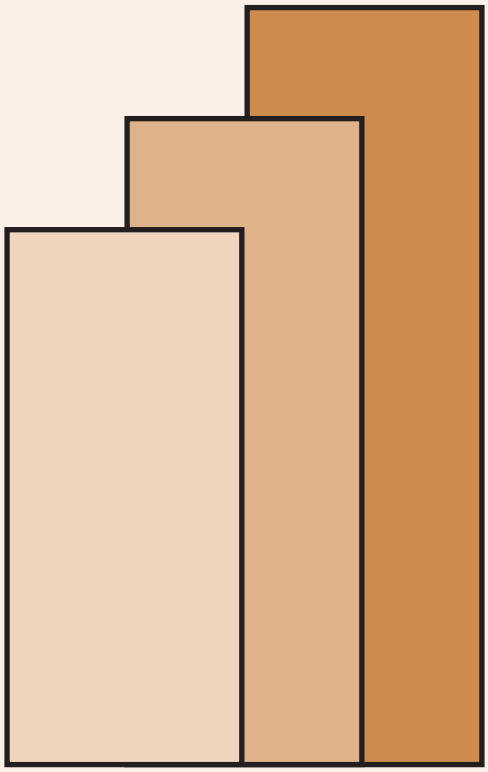

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Regulatory measures affecting services trade and investment: Distribution, Multimodal Transport and Logistics Services

By

Lai-Lynn A. B. Barcenas, Glenda T. Reyes, Jose L. Tongzon, and Ramonette B. Serafica*

Abstract

Barriers to trade and investment stifle economic expansion. The impacts are most profound when they are applied to the services sector given its role as 'the glue that binds all sectors together". This report examines the various regulatory requirements and legal obstacles that limit or discourage trade and investment in the services sector. Consistency with core obligations in new generation free trade agreements is also assessed. In distribution, multimodal transport and logistics (DML) services, restrictions in the form of foreign ownership limitations and other discriminatory measures are prevalent. In addition to the formal restrictions, burdensome requirements and inconsistent application of regulations lead to higher transactions cost. In other cases, it is the lack of regulation or weak enforcement that add to the risks of doing business in the Philippines. To foster the development of DML services in the Philippines, barriers to trade and investment must be reduced. Improving regulatory governance, ensuring policy coherence and strengthening policy coordination are also necessary to facilitate integration and the seamless supply of these services that are vital to the continued growth of the goods sector of the economy.

Keywords: services, distribution, transportation, multimodal, logistics, trade, investment, regulations, barriers

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1 Introduction

1.1 Brief description of the study

The services sector is the biggest sector in the economy and is recognized as the "glue that binds all sectors together" in the government's Comprehensive National Industry Strategy (CNIS). Efficient and competitive services are critical for improving the agricultural sector and supporting the continued growth of the manufacturing sector. Services are also emerging as a new driver of global trade providing tremendous opportunities especially for developing countries like the Philippines.

An efficient regulatory framework is a pre-requisite for developing a services market that supports competitiveness and offers opportunities for export diversification. Creating such a framework requires a comprehensive understanding of the laws, regulations, and practices affecting trade and investment in services currently in place (Molinuevo and Saez, 2014). Thus, this study will:

- Map horizontal or cross-cutting laws and regulatory measures affecting trade and investment in services.
- Map laws and regulatory measures affecting trade and investment in the distribution, multimodal transport and logistics (DML) services.
- Identify (a) legal, regulatory, and administrative restrictions to trade and investment in the services sector; (b) potential inconsistencies between existing laws and regulations and obligations in World Trade Organization (WTO) or other trade agreements; and (c) missing laws and regulations needed to ensure the adequate functioning of the services sector and implement commitments in trade agreements.
- Propose guidelines and an action plan for implementing such policy measures by the relevant government agencies and other relevant actors.
- Propose reforms of existing laws and regulations where needed.

The mapping and assessment of the measures aims to deepen our understanding of the rationale behind the various measures, enhance transparency and clarity on the regulatory regime in the Philippines, increase awareness on the extent of the barriers, and serve as a useful guide in identifying priorities for reform.

1.2 Objective and significance of the study

The objective of this assessment is to foster the development of the Philippines' services market by strengthening the regulatory framework for services trade and investment. Based on an assessment of laws and regulations affecting trade and investment in services, the study will provide recommendations to reduce the regulatory burden in services trade while ensuring adequate regulation of the services market.

As articulated in the **Philippine Development Plan 2017-2022**, removing restrictions in the economy is necessary to expand economic opportunities in the country. This will entail amending restrictive economic provisions in the Constitution; repealing or amending

regulations that impose restrictions on foreign participation in certain economic activities; and enhancing the competitiveness of the industry and services sector by ensuring that regulations promote fair competition and trade. The Plan also recognizes the need to improve the business climate by implementing structural reforms to create more open, well-functioning, transparent, and competitive markets as well as by simplifying rules and regulation on business registration and licensing. Similarly, in order to attract foreign and local direct investments, President Rodrigo R. Duterte's **0+10-point Socio-economic Agenda** calls for (a) easing constitutional economic restrictions and other Philippine laws; (b) enhancing the ease of doing business (cut red tape); and (c) enforcing law and order. As an important step towards the goal of easing economic restrictions, **Memorandum Order 16** entitled "Directing the National Economic and Development Authority (NEDA) Board and its Member Agencies to Exert Utmost Efforts to Lift or Ease Restrictions on Certain Investment Areas or Activities with Limited Foreign Participation," was signed by the President on November 21, 2017. Priorities for liberalization identified in MO 16 s. 2017 include:

- Private recruitment, whether for local or overseas employment
- Practice of particular professions, where allowing foreign participation will redound to public benefit
- Contracts for the construction and repair of locally-funded public works
- Public services, except activities and systems that are recognized as public utilities such as transmission and distribution of electricity, water pipeline distribution system, and sewerage pipeline system
- Culture, production, milling, processing, and trading except retailing, of rice and corn and acquiring by barter, purchase or otherwise, rice and corn and the by-products thereof
- Teaching at higher education levels
- Retail trade enterprises
- Domestic market enterprises

Due to the nature of the regulations, the easing of restrictions would need to be undertaken in phases. According to the Secretary for Socio-economic Planning, the immediate reform that could be undertaken is in removing administrative restrictions (i.e. within the purview of the Executive branch). Next would be restrictions that require amendments to current laws, which would be taken up starting next year. Those which require Constitutional changes would be targeted by 2019, along with other proposed Constitutional amendments.[1]

This study supports the above national priorities and complements other government initiatives as well. The regulatory mapping is aligned with **Project Repeal** spearheaded by the National Competitiveness Council that aims to lessen the regulatory burden of companies. The review of impediments in the selected services cluster (i.e. distribution, multimodal

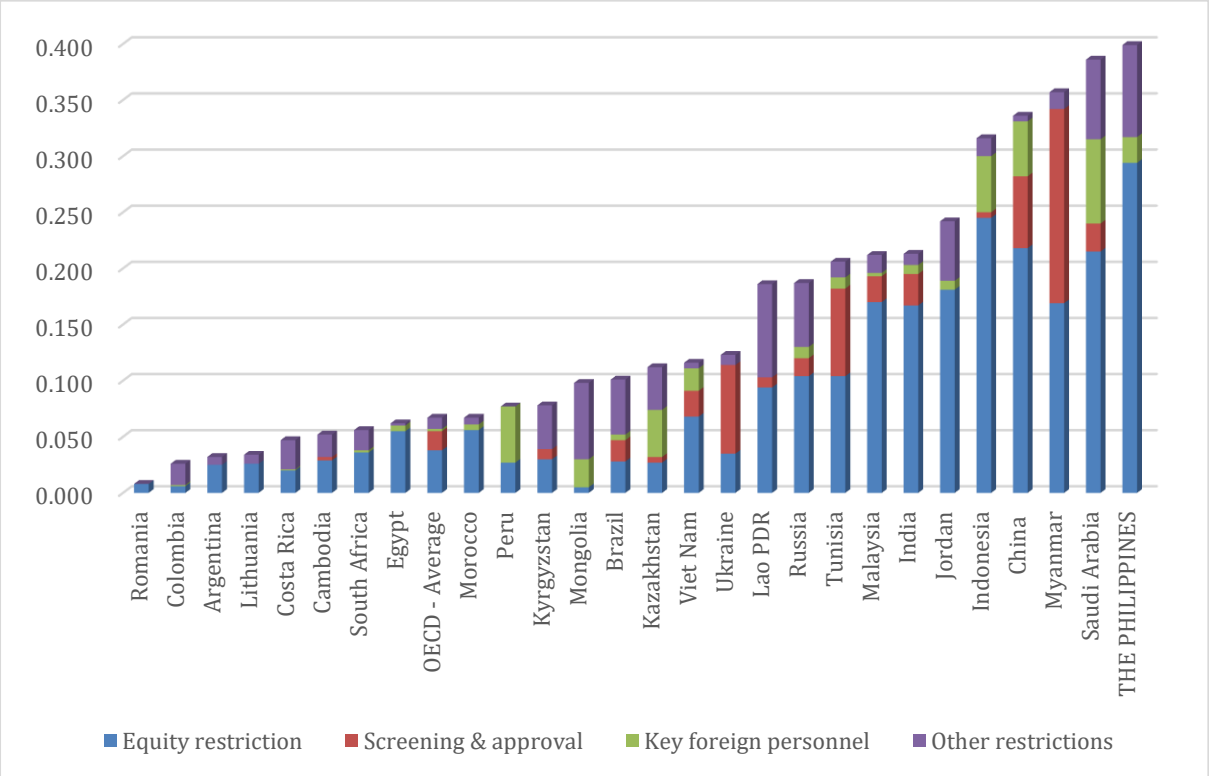
[1] De Vera, B.O. and L.B. Salaverria. 2017. Duterte to ease limits to foreign capital. *Inquirer.net.* http://business.inquirer.net/241346/duterte-to-ease-limits-to-foreign-capital#ixzz4zJVGHE00 (accessed on November 27, 2017)

transport and logistics services) supports the **Manufacturing Resurgence Program** (MRP) of the government. The MRP seeks to enhance the competitiveness of domestic manufacturing industries so they can be integrated in higher value-added, ASEAN-based production networks and global value chains. One of the key constraints that need to be addressed to boost manufacturing is the high cost of transport and logistics. Additionally, there is a need to complement the ambitious infrastructure program of the government dubbed as **"Build, Build, Build"** with efficient transport services. At the regional level, in line with the **APEC Services Cooperation Framework of 2015** and the **APEC Services Competitiveness Roadmap of 2016**, the Philippines has committed to ensuring an open and predictable environment for access to services markets by progressively reducing restrictions to services trade and investment.

Economic theory and many empirical studies based on cross-sectional country data have shown that an improvement in market access for suppliers of services through establishment of some degree of competition and modification of regulatory framework could result in economic benefits, such as productivity gains, improvement in international competitiveness and economic growth (for example, Mattoo et al. 2006; Balistreri et al. 2007; Jensen et al. 2007). An improved efficiency of services industries, as a result of greater competition and improved regulatory framework, has a powerful influence on productivity and economic growth. According to one study, structural reforms in transport, energy and telecommunications sectors lead to productivity gains that are twice as large as the productivity gains associated with liberalization of goods trade (APEC PSU 2010). Opening services sectors to foreign providers is a key channel through which services reforms affect downstream productivity in manufacturing (Arnold et al. 2011). In addition to the strong link between services productivity and manufacturing productivity, the restrictiveness of services trade is also negatively associated with the exports of manufactured goods (Hoekman and Shepherd 2016).

The Organisation for Economic Co-operation and Development (OECD 2016) reports that foreign direct investment (FDI) restrictions in the Philippines are high by both regional and global standards. Based on the most recent OECD FDI Regulatory Restrictiveness Index, the Philippines is the most restrictive economy among the 62 OECD and non-OECD countries included in the database. As Figure 1 shows, the Philippines has the highest score at 0.398. The relatively high score of the Philippines is due mainly to "Equity restrictions", followed by "Other Restrictions" which include for example, the reciprocity requirement and restrictions on land ownership.

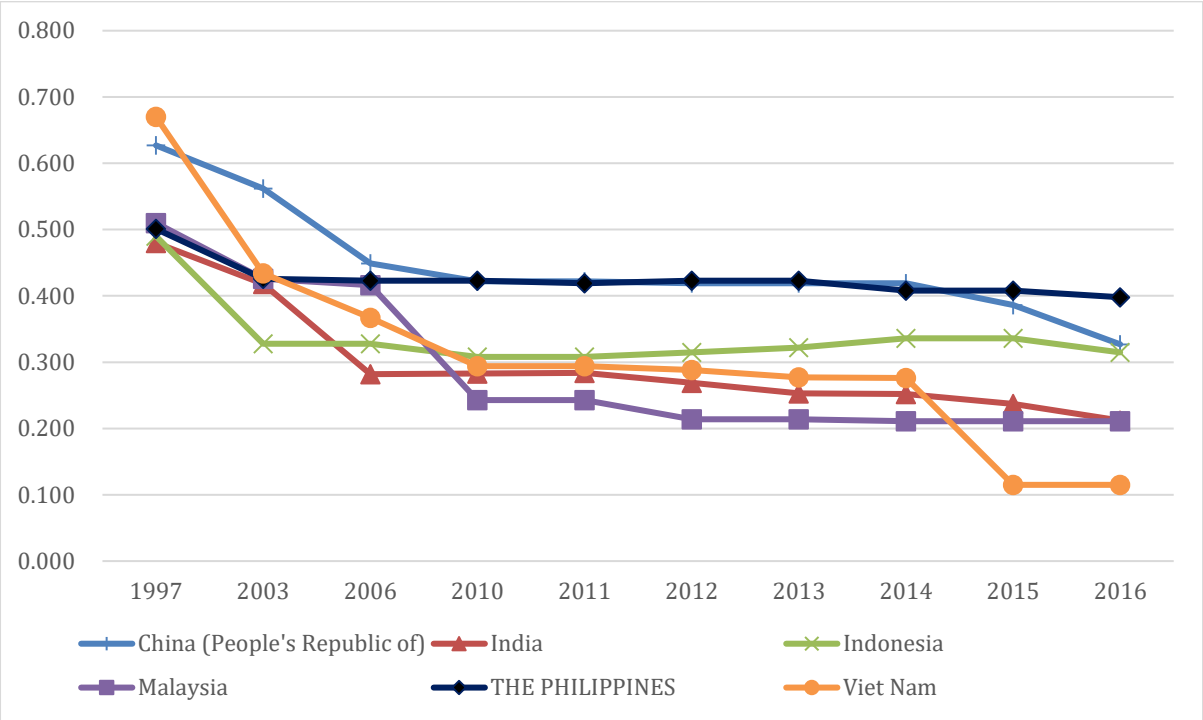
Figure 1. OECD FDI Regulatory Restrictiveness Index - Total (2016), non-OECD countries and OECD-average (ranked from least to most restrictive)



Note: Closed = 1; Open = 0
Source: http://stats.oecd.org

Figure 2 further reveals that the regulatory environment for FDI in the Philippines has not changed much in the last two decades compared to other countries. In 1997, Vietnam and China were more restrictive than the Philippines which was more or less at the same level as India, Indonesia, and Malaysia. By 2016 however, all these countries had overtaken the Philippines in opening up their economies to foreign direct investment.

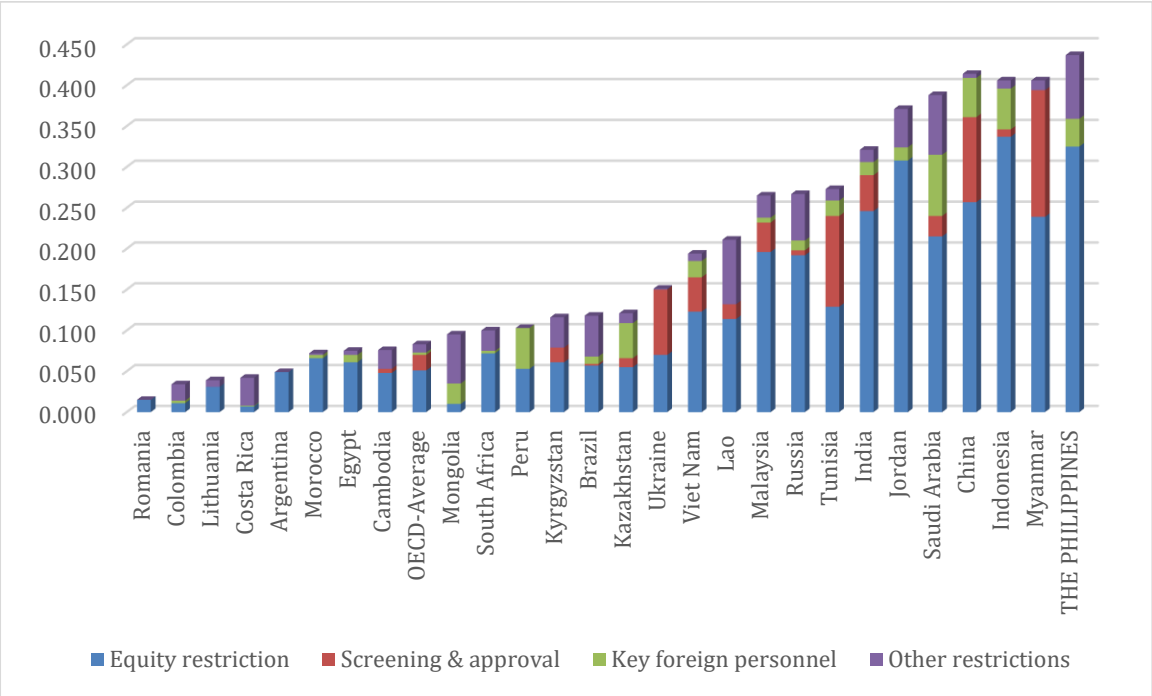
Figure 2. OECD FDI Restrictiveness Index – Total (over time), select countries



Note: Closed = 1; Open = 0
Source: http://stats.oecd.org

A significant number of these restrictions can be found in the services sector. Similar to the overall picture, compared to other countries, the Philippines has most restrictive FDI regime for services with a score 0.436. The high score of the Philippines is due mainly to "Equity restrictions", followed by "Other Restrictions" as explained above. See Figure 3.

Figure 3. OECD FDI Restrictiveness Index - Services Sector (2016), non-OECD countries and OECD-average (ranked from least to most restrictive)



Notes: (a) Closed = 1; Open = 0
(b) For China (People's Republic of), the index for 'all types of restrictions' in the services sector is '0.402' but the individual restrictions add up to '0.414'.
Source: http://stats.oecd.org

In addition to explicit market access limitations and discriminatory treatment of foreigners, other regulations and/or their application may have the effect of limiting trade and investments by imposing burdensome procedures and unnecessary costs to service suppliers as well as consumers. Moreover, various measures maintained by different national government agencies could also be inconsistent with the core obligations in new generation trade agreements.

1.3 Organization of this report

Chapter 2 reviews the different regulations which affect trade and investment in the services sector in general. It examines the various impediments that a firm faces from entry to exit, grouped according to key policy and regulatory areas. **Chapter 3** focuses on the distribution, multimodal transport and logistics (DML) sector. It provides an overview of the services covered, their economic significance, the institutional setting, and sector performance. The key regulations that affect trade and investment in this sector are then discussed followed by the critical issues and concerns that were raised during the stakeholder consultations. It concludes with a range of recommendations to address the impediments. In the final chapter, **Chapter 4**, an assessment of the Philippine regulatory environment through the lens of free trade agreements is conducted. Regulatory reforms that could be undertaken to conform with FTA obligations and comply with commitments are highlighted. The pros and cons of adopting the various approaches to scheduling commitments are also discussed.

2 Review of regulations affecting trade and investment in the services sector

To operate in the Philippines, business entities need to meet various regulatory requirements, some of which apply to specific industries to meet certain State policy objectives. Among the objectives that regulations aim to achieve is to safeguard against market failures, such as imperfect and asymmetric information, lack of competition, and natural barriers to entry. This is true for the services sector. However, such regulations have, in some instances, created barriers to entry to certain market players and been used as protectionist measures, which in turn prevent the Philippines from fully benefiting from market competition and productive market activity. Thus, the challenge to Philippine regulators is to adopt the best regulatory approach to accomplish legitimate policy objectives, without unnecessarily impeding services trade.

This chapter will analyze regulations generally affecting services trade and investment, and determine whether they pose a barrier to entry even if applied equally among market players or whether different treatment among these market players pose a barrier to entry. Where the service involves foreign market players, the review will include how these regulations affect the four modes of supply of services, if any, as defined under the WTO General Agreement on Trade in Services, namely:

- Mode 1 or **cross border trade** is defined under the WTO Trade in Services Agreement as the supply of a service from the territory of one Member to the territory of another Member.[2] It is analogous to goods traded and involves producing services in one country to be consumed in another;
- Mode 2 or **consumption abroad** is defined as the supply of a service in the territory of one WTO Member to the service consumer of another WTO Member.[3] It occurs when consumers travel across borders to consume services;
- Mode 3 or **commercial presence** is defined as the supply of service by a service supplier of one WTO Member, through commercial presence in the territory of any other WTO Member.[4] It occurs when the producer of a service establishes a local presence in the country where the consumer is located; and
- Mode 4 or **temporary movement of labor** is defined as the supply of service by a service supplier of one WTO Member, through presence of natural persons of a WTO Member in the territory of any other Member.[5] It occurs when the producer travels across borders to provide a service. (Molinuevo and Saez 2014).[6]

The horizontal laws and regulations generally fall under the following categories: Entry, Legal and Regulatory Compliance, and Exit Requirements. These are divided into 14 policy and regulatory areas. To better understand how regulation and its implementation impact the

[2] World Trade Organization (WTO) Trade in Services Agreement, Article I:2(a).
[3] Ibid., Article I:2(b).
[4] Ibid., Article I:2(c).
[5] Ibid., Article I:2(d).
[6] *See* Molinuevo, M. and S. Saez. 2014. *Regulatory assessment toolkit: A practical methodology for assessing regulation on trade and investment in services*. Washington, D. C.: International Bank for Reconstruction and Development/World Bank.

entry and operation of the various business entities, Appendix A outlines the binding authority of various laws rules and regulations, the authority to issue the same and the power to implement these.

ENTRY REQUIREMENTS

2.1 Business registrations

The World Bank in its Doing Business reports measures the impact of business registration requirements on businesses, among others. In particular the Starting a Business indicator records all procedures officially required or commonly done in practice, for an entrepreneur to start and formally operate n industrial or commercial business, as well as the time and cost to complete these procedures and the paid-in minimum capital requirement.[7] The Philippines is 171st out of 190 economies in the Starting a Business indicator in 2017. This is extremely low and indicates how difficult it is to start and operate a business in the Philippines compared to the other surveyed economies.

While the methodology for the Starting a Business indicator covers only limited liability companies, the procedures that takes the most time to complete cover common registration requirements among the different business entities discussed above, i. e., single proprietorship, partnership and corporation. These are for registrations with: (a) the local government, which takes an average of 8 days; and (b) the BIR, which takes 12 days. As a result, the number of procedures and the time it takes to complete these in the Philippines totaled, 16 procedures and 28 days, respectively. This is higher than the numbers for the East Asia and Pacific, which are 7 procedures and 23.9 days respectively. These procedures by themselves pose a barrier to entry into the services trade sector, particularly with respect to Mode 3, in relation to cross-border services trade.

Further, with respect to regulated industries, the additional requirement of an endorsement from the responsible regulatory agency is an added cost and procedure before a business enterprise can enter and operate in the services trade market.

Under Philippine laws, doing business, including in services trade, is generally subject to certain legal requirements to operate, and regulatory oversight to ensure that businesses are conducted in a manner that meets the State's policy objectives. Entities doing business in the Philippines may take the form of a single proprietorship, partnership, or corporation. The general characteristics, registration requirements and general requirements to operate for these entities are briefly discussed below.

2.1.1 Primary registrations

2.1.1.1 Sole proprietorship

[7] World Bank. 2002. Starting a Business Methodology, Doing Business, Washington, D.C.: World Bank. http://www.doingbusiness.org/Methodology/Starting-a-Business (accessed May 17, 2017).

A sole proprietorship is the oldest, simplest and most prevalent business enterprise. It is an unorganized business owned by one single person.[8] A sole proprietorship does not possess a juridical personality separate and distinct from the personality of the owner of the enterprise. But prior to doing business, the sole proprietor, whether a domestic or foreign, must first register a business name (BN) by which his business will be known with the Department of Trade and Industry (DTI).[9] Such registration is required to: (a) provide protection to the public dealing with a business establishment through disclosure of the identity and citizenship of the person owning the business; and (b) to prevent a business establishment from using a name that is identical or confusingly similar to the name of another business establishment.[10]

The law merely recognizes the existence of a sole proprietorship as a form of business organization conducted for profit by a single individual and requires its proprietor or owner to secure licenses and permits, register its business name, and pay taxes to the national government.[11]

Generally, a sole proprietor uses his own funds to finance his business. In the event he takes out a business loan in a bank or any other financing institution, he shall use his own properties for collateral, and shall be primarily liable for the payment of said loan. In addition, the sole proprietor is personally liable for all the debts and obligations of the business.[12] Hence, the personal properties of the sole proprietor shall answer for the debts and obligations of the business enterprise.

2.1.1.2 Partnership

By the contract of partnership two or more persons bind themselves to contribute money, property, or industry to a common fund, with the intention of dividing the profits among themselves.[13] The partnership has a juridical personality separate and distinct from that of each of the partners.[14] Generally, a partnership may be constituted in any form, whether verbally or in writing, except where immovable property or real rights are contributed. Where

[8] Excellent Quality Apparel, Inc. vs. Win Multi Rich Builders, Inc., represented by its President, Wilson G. Chua, GR No. 175048, 10 February 2009.
[9] Act No. 3883, as amended by Act No. 4147, Section 1. It shall be unlawful for any person to use or sign, on any written or printed receipt, including receipt for tax on business, or on any written or printed contract not verified by a Notary Public, or on any written or printed evidence of any agreement or business transactions, any name used in connection with his business other than his true name, or keep conspicuously exhibited in plain view in or at the place where his business is concluded, if he is engaged in a business, any sign announcing a firm name or business name or style, without first registering such other name, or such firm name, or business name, or style, in the Bureau of Commerce (now Department of Trade and Industry) together with his true name and that of any other person having a joint or common interest with him in such contract, agreement, business transaction, or business.
[10] DTI Department Order No. 10-01, Series of 2010, "Revised Implementing Rules and Regulations of Act No. 3883, as Amended , Otherwise Known as the Business Name Law", Rule I, Section 1.
[11] Ibid.
[12] Excellent Quality Apparel, Inc. vs. Win Multi Rich Builders, Inc., represented by its President, Wilson G. Chua, GR No. 175048, 10 February 2009.
[13] Civil Code of the Philippines, Republic Act No. 386, Article 1767.
[14] Ibid., Article 1768.

such assets are contributed, the partnership agreement must appear in a duly notarized document (i. e., a public instrument).[15]

In addition, a partnership with a capital of three thousand pesos (P3,000.00) or more, whether in money or property, must be registered with the Securities and Exchange Commission (SEC).[16]

The partnership assets answers for the contractual obligations of the partnership, entered into in its name and for its account. After all the partnership assets have been exhausted, and the partnership debts have not yet been fully settled, the partners are liable pro rata with all their properties.[17] However, in a limited partnership, the limited partners are not personally liable for the obligations of the partnership.[18] The limited partner shall be liable only up to his capital contribution.

As to its object, a partnership may either be universal or particular. A universal partnership may either refer to all present property or to all the profits. In universal partnership of all present property, the partners contribute all properties belonging to them to a common fund, with the intention of dividing the same and all profits earned from them, among themselves. All the properties owned by the partners at the time of the constitution of such partnership, and all profits earned from them, become the common property of all the partners. On the other hand, a universal partnership of all profits consists all the properties or earnings that the partners may acquire from their industry or work during the existence of the partnership. If the articles of partnership do not indicate its nature, it is considered a universal partnership of all profits.[19]

A particular partnership has for its object determinate things, their use or fruits, or specific undertaking, or the exercise of a profession or vocation.[20] Among the most common type of particular partnership are general professional partnerships, which are partnerships formed by persons for the sole purpose of exercising their common profession.[21] Another is a joint venture.

The legal concept of a joint venture is of common law origin. While it has no precise legal definition, it has been generally understood to mean an organization formed for some temporary purpose. Under the common law, a partnership contemplates a general business with some degree of continuity, while a joint venture is intended to execute a single transaction. This makes joint ventures temporary in nature. However, under Philippine law, since the laws of partnership include a particular partnership that may be created for a specific undertaking, it covers joint ventures. Thus, joint ventures are governed by the law on partnerships.

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[15] Ibid., Article 1771.
[16] Ibid., Article 1772.
[17] Ibid., Article 1816.
[18] Ibid., Article 1843.
[19] Ibid., Articles 1777 to 1781.
[20] Ibid., Article 1783.
[21] *Tax Reform Act of 1997,* Republic Act No. 8424, Section 22(B).

A joint venture is the most common entity formed to execute large infrastructure contracts either for the government or as a private undertaking. In some instances several partners form a consortium, where one party provide the financing, another the industry, and another the operation and maintenance of the finished works. For these types of arrangement, the parties either execute a joint venture agreement (or consortium agreement) or form a joint venture corporation. While generally, corporations cannot form partnerships, the Supreme Court has held that a corporation may engage in a joint venture.[22] This means that the relationship between the joint venture partners as well as their relationship with the rest of the world is governed by the law on partnership. However, if a joint venture corporation is formed, it will need to comply with the provisions of the Corporation Code with respect to, among others, the requirements for incorporation (such as the requirement to have at least 5 incorporators), reporting requirements after incorporation, and meeting requirements.

2.1.1.3 Corporation

A corporation is an artificial being created by operation of law, having the right of succession and the powers, attributed, and properties expressly authorized by law or incident to its existence.[23] It has a personality separate and distinct from its stockholders. It may be established either by registering with the Securities and Exchange Commission (SEC) in accordance with the provisions of the **Corporation Code**, or by **special law**.[24] Those created by special laws are governed by the provisions of these laws and supplemented by the Corporation Code, as may be applicable.[25]

2.1.1.4 Stock and non-stock corporations

Corporations created under the Corporation Code may either be stock or non-stock. Stock corporations are corporations with capital stock divided into shares and authorized to distribute to the holders of such shares dividends or allotments of the surplus profits on the basis of the shares held.[26]

While there are generally no minimum authorized capital stock required for stock corporations (except as specifically provided for by special law),[27] they are required to subscribe to at least 25% of their authorized capital stock and paid at least 25% of such subscription, which should in no case be less than PhP5,000.00.[28] However, various laws regulating certain specific industries impose minimum paid-in capital requirements to entities operating within these industries. These will be discussed in greater detail below on the analysis of existing regulatory barriers to services trade.

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[22] Information Technology Foundation of the Phil. V. Commission on Elections, G. R. No. 159139, 13 January 2004, citing Aurbach, et al. v. Sanitary Wares Manufacturing Corporation, et al., G.R. No. 75875, 15 December 1989, 180 SCRA 130.
[23] *Corporation Code of the Philippines*, Batas Pambansa Blg. 68, Section 2.
[24] Ibid., Section 14.
[25] Ibid., Section 4.
[26] Ibid., Section 3.
[27] Ibid., Section 12.
[28] Ibid., Section 13.

The incorporators of a corporation should not be not less than five (5) but not more than fifteen (15) natural persons. They must all be of legal age and a majority should be residents of the Philippines. Each of these incorporators must own or be a subscriber to at least one (1) share of the capital stock of the corporation.[29]

The board of directors of the corporation is authorized to exercise all the powers granted by law to the corporation, conduct its business and control its assets. The stockholders of the corporation periodically elect such board.[30] The powers of the board to oversee the operations of the corporation include the election and appointment of its officers. Such officers may consist of the president, who should be a director; a treasurer who may or may not be a director; and a secretary, who must be a resident and citizen of the Philippines. The corporate by-laws may provide for other officers designated to manage the corporation. The officers of the corporation may hold any two more positions concurrently, except that no one shall act as president and secretary or as president and treasurer at the same time.[31]

Non-stock corporations, on the other hand, are corporations whose capital are not divided into shares and are not authorized to distribute surplus profits to its members on the basis of shares held are non-stock corporations. [32] These corporations are usually non-profit corporations formed or organized for charitable, religious, educational, professional, cultural, fraternal, literary, scientific, social, civic service, or similar purposes, like trade, industry, agricultural and like chambers, or any combination thereof.[33] For purposes of this report, we will only focus on stock corporations organized for profit or public corporations mandated to perform public functions.

2.1.2 Secondary registrations

After securing their primary registrations, to lawfully do any business, these business entities, regardless of form, are required to secure a barangay clearance[34] and a mayor's permit[35] from the local government where their principal businesses are located. Applying for a Business Permit requires the approval of several agencies under the LGU such as the City/Municipal Health Department that issues Sanitary Permits, the City/Municipal Building Official who grants Certificates Electrical Inspection and Mechanical Permits, and the City/Municipal Fire Department.

[29] Ibid., Section 10.
[30] Ibid., Sections 23 and 24.
[31] Ibid., Section 25.
[32] Ibid., Section 3.
[33] Ibid., Section 88.
[34] Local Government Code of 1991 (LGC), Section 152 (c) which states, "Barangay Clearance – No city or municipality may issue any license or permit for any business or activity unless a clearance is first obtained from the barangay where such business or activity is located or conducted. For such clearance, the sangguniang barangay may impose a reasonable fee. The application for clearance shall be acted upon within seven (7) working days from the filing thereof. In the event that the clearance is not issued within the said period, the city or municipality may issue the said license or permit.
[35] Ibid., Section 455 (b)(3)(iv), which states, "Issue licenses and permits and suspend or revoke the same for any violation of the conditions upon which said licenses or permits had been issued, pursuant to law or ordinance;"

Business entities are also required to register as taxpayers with the Bureau of Internal Revenue (BIR).[36] In addition they are required to register as employers and their respective employees with the Social Security System (SSS),[37] Philippine Health Insurance Corporation (PHIC),[38] and the Home Development Mutual Fund (HDMF) for Pag-IBIG Fund,[39] for purposes of securing for their employees the mandatory social benefits provided by law.

2.1.3 Requirement of prior endorsement from regulatory agency

In certain industries, before a business enterprise can register with the SEC, it is required to secure the endorsement of the agency having jurisdiction over the industry where the business will operate, or other departments within the SEC. These are as follows:

Table 1. List of industries that require endorsement from responsible agencies before registering with the SEC[40]

No.	Industry	Regulatory Agency
1	Investment company, Financing and Lending companies, issuers of proprietary or non-proprietary membership (i.e. golf clubs), listed and public companies and foundation	Corporate Governance and Finance Department, SEC
2	Capital Market Institutions (i.e. Exchange, Broker, Dealer, Investment House and others	Markets and Securities Regulation Department, SEC
3	Air Transport	Civil Aeronautics Board
4	Bank, Pawnshop and other Financial Intermediaries with Quasi-Banking Functions	Bangko Sentral ng Pilipinas
5	Educational Institution: (stock & non-stock)	
	Elementary	Department of Education
	College, Tertiary Course	Commission on Higher Education
	Technical Vocational Course	Technical Education Skills and Development Authority
6	Electric Power Plant/Trading of Petroleum Products	Department of Energy
7	Hospital, Dental, Medical Clinics	Department of Health
8	Insurance/Mutual Benefit Association/ Health Maintenance Organization	Insurance Commission
9	Money Changer and Remittance Services	Bangko Sentral ng Pilipinas
10	Non-Chartered Government Owned and Controlled Corporation	Government Commission for Government-owned and Controlled Corporation
11	Professional Association	Professional Regulation Commission
12	Radio, TV, Telephone, Internet Service Providers,	National Telecommunications

[36] *Tax Reform Act of 1997,* Republic Act No. 8424, Section 236 (A)(2).
[37] *Social Security Law,* Republic Act No. 8282, Sections 2, 9 and 9-A.
[38] *National Health Insurance Act of* 1995, Republic Act No. 7875, as amended by RA 9241 and RA 10606, Section 5.
[39] *Home Development Mutual Fund Law of 2009, otherwise known as Pag-IBIG (Pagtutulungan sa kinabukasan: Ikaw, Bangko, Industriya, Gobyerno) Fund,* Republic Act No. 9679, Section 6.
[40] Endorsement Clearance, SEC website. http://www.sec.gov.ph/wp-content/uploads/2015/01/Endorsement-Clearance.pdf (accessed August 19, 2017)

	Value-Added Service Provider	Commission
13	Recruitment for Overseas Employment	Philippine Overseas Employment Administration
14	Security Agency/ Anti-Crime Task Force	Philippine National Police
15	Tobacco Related Business	National Tobacco Administration
16	Volunteer Fire Brigade	Bureau of Fire Protection
17	Vessel/Ship Operation, Ship Management. Shipbuilding, Ship Repair, Shipping Agency, Ship Husbanding, Ship Chandling and other Maritime related activities	Maritime Industry Authority
18	Water Service Providers and Waterworks	Local Waterworks Utilities Administration /Manila Waterworks and Sewerage Systems

Based on the above, there are about 18 industries, most of these in the services industry that require entrants to secure clearances from their respective regulatory authorities before they can register with the SEC and operate in the Philippines.

Note though that the prior endorsement from regulatory agencies before incorporation with the SEC is different from the licenses to operate granted by various regulatory agencies. These licenses are requirements after incorporation with the SEC but before start of operations of a corporation, required by regulatory agencies before regulated companies can do business. These licenses are sometimes referred to as Accreditation, Permit to Operate, Authority to Operate, and License to Operate, among others. This includes those required by the FDA. There are quite a number of these requirements across various regulatory agencies, depending on the activity to be engaged in by the business entity. Securing these licenses have its own set of challenges that may best be addressed in detail in another study.

The discussion above, based on applicable laws and usage by regulatory agencies, interchangeably uses registration, permits and licenses to describe the process by which entities qualify to do business. Philippine law and regulations do not generally provide a clear distinction between these terms. In fact, Section 2, Chapter I, Book VII of the Administrative Code defines license as:

> "(10) '**License**' **includes** the whole or any part of any agency **permit**, certificate, passport, clearance, approval, **registration**, charter, membership, statutory exemption **or other form of permission, or regulation of the exercise of a right or privilege**."

Since the Administrative Code governs the structural, functional and procedural principles and rules of governance in the Philippine government, [41] its definitions apply to all

[41] Executive Order No. 292 of July 25, 1987, Instituting the "Administrative Code of 1987", 3rd WHEREAS clause.

government agencies in all branches of government, unless specific laws provide a different definition.

Thus, distinctions will not be found in the express definition of registration, permit or license but in the right or privilege granted by law and implemented by the regulating agency. For example, in the registration of the business name of a sole proprietorship in the DTI, the right or privilege granted is simply the right to use the registered business name. Such registration does not in any way affect the personal liability of the proprietor for business debts.

On the other hand, registration of corporations with the SEC vests such corporation with personality that is separate and distinct from its owners/shareholders. The corporation becomes an "*artificial being created by operation of law* [i. e., BP Blg. 68], *having the right of succession and the powers, attributes and properties expressly authorized by law or incident to its existence*."[42]

Registrations with the BIR, and the social agencies simply involve the inclusion of the registrant in some form of official database for purposes of monitoring of the compliance of these registrants with applicable laws implemented by these agencies.

2.2 Number of incorporators

As noted above, a corporation needs to have at least five (5) incorporators who are natural persons before it can be established and organized. This poses certain difficulties to new entrants that may deter entry and expansion into the services trade sector in the Philippines for the following reasons:

a. Single investors, whether individual or corporate, face the added difficulty of looking for at least 4 nominee shareholders to meet the incorporation requirement, even if these shareholders are not necessary either for the company's financing or business operations, or may are qualified as independent directors.

b. Foreign investors intending to invest in the Philippines, and who are unfamiliar with Philippine culture and its business environment may be exposed to untrustworthy nominee shareholders who have easy access to confidential business matters and could potentially cause damage to the investors, whether financial or otherwise. This affects Mode 3 in the modes of supply of services.

c. It discourages individual entrepreneurs from establishing corporations, which will allow them to enter the formal sector and gain better access to financing. By default, entrepreneurs, especially small entrepreneurs choose a single proprietorship. This places them at greater financial risk, as single proprietors are personally liable for business debts unlike corporations or limited partnerships where the shareholders or partners are liable only up to the extent of their capital contribution in the corporation

[42] *Corporation Code of the Philippines*, Batas Pambansa Blg. 68, Section 2.

or partnership.

LEGAL AND REGULATORY COMPLIANCE REQUIREMENTS

2.3 Rules on shareholder and board meetings

Section 51 of the Corporation Code provides that "stockholders' or members' meetings, whether regular or special, shall be held in the city or municipality where the **principal office of the corporation is located**, and if practicable in the **principal office of the corporation**." The Securities and Exchange Commission interpreted this to mean that the shareholders must be in the **same** place during the meeting.

In SEC Opinion No. 16-01, the SEC declared that teleconferencing, either through video conferencing, computer conferencing or audio conferencing, for shareholders' meetings do not meet the requirement for meeting in the location of the principal office of the corporation or in the principal office itself. It notes that in teleconferencing, the participants are in different places although their communication with each other is facilitated through an electronic medium. It can only facilitate the linking of people but it does not alter the complexity of group communication. Although it may be easier to communicate through teleconferencing, it may also be easier to miscommunicate. In the SEC's opinion, teleconferencing cannot satisfy the individual needs of every meeting.

In addition, the SEC also noted a previous opinion where it stated that, "in cases where the law requires a duly called meeting to carry out a corporate transaction, 'constructive' or 'electronic presence is not a substitute for 'actual presence.'"[43]

However, in the case of Board meetings, the SEC allows these to be conducted via teleconferencing or videoconferencing. It cites Section 53 of the Corporation Code, which allows Board meetings to be held anywhere in or outside the Philippines.[44]

This inconsistent treatment of corporate meetings creates additional cost to shareholders (who could also be the directors of the company) especially foreign or non-resident shareholders who may need to travel to the Philippines for annual shareholders' meetings. While these shareholders can assign proxies to attend these meetings, there is a greater risk of miscommunication when using proxies than if shareholders themselves attend via teleconferencing.

This requirement may materially affect a foreign or non-resident investor's decision to invest in the Philippines if a comparable economy in Southeast Asia provides greater facility for corporate decision-making than in the Philippines.

[43] Ltr. To Wilma M. Valdemoro-Cua dated September 10, 1993; SEC Opinion addressed to Ms. Ma. Pelita B. Donato-Viliran dated 4 August 1998, citing SEC Opinion addressed to Atty. Victo Africa dated 25 March 1981.
[44] SEC Memorandum Circular No. 15, series of 2001 dated 20 November 2001.

2.4 Foreign Investment

The Foreign Investments Act of 1991 (Rep. Act 7042), as amended by Rep. Act No. 8179, allows 100% foreign equity ownership in Philippine industries that meet the following conditions:

a. export enterprises that export at least 60% of their output or products purchased domestically;[45] and
b. domestic enterprises with:

- US$200,000.00 or more paid-in capital; or
- US$100,000.00 or more paid-in capital, if they deal in advanced technology as determined by the Department of Science and Technology, or employs at least 50 employees.[46]

Foreign entities may establish a local presence through a subsidiary, branch, representative office, regional operating headquarters, and regional or area headquarters. These entities may do business in the Philippines by either registering a subsidiary domestic corporation, or securing a license to do business in the Philippines as a branch, representative office, regional operating headquarters or regional or area headquarters with the SEC.

There is no general rule or principle governing what constitutes "doing" or "engaging in" or "transacting" business in the Philippines under Philippine law with respect to a foreign corporation. Each set of acts or works of an enterprise must be judged by its own set of peculiar circumstances. The term, however, implies a continuity of commercial dealings and arrangements and contemplates the performance of acts or works or the exercise of some of the functions normally incident to, and in progressive prosecution of, the purpose and object of a foreign corporation's organization.[47] The FIA and its implementing regulations cites the following as examples:

a. Soliciting orders, service contracts, opening offices, whether liaison offices or branches;
b. Appointing representatives or distributors, operating under full control of the foreign corporation;
c. Domiciled in the Philippines or who in any calendar year stay in the country for a period or periods totaling one hundred eighty (180) days or more;
d. Participating in the management, supervision or control of any domestic business, firm, entity or corporation in the Philippines.[48]

The FIA also cites the following acts, as not deemed to be "doing business" in the Philippines:

[45] *Foreign Investments Act of 1991*, Republic Act No. 7042, as amended by Rep. Act No. 8179, Sections 3(e) and 6.
[46] Ibid., Sections 3(e), 7 and 8.b.2, 2nd par.
[47] Mentholatum Co., Inc. v. Mangaliman, G.R. No. 47701, 27 June 1941; *See* Rep. Act No. 7042, as amended by Rep. Act No. 8179, Section 3 (d); Implementing Rules and Regulations of Rep. Act No. 7042, Section 1(f).
[48] *Foreign Investments Act of 1991*, Republic Act No. 7042, as amended by Rep. Act No. 8179, Section 3 (d); Implementing Rules and Regulations of Rep. Act No. 7042, Section 1(f).

i. Mere investment as a shareholder by a foreign entity in domestic corporations duly registered to do business, and/or the exercise of rights as such investor;
ii. Having a nominee director or officer to represent its interests in such corporation;
iii. Appointing a representative or distributor domiciled in the Philippines which transacts business in the representative's or distributor's own name and account;
iv. The publication of a general advertisement through any print or broadcast media;
v. Maintaining a stock of goods in the Philippines solely for the purpose of having the same processed by another entity in the Philippines;
vi. Consignment by a foreign entity of equipment with a local company to be used in the processing of products for export;
vii. Collecting information in the Philippines; and
viii. Performing services auxiliary to an existing isolated contract of sale which are not on a continuing basis, such as installing in the Philippines machinery it has manufactured or exported to the Philippines, servicing the same, training domestic workers to operate it, and similar incidental services.[49]

For the acts that are not deemed "doing business" in the Philippines, as enumerated above, the foreign entity is not required to either register a subsidiary or secure a license to do business in the Philippines, even while they perform these acts in relation to transactions in the Philippines.

2.4.1 Foreign-owned domestic corporation

Under various Philippine statutes and regulations, a subsidiary or a majority-owned subsidiary is generally a corporation 50% or more than 50% of the voting stock of which is owned or controlled directly or indirectly through one or more intermediaries by another corporation, which thereby becomes its parent corporation.[50] It is established and registered to do business in the Philippines under Philippine corporation laws. Such subsidiary, even if owned by a foreign entity, is considered a domestic corporation.

These subsidiaries, if not operating in nationalized industries (See discussion in item F below), may operate either as an export enterprise as defined under the FIA at a minimum capitalization of PhP5,000.00[51] or as a domestic enterprise for a minimum capitalization of USD100,000 or USD200,000, as the case may be.

In contrast, domestic corporations owned by Philippine citizens need not comply with the export requirement for export enterprises or the minimum capitalization requirement for domestic enterprises owned 100% by foreign entities. This places a greater burden on

[49] Ibid., Section 3 (d); Implementing Rules and Regulations of Rep. Act No. 7042, Section 1(f).
[50] *Investment Company Act*, Republic Act No. 2629 of 1960, Section 3(s), for publicly listed corporations; Revenue Regulations No. 17-10 (*Consolidated Regulations Implementing Republic Act No. 7646, An Act Authorizing the Commissioner of Internal Revenue to Prescribe the Place for Payment of Internal Revenue Taxes by Large Taxpayers and Prescribing the Coverage and Criteria for Determining Large Taxpayers*), Section 3.10, for tax purposes; Pres. Decree No. 2029 (1986), Defining Government-Owned or Controlled Corporations and Identifying their Role in National Development, Section 2, for government-owned and controlled corporations.
[51] *See Corporation Code of the Philippines*, Batas Pambansa Blg. 68, Section 13.

foreign entities investing in the Philippines. This burden is justified by the FIA in its declaration of policy, to wit:

> "It is the policy of the State to attract, promote and welcome **productive investments from foreign** individuals, partnerships, corporations, and governments, including their political subdivisions, in activities, which **significantly contribute to national industrialization and socio-economic development to the extent that foreign investment is allowed in such activity by the Constitution and relevant laws**. Foreign investments shall be encouraged in enterprises that **significantly expand livelihood and employment opportunities for Filipinos**; enhance **economic value of farm products**; promote the **welfare of Filipino consumers**; expand the scope, quality and volume of **exports and their access to foreign markets**; and/or **transfer relevant technologies in agriculture, industry and support services**. **Foreign investments** shall be welcome as a **supplement to Filipino capital and technology** in those enterprises serving mainly the **domestic market**.
>
> As a general rule, there are no restrictions on extent of foreign ownership of export enterprises. In domestic market enterprises, foreigners can invest as much as one hundred percent (100%) equity except in areas included in the negative list. Foreign owned firms catering mainly to the domestic market shall be encouraged to undertake measures that will gradually **increase Filipino participation in their businesses** by taking in Filipino partners, electing Filipinos to the board of directors, implementing **transfer of technology** to Filipinos, **generating more employment** for the economy and **enhancing skills of Filipino workers**."[52] (Emphasis Supplied)

Based on the above, the entry of foreign investments in the Philippines is intended to achieve the following policy objectives:

i. it significantly contributes to national industrialization and socio-economic development to the extent that foreign investment is allowed by the foreign ownership restrictions imposed by the Constitution and other applicable laws;
ii. it significantly expands livelihood and employment opportunities for Filipinos, as well as enhance the skills of Filipino workers;
iii. it enhances the economic value of farm products;
iv. it promote the welfare of Filipino consumers;
v. it expands the scope, quality and volume of exports and their access to foreign markets;
vi. it transfers relevant technologies in agriculture, industry and support services;
vii. it supplements Filipino capital and technology in the domestic market; and
viii. it increases Filipino participation in the businesses of the foreign entities.

Whether the policy tool adopted to achieve the objectives of the FIA, i. e., the requirements for foreign ownership in export and domestic enterprises, together with the Constitutional and statutory foreign ownership limitations in certain industries, effectively accomplishes the above policy objectives, must be assessed by examining their impact on the economy,

[52] *Foreign Investments Act of 1991*, Republic Act No. 7042, as amended by Rep. Act No. 8179, Section 2.

including on labor market skills, technology development, export development, and consumer welfare.

As it is, the differences in treatment under the FIA of Philippine-owned enterprises and foreign-owned enterprises pose a significant barrier to foreign-owned enterprises.

2.4.2 Foreign corporations

A foreign corporation is an entity organized and existing under the laws of a foreign country whose laws allow Filipino citizens and corporations to do business in its own country or state.[53] Foreign corporations are allowed to do business in the Philippines by securing a license to operate in the Philippines through the SEC,[54] either as a branch office, a representative office, a regional or area headquarters or a regional operating headquarters.

2.4.2.1 Branch office

A branch office of a foreign company carries out the business activities of the foreign head office and derives income from the Philippines.[55] To do business and derive income in the Philippines through a branch office, such foreign company must secure a license to transact business with the SEC, subject to the following conditions:

- The laws of the country of incorporation of the foreign corporation allow Filipino citizens and corporations to do business in such country;
- The foreign corporation is in good standing;
- The foreign corporation is solvent and in sound financial condition;
- The foreign corporation has secured an authority from the applicable Philippine regulatory government agency having jurisdiction over the industry where foreign corporation intends to do business in the Philippines;[56]
- Once it secures a license from the SEC, the branch office may continue to operate within the Philippines as long as its foreign head office retains its corporate registration in its country of incorporation;
- To provide reasonable assurance that the branch office is capable of settling its obligations incurred in the Philippines, a branch office is required to deposit and maintain securities (e. g., Philippine government securities, shares of stocks in domestic corporations) with the SEC at any given time amounting to 2% of the amount by which a licensee's gross income for a given fiscal year exceeds PhP5 million.[57]

A branch office of a foreign company is an extension of such company in the Philippines. Thus, it is considered a 100% foreign owned enterprise. To operate in the Philippines, in addition to the securities it is required to deposit and maintain with the SEC, a branch must also comply with the FIA requirements for either an export or domestic enterprise for non-nationalized industries. As a 100% foreign owned enterprise, it cannot by itself engage in

[53] *Corporation Code of the Philippines*, Batas Pambansa Blg. 68, Section 123.
[54] Ibid., Sections 123, 125 to 126.
[55] Implementing Rules and Regulations of Republic Act No. 7042 (Foreign Investments Act), Section 1(c).
[56] *Corporation Code of the Philippines*, Batas Pambansa Blg. 68, Section 125.
[57] Ibid., Section 126.

any of the nationalized industries, unless it enters into a joint venture with Philippine companies and maintain the percentage of foreign ownership allowed by the applicable law in such joint venture.

2.4.2.2 Representative office

A representative or liaison office deals directly with the clients of the foreign corporation but does not derive income from the Philippines and is fully subsidized by such corporation. It undertakes activities such as but not limited to information dissemination and promotion of the company's products as well as quality control of products.[58] It is required to remit an initial capitalization of USD30,000.00 as working capital and maintain a resident agent in the Philippines.

A representative office performs limited functions. It cannot engage in the operations of the foreign corporation's business in the Philippines, except for the activities indicated above.

2.4.2.3 Regional or Area Headquarters (RHQ)

A regional or area headquarters is an office whose purpose is to act as an administrative branch of a multinational company engaged in international trade which principally serves as a supervision, communications and coordination center for its subsidiaries, branches or affiliates in the Asia-Pacific Region and other foreign markets. It does not earn or derive income in the Philippines[59] and does not participate in the management or operations of any subsidiary or branch of its foreign head office in the Philippines. It is also required to remit and maintain a working capital of USD50,000.00 for operating expenses.

The FIA does not provide a definition of an affiliate or a subsidiary. With respect to these types of words and phrases that are not defined in the enabling law, the Supreme Court has ruled that, "*It is a rule of statutory construction that words of a statute are to be taken in their natural, plain and ordinary signification in accordance with the common and approved usage of the language, giving to words of common use their popularly accepted meaning and to technical terms or words or art their accepted special signification, unless there is reason to believe from the context of the statute that such works have been used in another sense*."[60]

Black's Law Dictionary refers to affiliate as "*signifying a condition of being united; being in close connection, allied, associated, or attached as a member or branch. xxx An affiliated company is defined as a company effectively controlled by another company*."[61] In business and commerce, two parties are considered affiliates if "*either party has the power to control the other, or a third party controls or has the power to control both. Affiliation also exists in*

[58] Implementing Rules and Regulations of Republic Act No. 7042 (Foreign Investments Act), Section 1(c).
[59] *Omnibus Investments Code*, Executive Order No. 226, as amended by Rep. Act No. 8756, Section 2.2.
[60] Monserrat v. Erma, Inc., G.R. No. 37078, 27 September 1933.
[61] Campbell, B. 1979. *Black's Law Dictionary*. 5th ed. St. Paul, Minnesota: West Publishing Co.

(1) in interlocking directorates or ownership, (2) in identity of interests among members of a family and, (3) where employees, equipment, and/or facilities, are shared."[62]

A subsidiary company, on the other hand, is defined as "*one in which another corporation (i. e., parent) owns at least a majority of the shares, and thus has control. Said of a company more than 50 percent of whose voting stock is owned by another.*"[63] The business and commercial definition of subsidiary *"refer to an enterprise controlled by another (called the parent) through the ownership of greater than 50% of its voting stock*."[64]

Based on the above definitions, an affiliated company is a company that is connected to another through the power of control exercised by either over each other, or by a third company over the other two companies. Percentage of ownership is not the key but the ability to control decision-making in or by the affiliated company. A subsidiary, on the other hand, is a company where another corporation owns more the 50% of its voting stock. In the case of a subsidiary, the ability to have a direct majority vote in a company is the key.

Both affiliates and subsidiaries have separate and distinct personalities from the parent company or other affiliated companies. A branch is different from these entities since a branch is merely an extension of the head office of the company with no separate or distinct personality from such head office.

One of the necessary consequences of this distinction is in the extent of the liability of the related companies. While the parent or affiliated companies of the subsidiary or affiliates are shielded from the liabilities of the subsidiary or affiliate, the head office of the branch remains directly liable for the liabilities incurred by such branch.

2.4.2.4 Regional Operating Headquarters (ROHQ)

A regional operating headquarters is a foreign business entity that is allowed to derive income in the Philippines by performing qualifying services to its affiliates, subsidiaries or branches in the Philippines, in the Asia-Pacific Region and in other foreign markets.[65] The services that an ROHQ may provide to its regional affiliates, subsidiaries and branches are:

a) General administration and planning;
b) Business planning and coordination;
c) Sourcing/procurement of raw materials and components;
d) Corporate finance advisory services;
e) Marketing control and sales promotion;
f) Training and personnel management;
g) Logistics services;
h) Research and development services, and product development;
i) Technical support and maintenance;

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[62] BusinessDictionary website. Affiliate. http://www.businessdictionary.com/definition/affiliate.html (accessed on November 2017).
[63] Black's Law Dictiionary, 5th ed., Merriam & Webster, Inc. (1979): 1280.
[64] BusinessDictionary website, http://www.businessdictionary.com/definition/subsidiary.html.
[65] Ibid., Section 2.3.

j) Data processing and communication; and
k) Business development.[66]

An ROHQ is also required to remit an initial paid-in capital of USD200,000.00.

Of the above foreign-owned corporations and foreign corporations licensed to do business in the Philippines, only subsidiary corporations and branches of foreign corporations may operate and derive income from the Philippine domestic market or operate as an export enterprise. An ROHQ may derive income but only for services provided to the foreign corporation's affiliates, subsidiaries and/or branches in the Philippines, the Asia Pacific region or in other foreign markets. All the other offices of foreign corporations are authorized to do specific services for the foreign corporation's affiliates, subsidiaries and/or branches in the Philippines, the Asia Pacific region or in other foreign markets but do not derive income from it.

Based on the above, for foreign corporations intending to invest in the Philippines, it is a challenge to navigate the rules and requirements for Philippine corporate registrations and operations. This by itself poses a barrier to these corporations into the service trade sector in the Philippines.

2.4.3 Effect of Operating Without a License

If the foreign entity fails to secure such a license, it cannot sue before Philippine courts or administrative agencies. This means that it cannot enforce its rights under any contract before Philippine courts and/or administrative agencies. The corporation and/or its responsible officers will also be subject to criminal penalties of a fine ranging from PhP1,000 to PhP10,000 or imprisonment of not less than 30 days but not more than 5 years, or both.[67]

In relation to the above, the Supreme Court ruled though that contracts entered into by a foreign corporation doing business in the Philippines without first securing a license will still remain valid and enforceable. The requirement of registration affects only the remedy (that is, whether it can sue before Philippine courts to enforce its contracts).[68] However, foreign corporations that do not have the requisite license may still sue before Philippine courts in the following instances: (a) when a corporation seeks redress for an isolated transaction;[69] (b) to protect its corporate reputation, name and goodwill, such as an action for infringement and unfair competition;[70] (c) to enforce its right not arising out of a business transaction;[71] and (d) when a party is estopped to challenge the personality and capacity of a foreign corporation by having acknowledged the same by entering into a contract with it (principle of estoppel).[72]

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[66] Ibid., Section 59(b)(1).
[67] *Corporation Code of the Philippines,* Batas Pambansa Blg. 68, Sections 123, 133 and 144.
[68] Home Insurance Company v. Eastern Shipping Lines, G.R. Nos. L-34382 and L-34383, 20 July 1983.
[69] New York Marine Managers, Inc. v. Court of Appeals, et al, G.R. No. 111837, 24 October 1995.
[70] Western Equipment & Supply Co. v. Reyes, 51 Phil 115, 1927.
[71] Swedish East Asia Co., Ltd. v. Court of Appeals, G.R. No. 97816, 26 October 1968.
[72] Merrill Lynch Futures, Inc. v. Court of Appeals, G.R. No. 97816, 24 July 1992.

2.5 Foreign ownership in business enterprises

As discussed above, foreign entities can maintain commercial presence in the Philippines either through a domestic subsidiary, branch, representative office, regional or area headquarters and regional operating headquarters. However, the Constitution and various laws also impose specific limitations on foreign ownership of business enterprises in certain industries. These are as follows:

2.5.1 Constitutional foreign ownership limitations

Table 2. Constitutional Limitations on Foreign Participation

Sector	Allowed % of foreign ownership	Source
Mass media	0%	Art. XVI, Sec.11.1
Practice of profession	0%	Art. XII, Sec. 14
		Rep. Act No. 5181 (1967)[73]
		Rep. Act No. 8981 (2000), Section 7j(PRC Modernization Act)
Pharmacy		Rep. Act No. 5921
Radiology and x-ray technology		Rep. Act 7431
Criminology		Rep. Act 6506
Forestry		Rep. Act 6239
Law		Constitution, Art. VIII, Section V; Rule 138, Sec. 2 of the Rules of Court
Manufacture, repair, stockpiling and/or distribution of nuclear weapons	0%	Art. II, Sec. 8
Advertising	30%	Art. XVI, Sec. 11.2
Exploration, development and utilization of natural resources	40%	Art. XII, Sec. 2.
Public utilities	40%	Art. XII, Sec. 11
Operation and management of public utilities	40%	Com. Act 146 (1936),[74] Sec. 16
Project proponent and facility operator of a BOT project requiring a public utilities franchise	40%	Rep. Act No. 6957 (1990)[75] as amended by Rep. Act No. 7718 (1994),[76] Sec. 2a
Ownership/establishment and administration of educational institutions	40%	Art. XIV, Sec. 4

Source: Foreign Investments Negative List 2015; Author's compilation

2.5.2 Statutory foreign ownership limitations in certain industries

The Constitution also mandates Congress and the government to:

[73] *An Act Prescribing Permanent Residence and Reciprocity as Qualifications for any Examination or Registration for the Practice of any Profession in the Philippines*, Republic Act No. 5181.
[74] *Public Service Act*, Commonwealth Act No. 146, as amended and modified by PD No.1 and Executive Order No. 546.
[75] *An Act Authorizing the Financing, Construction, Operation and Maintenance of Infrastructure Projects by the Private Sector, and for Other Purposes*, Republic Act No. 6957.
[76] *An Act Amending Certain Sections of Republic Act No. 6957*, Republic Act No. 7718.

- reserve certain areas of investment to Philippine citizens, or a certain percentage of interest in corporations or associations to Philippine citizens, as dictated by the national interest;
- enact measures that will encourage the formation and operation of enterprises whose capital is wholly owned by Filipinos; and
- regulate foreign investments in accordance with the country's national goals and priorities.[77]

The regulated sectors, as provided by statute are summarized as follows:

Table 3. Statutory Limitations to Foreign Participation

Sector	Allowed % of foreign ownership	Source
Retail trade enterprises with less than PhP2.5 million paid-in capital	0%	Rep. Act. No. 8762, Sec. 5
Cooperatives	0%	Rep. Act No. 6938, Art. 26
Private security agencies	0%	Rep. Act No. 5487, Sec. 4
Small-scale mining	0%	Rep. Act No. 7076, Sec. 3
Ownership, operation and management of cockpits	0%	Pres. Decree No. 449, Sec. 5
Manufacture, repair, stockpiling, and/or distribution of biological and radiological weapons and anti-personal mines	0%	Various treaties and international conventions to which the Philippines is a party
Manufacture of firecrackers and other pyrotechnic devices Manufacture of firecrackers and other pyrotechnic devices	0%	Rep. Act No. 7183 Sec. 5
Small and medium-sized domestic enterprises with paid-in capital of less than US$200,000.00 or US$100,000.00, as the case may be	0%	Rep. Act No. 7042, Sec. 8.b.2
Private radio communication network	20%	Rep. Act No. 3846
Private recruitment, whether for local or overseas	25%	Pres. Decree No. 442, Art. 27
Contracts for construction of defense-related structure	25%	Com. Act No. 541, Sec. 1;
Contracts for the construction and repair of locally-funded public works, with certain exceptions under the BOT Law (Rep. Act No. 7718)	25%	Letter of Intent 630
Culture, production, milling, processing, trading excepting retailing, of rice and corn and acquiring by barter, purchase or otherwise, rice and corn and the by-products thereof	40%	Pres. Decree No. 194, Sec. 5
Contracts for the supply of materials, goods and commodities to government-owned or controlled corporations, company, agency or municipal	40%	Rep. Act No. 5183, Sec. 1

[77] *The Constitution of the Republic of the Philippines.* The 1987 Constitution, Article XII, Section 10. The Congress shall, upon recommendation of the economic and planning agency, when the national interest dictates, reserve to citizens of the Philippines or to corporations or associations at least sixty per centum of whose capital is owned by such citizens, or such higher percentage as Congress may prescribe, certain areas of investment. The Congress shall enact measures that will encourage the formation and operation of enterprises whose capital is wholly owned by Filipinos.
In the grant of rights, privileges and concessions covering the national economy and patrimony, the State shall give preference to qualified Filipinos.
The State shall regulate and exercise authority over foreign investments within its national jurisdiction and in accordance with its national goals and priorities.

corporations		
Operation of deep sea commercial fishing vessels	40%	Rep. Act No.8550, Sec. 27
Ownership of condominium units where the common areas in the condominium projects are co-owned by the owners of the separate units or owned by a corporation	40%	Rep. Act No. 4726, Sec. 5
Manufacture, repair, storage and/or distribution of products and/or ingredients requiring clearance from the Philippine National Police (PNP), Department of National Defense (DND)	40%	Rep. Act 7042, as amended by Rep. Act 8179
Manufacture and distribution of dangerous drugs	40%	Rep. Act 7042, as amended by Rep. Act 8179
Sauna, steam bathhouses, massage clinics and other like activities regulated by law because of risks posed to public health and morals	40%	Rep. Act 7042, as amended by Rep. Act 8179
All forms of gambling, with certain exceptions	40%	Rep. Act 7042, as amended by Rep. Act 8179

Source: Foreign Investments Negative List 2015, as amended by Republic Act No. 10881 (2016); Author's compilation

2.5.3 The Build-Operate Transfer Law

The purpose of the Build-Operate Transfer (BOT) law (Republic Act 6957 s1990 as amended by RA 7188 s1994) was to engage and mobilize the private sector as a partner in bringing about growth and development in the country. It has allowed private sector participation in activities pertaining to infrastructure or development facilities/projects that were previously solely undertaken by government. It has also unbundled the stream of activities related to the provision of these facilities to construction, management and maintenance.

The BOT scheme and its variants apply to a wide range of areas. The law and its implementing rules and regulation have provided a list of what are or may be considered as infrastructure facility or development projects. The list is not encompassing but includes the following:

> "power plants, highways, ports, airports, canals, dams, hydropower projects, water supply, irrigation, telecommunications, railroad and railways, transport systems, land reclamation projects, industrial estates or townships, housing, government buildings, tourism projects, public markets, slaughterhouses, warehouses, solid waste management, information technology networks and database infrastructure, education and health facilities, sewerage, drainage, dredging, and other infrastructure and development projects as may otherwise be authorized by the appropriate Agency/LGU pursuant to the Act or these Revised IRR."

Foreign service suppliers may be engaged in the construction and supply of equipment, and operation and maintenance of infrastructure facilities, except when public utility franchise is required for the operation and management of the facility. In such a case, the law requires the (facility) operator to be a Philippine national, which in case of a corporation must be 60% Filipino owned. This is based on the 1987 Philippine Constitution provision on public utility,

which states that:

> "No franchise, certificate, or any other form of authorization for the operation of a public utility shall be granted except to citizens of the Philippines or to corporations or associations organized under the laws of the Philippines at least sixty per centum of whose capital is owned by such citizens . . ."

The origin of the ownership limitation dates back to the 1935 Philippine Constitution and the Public Service Act of 1936 (Commonwealth Act 146 s1936) carried forward through the 1973 and 1987 Philippine Constitution.

What constitutes public utility in the Philippines is defined in the Public Service Act (as amended), which interchangeably uses public service and public utility, as any person (individual or juridical) that may own, operate, manage or control, for hire or compensation the following:

a) any common carrier, railroad, street railway, traction railway, sub-way motor vehicle, either for freight or passenger, or both with or without fixed route and whether may be its classification, freight or carrier service of any class, express service, steamboat or steamship line, pontines, ferries, and water craft, engaged in the transportation of passengers or freight or both:
b) shipyard, marine railways, marine repair shop, wharf or dock;
c) ice plant, ice-refrigeration plant;
d) canal, irrigation system;
e) gas, electric light, heat and power;
f) water supply and power;
g) petroleum;
h) sewerage system,
i) wire or wireless communications system,
j) wire or wireless broadcasting stations and
k) other similar public services

A comparison of the two lists shows that a significant segment of the deregulated infrastructure projects would fall under the public utility category. The list in the Public Service Act has been amended but the change has been limited to the following:

a) inclusion of sub-way, motor vehicle in the list and clarifying watercraft as small water craft in CA 149 in 1939;
b) exclusion of warehouse from the list, and expanding scope of small watercraft to watercraft in RA 2677 in 1960; and
c) electricity, which as a result of RA 9136 s2001 (Electric Power Industry Reform Act (EPIRA)), unbundled the sector and limited the scope of public utility only to electricity transmission and distribution.

While the BOT law has made a significant milestone and headway in allowing private sector participation in what otherwise would have to be funded and operated by government, it has pulled back on what could have been a bolder initiative. The trimming of the scope of private sector engagement based on nationality effectively restrained competition in the provision of these services. This raises a question if this is efficient in as far as the economy is concerned and whether this choice is optimal.

2.5.4 Foreign equity limitations on Contractors' industry

In addition to the Constitutional and statutory limitations mentioned above, and through an administrative regulation, the contractors' industry is also subjected to foreign ownership limitations.

The industry is governed by Republic Act No. 4566 (1965),[78] otherwise known as the Contractors' License Law. Under such law, applicants for contractors' licenses are required to take the examinations required, have at least two years of experience in the construction industry, and knowledgeable of the building, safety, health and lien laws of the Philippines and the rudimentary administrative principles of the contracting business. A partnership or corporation may qualify as a contractor through its responsible managing officer after the latter presents certain requirements to qualify.[79] The law did not make any distinction between a domestic or foreign business entity.

Under the Contractors' License Law, Philippine Licensing Board for Contractors (PLBC) under the Board of Examiners, now the Professional Regulation Commission (PRC)[80] was authorized to issue the contractors' licenses. However, unlike professional licenses, and as noted above, these licenses may be granted not only to individuals, but also to partnerships, corporations, associations or other organizations. It was issued to authorize the licensees (whether individual or corporate entity) to engage in three classifications of business activity, to wit: (a) general engineering contractor; (b) general building contractor; and (c) specialty contracting.[81]

In addition, the law expressly excludes registered civil engineers and licensed architects performing services in their professional capacity from securing this license.[82] These indicate that the license was never intended as a professional license but as an authority or permit to engage in the contracting business.

In 1980, then President Ferdinand E. Marcos, exercising his legislative powers, issued Presidential Decree No. 1746, "Creating the Construction Industry Authority of the Philippines." It abolished the PLBC and transferred its authority to the Philippine Contractors Accreditation Board (PCAB). PCAB was brought under the jurisdiction of the Construction Industry Authority of the Philippines (CIAP), an agency under the authority of the

[78] *Contractors' License Law,* Republic Act No. 4566.
[79] Ibid., Sections 19 and 20.
[80] Ibid., Section 2.
[81] Ibid., Section 16.
[82] Ibid., Section 14.

Department of Trade and Industry.[83] This is also another indication that the license is not intended as a professional license but as an authority or permit to engage in the contracting business.

In 1989, PCAB issued the Rules and Regulations Governing Licensing of Constructors in the Philippines to implement Rep. Act 4566, as amended (IRR RA4566). IRR RA4566 required that a regular license shall be reserved and issued only to constructor-firms of Filipino sole proprietorship or partnership/corporation with at least 70% (adjusted to 60% under the Omnibus Investment Code, Chapter III, Book II, Article 48) Filipino equity participation and duly organized and existing under Philippine laws.[84] IRR RA4566 does not specify the rationale behind this rule and neither does this appear in both Rep. Act 4566 nor PD 1746.

In 2011, PCAB issued Board Resolution No. 605, Series of 2011, entitled "*Imposition of at Least 60%-40% Filipino-Foreign Equity Participation (Peso Value) and Equivalent Management Control as Prerequisite Requirements for the Grant of the Regular Contractors' License by the PCAB.*" It imposed the 60%-40% Filipino-foreign equity requirement for regular contractor's license. It cited as its rationale that construction contracting is a practice of profession and therefore must comply with the provisions of the Constitution.

This rationale suffers from the following defects:

- The PCAB is now under the authority of the Department of Trade and Industry and not under the Professional Regulation Commission. Thus, the construction industry cannot be described as a practice of profession, as it is not governed by the professional regulation body.

- The imposition of the 60% Filipino equity requirement was made under an implementing rule and not a statute.

Despite these defects, the PCAB continues to implement IRR 4566 and Board Resolution No. 605. Given the current state of the law as outlined above, these are issues that need to be resolved for clarity investors and policymakers. As long as the 60-40 ownership requirement remains in the regulations, even while it is not justified under existing laws, this creates an environment of unpredictability in the interpretation of Philippine laws, which, in turn becomes a barrier to entry of potentially more efficient market players.

As noted in the previous chapter, President Duterte issued Memorandum Order No. 16 (MO 16-2017), entitled, "*Directing the National Economic Development Authority (NEDA) Board and its Member Agencies To Exert Utmost Efforts to Lift or Ease Restrictions on Certain Investment Areas or Activities with Limited Foreign Participation.*" MO 16-2017 ordered NEDA and its member agencies to take immediate steps to lift or ease existing restrictions on

[83] Presidential Decree No. 1746 of Nov. 28, 1980, *Creating the Construction Industry Authority of the Philippines (CIAP)*, Section 3.
[84] Implementing Rules and Regulations of RA 4566 (Contractors' License Law), Section 3.1(a).

foreign participation in certain areas or activities, including contracts for the construction and repair of locally-funded public works.

MO 16-2017 was issued pursuant to the government's zero to 10-point socioeconomic agenda, which includes increasing competitiveness and ease of doing business by, among others relaxing Constitutional restrictions on foreign ownership. The case of the foreign ownership limitation in the contractors' industry is not even a Constitutional or statutory limitation but the result of administrative legislation, which is unconstitutional and invalid.

2.5.5 Interpretation of foreign equity participation in nationalized industries

In the case of *Gamboa v. Teves*,[85] the Supreme Court ruled that the term "capital" in the Constitution refers to controlling interest or shares entitled to vote the board of directors of a corporation. The Court read the Section 11 with Section 19, Article II of the Constitution, which enunciates the State policy to develop a self-reliant and independent economy **effectively controlled by Filipinos**.[86] In this context, the term "capital" in Section 11, Article XII of the Constitution means that "**full beneficial ownership of 60 percent of the outstanding capital stock, coupled with 60 percent of the voting rights, is constitutionally required for the State's grant of authority to operate a public utility**."

In implementing the *Gamboa* decision to all nationalized industries, SEC Memorandum Circular No. 8, series of 2013, required that "the required percentage of Filipino ownership shall be applied to BOTH (a) the total number of shares of stock entitled to vote in the election of directors; AND (b) the total number of shares of stock, whether or not entitled to vote in the election of directors."[87] That is, both the **Voting Control Test** and the **Beneficial Ownership Test** must be applied to determine whether a corporation is a "Philippine national." This means, that 60% of the common shares (entitled to vote the board of directors), and 60% of all outstanding common and preferred shares must by maintained to meet the nationality requirement for public utility corporations and other nationalized industries.

Unless justified by legitimate policy objectives that are the least restrictive to trade, these foreign ownership limitations unnecessarily impede the entry of more efficient and productive market players in the services sector.

2.6 Differences in tax treatment on income

Taxation in the Philippines also poses a challenge to investors. Philippine tax rates are quite high compared to its ASEAN neighbors. As of 2015, the Philippines has the second highest personal income tax rate at 32%, second only to Thailand and Vietnam at 35%. It has,

[85] Gamboa v. Teves et al., G.R. No. 176759, 28 June 2011.
[86] *The Constitution of the Republic of the Philippines.* The 1987 Constitution, Article II, Section 19.
[87] SEC Memorandum Circular No. 8, series of 2013, Section 2.

however, the highest corporate income tax at 30%.[88] Its Value-Added Tax rate is likewise the highest in Asia.[89]

Also, the application of tax laws sometimes places Philippine taxpayers at a disadvantage compared to foreign taxpayers. Interpretation of tax laws at the regulatory is also sometimes not consistent with established principles of tax laws. Some of these circumstances are illustrated in the discussion below.

What is clear though is that the above conditions, not only increase the cost of doing investment in the Philippines, but also create an environment of uncertainty and unpredictability, which discourages investment in the Philippines.

2.6.1 Tax on individuals / single proprietors

The National Internal Revenue Code (NIRC or the Tax Code) imposes varying income tax rates of different classes of taxpayers. Individuals are generally taxed at graduated tax rates between 5% to 32% on taxable income, while corporations are generally taxed at a lower tax rate of 30% of taxable income. Different tax rates are also imposed on non-resident foreign individuals and corporations, as well as on certain income payments.

2.6.1.1 Resident individuals

Under the Tax Code, individual citizens or individual foreign residents are taxed at graduated rates from 5% to 32% of their taxable income. Progressively increasing tax rates are imposed on higher taxable income.[90] Taxable income is the items of gross income defined by the Tax Code less the deductions and/or personal exemptions and additional exemptions, if any, authorized for such types of income by the Tax Code or other special laws.[91]

Individual citizens are taxed on their taxable income from all sources, whether from within or without the Philippines.[92] Foreign individual residents, on the other hand, are taxed only on their taxable income sourced from within the Philippines.[93] If the country where the individual foreign resident is a citizen imposes income tax rates on taxable income lower than that imposed by the Philippines, an individual Philippine citizen will be at a disadvantage even if its foreign sourced income is from the same country of citizenship of the individual foreign resident. Because, while the individual foreign resident enjoys the lower income tax rates of its country of citizenship, the individual Philippine citizen will still apply the 32% income tax rate on its foreign-sourced income.

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[88] Dela Paz, C. 2015. Why PH has 2nd highest income tax in ASEAN. Rappler. https://www.rappler.com/business/governance/107617-philippines-highest-income-tax-asean (accessed on November 2017).
[89] Runckel & Associates, Inc. Table of tax comparison: Taxes and mandatory contributions that a medium-size company must pay or withhold in a given year in Asia. Business-in-Asia.com. http://www.business-in-asia.com/asia/taxation_asia.html (accessed November 2017).
[90] *Tax Reform Act of 1997*, Republic Act No. 8424, Section 24(A).
[91] Ibid., Section 31. The business deductions referred to may either be substantiated expenses allowed as deductions under the Tax Code (Section 34(A) to (K) and (M)), or the optional standard deduction of 40% of gross income if the expenses cannot be substantiated (Section 34(L)).
[92] Ibid., Section 24(A)(1)(a) and (b).
[93] Ibid., Section 24(A)(1)(c).

This disadvantage may, to some extent be mitigated by the rules on foreign tax credit. Under the Tax Code, a Philippine citizen who pays income tax in a foreign jurisdiction for income earned in such jurisdiction will be allowed to deduct the tax paid or accrued from its income tax due in the Philippines.[94]

However, the actual tax paid on foreign income must not be higher than the proportionate share of the total foreign taxable income in the individual citizen's global taxable income (total income from sources within and without the Philippines) applied to his Philippine income tax liability (the "Allowable Limit).[95] If the actual tax paid or accrued exceeds the Allowable Limit, the excess cannot be claimed as a loss. This is because the foreign tax credit is allowed as a deduction only up to the extent of the foreign taxable income in relation to a company's global income. Thus, only the percentage of such foreign taxable income to the company's global income as applied to the Philippine income tax liability shall be effectively credited the foreign tax credit.

This means that even with the deduction for foreign tax credit allowed by Philippine tax laws, a Philippine citizen may still find itself in a position where it pays tax twice in one item of income in two taxing jurisdictions. This rule is a disincentive for Philippine citizens to invest and earn income or expand their businesses abroad.

2.6.1.2 Non-resident foreign individual

Non-resident foreign individuals are taxed depending on the length of their stay in the Philippines or in the industry they are employed. The tax treatment of these individuals are summarized as follows:

Table 4. Income Tax Rules for Non-Resident Foreign Individuals[96]

No.	Taxable Entity	Conditions	Tax Rates	Tax Base
1	Non-Resident Foreign Individual Engaged in Trade or Business in the Philippines	Comes to the Philippines and stays for an aggregate period of more than 180 days during any calendar year	Graduated rates of 5% to 32%	Taxable income from all sources within the Philippines
2	Non-Resident Foreign Individual Not Engaged in Trade or Business in the Philippines	Comes to the Philippines and stays for an aggregate period of 180 days or less during any calendar year	25%	All income received within the Philippines
3	Foreign Individual employed by:	Regional or Area Headquarters and Regional Operating Headquarters of Multinational Companies	15%	Gross income as salaries, wages, annuities, compensation, remuneration and other emoluments
		Offshore Banking Unit	15%	Gross income as salaries, wages, annuities, compensation, remuneration and other emoluments

[94] Ibid., Section 34(C)(3)(a).
[95] Ibid., Section 34(C)(4).
[96] Ibid., Section 25.

		Petroleum Service Contractor and Subcontractor	15%	Gross income as salaries, wages, annuities, compensation, remuneration and other emoluments

Source: Author's Compilation

2.6.2 Tax on partnerships / corporations

Under the Tax Code, partnerships, no matter how created or organized are taxed as corporations. However, general professional partnerships and joint ventures[97] or consortia formed for the purpose of undertaking construction projects or engaging in petroleum, coal, geothermal and other energy operations pursuant to an operating consortium agreement under a service contract with the Government are exempt from corporate income tax. General professional partnerships are partnerships formed by persons for the sole purpose of exercising their common profession, no part of the income of which is derived from engaging in any trade or business.[98]

Since the partnership and joint venture is not subject to the corporate income tax, each partner of the general professional partnership and co-venturer in the joint ventures mentioned above are taxed on their taxable income during each taxable year from income derived from the partnership or joint venture.[99]

Taxable corporations and partnerships are taxed at the following rates:

Table 5. Income Tax Rates on Corporations and Taxable Partnerships[100]

No.	Taxable Entity	Conditions	Tax Rates	Tax Base
1	Domestic Corporation	In general	30%; or	Taxable income
		Imposed on the 4th taxable year after the start of the commercial operations of the corporation (the "minimum corporate income tax" or MCIT) when the MCIT is higher than the normal income tax applying the 30% tax rate; the excess of the MCIT over the normal income tax shall be carried forward and credited against the normal income tax for 3 immediately succeeding taxable years	2%	Gross income
	• Proprietary educational institution and hospitals (non-profit)	In general	10%	Taxable income
		If gross income from "unrelated trade, business or other activity"[101] exceeds	30%	Entire taxable income

[97] Bureau of Internal Revenue, Revenue Regulations No. 10-12, 1 June 2012.
[98] *Tax Reform Act of 1997,* Republic Act No. 8424, Section 22(B).
[99] Ibid., Section 26; *See* BIR Ruling No. 340-16, June 29, 2016; BIR Ruling [DA-392-05], September 16, 2005; BIR Ruling 475-14, November 26, 2014; BIR Ruling No. 176-14, June 9, 2014.
[100] *Tax Reform Act of 1997,* Republic Act No. 8424, Sections 27(A) (B) and (E); 28(A)(1) to (6) and (B)(1) to (4).

		50% of the total gross income derived by such educational institutions or hospitals from all sources		
2	Resident Foreign Corporations (i. e., branch of a foreign head office)	In general	30%; or	Taxable income from all sources within the Philippines
		Same MCIT imposed on domestic corporations under the same conditions	2%	Gross Income from all sources within the Philippines
	a. International carrier (both air and shipping)	May be exempt or subject to preferential rate under an applicable tax treaty, international agreement or on the basis of reciprocity with the come country of the international carrier	2.5%	Gross Philippine billings
	b. Offshore banking units (OBUs)	Income from foreign currency transactions with nonresidents, other offshore banking units, local commercial banks, including branches of foreign banks authorized by the BSP to transact with offshore banking units	Exempt	
		Interest income derived from foreign currency loans granted to residents other than offshore banking units or local commercial banks authorized by BSP to transact business with offshore banking units	10%	Interest income
	c. Branch profit remittance		15%	Total profits applied or earmarked for remittance
	d. Regional or area headquarters		Exempt	
	e. Regional operating headquarters		10%	Taxable income
3	Non-resident foreign corporation	In general	30%	Gross income from Philippine sources
		Non-resident cinematographic film owner, lessor, or distributor	25%	Gross income from Philippine sources
		Non-resident owner or lessor of vessels chartered by Philippine nationals	4 ½ %	Gross rentals, lease or charter fees
		Non-resident owner or lessor of aircraft, machineries and other equipment	7 ½ %	Gross rentals or fees

Source: Author's compilation

2.6.3 Tax on certain income

The Tax Code also imposes final income tax on certain types of passive income or transactions. These are summarized below.

[101] This means any trade, business or other activity the conduct of which is not substantially related to the exercise or performance by such educational institution or hospital of its primary purpose or function. Tax Code, Section 27(B).

Table 6. Tax Rates on Certain Income[102]

No.	Income/Gain	Conditions	C&IFR	NRFI ETBP	NRFI NETBP	DC	RFC	NRFC
1	Interest from bank deposits	Includes any yield from or any other monetary benefit from deposit substitutes and from trust funds and similar arrangements	20%	✓	RITR	✓	✓	RITR
2	Royalties	In general	20%	✓	RITR	✓	✓	RITR
		on books and other literary works and musical compositions	10%	✓	RITR	20%	20%	RITR
3	Lease of cinematographic films and similar works		RITR	25%	RITR	RITR	RITR	RITR
4	Prizes	Except those amounting to PhP10,000 or less, which shall be taxed at the applicable regular tax rate	20%	✓	RITR	RITR	RITR	RITR
5	Other winnings	Except PCSO and lotto winnings, which is exempt	20%	✓	RITR	RITR	RITR	RITR
6	Earnings under the expanded foreign currency deposit system	Interest from foreign currency deposits	7 ½ %	20%	RITR	✓	✓	RITR
		Income by depository banks from foreign currency transactions with non-residents, OBUs in the Philippines, local commercial banks including branches of foreign banks that may be authorized by the Bangko Sentral ng Pilipinas (BSP) to transact business with foreign currency deposit system	N/A	N/A	N/A	Exempt	Exempt	N/A
		Interest from foreign currency loans granted by depository banks under the expanded to residents other than OBUs in the PHL or other banks under the expanded system	N/A	N/A	N/A	10%	10%	N/A

[102] *Tax Reform Act of 1997*, Republic Act No. 8424, Sections 24(B), 25(A)(2) and (3), (B) to (E), 27(D), 28(A)(7), (B)(5).

		Any income from transactions with depository banks by non-residents under the expanded foreign currency deposit system	N/A	Exempt	Exempt	Exempt	Exempt	Exempt
7	Interest on foreign loans		N/A	N/A	N/A	N/A	N/A	20%
8	Interest from long-term deposits or investments to be held for a minimum of 5 years	If pre-terminated:	Exempt	✓	RITR	20%	20%	RITR
		Less than 3 years	20%	✓	RITR	20%	20%	RITR
		3 years to less than 4 years	12%	✓	RITR	20%	20%	RITR
		4 years to less than 5 years	5%	✓	RITR	20%	20%	RITR
9	Dividends, including share in partnership income	Inter-corporate dividends:	10%	20%	RITR	N/A	N/A	RITR
		between domestic corporations or received by a resident foreign corporation from a domestic corporation	N/A	N/A	N/A	Exempt	Exempt	N/A
		received by a non-resident foreign corporation from a domestic corporation	N/A	N/A	N/A	N/A	N/A	30%
		• if the country of domicile of the non-resident foreign corporation allows a tax credit on the tax due from such corporation taxes deemed paid in the Philippines equivalent to 15%	N/A	N/A	N/A	N/A	N/A	15%
10	Capital gains in sale of shares of stock not traded in the stock exchange	Not over a gain of PhP100,000	5%	✓	✓	✓	✓	✓
		On any gain in excess of PhP100,000	10%	✓	✓	✓	✓	✓
11	Capital gains from sale of real property	Gross selling price or current fair market value, whichever is higher	6%	✓	✓	✓	N/A	N/A

Source: Author's Compilation

Legend: C&IFR – Citizen and Individual Foreign Resident

NRFI ETBP – Non-Resident Foreign Individual Engaged in Trade or Business in the Philippines

NRFI NETBP - Non-Resident Foreign Individual Not Engaged in Trade or Business in the Philippines

DC – Domestic Corporation
RFC – Resident Foreign Corporation
NRFC – Non-Resident Foreign Corporation
✓*- the same tax rate as C&IFR*
RITR – Regular Income Tax Rate

For domestic corporations and resident foreign corporations, under the Tax Code, interest income from long-term deposits or investment is subject to a final withholding tax of 20%, as indicated in **Table 10** above.[103] However, the Bureau of Internal Revenue (BIR) issued Revenue Regulation No. 14-2012[104] where it made a distinction between interest income from long term deposits or investments issued by banks and investment certificates considered deposit substitutes ("Bank Issuances"), and those not issued by banks and investment certificates not considered deposit substitutes ("Non-Bank Issuances).[105] Interest income from Bank Issuances are subject to final withholding tax of 20% while those earned from Non-Bank Issuances are subject to the 30% regular income tax rate. This is an example of a conflict between law and regulations created by erroneous interpretations of regulatory agencies. Such interpretation creates uncertainty in the enforcement of tax laws and discourages investment in long-term deposits or investments in non-bank financial institutions.

2.7 Fiscal incentives granted by Investment Promotion Agencies

To encourage more investments, particularly foreign investments, in the Philippines, various investment promotion laws and agencies provide and grant fiscal/tax incentives. These include incentives granted under the following laws and granting investment promotion agencies (IPA):

- Omnibus Investments Code of 1987 (EO 226) by the Board of Investment;
- Special Economic Zone Act of 1995 (Rep. Act No. 7916, as amended) by the Philippine Economic Zone Authority;
- Executive Order No. 458 (1991) by the Regional Board of Investments – Autonomous Region in Muslim Mindanao (RBOI-ARMM);
- Bases Conversion and Development Act of 1992 (Rep. Act No. 7227, as amended by Rep. Act No. 9400) by the authorities having jurisdiction over the various ecozones created by the Act, such as the Subic Bay Metropolitan Authority (SBMA);
- Zamboanga City Special Economic Zone Authority Act of 1995 (Republic Act 7903), by the Zamboanga City Special Economic Zone Authority (ZCSEZA);
- Presidential Decree No. 538 (1974), by the PHIVIDEC Industrial Authority;
- Aurora Special Economic Zone Act of 2007 (Rep. Act No. 9490) by the Aurora Special Economic Zone Authority (ASEZA);

[103] Ibid., Sections 27(D)(1) and 28(A)(7)(a).
[104] Entitled, "*Proper Tax Treatment of Interest Income Earnings on Financial Instruments and Other Related Transactions*."
[105] BIR Revenue Memorandum Circular No. 77-2012, "Clarifying Certain Provisions of Revenue Regulations No. 14-2012 on the Proper Treatment of Interest Income Earnings on Financial Instruments and Other Related Transactions," 22 November 2012.

- Freeport Area of Bataan Act of 2009 (Rep. Act No. 9728) by the Authority of the Free Port Area of Bataan (AFAB).

Fiscal incentives generally enjoyed by enterprises registered in the economic zones created by, or registered under, the above laws include: (a) income tax holiday (ITH) for an initial period after start of operations and 5% gross income tax, in lieu of national and local taxes, after such initial period; and (b) tax and duty exemptions/reductions on capital, raw material or supply purchases, among others.

These fiscal/tax incentives attract foreign investments because of low or reduced tax and duty rates imposed on registered enterprise. However, these laws discriminate against non-registered and usually small domestic enterprises that are not financially capable of raising the investment requirements under applicable laws and regulations.

At the same time, since these exemptions and reduced tax and duty rates are privileges granted by the State, compliance with the requirements of these incentives are more strictly monitored. For example, movement in and out of PEZA zones of a registered enterprise's inventory and capital equipment requires the prior approval of PEZA. Any change in the activity of the enterprise requires prior approval and registration with PEZA.[106]

Also, in addition to the regular reporting requirements to be filed with the BIR and SEC, ecozone registered entities are required to provide periodic reports to their respective ecozone authorities, tracking their export and other sales volume, and their investment, among others. With the passage of the Tax Incentives Management and Transparency Act (TIMTA) (Rep. Act 10708, 2015), these registered enterprises are required to file an additional annual tax incentives report to their respective IPAs.[107]

As illustrated above, these incentives come with additional compliance costs to registered enterprises. Thus, as a response to the country's high tax rates and unpredictable implementation of tax laws, to attract investments, the Philippines grants fiscal and tax incentives to investors. But this policy tool is implemented at the expense of discriminating against small domestic enterprises that continue to suffer high tax rates, as well as higher compliance cost to enterprises that take advantage of these incentives.

There is thus a need to review the investment incentive framework of the Philippines and pass a more progressive tax law to reduce these unnecessary costs to doing businesses, both to small and large enterprises.

[106] *See* PEZA Citizen's Charter. 2016. http://www.peza.gov.ph/documents/charter2016.pdf (accessed on November 2017).
[107] *The Tax Incentives Management and Transparency Act (*TIMTA), Republic Act No. 10708, Section 4.

2.8 Exploration of natural resources and real property ownership

The Philippine Constitution and applicable laws also places limitations on the exploration of natural resources and ownership of land and certain real property.

2.8.1 Natural resources

Lands of the public domain, waters, minerals, coal, petroleum and other mineral oils, all forces of potential energy, fisheries, forests or timber, wildlife flora, and fauna, and other natural resources are owned by the State. Except for agricultural land, these resources cannot be alienated. As such, under the Constitution, the State has full control and supervision of the exploration, development, and utilization of natural resources. This means that it may:

- directly undertake the exploration, development, and utilization of the natural resources;
- enter into co-production, joint venture, or production-sharing agreements with Filipino citizens, or corporations or associations.
    - Such corporation or associations must be at least 60 percent owned by Filipino citizens;
    - Co-production, joint venture, or production-sharing agreements shall be for a maximum period of twenty-five years, renewable for not more than twenty-five years, and under such terms and conditions as may be provided by law.
    - enter into technical or financial assistance agreements for large-scale exploration, development, and utilization of minerals, petroleum, and other mineral oils with foreign-owned corporations, subject to the following conditions:
    - according to the general terms and conditions provided by law,
    - based on real contributions to the economic growth and general welfare of the country; and
    - it is necessary for the agreement to promote the development and use of local scientific and technical resources.[108]

As indicated above, the exploration, development and utilization of natural resources is fully controlled by the State, but it may do so in partnership with private entities, preferably Philippine entities. Any involvement of foreign-owned corporations in any venture with the government with respect to these natural resources are conditioned on their real contribution to economic growth and general welfare of the country and its promotion of the development and use of local scientific and technical resources. These conditions and restrictions to foreign participation in the exploration, development and utilization of natural resources are by themselves barriers to entry to foreign-owned corporations. To determine whether these are justified by the underlying policy objectives for these limitations, its effectiveness in achieving the objectives must be assessed.

2.8.2 Land ownership

On the other hand, the Constitution limits land use and ownership to the following:

[108] *The Constitution of the Republic of the Philippines.* The 1987 Constitution, Article XII, Section 2.

Table 7. Limits on land use and ownership

Type of Land	Private corporations or associations	• Individuals
Inalienable land of the public domain	• Cannot be alienated • Subject to the provisions on natural resources in (a) above	• Cannot be alienated • Subject to the provisions on natural resources in (a) above
Agricultural land (alienable land of the public domain)	• Lease for a maximum period of 25 years, renewable for another 25 years • Not to exceed 1,000 hectares	• Philippine citizens • Lease up to a maximum of 500 hectares • Acquire up to a maximum of 12 hectares
Private lands	• may acquire private lands • at least 60% of the capital stock or any interest therein must be owned by Philippine citizens	• May acquire private lands • May be owned by an alien, if acquired by hereditary succession • Includes former Philippine natural-born citizens

Source: Author's compilation

Limitations on land use and ownership minimizes its productive use, as well as discourages investment in service industries where the use of land and other real property is necessary for its operations.

2.8.3 Condominium ownership

Section 2 of the Condominium Act, as amended,[109] defines a condominium as, "an interest in real property consisting of separate interest in a unit in a residential, industrial or commercial building and an undivided interest in common, directly or indirectly, in the land on which it is located and in other common areas of the building," and may include "a separate interest in other portions of such real property."

Filipinos and Filipino-owned corporations may own and acquire condominium units or one hundred percent (100%) ownership interest in a condominium corporation. Foreign nationals and foreign-owned Philippine corporations, on the other hand, may own and acquire real estate through the purchase of condominium units under the condominium principle defined under the Philippine Condominium Act, Rep. Act No. 4726.[110] However, such ownership is subject to certain rules and limitations, to wit: [111]

[109] *The Condominium Act*, Republic Act No. 4726, Section 2. "A condominium is an interest in real property consisting of separate interest in a unit in a residential, industrial or commercial building and an undivided interest in common, directly or indirectly, in the land on which it is located and in other common areas of the building. A condominium may include, in addition, a separate interest in other portions of such real property. Title to the common areas, including the land, or the appurtenant interests in such areas, may be held by a corporation specially formed for the purpose (hereinafter known as the 'condominium corporation') in which the holders of separate interest shall automatically be members or shareholders, to the exclusion of others, in proportion to the appurtenant interest of their respective units in the common areas."

[110] Jacobus Bernhard Hulst v. PR Builders, Inc., G.R. No. 156364, 25 September 2008.

[111] *The Condominium Act*, Republic Act No. 4726, Section 5. Any transfer or conveyance of a unit or an apartment, office or store or other space therein, shall include the transfer or conveyance of the undivided interest in the common areas or, in a proper case, the membership or shareholdings in the condominium corporation; Provided, however, That where the common areas in the condominium project are held by the owners of separate units as co-owners thereof, no condominium unit therein shall be conveyed or transferred to persons other than Filipino citizens or corporations at least 60% of the capital stock of which belong to Filipino citizens, except in cases of hereditary succession. Where the common areas in a

i. every transfer or conveyance of a condominium unit, which may be an apartment, office, store or other spaces in such unit, includes an undivided interest in the common areas of the condominium, or in the proper case, membership or shareholdings in the condominium corporation;

ii. ownership of condominium units and consequently, ownership of the common areas, by foreign nationals and foreign-owned corporations must not exceed forty percent (40%), unless ownership is acquired through hereditary succession by intestacy;

iii. if the common areas are owned by a condominium corporation, the foreign membership or shareholdings over the same must not exceed forty percent (40%).

The reasons for the limitations on foreign ownership in a condominium corporation are not clear. Note that the Constitution only limits foreign ownership of land. Buildings that are not condominiums and built on these lands may be owned 100% by foreign entities. Thus, foreigners may own warehouse buildings, and office buildings, but not condominium buildings. This rule places an unnecessary barrier to foreign entities intending to invest in condominium buildings and deal in property rental and management.

2.9 Rental of land and real estate

The Philippines has a rent control law, the Rent Control Act of 2009, or Rep. Act No. 9653 that applies to certain residential units. It placed limits on rental price increases on residential units to a maximum of 7% per year over the following:

a. those with a total monthly rent that ranges from One Peso (PhP1.00) to Ten Thousand Pesos (PhP10,000.00) for units located in the National Capital Region and other highly urbanized cities, and

b. those located in all other areas with total monthly rent ranging from One Peso (PhP1.00) to Five Thousand Pesos (PhP5,000.00),

effective until December 31, 2015.

Beyond December 31, 2015, the Housing and Urban Development Coordinating Council (HUDCC) was granted the power to continue to regulate residential units and determine the appropriate measures necessary to carry out the law's legal mandate.

Pursuant to its mandate to regulate rentals on certain residential units, HUDCC issued Resolution No. 1, Series of 2015, approved on 08 June 2015 (the "HUDCC Resolution"). The HUDCC Resolution extended the effectivity of the Rent Control Act for two (2) years from January 01, 2016 to December 31, 2017. It also revised the coverage of the act to Ten

condominium project are held by a corporation, no transfer or conveyance of a unit shall be valid if the concomitant transfer of the appurtenant membership or stockholding in the corporation will cause the alien interest in such corporation to exceed the limits imposed by existing laws.

Thousand Pesos (PhP10,000.00) and placed the following maximum limits on rent price increases:

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- Four percent (4%) annually for those paying a monthly rent/ ranging from PhP1.00 to PhP3,999.00 per month; and

- Seven percent (7%) for those paying a monthly rent of PhP4,000.00 up to PhP10,000.00 for as long as the unit is occupied by the same lessee.

Note, however, that there are no limitations on rental on commercial and industrial buildings and other real estate. While there may be a social objective to rent control over residential units, such policy tool must be assessed as to its effectiveness in achieving the underlying objective. Otherwise, the limited profit that potential investors expect to earn from the rental of residential units would discourage further investment in these assets.

2.10 Payments and transfers

Generally, the payments and transfers of legal tender and other foreign currencies is heavily regulated by the Bangko Sentral ng Pilipinas (BSP) for certain public policy reasons. Among these are the policy of the State: (a) to ensure that the Philippines will not be used as a money laundering site for the proceeds of any unlawful activity,[112] (b) to service its foreign/foreign currency loans in an orderly manner with due regard to the economy's overall debt servicing capacity,[113] and (c) to encourage inward foreign investments.[114]

Certain rules on payments and transfers of the BSP affect service providers under all four modes of supply of services. These are discussed below.

2.10.1 Modes 1, 2 and 4

Service trade transactions performed by non-residents to residents of the Philippines may be paid for either in pesos or in foreign currency. In relation to payments in pesos from Philippine residents for services rendered by such non-residents, the non-resident service provider may maintain peso deposit accounts in Philippine banks.[115] In addition to the proceeds of the payment for services rendered by the non-resident, such peso deposit account must be funded only by following:

i. inward remittances of convertible foreign exchange;
ii. peso income of non-residents from, or peso sales proceeds of, properties in the Philippines allowed to be owned by non-residents under existing laws;
iii. onshore peso receipts of non-residents from residents for services rendered by the former to the latter, for which the resident would have been entitled to buy foreign

[112] *Anti-Money Laundering Act of 2001*, Republic Act No. 9160, as amended, and related BSP regulations.
[113] BSP Manual of Regulations on Foreign Exchange Transactions, Part Three, Chapter I, Section 22.
[114] Ibid., Chapter II, Section 32.
[115] Ibid., Chapter I, Section 3(1)(c).

exchange from Authorized Agent Banks (AABs) [116] and AAB-forex corporations[117] for remittance to the non-resident service provider;

iv. peso receipts of expatriates working in the Philippines with contracts of less than one (1) year representing salary/allowance/other benefits;

v. onshore peso funds of: (i) foreign students enrolled for at least one semester in the Philippines; and (ii) non-resident Filipinos; and

vi. peso proceeds from the onshore sale by non-resident issuers of their PSE-listed equity securities.[118]

The non-resident peso deposit account holder may purchase foreign exchange from BSP authorized agent banks (AABs) of up to USD60,000.00 per day for the balance of such peso deposit account, without need of prior BSP approval.[119] Purchases of foreign exchange beyond this amount per day will already require BSP approval even if the balance of the peso deposit account exceeds USD60,000.00.

Non-resident tourists may also purchase foreign exchange from AABs or AAB-forex corporations, but only up to the extent of the amount of foreign exchange such tourists used to purchase Philippine pesos. Non-resident tourists may also re-convert unspent Philippine pesos at airports or other ports of exit up to a maximum of USD10,000.00 or its equivalent in other foreign currency, without showing proof of previous sale of foreign exchange for pesos.[120]

In addition, loans from offshore source, offshore banking units, and foreign currency loans obtained from locally operating banks must be submitted to the BSP for prior approval and/or registration if these will ultimately be serviced with foreign exchange purchased from the Philippine banking system, through AABs/AAB-forex corporations (including those covered by derivatives transactions), subject to certain exceptions.[121]

2.10.2 Mode 3

Foreign investments that need to purchase foreign exchange from the Philippine banking system, through AABs or AAB forex corporations to service the repatriation of capital and remittance of dividends, profits and earning from such investments must also be registered with the BSP.[122] However, if the corporation finance by foreign investments earns its own foreign currency from its operations, there generally is no need to purchase foreign currency from the Philippine banking system. In which case, there would be no need to register such foreign investment with the BSP.

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[116] Authorized Agent Banks are defined under the BSP Forex Manual as "all categories of banks (except Offshore Banking Units (OBUs) duly licensed by the BSP. It is understood that each category of bank should function within the operational parameters defined by existing laws/regulations for the specific bank category to which they respectively belong."

[117] AAB forex corps are defined under the BSP Forex Manual as an "AAB subsidiary/affiliate forex corporations whose business include buying and selling foreign exchange."

[118] BSP Manual of Regulations on Foreign Exchange Transactions, Part Two, Chapter I, Section 3(1).

[119] Ibid., Section 3(2)(a).

[120] Ibid., Section 3(2)(c).

[121] Ibid., Section 22.

[122] Ibid., Chapter II, Section 32.

2.10.3 Other payments and transfers

Local currency (Philippine pesos) may be physically brought in and out of the Philippines, or by electronic transfer[123] in an amount not exceeding PhP50,000.00 without prior BSP approval. Any amount brought out of the country in excess of such limit must have prior written authorization from the BSP. Likewise, foreign currency, as well as other foreign currency-denominated bearer monetary instruments not exceeding USD10,000.00 does not require prior notice to and approval from the BSP. Transfers in excess of such amount must be declared in writing and the source, and purpose of the transport of such currency or monetary instrument must be fully disclosed to the BSP.[124]

Whether or not the above limitations constitute an unjustified and unreasonable barrier to the transfer of investments and payments to and from the Philippines will need to be assessed against the policy underlying these limitations.

2.11 Cross-border data flows

The E-Commerce Act, Rep. Act No. 8792, was passed in 2000. It aims to facilitate domestic and international transactions and exchanges, store information through electronic, optical and similar medium, recognize the authenticity and reliability of electronic documents, and promote the universal use of electronic transactions in the government.[125] The E-Commerce Act allows the legal recognition of electronic data messages, electronic documents, electronic signatures for purposes of enforcement of the content of such electronic communication, and their admissibility as evidence in court.

While the E-Commerce Act promotes the free flow of information through electronic means, the Data Privacy Act of 2012, Rep. Act No. 10173, seeks to secure and protect certain types of information to protect a person's right to privacy. It specifically protects:

(a) personal information, which refers to information from which the identity of an individual is apparent or can be reasonably and directly ascertained by the entity holding the information, or when put together with other information would directly and certainly identify and individual;[126] and

(b) sensitive personal information, which refers to personal information:

    i. about an individual's race, ethnic origin, marital status, age, color and religious, philosophical or political affiliations;

[123] "Electronic transfer" is understood to mean under the BSP Forex Manual, as a system where the authority to debit or credit an account (bank, business or individual) is provided by wire, with or without a source document being mailed to evidence the authority.
[124] Ibid., Chapter I, Section 4(1) and (2).
[125] *An Act Granting the Princess Urduja Communications, Inc., A Franchise to Construct, Establish, Install, Maintain, and Operate Local Exchange Network in the Provinces of Pangasinan, Pampanga and Bulacan,* Republic Act No. 8792, Section 3.
[126] *Data Privacy Act of 2012,* Republic Act No. 10173, Section 3(g).

ii. about an individual's health, education, genetic or sexual life, or to any court proceedings for an offense or alleged offense of an individual and its disposition;
iii. issued by government agencies peculiar to an individual which includes, but not limited to, social security numbers, previous or current health records, licenses or its denials, suspension or revocation and tax returns; and
iv. specifically established by an executive order or an act of Congress to be kept classified.[127]

The Data Privacy Act applies to the above personal information and controllers and processors of the same who use equipment located in the Philippines (even if such controllers and processors are not located in the Philippines), or those who maintain an office, branch or agency in the Philippines.[128] It also applies to acts performed outside the Philippines if: (a) the act relates to personal information about a Philippine citizen or resident; (b) the entity has a link with the Philippines and processing personal information in the Philippines, or even if done outside the Philippines, the information pertains to Philippine citizens or residents.[129]

However, the Data Privacy Act expressly exempts from its protection personal information originally collected from residents of foreign jurisdictions pursuant to its laws, including any applicable data privacy laws, which is being processed in the Philippines.[130] On the other hand, other countries also impose limitations on the transfer of data to countries that do not meet the standards of their data protection laws.

For example, the European Union prohibits the transfer of personal data to third countries unless the third country ensures an adequate level of protection under its domestic laws or international commitments.[131] The adequacy of the level of protection is determined by the European Commission upon its assessment of the circumstances surrounding a data transfer operation or set of data transfer operations with particular consideration to be given to *"the nature of the data, the purpose and duration of the proposed processing operation or operations, the country of origin and country of final destination, the rules of law, both general and sectoral, in force in the third country in question and the professional rules and security measures which are complied within that country*."[132]

For countries, like the Philippines, that the EU deems not to have met its standard of "adequate level of protection," the European Commission issued Model Contracts for the

[127] Ibid., Section 3(l).
[128] Ibid., Section 4.
[129] Ibid., Section 6.
[130] Ibid., Section 4(g).
[131] EC Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 (on the protection of individuals with regard to the processing of personal data and on the free movement of such data), Article 25(6).
[132] EC Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 (on the protection of individuals with regard to the processing of personal data and on the free movement of such data), Article 25(2); So, far only the following countries have been found by the EC to have met the EU standard of "adequate level of protection:" Andorra, Argentina, Canada, Faeroe Islands, Geurnsey, Israel, Isle of Man, Jersey, New Zealand, Switzerland and Uruguay. The EU-US Safe Harbour was declared invalid by the Court of Justice of the EU, which led to a new agreement on transatlantic data flows between the EU and the US, the EU-US Privacy Shield, Commission decisions on the adequacy of the protection of personal data in third countries, http://ec.europa.eu/justice/data-protection/international-transfers/adequacy/index_en.htm. (accessed on November 2017).

transfer of personal data to third countries, which third countries should follow to meet the EU's standard of protection. The Model Contract clauses consists of two sets for data transfers between an EU data controller to a non-EU/European Economic Area (EEA) data controller,[133] and one set for data transfer from an EU data controller to a non-EU/EEA data processor.[134]

This means that for European companies to be able to contract with Philippine companies for the transmission to, and processing of data in the Philippines, the Philippine company must agree to the standard clauses provided under the Model Contract clauses mentioned above.

At the same time other countries, like Australia under its Privacy Act of 1988 impose restrictions on the cross-border data flows, such as holding the Australian entity disclosing personal information overseas accountable for any violation of the Privacy Act.[135]

This gives rise to a situation where the Philippines is not bound to provide protection of personal information originally collected from residents of foreign jurisdictions but it is forced to do so by the data privacy laws of these countries. And because the data privacy laws of different countries vary, business process outsourcing and data processing firms located in the Philippines with clients from the Philippines, EU and Australia, for example, will be forced to set up different sets of data privacy policy guidelines within their firms to comply with applicable Philippine, EU and Australian data privacy laws. This increases the administrative cost of legal and contractual compliance with data protection laws and related contracts of these Philippine firms.

However, the present difficulty in the application of Philippine data privacy laws cannot be addressed by the act of the Philippines alone. Even if Congress amends the Data Privacy Act to include personal information originally collected from residents of foreign jurisdictions in its protection, it will not change the present data privacy laws of other countries such as the EU and Australia and how they apply these to cross border data flows.

There is thus a need to go beyond national borders and to consider other means of ensuring that personal information of all individuals collected and processed within and across national borders are protected. Initial efforts to harmonize data privacy rules were made by the Organization for Economic Cooperation and Development (OECD) through the OECD Guidelines on the Protection of Privacy and Trans-border Flows of Personal Data. There has also been an observed convergence of basic principles among data privacy legislations, which have generally revolved around four standards, to wit: (a) data quality; (b) transparency or openness of processing; (c) treatment of particularly sensitive data; and (d) enforcement mechanisms.

However, the implementation and interpretation of these basic principles across countries

[133] Commission Decision 2001/497/EC: Set I (as amended by Commission Decision C(2004)5271) and Commission Decision 2004/915/EC: Set II.
[134] Commission Decision 2010/87/EU.
[135] Australian Privacy Principle (APP) 8.1 and Privacy Act, Section 16C.

differ. Sometimes data privacy principles are balanced against equally important values, such as freedom of information. These differences in implementation and interpretation make harmonization difficult. [136]

Reidenberg notes the usefulness of establishing international technical standards, such as in the technical design of certain electronic infrastructure that are independent of the governance structure of states. These standards may be implemented in technical codes of conduct, where data privacy principles are embedded, and which developers, technical designers and users of ICT are bound to follow.[137]

Other mechanisms that may limit divergence would be the WTO General Agreement on Trade in Services (WTO GATS), which allows the adoption of data privacy laws by the individual Member States up to the extent that these do not "*constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services*."[138] The limitation against discrimination or trade restriction in trade in services under the WTO and other applicable free trade agreements can be a disciplining mechanism in the application of data privacy laws.

The chapeau in Article XIV (General Exceptions) of the GATS, cited above, is the same as the chapeau in Article XX (General Exceptions) in the WTO General Agreement on Tariff and Trade (GATT). In interpreting the GATT Article XX chapeau, the WTO Appellate Body ruled that authorities must strike a balance between the right of the Member State to invoke the exceptions under Article XX, and its duty to respect the treaty rights of the other members, i. e., their rights to market access and against discrimination.[139] It notes though that "the location of the line of equilibrium, as expressed in the chapeau, is not fixed and unchanging; the line moves as the kind and the shape of the measures at stake vary and as facts making up specific cases differ."[140] This means that each data privacy measure must be analyzed on a case to case basis or specific parameters may be agreed on in a more detailed international agreement on data privacy.

However, Mattoo notes in a think piece for the E15 Initiative[141] that, while trade disciplines are useful, these are inadequate in limiting national discretion in implementing policies. This is best illustrated in the interpretation of the Exceptions clause in GATT Article XX, which may be applied to GATS Article XIV, as discussed above. Because of the latitude given to states to interpret and implement WTO Agreement provisions, the net effect is that states still enjoy wide latitude in implementing these provisions. This, together with the different regulatory environment among states lead to different regulatory regimes that make harmonized implementation of trade rules difficult, if not impossible. Mattoo proposes, thus,

[136] Reidenberg, J.R. 1999. Resolving Conflicting International Data Privacy Rules in Cyberspace, *Stanford Law Review* Vol. 52:1315.
[137] Ibid.
[138] WTO General Agreement on Trade in Services, Article XIV(c)(ii).
[139] United States-Import Prohibition of Certain Shrimp and Shrimp Products, adopted 12 October 1998, WT/DS58/AB/R, para.156.
[140] Ibid., para. 159.
[141] Mattoo, A. 2015. Services Trade and Regulatory Cooperation. ICTSD and World Economic Forum.

to make regulatory cooperation a pre-condition to liberalization. This could take the form of a trade facilitation agreement in services to address the procedural aspects of regulation.

Whatever mechanisms will prove effective, the most obvious need in the implementation of data privacy laws particularly with respect to cross border data flows, is for states to work together to find an international mechanism that would address divergence in implementation and interpretation.

2.12 Immigration and labor

Foreign nationals providing services in the Philippines may do so either as consultants, or as employees in foreign funded projects or, Philippine enterprises or foreign companies authorized to do business in the Philippines. They may do so as professionals or other skilled personnel. However, such provision of services is subject to the Constitutional policy of promoting the preferential use of Filipino labor,[142] and the sustained development of national talents through, among others, the limitation of the practice of profession to Filipino citizens, save in cases prescribed by law.[143] In implementing such State policy, Philippine laws and regulations impose conditions for the provision of services of foreign nationals in the Philippines. These cover limitations in the practice of profession, employment and entry into the Philippines.

2.12.1 Practice of profession

The practice of profession is defined by PRC Resolution No. 2012-668 as "an activity/undertaking rendered by a registered and licensed professional or a holder of a Special Permit as defined in the scope of practice of a professional regulatory law."[144] There are about 43 regulated professions in the Philippines. Pursuant to the constitutional policy providing preference for Filipino professionals, foreign professionals may be allowed to practice their profession only under the following circumstances:

i. Upon issuance of a **Certificate of Registration/License** and professional identification card upon recommendation of the Professional Regulatory Board (PRB) concerned and approval of the Professional Regulatory Commission (PRC), subject to certain conditions;[145] or
ii. Upon issuance of a **Special Temporary Permit** (STP) by the PRC to foreign professionals, under reciprocity or other international agreements; to consultants in foreign-funded joint venture or foreign-assisted government projects; to

[142] *The Constitution of the Republic of the Philippines.* The 1987 Constitution, Art. XII, Section 12.
[143] Ibid., Section 14.
[144] Professional Regulation Commission (PRC) Resolution No. 2012-668, Section 1(b).
[145] The professional license may be issued by PRC under the following conditions: (a) the concerned Professional Regulatory Board (PRB) recommends to the Professional Regulatory Commission (PRC) the issuance of a certificate of registration/license and professional identification card to a foreign professional, with or without a qualifying examination; (b) the foreign national is a registered professional under the laws of his country of origin; (c) such registration has not been suspended or revoked; and (d) the licensing requirements of the country where the foreign national is registered are substantially the same as that required under Philippine laws, and in accordance with the rule of reciprocity. (Rep. Act 8981 (PRC Modernization Act of 2000), Section 7(j)).

employees of Philippine or foreign private firms or institutions as provided by law; and to health professionals engaged in humanitarian mission for a **limited period of time**.[146]

iii. Former Filipino professionals who have acquired foreign citizenship but wish to practice their profession in the Philippines, may do so, after securing a **special permit** and updated professional identification card from the applicable PRB and approved by the PRC, and upon payment of the appropriate permit and annual registration fees.[147]

2.12.2 Authority to employ alien

A foreign person employed as technical personnel in a wholly or partially nationalized industry is also required to secure an Authority to Employ Alien from the Department of Justice (DOJ).[148]

2.12.3 Alien Employment Permit

In addition to the above requirements, foreign professionals and non-professionals who wish to seek gainful employment in the Philippines need to secure an **Alien Employment Permit** (AEP) from the Department of Labor and Employment (DOLE). Gainful employment is defined in DOLE Department Order No. 146-15, series of 2015 as "a state or condition that creates an **employer-employee relationship** between the Philippine based company and the foreign national where the former has the power to hire or dismiss the foreign national from employment, pays the salaries or wages thereof and has authority to control the performance or conduct of the tasks and duties."[149]

The AEP is required pursuant to the State policy of giving preference to Filipino labor, and is mandated by the Philippine Labor Code after a determination of the non-availability of a person in the Philippines who is competent, able and willing at the time of application to perform the services required from the foreign person.[150]

The AEP requirement does not, however, apply to the following:

i. Members of the governing board with voting rights only and do not intervene in the management of the corporation or in the day to day operation of the enterprise;
ii. Corporate officers of a corporation, such as President or Treasurer;
iii. Those providing consultancy services who do not have employers in the Philippines;

[146] *PRC Modernization Act of* 2000, Republic Act No. 8981, Section 7(j).
[147] Presidential Decree No. 541 of Aug. 20, 1974, *Allowing Former Filipino Professionals to Practice Their Respective Professions in the Philippines,* Section 1; Republic Act No. 8981, Section 7(l).
[148] *The Anti-Dummy Law,* Commonwealth Act No. 108, as amended by Pres. Decree No. 715 (1975), Section 2-A; Anti-Dummy Ministry Order No. 210, December 1, 1980.
[149] Department of Labor Employment (DOLE), Department Order No. 146-15, Section 1.
[150] Presidential Decree No. 442 of May 1, 1974, *A Decree Instituting a Labor Code Thereby Revising and Consolidating Labor And Social Laws To Afford Protection To Labor, Promote Employment And Human Resources Development And Insure Industrial Peace Based On Social Justice,* Article 40.

iv. Intra corporate transferee who is a manager,[151] executive[152] or specialist[153] and an employee of the foreign service supplier for at least one (1) year prior to deployment to a branch, subsidiary, affiliate or representative office in the Philippines;
v. Contractual service supplier who is a manager, executive or specialist and an employee of a foreign service supplier which has no commercial presence in the Philippines:

    a) who enters the Philippines temporarily to supply a service pursuant to a contract between his/her employer and a service consumer in the Philippines;
    b) must possess the appropriate educational and professional qualifications; and
    c) must be employed by the foreign service supplier for at least one year prior to the supply of service in the Philippines.[154]

The following foreign persons are also exempted from the coverage of the AEP requirement:

i. All members of the diplomatic service and foreign government officials accredited by and with reciprocity arrangement with the Philippine government;
ii. Officers and staff of international organizations of which the Philippine government is a member, and their legitimate spouses desiring to work in the Philippines;
iii. All foreign nationals granted exemption by law;
iv. Owners and representatives of foreign principals of POEA-accredited companies who come to the Philippines for a limited period and solely to interview Filipino applicants for employment abroad;
v. Foreign nationals who come to the Philippines to teach, present and/or conduct research studies in universities and colleges as visiting, exchange or adjunct professors under formal agreements between the universities or colleges in the Philippines and foreign universities or colleges; or between the Philippine government and foreign government. Such exemption must be on a reciprocal basis;
vi. Quota immigrants as defined in the Philippine Immigration Act of 1940.[155]

Based on the above, foreign nationals employed by domestic enterprises, either a sole proprietorship, partnership or corporation, and foreign corporations registered to do business in the Philippines (i. e., branch, representative office, regional area headquarters and regional operating headquarters), are generally required to secure AEPs before they can be employed

[151] Defined as "a natural person within the organization who primarily directs the organization/department/subdivision and exercises supervisory control functions over other supervisory, managerial or professional staff; does not include first line supervisors unless employees supervised are professionals; does not include employees who primarily perform tasks necessary for the provision of the service." (DO 146-15, Section 3(d)(ii)).
[152] Defined as "a natural person within the organization who primarily directs the management of the organization and exercises wide latitude in decision making and receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the business; an executive would not directly perform tasks related to the actual provision of the service or services of the organization." (DO 146-15, Section 3(d)(i)).
[153] Defined as "a natural person within the organization who possesses knowledge at an advanced level of expertise essential to the establishment/provision of the service and/or possesses proprietary knowledge of the organisation's service, research equipment, techniques or management; may include, but is not limited to, members of a licensed profession." (DO 146-15, Section 3(d)(iii)).
[154] DOLE, Department Order No. 146-15, Section 3.
[155] Ibid., Section 2.

and perform services in the Philippines. Executive officers and specialists of these entities are, however, not considered employees subject to the AEP requirement.

The rule does not generally apply to individual consultants independently providing services in the Philippines, or employees of foreign service providers not doing business in the Philippines and temporarily providing services in the country as part of a contract between the foreign service provider and a Philippine service consumer.

2.12.4 Visa requirements

Other than the limitations on the practice of profession, labor market test and reciprocity requirements imposed under professional regulatory, labor and corporate laws, Philippine laws also imposes conditions on the entry of foreign nationals into the Philippines for employment or engage in services trade.

Foreign nationals entering the country on a pre-arranged employment is required to secure a Working Visa under Section 9(g) of the Philippine Immigration Act of 1940. To eliminate the duplication of requirements for the issuance of work permits to foreigners, the DOLE and Bureau of Immigration (BI) agreed not to require AEPs from foreign nationals who will work in the Philippines for a period not exceeding 6 months. Instead, the BI shall issue Special Work Permits (SWP) to these foreign nationals. The application for AEP shall serve as Provisional Permit to Work (PPW) while the AEP is being processed for foreign nationals intending to work in the Philippines for more than 6 months but not more than 1 year.[156] If the foreign national continues to work in the Philippines for more than 6 months, he will be required to secure both an AEP from DOLE and a Working Visa (9(g) visa) from the BI.

Based on the survey of applicable laws above, it is clear that Philippine laws impose a significant amount of barriers to the entry of foreign nationals intending to engage in services trade in the Philippines. To illustrate an extreme example, a foreign professional temporarily employed as an architect in an architectural company, for example, will need to secure a STP from the PRC, an Authority to Employ Alien from the DOJ, an AEP from DOLE and a Working Visa (whether SWP, PPW, or a full Working Visa) from the BI to be able legitimately perform services in the Philippines. These barriers affect not only Mode 4, but also Mode 3, as it limits the ability of domestic corporations or foreign corporations registered to do business in the Philippines to employ foreign professionals they may deem qualified to perform the services required by Philippine customers.

2.13 Competition Law

Shortly after the adoption of the 1987 Constitution, the first competition bill was filed in the Philippine House of Representatives during the 8th Congress. However, the first bill and all subsequent bills filed languished in Congress for nearly 30 years, until the passage of

[156] Bureau of Immigration (BI), Memorandum Order-AFFJr. No. 05-009, Sections 1 and 2; BI, Memorandum Circular No. AFF-05-01.

Republic Act No. 10667,[157] otherwise known as the "Philippine Competition Act" (PCA)on July 21, 2015. The newly established Philippine Competition Commission issued its implementing regulations and regulations on June 3, 2016, and became effective on July 3, 2016.

The PCA recognizes that the past measures that were undertaken to liberalize key sectors in the economy needed to be reinforced by measures that safeguard competitive conditions in the Philippine economy. It recognizes that the provision of equal opportunities to all promotes the entrepreneurial spirit, encourages private investments, facilitates technology development and transfer, and enhances resource productivity. Market competition also promotes consumer welfare by allowing them to exercise their right of choice over goods and services offered in the market.

The PCA also undertakes to pursue the constitutional goals of the national economy to attain a more equitable distribution of opportunities, income and wealth, sustained increase and expansion of productivity to raise the quality of life for all, especially the underprivileged, and to regulate or prohibit monopolies when the public interest so requires and prohibit combinations in restraint of trade or unfair competition. To achieve this end, the State is mandated to:

a. Enhance economic efficiency and promote free and fair trade competition in trade, industry and all commercial economic activities, as well as establish a National Competition Policy;
b. Prevent economic concentration which will control the production, distribution, trade, or industry that will unduly stifle competition, lessen, manipulate or constrict the discipline of free markets; and
c. Penalize all forms of anti-competitive agreements, abuse of dominant position and anti-competitive mergers and acquisitions, with the objective of protecting consumer welfare and advancing domestic and international trade and economic development.[158]

The PCA applies to any person or entity engaged in any trade, industry and commerce within the Philippines. It also applies to international trade that have direct, substantial and reasonably foreseeable effects in Philippine trade, industry and commerce, and has extraterritorial application to acts done outside the Philippines, which has the same effect on Philippine trade, industry and commerce.[159]

The PCA created the Philippine Competition Commission (PCC) as an independent quasi-judicial body tasked to implement the national competition policy and attain its objectives. It has original and primary jurisdiction over the enforcement and implementation of the provisions of the PCA and its implementing regulations.[160] It has the authority to file criminal complaints for violations of the PCA with the Office for Competition of the Department of Justice (DOJ-OFC). The DOJ-OFC is empowered to conduct preliminary

[157] *Philippine Competition Act,* Republic Act No. 10667.
[158] Ibid., Section 2.
[159] Ibid., Section 3.
[160] Ibid., Section 12.

investigations and criminal prosecutions of offences under the PCA and other competition-related laws.[161]

In addition, where cases before sector regulators involving competition issues, the PCC will have original and primary jurisdiction to decide the same. Where such cases involve both competition and non-competition issues, the PCC is required to consult and afford the sector regulator concerned reasonable opportunity to submit its own opinion and recommendation on the matter before the PCC issues a decision. The PCC and sector regulators are also mandated to work together, where appropriate, to issue rules and regulations to promote competition, protect consumers, and prevent abuse of market power by dominant players within their respective sectors.[162]

The PCA identifies acts and agreements that are *per se* prohibited and those that are simply regulated to ensure that they do not have anti-competitive effects. These are acts and agreements are: (a) Anti-Competitive Agreements, which are in themselves prohibited, either because the agreements in themselves are anti-competitive or it is entered into with anti-competitive intent;[163] (b) Abuse of Dominant Position, where one or more entities are prohibited from abusing their dominant position by engaging in conduct that would substantially prevent, restrict or lessen competition;[164] and (c) Prohibited Mergers and Acquisitions that substantially prevent, restrict, or lessen competition in the relevant market.[165]

2.13.1 Issues and challenges with the implementation of the Philippine Competition Act (PCA)

In order to effectively implement the PCA, the PCC and other stakeholders must look beyond simple behavioral barriers to entry, which are defined in Sections 14, 15 and 20 of the PCA. As the Philippines continue its process of market liberalization, firms are constantly faced with external challenges to the business environment. These constraints prevent them from fully maximizing their potential for productivity and innovation that will promote greater market efficiency.

Among these are the foreign ownership limitations in nationalized industries, and certain constraints in the national environment that affect Philippine firms' competitiveness, which were discussed above. There are also added challenges arising from the provisions of the PCA which could limit the capacity of the PCA and the PCC to ensure the removal of barriers to entry in the services trade sector. These challenges are discussed in greater detail below.

2.13.1.1 Technical requirements of analysis and enforcement

[161] Ibid., Section 13 and 31.
[162] Ibid., Section 32.
[163] Ibid., Section 14.
[164] Ibid., Section 15.
[165] Ibid., Section 20.

The Declaration of Policy of the Philippine Competition Act mentions enhancing economic efficiency and preventing anti-competitive market concentration as a means of promoting the State's economic objectives, regulating or prohibiting monopolies and prohibiting unfair competition. In assessing whether an agreement, conduct or government action will promote efficiency gains to the market may require the regulator to assess both static and dynamic efficiency gains.

Static efficiency, referring to both allocative and productive efficiency, exists when producers and consumers' welfare is maximized at a particular point in time. Dynamic efficiency, on the other hand, refers to the extent to which a firm introduces new products or processes of production that improves efficiency over time.[166]

Determining static efficiency gains may be calculated, for example, by analyzing the effects of monopoly price on total welfare (i. e., consumer and producer surplus). However, calculating the dynamic efficiency gains of an agreement, conduct or merger may be more challenging, as the regulator will try to look into the future and determine its potential for improving efficiency through time, even if static inefficiencies may exist. This challenge will be much greater in a developing economy like the Philippines, with its share of structural market defects. How does one assess, for example, the dynamic efficiency gains of allowing a monopoly to engage in anti-competitive activities, such as imposing monopoly prices, in a technologically undeveloped market; where such act or conduct may allow the monopolistic firm to achieve economies of scale and earn enough profits to invest in research and development to further innovation and efficiency in the future?

Another potential challenge is the determination of market concentration. Is it enough, for example, to adopt such methods of determining market concentration as the Herfindahl-Hirschman Index (HHI) or four-firm concentration ratios, without considering certain conditions in the Philippines, such as the archipelagic nature of its geography, in determining the relevant market?

All these require an emphasis on economic analysis, an understanding of the Philippine market and, the capacity to translate these into enforceable rules, regulations and decisions on matters involving competition. This means that the PCC will need to strengthen its capacity to conduct economic analysis, market surveys, policy and regulatory analysis, and regulatory impact assessments, among others. It should also be able to communicate the results in terms that make concrete action possible, and build a body of legal interpretation and jurisprudence that will make competition enforcement predictable.

2.13.1.2 Limited familiarity of local firms to the concept of competition

After its passage in July 21, 2015, the PCA will be implemented in an environment where local firms have been used to the presence of monopolistic and oligopolistic market structures; where monopolistic and oligopolistic firms succeeded by maintaining control over

[166] *See* Motta, Massimo, *Competition Policy, Theory and Practice*, Cambridge University Press, 2004: 39-55.

the market and limiting market competition; and where the growth of small and medium enterprises (SMEs) have stagnated and most are engaged in trading and low value services, with very little evidence of upgrading and innovation over the past decades.[167]

The experience of other countries first implementing competition laws indicates that there is very little effective enforcement activity during the first few years of implementation. Most often, the competition authorities focus on advocacy activities to inform and educate the public about their rights and obligations under the competition law, and to encourage voluntary compliance.[168]

Given the limited knowledge of Philippine firms on the concept of competition and how it can be harnessed to improve productivity and innovation that benefits the economy, as whole and individual firms, in particular, the PCC may need to place greater emphasis on competition advocacy during the first few years of the PCA's effectivity, even while it tries to discipline market behavior and prevent anti-competitive conduct.

2.13.1.3 Issues potentially affecting the independence of the PCC

While initial budgetary appropriation for the PCC is PhP300M, the amount is not fixed and PCC is required to ask for its budgetary appropriation from Congress every year. In addition, all funds collected by the PCC shall be remitted to the National Treasury and form part of the government's general funds. This means that all funds available to the PCC for its operations and advocacy activities are only those appropriated by Congress. This makes the PCC vulnerable to the whims of political influence and regulatory capture.

2.13.1.4 Potential conflict between sector regulators and the PCC

As noted above, cases before sector regulators in regulated industries, such as the airline, telecommunications and, electricity industries in the Philippines, among others, involving competition issues shall be under the original and primary jurisdiction of the PCC. It also acquires jurisdiction if the issue involves both competition and non-competition issues, where the PCC is required to consult and afford the sector regulator concerned a reasonable opportunity to submit its own opinion and recommendation on the matter before the PCC issues a decision. The jurisdiction of the PCC over cases before sector regulators involving competition and non-competition issues may give rise to conflict between the PCC and sector regulators.

First, the phrase the PCC "*shall still have jurisdiction if the issue involves both competition and non-competition issues*," in Section 32 of Rep. Act 10667, referring to the jurisdiction of the PCC over regulated industries, may result to over-reach on the part of the PCC. If the PCC also has jurisdiction even over non-competition issues that could be embedded in the

[167] *See* Barcenas, Lai-Lynn Angelica, Maria Theresa M. Bautista, Joan P. Serrano, "Promoting Coherence in Philippine Policies, Laws, Rules and Regulations that Encourage the Growth and Development of Small and Medium Enterprises into Active Participants in the Global and Regional Economy," APEC 2015 Policy Studies, Department of Foreign Affairs, Vol. II, 2015: 125 – 181.

[168] *See* Mendoza et al.

competition issue, it runs the risk of infringing on operational and regulatory matters that may well be within the jurisdiction of the sector regulators.

Second, on matters involving both competition and non-competition issues, the PCC have the authority to render a decision. The sector regulators may only be consulted and afforded a reasonable opportunity to submit their own opinion and recommendation. Nothing in the law indicates that the PCC is duty-bound to recognize the sector regulators' expertise on industry-specific matters. It seems that the intent of the PCA is to give competition primacy over industry-specific concerns, such as for example in the pursuit of an established industrial policy. This may give rise not only to jurisdictional conflict, but policy conflict as well.

It is thus important that the PCC and sector regulators issue joint regulations to govern the resolution of competition and non-competition issues and include a mechanism for resolving issues such as conflict between competition policy and other governmental policy involving the industry or conflict between the mandate of the sector regulators over operational or regulatory industry concerns and those of the PCC on competition matters.

The above issues and challenges, if not properly addressed, can either render the PCC ineffective in removing both regulatory and behavioral barriers to entry in the market, or worsen the same.

EXIT REQUIREMENTS

2.14 Closing or dissolving a business

In closing or dissolving a business, the business enterprise will need to notify and/or secure the approval/clearance of various government agencies where it is registered.

2.14.1 Cancellation of Primary Registrations

A sole proprietorship with a business name (BN) registered with the DTI may cancel its BN registration with the DTI by submitting the following to the DTI: (a) Letter request by the owner; (b) original copy of its BN Certificate of Registration and duplicate copy of its application form; and (c) affidavit of cancellation of the BN Registration, stating the reason/s for the cancellation and that the registered owner has no outstanding financial obligation at the time of closure of establishment.[169] The BN Registration may also be automatically cancelled after its expiration 5 years after its registration, and if not renewed within 6 months from its expiry date.[170]

[169] *See* DTI Administrative Order (DAO) No. 10-01, as amended by DAO No. 10-08, Sections 19.2.1 and 19.2.2; *See also* DTI website, http://www.dti.gov.ph/businesses/msmes/exit-your-business.
[170] DTI DAO No. 10-01, as amended by DAO No. 10-08, Sections 15.1 and 19.1.

Corporations registered with the SEC, on the other hand, may be voluntarily dissolved in two ways: (a) voluntary dissolution: (i) where no creditors are affected;[171] (ii) where creditors are affected;[172] and (b) by shortening of the corporate term.[173]

2.14.2 Voluntary Dissolution, Generally

Voluntary dissolution requires the vote of the majority of the directors of the corporation, and the vote of shareholders of the corporation owning 2/3 of the outstanding capital stock. The notice of meeting to the shareholders to vote on such dissolution should also be published in a newspaper of general circulation where the principal office of the corporation is located for three consecutive weeks. If there is no newspaper in the locality where the principal office of the corporation is located, then the notice may be published in a newspaper of general circulation in the Philippines.[174]

Where no creditors are affected, shareholders are also notified of the meeting either by registered mail or personal delivery at least 30 days prior to the scheduled meeting. Once the Board resolution authorizing the dissolution, certified by majority of the Board and countersigned by the Corporate Secretary is filed with the SEC, the SEC shall issue the certificate of dissolution.[175]

Where creditors are affected, in addition to the notice of meeting sent to shareholders, a copy of such notice must also be posted in three public places in the city or municipality where the principal office is located for three consecutive weeks. In this case, the process also takes longer as it requires the filing of a petition for dissolution with the Office of General Counsel of the SEC, where objections may be filed by affected parties, and could subject the corporation to receivership proceedings to dispose of the corporate assets and pay the debts of the corporation.[176]

2.14.2.1 Shortening of Corporate Term

The most commonly adopted method of voluntary dissolution is the shortening of corporate term/existence.[177] This also requires the majority vote of the board of directors and the ratification by the shareholders representing 2/3 of the outstanding capital stock.[178]

In shortening the corporate term, the board and shareholders of the corporation amend its Articles of Incorporation to record its new shortened term. The corporation must also have its

[171] CCP, Section 118.
[172] CCP, Section 119.
[173] CCP, Section 120.
[174] CCP, Sections 118 and 119.
[175] CCP, Sec. 118.
[176] CCP, Sec. 119.
[177] CCP, Sec. 120.
[178] CCP, Sec. 37.

financial statements audited as of the last fiscal year, except where certain conditions exist.[179] It must also secure a BIR tax clearance, publish a notice of dissolution of the corporation every week for three consecutive weeks, and secure the endorsement/clearance of other government agencies, if applicable.[180] Once all the requirements are filed, the amended Articles of Incorporation is approved by the SEC and upon expiration of the shortened term, the corporation shall be deemed dissolved.

After the corporation is dissolved, it shall continue as a body corporate for another three (3) years for the purpose of prosecuting and defending suits for 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 to continue its business.[181] The dissolution of the corporation does not affect any liability, which the corporation may have incurred prior to such dissolution.[182] It will remain to be liable until all such obligations are fully paid.

The withdrawal of the license of a foreign corporation to do business in the Philippines also require: (a) the filing of a petition of withdrawal with the SEC; (b) a prior authorization of the Board of Directors of the foreign corporation; (c) submission of the audited financial statements of the Philippine registered entity as of the last fiscal year; (d) publication of the notice of withdrawal once a week for three consecutive weeks; (e) endorsement/clearance of the Board of Investments (for RHQ and ROHQ), or from the appropriate government agency, as the case may be; and (f) BIR tax clearance.[183]

For the dissolution of a partnership registered with the SEC, the partnership is required to submit the Articles of Dissolution or an Affidavit of Dissolution, together with a BIR tax clearance.

2.14.3 Cancellation of Secondary Registrations

To completely close its operation, the business entity, whether a sole proprietorship, corporation or partnership is also required to cancel its other registrations with the local government unit (LGU) where it is located, BIR, SSS, Philhealth and HDMF. If it has a

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[179] The following requirements apply under the following conditions: (a) where the applicant has ceased operations for at least 1 year, submit: (i) AFS of last fiscal year of operation; and (ii) affidavit of non-operation certified under oath by the President and Treasurer; (b) where the applicant has no operation since incorporation, submit: (i) Balance Sheet certified under oath by the President and Treasurer; (ii) affidavit of non-operation certified under oath by the President and Treasurer; (iii) certificate of non-registration by the BIR; (c) where the applicant is a stock corporation with paid-up of less than P50,000, submit its Balance Sheet as of last preceding fiscal year certified under oath by the President and Treasurer; and (d) where the applicant is a non-stock corporation with gross receipts of less than P100,000 or a total assets of less thanP500,000, submit its Balance Sheet as of last preceding fiscal year certified under oath by the President and Treasurer. (2017 SEC Citizen's Charter).

[180] *See* 2017 SEC Citizen's Charter; *See also* SEC Resolution No. 421, series of 2012.

[181] Sec. 122, Corporation Code of the Philippines

[182] Sec. 145, Corporation Code of the Philippines, which states thus:

"Sec. 145. *Amendment or repeal.* No right or remedy in favor of or against any corporation, its stockholders, members, directors, trustees, or officers, nor any liability incurred by any such corporation, stockholders, members, directors, trustees, or officers, shall be removed or impaired either by the subsequent dissolution of said corporation or by any subsequent amendment or repeal of this Code or of any part thereof."

[183] 2017 SEC Citizen's Charter: 192.

secondary license from other government agencies, it is also required to cancel its registrations with these government agencies.

2.14.3.1 Local Government Unit (LGU)

The requirements for closure or retirement of business by LGUs vary. For example, in Makati, the closing entity is required to submit its audited financial statements for three calendar years. This is more than is required by the SEC in the dissolution of corporations and partnerships. If the entity has a branch, sales office, factory, warehouse and/or project office outside Makati, it is required to submit a breakdown of gross sales or receipts, assessment and proof of payments to, or Certified True Copies of Official Receipts issued by other LGUs, where the branch, sales office, factory, warehouse and/or project office is located.[184]

Other documentary requirements include the original mayor's permit/license for the current year, board resolution/secretary's certificate authorizing the closure, and affidavit of non-operation in case of no sales/operation. If the submitted documents contain inconsistencies, the City Treasurer will order the examination of the entity's Books of Accounts. In addition, the City Treasurer will also order the inspection of the premises of the business entity to verify that it is no longer operating.[185]

On the other hand, Quezon City require the submission of the following documents for purposes of business retirement: (a) duly accomplished retirement application form signed by the owner/president or vice president; (b) original latest tax bill and the past 3 years' official receipts; (c) original latest business permit; (d) original affidavit of closure if sole proprietorship; (e) original partnership dissolution, if partnership; (f) original notarized Secretary's Certificate or Board Resolution authorizing the closure or retirement of business, if corporation; (g) original and photocopy of the owner's/president's valid ID, or all ID's of partners (if a partnership); (h) real property tax clearance; (i) contract of lease and term of the same; (j) barangay certificate on business closure; (k) business location sketch and contact number; (l) original and photocopy of latest Income Tax Return with the past 3 years' financial statements; (m) original and photocopy of VAT returns or percentage tax returns; and (n) books of accounts, to be presented upon assessment.[186]

In both examples above, the business entity is also open to examination and assessment by the City Treasurers, subject to the existence of certain conditions. Also, compared to Makati, Quezon City requires more documentary requirements for the closure / retirement of business. The above example illustrates the varying challenges a business entity will need to navigate at the LGU level when closing or retiring its operations.

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[184] The Revised Makati Revenue Code (City Ordinance No. 2004-A-025), Chapter III, Article A, Section 3A.10(g)1.
[185] The Revised Makati Revenue Code (City Ordinance No. 2004-A-025), Chapter III, Article A, Section 3A.10(g).
[186] Requirements for Business Retirement 2014, Quezon City website, http://quezoncity.gov.ph/index.php/component/content/article/67/1336-requirements-for-business-retirement2014

2.14.3.2 Bureau of Internal Revenue

In closing a business, the BIR requires the submission of: (a) a notice of closure; (b) the list of ending inventory of goods, supplies, including capital goods; (c) inventory of unused sales invoices/official receipts; (d) unused sales invoices/official receipts and all other unutilized accounting forms; (e) all business notices and permits and the BIR Certificate of Registration; and (f) other documents necessary to support the changes applied for.[187]

For purposes of issuing the BIR tax clearance to be submitted to the SEC for the approval of the dissolution of the business, the BIR may assess the closing corporation or partnership over a period covering up to 3 taxable years prior to the issuance of the applicable BIR Final Assessment Notice. The assessment and issuance of the BIR tax clearance could take about 1 to 2 years depending on the BIR Examiner assigned to the dissolving corporation or withdrawing foreign firm.

2.14.3.3 Social Agencies

With respect to the social agencies, SSS, PhilHealth and HDMF, the requirements for termination of employer registration due to closure also vary. For SSS, the closing entity is required to submit a duly filled out SSS Employer Data Change Request Form; for PhilHealth, a duly filled out PhilHealth Employer Data Amendment for; for HDMF, a letter notice of termination and the following documents:

Table 8. Documentary Requirements for Closure of Social Agencies

Document	SSS	Philhealth[188]	HDMF
a. Single Proprietorship			
• Approved Application for Business Retirement from the Municipal/City Treasurer's Office; or			
• If the above document is not available, any **two** of the following:			
• Certificate of Non-Operation filed with the Municipal/City Treasurer or the BIR;			
• Lease Contract/Joint Affidavit of Lease Termination			
• Employment Report (Form R-1A) showing the separation of its employees duly received by the SSS;			
• DTI Certificate of Cancellation			
• Latest ITR and AFS			
b. Partnership /Corporation			
• Certificate of filing of Articles of Dissolution/Cancellation of Registration			

[187] Revenue Regulations No. 7-2012, Annex A, as amended by Revenue Memorandum Circular No. 37-2016, Section VI.C.
[188] For single proprietorship, two checked documents are required; for corporation and partnership, any **one** of the checked items is sufficient.

issued by the SEC; or			
• If the above document is not available, any **two** of the following:			
• Audited Financial Statements and Income Tax Return filed with the SEC or BIR within the prescribed period;			
• Board Resolution approving the termination of the business operation duly received by the SEC or BIR, or other applicable regulatory government agency			
• Employment Report (Form R-1A) showing the separation of its employees duly received by the SSS;			
• Termination of business operation duly received by SEC or the BIR within the prescribed period.			
• Certificate of Non-Operation filed with the SEC or the BIR;			
• Minutes of Meeting certified by the Corporate Secretary			

Source: SSS Employer Data Change Request Form, Philhealth Employer Data Amendment Form, and BOI Compilation of Requirements for Dissolution

As may be noted above, the most challenging aspect in closing or retiring a business rests mainly in the agencies involved in the collection of national and local taxes. Given the revenue-generating mandates of the BIR and the LGUs, the need to ensure that taxes due from the closing entity are duly paid before it ceases operations is understandable. However, the difference in requirements across these agencies places an unnecessary burden to the closing entity.

To illustrate, a closing business entity in Quezon City will need to prepare and provide the following documentary requirements to local and national agencies:

a. various application/petitions for closure or termination of business operations;
b. original latest tax bill and the past 3 years' official receipts;
c. original latest business permit;
d. proof of authorization for closure: (i) original affidavit of closure if sole proprietorship; (ii) original partnership dissolution, if partnership; or (ii) original notarized Secretary's Certificate or Board Resolution authorizing the closure or retirement of business, if corporation;
e. original and photocopy of the owner's/president's valid ID, or all ID's of partners (if a partnership);
f. real property tax clearance;
g. contract of lease and term of the same;
h. barangay certificate on business closure;
i. business location sketch and contact number;
j. original and photocopy of latest Income Tax Return with the past 3 years' financial statements;

k. original and photocopy of VAT returns or percentage tax returns;
l. books of accounts, to be presented upon assessment;
m. the list of ending inventory of goods, supplies, including capital goods;
n. inventory of unused sales invoices/official receipts;
o. unused sales invoices/official receipts and all other unutilized accounting forms;
p. all business notices and permits and the BIR Certificate of Registration;
q. other documents necessary to support the changes applied for, which could include items (l) to (n) above; and
r. proof of publication of notices of dissolution.

For any investor planning to open a business in the Philippines, the requirements for closing or terminating operations, and the time it takes to do so is a daunting prospect. This could adversely affect an investor's decision to invest.

3 Review of regulations affecting trade and investment in the DML sector

The distribution, multimodal transport and logistics services (DML) sector plays a crucial role in a nation's trade performance in the process of economic development. An efficient DML sector contributes to trade performance and economic development by lowering transaction costs and creating more customer value and thus providing firms with opportunities to increase their earnings and enhance their international competitiveness (Gannon and Liu 1997; Banomyong et al. 2008). In the economic development literature, many studies have already established a positive link between this sector's efficiency and economic development (for example, see Hummels 2000; Limão and Venables 2001; Wilson et al. 2003). In this era of increasing globalization, brought about by greater trade and investment liberalization, this sector is increasingly becoming a differentiating factor and source of international competitiveness.

Furthermore, an efficient and well-functioning DML sector enhances a nation’s capability and willingness to open up its market as it strengthens its export competitiveness in the export of goods and services. The process of trade liberalization would therefore be facilitated, resulting in greater economic integration.

To have an efficient and well-functioning DML sector requires, among others, a regulatory environment that encourages rather than stifles efficiency and competitiveness not only in the export of DML services but also in the exports of goods since transport and logistics services are important inputs in the production and export of traded goods and other exportable services. Hence, this chapter is devoted to the understanding of the current policies, regulations and practices affecting trade and investment in this sector.

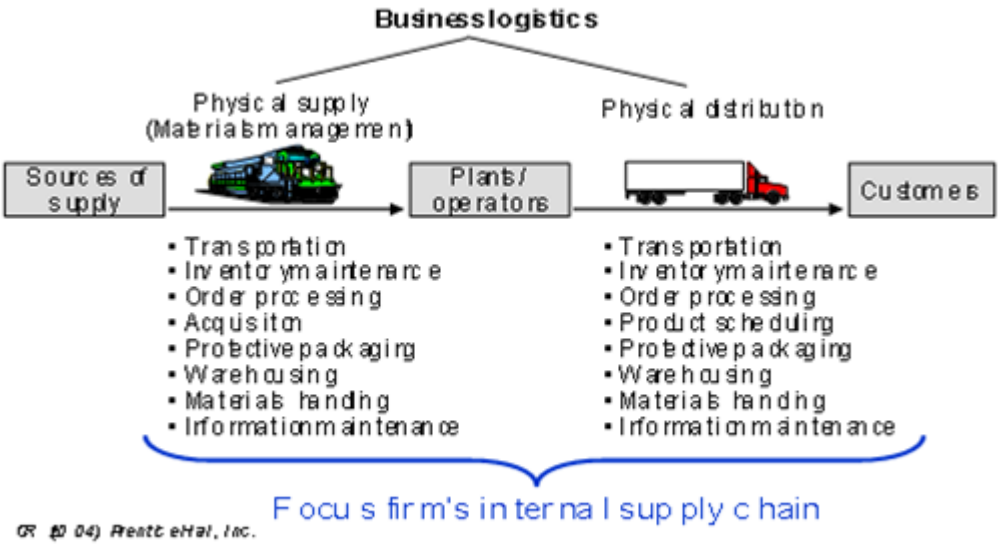
The rest of the chapter is organized as follows. Section 3.1 defines the concept and scope of DML. Section 3.2 discusses the economic importance of this sector particularly in the context of the current effort to achieve and sustain economic growth and development, as confirmed by previous empirical studies in the literature. Section 3.3 looks at the current logistics performance of the Philippines compared to other countries in the region. The final section 3.4 presents the key measures affecting trade and investment in this sector

3.1 Definition and scope

It should be pointed out that logistics services have a broader scope which goes beyond the physical movement of freight. Logistics services comprise a wide range of activities (e.g. transportation services, warehousing and inventory management, distribution services, public and private port management services constituting the logistics chain) for efficient management of the movement of materials, finished products and information from the point of origin to the point of destination. The overall goal of these activities is to bring the materials and finished products to the final point of consumption at the *right time, in the right condition, at the right place and at the right price.*

The scope of logistics services can be viewed to have two key components: the procurement component (from source of supply to production) and the distribution component (from production to final customers). But in each component almost the same sets of activities are involved. The largest activity in this logistics chain in terms of cost is transportation. There are four major transportation modes involved in international logistics: maritime transportation, rail, road and air transportation. Of these four modes, maritime transportation is the most commonly used mode of transportation since the largest proportion of international trade in volume terms is carried by sea. See Figure 4 for the various components of logistics services.

Figure 4. Scope of Logistics Services



The broad scope of logistics services can be further appreciated by looking at the checklist recommended by the WTO in their current effort toward the liberalization of logistics services. This list is drawn from the United Nations (UN) Provisional Central Product Classification (CPC) system and is used to facilitate the effort of securing liberalization through negotiations. It consists of three major categories: (1) core freight logistics services, (2) related freight logistics services, and (3) noncore freight logistics services. The core freight logistics services consist of the basic logistics operations in terms of cargo handling, storage and warehousing, transport agency services and other auxiliary services. The related freight logistics services consist of freight transport services, such as maritime transport, air transport, rail and road transport services, and other related logistics services, such as technical testing, commission agents, courier services, wholesale trade and retailing, and the non-core logistics services comprise packaging services, leasing services computer-related services and management consulting. For a more detailed description of these categories and their respective CPC codes, refer to Appendix B.

Under this definition, distribution, which focuses on the delivery of freight to the final consumers, is part of logistics which is concerned with the efficiency and cost-effectiveness of the overall logistics chain, which includes, among others, cargo handling, transport,

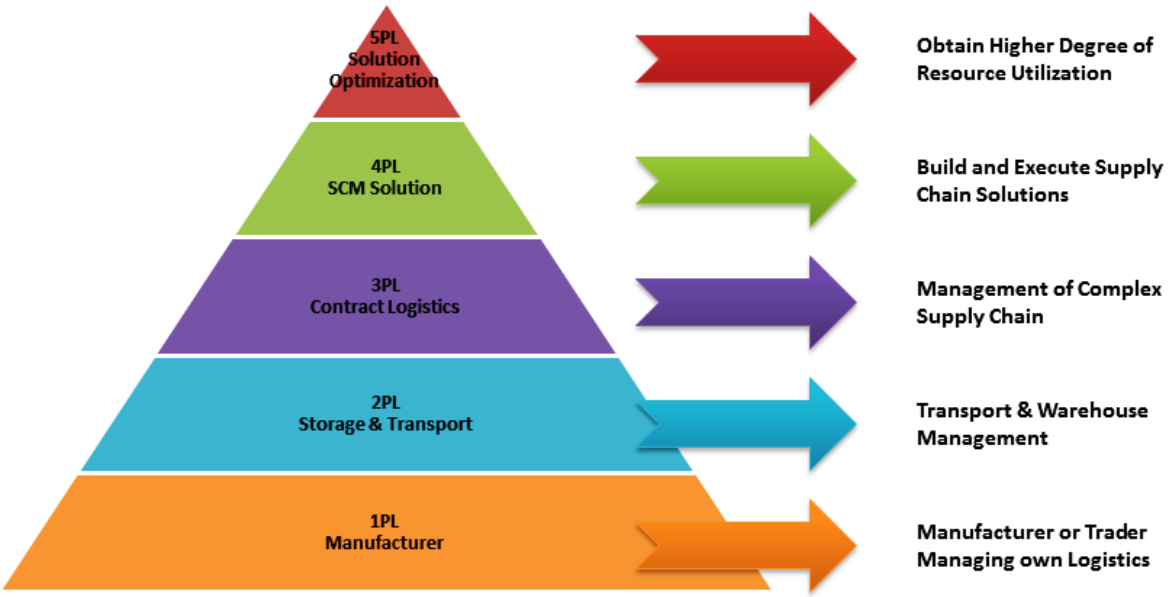
inventory and distribution. Thus, distribution covers such areas as commission agencies, wholesaling and retailing, and other ways of bringing the freight to the final consumers, which form the channels to deliver the final products to the final consumers.

Multimodal or intermodal transport refers to the use of at least two modes of transport under one single bill of lading or single contract of carriage. The use of multimodal transport has been strongly advocated and promoted in the ASEAN countries under the ASEAN Economic Community Blueprint (2015) with the growing realization about its economic and environmental benefits, particularly in terms of lower transport costs compared to the use of air transport only, reduced transit time compared to the use of maritime transport only over the entire logistics chain, providing door-to-door delivery and ensuring lower environmental costs as it does not rely solely on a single mode of transport in the entire transportation process. Door-to-door delivery of freight further adds more customer value as consumers are becoming more demanding in terms of convenience, quick ordering and delivery time, and lower costs.

There are basically four types of logistics service providers: First-party logistics (1PLs) service providers, Second-party logistics (2PLs) service providers, Third-party logistics (3PLs) service providers and Fourth-party logistics (4PLs) service providers. 1PLs are manufacturing companies who do their own logistics activities. 2PLs are transportation carriers who have their own assets like the truck carriers, shipping lines and the like. 3PLs are companies that provide logistics activities on behalf of their clients - mostly manufacturing companies which want to focus on their core competencies and outsource their logistics functions to specialist logistics service providers – 3PLs. 4PLs are companies that act as integrators that assemble the resources, capabilities, and technology of its own organization and other organizations to design, build, and run comprehensive supply chain solutions. Whereas a third-party logistics (3PL) service provider targets a function, a 4PL targets management of the entire process.

Firms providing transport management services and other value-added logistics services are called “Third-party LSPs or 3PLs” and may own fully or partially their fleet and other equipment used (asset-based). They are differentiated from First-party LSPs which are part of a manufacturing establishment and thus provide in-house logistics functions. There are also other LSPs (Second-party LSPs which are asset-based transport carriers, such as shipping lines and airlines; Fourth-party LSPs that focus on supply chain consulting, such as global network design and distribution strategies, inventory forecasting and planning, product design strategies, information technology (IT) needs assessment, and vendor identification and management; and Fifth-party LSPs that are asset-based and aggregate the demands of the 3PLs and others into bulk volume for negotiating more favorable rates with shipping lines and airlines. Such LSPs are more IT-intensive and less asset-intensive. Both transport management and supply chain consulting services are key services for the logistics sector and are categorized as Tier 1 logistics service activities. See Figure 5 for more illustrations.

Figure 5. Different Types of Logistics Service Providers (LSPs)



Since there are various activities and stakeholders in the logistics chain, integration or coordination among the various activities in the logistics chain is crucial to the attainment of providing a seamless and efficient movement of freight and information from the point of production to the point of consumption. Hence, there is a need to adopt an integrated view of logistics rather than just considering them as separate and independent entities in the logistics chain.

3.2 Economic significance

Logistics play a critical role in every country's international trade success and economic development. In particular, access to foreign markets does not only depend on the level of tariffs and non-tariff barriers faced by exporters but also on the cost and efficiency of the international logistics chain which could facilitate or impede the flow of international trade. Similarly, the efficiency or lack of efficiency in logistics chain can also facilitate or impede the flow of essential imports which could have a beneficial or detrimental impact on a country's growth potential and national development.

Logistics costs now account for a significant portion of export costs and therefore, any reduction in logistics costs and/or improvement in logistics efficiency will largely contribute to a country's trade performance by lowering the cost of exporting and importing as well as by delivering the goods from the point of production to the point of consumption at the right place at the right time and in conditions that the customers want. In the Philippines, logistics costs are significantly higher than in most of the older ASEAN member countries (most notably Singapore, Malaysia and Thailand), due to its geographical and infrastructure challenges arising from its archipelagic nature, but also due to burdensome and sometimes inconsistent regulations imposed by various government agencies.

Many industries and service providers also use distribution services inputs in their production processes and delivering their services. As such, a more efficient domestic distribution services market is likely to reduce the cost of doing business throughout the entire economy. More efficient resource allocation, lower consumer prices and increased consumer choice for commissioning agents' services, wholesale services and retail services is therefore likely to produce positive economy-wide development impacts.

There are several studies in the literature which provide substantial evidence of a direct link between efficiency in logistics, trade performance and economic growth (for example, Radelet and Sachs 1998; Hummels 2000) as well as a link between market access improvement and efficiency in logistics (for example, Fink et al. 2000; De Sousa and Findlay 2008; Hollweg and Wong 2009; Anderson and Banomyong 2010; Tongzon 2011; Tongzon 2012). Radelet and Sachs (1998) highlighted the importance of shipping costs to a country's trade performance and economic growth when they found, among a sample of 92 developing countries, that countries with lower shipping costs enjoyed faster manufactured export growth and overall economic growth over the past 3 decades than those with higher shipping costs. Hummels (2000) later confirmed this with his findings, showing that exporters with 1 percent lower shipping costs experienced 5 to 8 percent higher market shares in the export of manufactured products. Fink et al. (2000) further attributed the differences in shipping costs mainly to countries' restrictive trade policies and anti-competitive practices by liner shipping conferences. They therefore concluded that deregulation of trade measures particularly in the provision of port services and break-up of anti-competitive shipping alliances could lower shipping costs substantially. Hollweg and Wong (2009) found strong evidence for a negative relationship between logistics regulatory restrictiveness and logistics performance based on the World Bank's Logistics Performance Index. An efficient logistics contributes further to economic development by lowering transaction costs and creating more customer value and thus providing firms with opportunities to increase their earnings (Banomyong et al. 2008; Anderson and Banomyong 2010). The World Bank (2016) has consistently shown that economies that have less efficient logistics systems tend to have lower international competitiveness and economic growth.

In terms of country case studies, De Sousa and Findlay (2008) showed that the deregulation of the logistics sector in Australia resulted in greater economic gains in terms of lower freight rates and better quality of service due to greater competition within the logistics industry and contributed to Australia's improved international competitiveness. They also raised the importance of privatization, competition, and supportive government measures in undertaking the deregulation of the logistics sector and the need for proper consultation with all the stakeholders affected by the logistics services deregulation. Tongzon (2012) analyzed the likely implications of logistics services deregulation for Indonesia's logistics industry and using the concept of competitive advantage supplemented with industry survey, concluded that Indonesia could benefit in those sub-sectors where Indonesia has a competitive advantage while losing in those sub-sectors where she has a competitive disadvantage. However, economic benefits would be substantial in the long run if appropriate policies and measures can be adopted and implemented to facilitate the transfer of technology and address

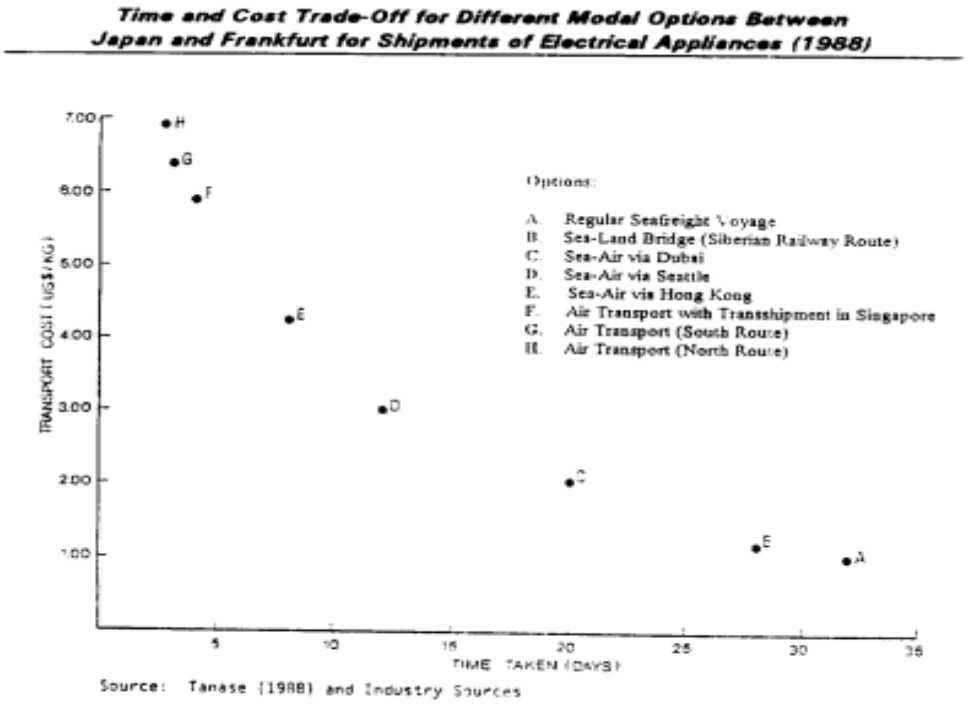
other factors that can enhance their capacity and international competitiveness. Tongzon et al. (2017) have demonstrated based on empirical evidence that deregulation and liberalization reforms undertaken by Australia for its logistics sector have brought about substantial economic benefits in terms of improved productivity, innovation, better quality of service and overall higher economic growth and employment, although in some sub-sectors there were short-term adjustment costs.

All these studies have shown that an improved market access for logistic services could lead to greater logistics efficiency and lower costs and thus contribute to a country's trade performance and economic growth. However, these studies have also pointed out that deregulation of logistics services *per se* does not necessarily lead to higher exports and greater economic growth unless the deregulation is preceded or accompanied by necessary reforms to improve a country's capacity and international competitiveness, build a country's infrastructure, improve its regulatory framework and implementing policies that facilitate the transfer of technology from highly efficient foreign logistics companies to less efficient local counterparts.

Innovation in logistics and distribution, such as the use of ICT or e-commerce, the internet of things and the use of drones in freight delivery and distribution, has greatly enhanced their ability to improve their logistics and distribution performance in terms of reduced order cycle time, transit time and other aspects of their operations, which require a high level of integration and coordination within and with other firms in other industries involved in the provision of logistics and distribution services. However, this innovation has also intensified the pace of globalization and competition within the logistics and distribution industry. Smaller domestic logistics firms that have less access to the advances in information technology have been at a disadvantage relative to the larger and more established foreign firms, which have the capital and state-of-the-art technology. Conventional retailers (for example, Walmart) are facing increasing competition from logistics firms that are now expanding into retailing business (for example, Amazon). Users and consumers of services are also becoming more demanding in their expectations about the standards of logistics and distribution performance. With easy access to more up-to-date and timely information about the availability and quality of products and services, innovation has empowered them to make more informed choice decisions.

As mentioned previously, multimodal transportation lowers the cost and improves the service offered to freight owners and passengers by using each mode for the portion of the journey for which it is best suited (for example, a combination of shipping and air transport under one single contract of carriage provides the cost advantage of shipping relative to air transport and the speed of airlines relative to other modes of transport). As illustrated in Figure 6, the sea-air multimodal transport either via Dubai offers the least cost option compared to just a single air transport mode and least transit time compared to pure maritime transport mode. Multimodal transport can also reduce the burden on overstressed infrastructure and improve environmental quality.

Figure 6. Time and Cost Trade-offs



3.3 Regulatory institutions

This section identifies the different executive agencies which regulate the transport, logistics and distribution sectors in the Philippines. Appendix C provides background information on the general institutional setting.

Multimodal transport or intermodal transport as defined previously which refers to the use of at least two modes of transport under one single bill of lading or single contract of carriage still does not exist in the Philippines. There is no integrated regulatory framework for multimodal transport as different modes of transport are under different agencies with different regulations.

Tables 9 and 10 identify the industry specific regulators. The industry classification and description are based on the UN International Classification of All Economic Activities (ISIC), Rev. 4, and do not necessarily reflect the definitions adopted in specific laws.

Table 9. Regulators in the Transport and Storage industries

Industry	Regulator
Freight rail transport Includes freight transport on mainline rail networks as well as short-line freight railroads	No regulator identified.
Freight transport by road Includes all freight transport operations by road - logging haulage; stock haulage; refrigerated haulage; heavy haulage; bulk haulage, including	Land Transportation Franchising and Regulatory Board (LTFRB) Sectoral office under the Department of Transportation (DOTr) responsible for the

haulage in tanker trucks; haulage of automobiles; transport of waste and waste materials, without collection or disposal	issuance of Certificates of Public Convenience or permits authorizing the operation of public land transportation services provided by motorized vehicles and prescription of appropriate terms and conditions. Land Transportation Office (LTO) Sectoral office under the DOTr tasked for the registration of motor vehicles; issuance of licenses to motor vehicle drivers; collection of fines and penalties for motor vehicle-related infractions
Transport via pipeline Includes transport of gases, liquids, water, slurry and other commodities via pipelines	No regulator identified
Sea and coastal freight water transport Includes transport of freight overseas and coastal waters, whether scheduled or not; transport by towing or pushing of barges, oil rigs etc.	Maritime Industry Authority (MARINA) Attached agency to the DOTr in charge of the prescription of routes and areas of operations of domestic ship operators; vessel registration; issuance of Certificate of Public Convenience; safety and environmental standards
Inland freight water transport Includes transport of freight via rivers, canals, lakes and other inland waterways, including inside harbours and ports	As above
Freight air transport Includes transport freight by air over regular routes and on regular schedules; non-scheduled transport of freight by air; launching of satellites and space vehicles; and space transport	Civil Aeronautics Board (CAB) Attached agency to the DOTr responsible for the issuance of Certificates of Public Convenience and Necessity (CPCN) to domestic carriers, Foreign Air Carrier's Permit (FACP) to foreign carriers.
Warehousing and storage Includes the operation of storage and warehouse facilities for all kind of goods such as the operation of grain silos, general merchandise warehouses, refrigerated warehouses, storage tanks etc. It also includes storage of goods in foreign trade zones and blast freezing	Regulated by relevant port authority where facility is located. Facilities outside the ports are not regulated.
Service activities incidental to land transportation Includes 1) activities related to land transport of passengers, animals or freight such as operation of terminal facilities such as railway stations, bus stations, stations for the handling of goods; operation of railroad infrastructure; operation of roads, bridges, tunnels, car parks or garages,	Toll Regulatory Board (TRB) DOTr-attached agency tasked with the issuance, modification, and promulgation of rates of toll facilities; grant authorization to operate a toll facility; issuance of Toll Operation Certificate The administration and regulation of public land transportation services are undertaken by the

bicycle parkings; 2) switching and shunting; 3) towing and road side assistance. This class also includes: liquefaction of gas for transportation purposes	DOTr through its attached agencies, the LTO and the LTFRB. The LTFRB's functions include the regulation of entry and exit of public transportation operators and setting of fares; the LTO assists with the implementation of regulations through its registration and inspection functions. The accreditation, regulation, and supervision of towing services is undertaken by the relevant authority where the towing service provider is located. For example, the accreditation, regulation, and supervision of towing service providers operating within Metro Manila falls under the Metropolitan Manila Development Authority (MMDA).
Service activities incidental to water transportation Includes activities related to water transport of passengers, animals or freight: operation of terminal facilities such as harbours and piers; operation of waterway locks etc.; navigation, pilotage and berthing activities; lighterage, salvage activities; and lighthouse activities	Philippine Ports Authority (PPA) Government –Owned and –Controlled Corporation (GOCC) attached to the DOTr in charge of the development, regulation, and operation of Philippine seaports; regulation and supervision of pilotage in any Port District Cebu Port Authority (CPA) Attached agency to the DOTr tasked with the administration, maintenance, and operation of all ports located in Cebu province The administration and regulation of Special Economic Zones (SPZ) are charged either to the Philippine Economic Zone Authority (PEZA) or independent authorities. Examples of independent SPZ authorities are the Subic Bay Metropolitan Authority (SBMA) and the Cagayan Economic Zone Authority (CEZA) which manages and regulates the Subic SPZ and Freeport and the Cagayan SPZ and Freeport, respectively. There are also economic zones that are owned and operated privately. These zones, however, are still monitored by the PEZA for the implementation of incentives and operations for adherence to the law.[189]
Service activities incidental to air transportation Includes activities related to air transport of passengers, animals or of passengers, animals or freight: operation of terminal facilities such as airway terminals, etc.; airport and air-traffic-	Civil Aeronautic Authority of the Philippines (CAAP) Attached agency to the DOTr responsible for the setting and implementation of rules and regulations for the Philippine aviation industry

[189] *The Special Economic Zone Act of 1995,* Republic Act No. 7916, as amended by RA 8748, Section 15.

control activities; ground service activities on airfields etc. It also includes firefighting and fire-prevention services at airports	including the registration of all aircraft owned and operated in the Philippines and all air facilities; determination of charges and/or rates pertinent to the operation of public air utility facilities and services; operation and maintenance of national airports, air navigation and other similar facilities. Manila International Airport Authority (MIAA) DOTr-attached agency tasked with the provision of airport facilities for international and domestic travel at the Ninoy Aquino International Airport Clark International Airport Corporation (CIAC) Attached agency to the DOTr in charge of the management of airport infrastructure and services of the Clark International Airport Mactan-Cebu International Airport Authority (MCIAA) Attached agency to the DOTr responsible for the operation and maintenance of the Mactan International Airport; airport safety and security
Cargo handling Includes loading and unloading of goods or passengers' luggage irrespective of the mode of transport used for transportation; stevedoring; and loading and unloading of freight railway cars	Regulated by the relevant port authority. For example, PPA sets and collects port charges such as wharfage dues, berthing/usage fees, and terminal handling costs. It approves increases in cargo-handling rates and receives cargo handling revenues on domestic and foreign cargo, respectively.
Other transportation support activities Includes forwarding of freight; arranging or organizing of transport operations by rail, road, sea or air; organization of group and individual consignments (including pickup and delivery of goods and grouping of consignments); logistics activities, i.e. planning, designing and supporting operations of transportation, warehousing and distribution; issue and procurement of transport documents and waybills; activities of customs agents; activities of sea-freight forwarders and air-cargo agents; brokerage for ship and aircraft space; and goods-handling operations, e.g. temporary crating for the sole purpose of protecting the goods during transit, uncrating,	Fair Trade Enforcement Bureau (FTEB) Bureau created under the Consumer Protection Group (CPG) of the Department of Trade and Industry (DTI) tasked with the accreditation of seafreight forwarders; handling of consumer complaints Civil Aeronautics Board DOTr-attached agency charged with the issuance of Letters of Authority to airfreight forwarders, general sales agents, cargo sales agents Professional Regulatory Board for Customs Brokers (PRBCB)

sampling, weighing of goods	Its primary mandate is the supervision, control and the regulation of the practice of the customs broker profession. The PRBCB is also tasked to standardize and regulate the customs administration education and oversee the examination and registration of customs brokers. The Board is under the supervision and administrative control of the Professional Regulation Commission (PRC).
Postal activities Includes the activities of postal services operating under a universal service obligation. The activities include use of the universal service infrastructure, including retail locations, sorting and processing facilities, and carrier routes to pickup and deliver the mail. The delivery can include letter-post, i.e. letters, postcards, printed papers (newspaper, periodicals, advertising items, etc.), small packets, goods or documents. Also included are other services necessary to support the universal service obligation.	No regulator identified. The Philippine Postal Corporation (PhilPost) is a GOCC under the direct jurisdiction of the Office of the President with the mandate to plan, develop, promote, and operate a nationwide postal system. It is engaged in the collection, handling, transportation, delivery, forwarding, returning and holding of mails, parcels, and like materials, throughout the Philippines, and, pursuant to agreements entered into, to and from foreign countries. In 2012, PhilPost ventured into the warehousing and logistics business.
Courier activities Involves courier activities not operating under a universal service obligation. Includes 1) pickup, sorting, transport and delivery (domestic or international) of letter-post and (mail-type) parcels and packages by firms not operating under a universal service obligation. One or more modes of transport may be involved and the activity may be carried out with either self-owned (private) transport or via public transport and 2) distribution and delivery of mail and parcels. It also includes home delivery services.	No regulator identified

Wholesaling and retailing are the final steps in the distribution of goods. The distinction between wholesale and retail sale is based on the predominant type of customer.

Table 10. Regulators in Distribution industry

Industry	Regulator
Wholesale trade Includes wholesale trade on own account or on a fee or contract basis (commission trade) related to domestic wholesale trade as well as international wholesale trade (import/export).	No overall regulator identified. However, trade in specific goods are regulated (see other chapters)

Wholesale is the resale (sale without transformation) of new and used goods to retailers, business-to-business trade, such as to industrial, commercial, institutional or professional users, or resale to other wholesalers, or involves acting as an agent or broker in buying goods for, or selling goods to, such persons or companies.	
Retail trade Retail trade is classified first by type of sale outlet (retail trade in stores and retail trade not in stores). "Retail trade not in stores, stalls or markets" includes retail sale activities by mail order houses, over the Internet, through door-to-door sales, vending machines etc. It also includes the retail sale by commission agents and activities of retail auctioning houses.	No overall regulator identified. However, trade in specific goods are regulated (see other chapters). Moreover, foreign retailers must secure a certificate of compliance with pre-qualification requirements from the Board of Investments in line with the Retail Trade Liberalization Act. The E-Commerce Office, which is a Program Office lodged under the Sector Planning Bureau (SPB) of the Department of Trade and Industry (DTI) is tasked with the formulation of policies and guidelines in support of e-commerce. It oversees the implementation of the Philippine E-Commerce Roadmap 2016-2020.

3.4 Philippines' current logistics performance

The best way of assessing Philippines' logistics performance is to look at its logistics performance index (LPI) and other indicators compared with the other ASEAN countries based on the worldwide latest survey undertaken by the World Bank (2016) among the world's multinational freight forwarders and main express carriers. This index provides the most up to date and comprehensive measure of logistics performance as it covers key performance indicators for logistics such as customs processing, infrastructure quality, ability to track and trace shipments, timeliness and competency of the domestic logistics industry. As can be seen from Table 11, the Philippines' overall logistics performance index in 2016 was way below those of the older ASEAN members and even lower than Vietnam, one of the transitional economies of Southeast Asia.

This ASEAN cross-country comparison implies that the Philippine logistics sector has a competitive disadvantage in logistics services vis-à-vis other older ASEAN members. Compared with these countries, its logistics sector was found to be one of the most inefficient sectors adversely affecting its international competitiveness. The main factors behind this relatively poor logistics performance can be explained by its inadequate and relatively poor quality of infrastructure, inefficient customs, poor competency of its logistics providers and limited ability to track and trace shipments.

Another contributing factor to this relatively poor logistics performance is its excessively high logistics cost. This is more specifically illustrated by comparing the cost of shipping containers from the port of Manila to the port of Los Angeles, USA relative to other regional capital ports. As Table 12 shows, the cost of shipping containers from the port of Manila to the port of Los Angeles (LA) is much higher than the rest of the regional capital ports, except for the port of Phnom Penh, Cambodia. The high cost of shipping is caused by limited cargo base (lack of economies of scale), inadequate port infrastructure, lack of competition in the coastal shipping market due to cabotage, inadequate road transport networks and regulations that lead to excessive road congestion, higher cost of port operations and inadequate investments from the private sector (MARINA, 2016). The current coastal market for shipping is not yet totally open to foreign shipping operators, as domestic ships are only allowed to make port-to-port calls within the country. There will be more discussion of this issue later.

Thus, the factors above, including its excessively high shipping costs, (which constitute a major part of domestic logistics costs in the export of goods) have been found to be the major factors contributing to high logistics costs in the Philippines and thus to constraining the flow of cargoes throughout the logistics chain.

Table 11. ASEAN (minus Brunei) Cross-country Comparison in terms of Logistics Performance

Country	LPI	Customs	Infrastructure	International shipments	Logistics competence	Tracking & tracing	Timeliness
Singapore	4.14	4.18	4.20	3.96	4.09	4.05	4.40
Malaysia	3.43	3.77	3.45	3.48	3.34	3.46	3.65
Thailand	3.26	3.11	3.12	3.37	3.14	3.20	3.56
Indonesia	2.98	2.69	2.65	2.90	3.00	3.19	3.46
Vietnam	2.98	2.75	2.70	3.12	2.88	2.84	3.50
Philippines	2.86	2.61	2.55	3.01	2.70	2.86	3.35
Cambodia	2.80	2.62	2.36	3.11	2.60	2.70	3.30
Myanmar	2.46	2.43	2.33	2.23	2.36	2.57	2.85
Lao PDR	2.07	1.85	1.76	2.18	2.10	1.76	2.68

Source: World Bank (2016)

Table 12. ASEAN Cross-country Comparison: Cost of Shipping from Port to Port

No	From	To	Currency	20'	40'	ROUTING
1	Jakarta	LA	USD	1420	1800	via HKG
2	Manila	LA	USD	1450	1717	via Kaohsiung
3	Port Klang	LA	USD	1260	1600	via HKG
4	Bangkok	LA	USD	1340	1700	via HKG
5	Singapore	LA	USD	1270	1612	Direct
6	Ho Chi Minh	LA	USD	1340	1700	via HKG
7	Phnom Penh	LA	USD	1740	2200	via HKG

Source: Department of Sales, DHL

It is evident from the literature review that an improved market access for the provision of DML services can produce substantial national economic benefits, such as increased

efficiency and quality of services, lower production costs, greater international competitiveness and economic growth. However, these benefits can only be realized, if market openness is complemented with effective policies and measures to improve the quality of institutions, adequacy and quality of infrastructure, transfer of technology, human resource development and other measures that can address the other factors affecting a nation's trade and investment of DML services, and international competitiveness.

Despite the potential benefits of an improved market access for DML services, the Philippines' DML services sector lags behind other countries having one of the most restrictive regulatory regime for services affecting its growth potentials. Specifically, in the field of logistics, the Philippines has one of the most restrictive set of regulations which, together with other factors, are responsible for its relatively poor logistics performance.

There are basically four types of logistics service providers: First-party logistics (1PLs) service providers, Second-party logistics (2PLs) service providers, Third-party logistics (3PLs) service providers and Fourth-party logistics (4PLs) service providers. 1PLs are manufacturing companies who do their own logistics activities. 2PLs are transportation carriers who have their own assets like the truck carriers, shipping lines and the like. 3PLs are companies that provide logistics activities on behalf of their clients - mostly manufacturing companies which want to focus on their core competencies and outsource their logistics functions to specialist logistics service providers – 3PLs. 4PLs are companies that act as integrators that assemble the resources, capabilities, and technology of its own organization and other organizations to design, build, and run comprehensive supply chain solutions. Whereas a third-party logistics (3PL) service provider targets a function, a 4PL targets management of the entire process.

The 3PL industry in the Philippines is still quite fragmented and dominated by foreign transnational players such as DHL, UPS, Panalpina, and others. The Philippine logistics market has grown in recent years driven by the country's strong economic growth, growing outsourcing and rising globalization. The growth of export and import activities in the Philippines has significantly contributed to the growth of logistics market (Philippine Logistics Market Outlook to 2020, 2016). However, the domestic logistics companies are generally small to medium in size, compared to its foreign counterparts, and are mainly offering freight forwarding services.

There are two major freight forwarding industry associations in the Philippines: one for sea freight forwarding (known as Philippine International Sea Freight Forwarding Association, or PISFA), and the other for air freight forwarding (Aircargo Forwarders of the Philippines, or AFP). PISFA consists of over 160 members, including both home-grown (small to medium enterprises) and multinational corporations (medium to large enterprises). Key industry players are not members of PISFA as they are discouraged by international law to join associations for antitrust reasons. FedEx is represented by local business partners and most foreign shipping and airlines are represented by general sales agents.

3.5 Key regulations in the DML sector

One of the main objectives of DML services is to bring the freight to the final consumers at the right time and at the right price. This implies that in the light of increasingly competitive market, the goods should be delivered as quickly as possible (or in as short a lead time as possible) and at the lowest possible cost. The longer the lead time, the more inventories the customer, distributor or retailer should have and thus incurring a higher inventory cost. It also means that, if an increase in cost is due to delays in the provision of these services, this can be passed onto to the shippers or the cargo owners, which could lead to lower profitability or reduced international competitiveness.

Government restrictions in the form of laws and regulations can adversely affect the price, reliability and quality of these services, especially if they discriminate between providers of these services and if these laws and regulations are administered or implemented less efficiently. The time as much as the cost of complying with all the laws and regulations can add up to higher operating costs for shippers and traders.

Although there are other barriers to trade and investment performance in this sector, such as the poor quality of infrastructure and shortage of human resources with appropriate skills, this study focuses on laws and regulations and their governance frameworks in this sector. Laws and regulations can be discriminatory or non-discriminatory against foreign logistics service suppliers. Discriminatory laws and regulations apply only to foreign suppliers and treat foreign logistics services suppliers less favorably than domestic service suppliers. Non-discriminatory laws and regulations are regulatory processes that apply to both domestic and foreign providers, but can still restrict activity. Regulatory barriers can act to reduce competition in the DML sector and thus reduce market efficiency. Although there are competition-reducing regulatory barriers to deal with market failures or strategic and political objectives, they still restrict trade and investment in this sector. Regulations can also lead to inefficiency if they are not transparent or implemented less consistently or inefficiently.

As an active member of the WTO, the Philippines is committed to the "most favored nation" principle and has participated in a number of negotiations under the Geneva Agreement on Trade in Services (GATS) where countries have to make unilateral offers and requests in the context of the member countries' limitations on market access (MA) and national treatment (NT). As a founding member of ASEAN, the Philippines has also committed itself to the ASEAN vision of an economically integrated Southeast Asian region. In particular, it has officially supported the objectives under the ASEAN Roadmap for the Integration of Logistics Services by signing and ratifying the ASEAN Framework Agreement for the integration of Priority Sectors and the Roadmap for the Integration of Logistics Services endorsed in 2007. These liberalization commitments under services and logistics in particular will be further discussed in more detail in a separate chapter of this study.

As discussed previously, there are four possible modes of supply. In the context of DML services, Mode 1 of supply refers to the export of DML services across borders; for example,

a Filipino freight forwarder is transporting cargoes on behalf of a Filipino exporter to a Malaysian importer in Malaysia. Mode 2 refers to consumption abroad; for example, a Philippine registered shipping company may use an Indonesian stevedoring company to handle its cargoes at Indonesian ports. Mode 3 relates to commercial presence; for example, when a Filipino logistics provider establishes a branch in other countries. Mode 4 of supply refers to the temporary movement of natural persons across borders; for example, a Filipino crane operator may be temporarily contracted to operate a crane in a Japanese port.

Although the Philippines has implemented its liberalization commitments in multilateral and regional contexts, there are still remaining regulatory barriers affecting the flow of trade and investment in the DML sector, as can be seen in Table 13.[190]

Table 13. Key Regulatory Measures to Trade and Investment in the DML sector in the Philippines

Regulatory Barriers	Description
Horizontal Regulations	All subsectors
Mode 3 (in activities reserved by law to Philippine citizens, foreign equity limited to minority share)	Based on 1987 Philippine Constitution
Mode 4 (subject to labor market test)	Based on 1987 Philippine Constitution;
A. Distribution	
Limits on foreign investment	
Regulations that restrict foreign retailers from entry (Mode 3)	Investment in small retail ventures is close to foreigners, based on 1987 Philippine Constitution and EO 858 (Promulgating the 8th Regular Foreign Investment Negative List). Small retail ventures are those enterprises with paid up capital of less than USD 2.5 million.
Regulations that limit foreign investment in retail based on foreign equity holdings (Mode 3)	Up to 80% foreign equity holdings, except in cases where at least 30% of shares are held by local investors, based on RA 7042, section 3.
Regulations that limit investment in commission agents' services (Mode 3)	Only open to natural persons from ASEAN provided certain conditions are met, based on the Philippine commitments to the ASEAN Economic Community.
Licensing and approval	
Registration with SEC and DTI for retailing	Foreign retail enterprises should be registered with SEC and DTA; need to pass pre-qualification procedures
Registration with SEC and DTI for corporate agents/distributors and sole proprietorships	Corporate agents/distributors must register with SEC and sole proprietorship agents with DTI
Scope of service	
Foreign retailers area of operation	Prohibited to operate outside their accredited stores
Performance requirements for foreign retailers	At least 30% or 10% of their inventory in value to be sourced in the Philippines
Nationality requirements	
Only for Philippine nationals	Foreigners are only allowed to own and invest in large retail ventures subject to several requirements, based on RA 8762 Retail Trade Liberalization Act of 2000.
Transport Services	All subsectors (operations of public utility are granted only to Filipino citizens or to corporations with 60% equity owned by such citizens, employment of aliens not exceeding 5 years upon entry, limitations listed in horizontal regulations
B. Air Transport	
Limits on foreign investment	

[190] Other restrictions are discussed in Chapters 2 and 4.

Regulations that limit foreign investment based on foreign equity holdings (Mode 3)	A maximum of 40% as transportation is considered a public utility; this also applies to leasing of aircraft, maintenance/repair of aircraft, and general sales/cargo sales agency, subject to approval by CAAP. This is based on the 1987 Philippine Constitution.
Cabotage policy (Mode 1)	Cabotage is restricted to domestic airlines, but other air services are subject to foreign equity restrictions.
Licensing and approval	
Certificate and permit from SEC and the President of the Philippines (Mode 3)	Subject to certain requirements, each permit is only up to 25 years
Leasing/rental of aircraft without crew (Mode 3)	Subject to approval by CAAP, based on RA 776 and Advisory Circular 09-006 Application and Process: Aircraft Leasing Arrangements.
Scope of service	
Restrictions based on ASAs	The terms of the agreement can be modified by CAAP, subject to the approval of the President
C. Maritime Transport	
Limits on foreign investment	
Regulations that limit foreign investment based on foreign equity holdings for nationally registered ships and domestic express delivery services (Mode 3)	A maximum of 40% as transportation is considered a public utility, based on 1987 Philippine Constitution.
Limit foreign investment based on foreign equity holdings in ports (Mode 3)	A maximum of 40% as ports are considered as public utilities; this same applies to port-related services and ports under concessions to the private sector.
Licensing and approval	
Registration of ships (Mode 1)	A foreign ship must be registered with MARINA which will evaluate whether its services provide economic benefits
Cargo handling (Mode 2)	Requirements for cargo handling services, which are in the list of requirements for registration as a Subic Bay Freeport Enterprises, include 5-year experience in cargo handling operations and certification from previous or current clients (RA 7227). Cargo handling operations at the port of Manila and other ports in the country under the jurisdiction of PPA are to be handled by one operator subject to the evaluation of PPA (LOI 1005-A).
Leasing/rental of vessels without a crew (Mode 3)	Bareboat charter subject to the approval by MARINA, based on MARINA Memorandum Circular No.182.
Maintenance/repair of vessels (Mode 2)	For any repairs, conversions or dry docking of Philippine-owned or registered vessels must be done at domestic ship repair yards registered with MARINA, based on Section 2 , Rule II, Rules and Regulations to implement PD 1221.
Scope of service	
Cabotage policy (Mode 1)	Foreign registered vessels are not allowed to operate domestic shipping unless they are locally registered.
Cargo reservation scheme (Mode 1)	Foreign registered ships are not allowed to transport government cargoes
Nationality Requirements	
Only for Filipinos (Mode 1)	All locally registered ships must be owned by Filipinos; if owned by corporations; the CEO must be Filipino and permanent resident and the crew must be 100% Filipino
D. Road and Rail Transport	
Limits on foreign investment	
Limit based on foreign equity holdings (Mode 3)	A maximum of 40% as road and rail transport are considered as public utility, except for road transport maintenance and repair services
Limit for other ASEAN countries (Mode 3)	A maximum of 49% for supporting services from other ASEAN member states, subject to certain conditions
Licensing and approval	
Certificate and permit for road transport (Mode 3)	Certificate of public convenience must be obtained from LTFRB, subject to economic needs test, based on Executive Order 202 and 1987 Philippine Constitution and Public Service Law.

E. Logistics services	This section includes cargo-handling services, storage and warehousing, container yard and depot services and freight forwarding services.
Limits on foreign investment	
Limit based on foreign equity holdings (Mode 3)	A maximum of 40% as it is considered a public utility, based on 1987 Philippine Constitution.
Nationality requirement	
Custom brokerage (Mode 3)	Customer brokerage must be a Filipino, based on 1987 Philippine Constitution, RA 9280 and EO 858.
F. Multimodal Transport	
Absence of an integrated regulatory framework (Modes 1-3)	Different modes of transport are under different agencies with different regulations.
G. Other regulatory barriers	
Visa requirements for foreign ship crew (Mode 1)	All foreign ships that make a port call need to apply for a tourist visa to be able to disembark from their ships

Source: APEC's Services Trade Access Requirements (STAR) Database (http://www.servicestradeforum. org/Home.aspx) ; Interviews with government agencies in the Philippines.

3.5.1 Distribution

As discussed previously, distribution is an important part of the logistics chain that is mainly concerned with the efficient movement and storage of the final products from their suppliers down to their final consumers. The distribution channel mainly consists of wholesalers and retailers. The Philippine National Statistics Office (NSO) officially defines wholesale trade as the resale of new and used goods to retailers, while retail trade is defined as the resale of new and used goods for personal and household consumption. The two channel partners therefore differ mainly in terms of the nature of consumers served.

The Philippine distribution industry has been liberalized since 2000 with the issuance of the Philippine Retail Trade Liberalization Act (RA 8762) which allowed the entry of foreign players into the Philippine retail industry. The passage of the law ended the 5-year stance of local retailers, headed by its industry association, to uphold the closure of local retail industry from foreign players. The new law effectively repealed RA 1180, also known as the Retail Trade Nationalization Law, which reserved retail trade activities solely for Filipinos (Dueñas-Caparas 2005). There are however no specific laws or regulations on wholesale trade.

The existing or remaining regulatory barriers in this sub-sector, as can be seen in Table 12, are in the form of limits on foreign investment based on foreign equity holdings for large retail ventures, licensing procedures and approval, area of operations and performance requirements and nationality requirements.

Retail Trade Services. The Retail Trade Liberalization Act of 2000 (RA 8762) prescribes a capitalization requirement for foreign service suppliers which essentially limit their participation in large ticket ventures or investments. Foreign investors are only allowed to own and invest in large retail ventures with 100% equity holding, subject to certain requirements. It sets a minimum capitalization of USD 2.5 million for foreign service suppliers; and below this amount is reserved exclusively to Philippine nationals. It requires USD 830,000 minimum investment per store and a parent company net worth of over USD

200 million. In addition, the foreign retailer must either own at least 5 retail stores elsewhere or have at least one outlet with capitalization of USD 25 million or more. Retail enterprises reserved exclusively for Philippine nationals are classified as Category A. On the other hand, retail enterprises that are allowed to be wholly owned by foreign nationals, are classified into several other Categories and for which certain specific limitations relating to equity, local content and qualifications on foreign retailers are imposed. These Categories are as follows:

- Category B. Enterprises with a minimum paid-up capital equal to USD2.5 million but less USD7.5 million, whose investments in establishing a store should not be less than USD830,000.00, which may be owned by foreign nationals;
- Category C. Enterprises with a paid-up capital equal to USD7.5 million or more, whose investments in establishing a store should not be less than USD830,000.00, which may be owned by foreign nationals;
- Category D. Enterprises specializing in high-end luxury goods with paid-up capital of at least USD250,000.00 per store, which may be owned by foreign nationals.[191]

Categories B and C retail enterprises whose foreign ownership exceeds 80 percent, are required to offer a minimum of 30% of their equity to the public within 8 years from their start of operations[192] In addition, foreign retailers are required to allocate and maintain at least thirty percent (30%) of the aggregate cost of their stock inventory to Philippine-made products under Categories B and C, and ten percent (10%) for category D.[193] This requirement promotes use of local content, which does not conform to the obligation on performance requirement.

To engage in retail trade in the Philippines, foreign retailers must also have the following qualifications:

- For Categories B and C, the foreign retailers' parent corporation must have a minimum net worth of USD200 million, and USD 50 million for Category D retailers;
- All foreign retailers, regardless of Category, must have at least 5 operating retailing branches or franchises anywhere around the world or at least 1 store with a minimum capitalization of USD25 million;
- Have 5 year track record in retailing; and
- The rule of reciprocity, i. e., countries where the foreign retailers are formed or incorporated must also allow the entry of Filipino retailers.[194]

On investment, the Act further requires the foreign retailer or investor to undertake the following: (i) maintain the full amount of capitalization in the country; (ii) secure a certificate of remittance of capital investment from the Bangko Sentral ng Pilipinas; and (iii) notify

[191] *Retail Trade Liberalization Act of 2000,* Republic Act No. 8762, Section 5.
[192] Ibid., Section 7.
[193] Ibid., Section 9.
[194] Ibid., Section 8.

authorities for inward remittance of capital investment, repatriation of investments and cessation of operations.[195]

Trading of Rice and Corn. The full ownership of non-Philippine nationals in firms engaged in domestic and international trading of rice and corn is allowed under Presidential Decree No. 194 (s.1973) subject to conditions that are set by the National Food Authority. One of the conditions includes a certification by the authority that (i) there is urgency in allowing the participation of foreigners in the trading; and (ii) such will not pose any danger of promoting a monopoly.[196] Further, 60 percent of foreign ownership in this activity is required to be divested to Philippine citizens within 30 years from the start of operations of the trading enterprise.[197]

Other trade distribution activities. It is worth noting that certain distribution activities are prohibited in the Philippines for reasons of morals, health and environment. The measures, which are specified in laws pertaining or relating to the environment, public safety, health and morals are applied irrespective of the nationality of the service suppliers and covers the following activities or areas:

- dangerous drugs and/or controlled precursors and essential chemicals regardless of quantity and purity
- chemical substances and mixtures that present unreasonable risk and/or injury to health or the environment;
- hazardous and nuclear wastes and their disposal in the Philippines; and
- nuclear weapons, devices and parts of it
- non-environmentally acceptable packaging materials;
- importation of consumer products packaged in non-environmentally acceptable materials;
- importation and distribution of chain saws.

For Commission Agents' Services (except in the rice and corn industry) delivered by ASEAN investors, 100 percent foreign equity participation is permitted where; i) paid-in equity capital is not less than US$200,000 for domestic market enterprises; or ii) paid-in equity capital is not less than US$100,000 for domestic market enterprises employing at least 50 direct employees; or iii) paid-in equity is no less than US$100,000 for domestic market enterprises involving advanced technology as determined by the DOST; or, iv) the agent exports 60% or more of its output. Otherwise, only up to 40 percent foreign equity participation is allowed.

Natural persons from ASEAN countries may provide Commission Agents' Services (except in the rice and corn industry) provided that: i) the total investment is not less than US$200,000 for domestic market enterprises; or ii) the total investment is not less than US$100,000 for domestic market enterprises employing at least 50 direct employees; or iii)

[195] Ibid., Section 5.
[196] Presidential Decree No. 194 of May 17, 1973, *Authorizing Aliens, as well as Associations, Corporations or Partnerships Owned in Whole or in Part by Foreigners to Engage in the Rice and Corn Industry, and for Other Purposes,* Section 3(a).
[197] Ibid., Section 5; National Food Authority (NFA), Council Resolution No. 193, s. 1998.

the total investment is not less than US$100,000 for domestic market enterprises involving advanced technology as determined by the Department of Science and Technology; or, iv) 60% or more of output is exported.

3.5.2 Transport and Logistics Services – Horizontal Measures

The Constitutional limitation imposed on public utilities is a measure that impacts transport and logistics activities. The measures in particular:

(i) limits the grant of franchise, certificate or any form of authorization for the operation of a public utility to Philippine nationals. In the case of corporations or associations it requires that at least 60 percent of its capital is owned by citizens of the Philippines;
(ii) requires the executive and managing officers of corporation or association of a public utility to be Philippine citizens; and
(iii) limits the participation of foreign investors to the governing body of any public utility enterprise to their proportionate share in its capital.

Based on the definition and scope of public utility (CA 146, s1936), the restriction applies to supply of service via commercial presence or investment in passenger and freight transport services by road, railway, water, and air. It also covers freight and carrier service, and express delivery as well as some other auxiliary transport services such as ice-plant, ice refrigeration plant, and wharf or dock. Other transport related activities such as shipyard, graving dock and marine repair yard (RA 9295 s2005, Section 3; and PD 666 21975, Section 1(d)), and warehouse (CA 454, s1939) were later excluded from the original list/scope by virtue of amendment to CA 146, 1936).

3.5.3 Air Transport Services

The Philippines as an ASEAN member is a signatory of the ASEAN Single Aviation Market (ASAM), which aims to allow all carriers from ASEAN to enjoy unlimited third, fourth and fifth freedom operations within the region, and has in 2016 ratified the fully the agreement to include all airports in the Philippines under the ASAM. Although there has been a substantial progress in the liberalization of the Philippine air transport market, substantial regulatory barriers remain.

As shown in Table 12, these barriers are in the form of foreign equity participation limits, nationality requirements and cabotage policies. Foreign investors in air transport can only hold an equity share up to 40 percent on the assumption that transportation is a public utility and on the basis of the Philippine constitution public utilities are only granted to Filipino citizens or to corporations with at least 60 percent equity owned by such citizens. This foreign equity limit applies to airline ownerships and auxiliary services, including ground handling services. This also applies to leasing of aircrafts without a crew, maintenance/repair of aircrafts and general sales/cargo sales agencies, subject to the approval of CAAP.

Airports are still purely government-owned and government-managed, except for those airports in Manila, Subic and Clark which have separate airport authorities, and Cebu whose airport management is a public-private partnership under which the private sector provides the construction, rehabilitation and operation of the terminals. The airside management of all airport is, however, still with the government, particularly for the rehabilitation of the runways, taxiways and air traffic controls.

Foreign air carriers are required to obtain a certificate and permit from Security and Exchange Commission (SEC) and the President of the Philippines, and subject to certain requirements, each permit is only up to 25 years. Cabotage is reserved for domestic airlines while other air transport services are subject to the same foreign equity restrictions.

Air transport of passengers and freight. Only aircraft owned by or leased to citizens of the Philippines or associations or corporations at least 60 percent owned by Philippine citizens are allowed to be registered in the Philippines. An aircraft registered in the Philippines assumes a Philippine nationality. Exempted from this rule are foreign owned or registered aircraft for use by members of an aero club for recreation, sport, or flying skills as a pre-requisite to any aeronautical activities within the Philippines and those covered under existing international treaties (RA 9497s, Section 44).

Permit for domestic air commerce or transportation is limited to citizens of the Philippine citizens, and in case of associations or corporations must have 60 percent of voting interest owned or controlled by citizens of the Philippines. For the latter, the directing head, two-thirds of its board of directors and managing officers are required to be citizens of the Philippines. (RA 776 s1952, Section 12)

No foreign air carrier is allowed cabotage air traffic rights, passenger or cargo, between two points in the Philippines (EO 29 s2011, Section 5).

Only foreign air carriers with foreign air carrier permits granted by the Philippine government may operate in the Philippines, however such permit is only granted to those with existing ASAs with the Philippines. (EO 296 s2001, IRR Rule 2.6) The grant of frequencies, capacities or increased frequencies is the sole prerogative of the President.

Grant of increases in frequencies and or capacities in the country's airports other than NAIA to foreign service supplier may be granted by the CAB and subject to the approval of the President (EO 29 s2011, Section 3). Foreign air carriers applying for increase in frequencies or capacities are required to notify Philippine carriers operating in the route. (EO 29 s2011 IRR, Rule 3.3) subject to equal rights or reciprocal rights granted to Philippine carriers by the State of Registry of the foreign air carrier (EO 29 s2011 IRR Rules 4.1 and 4.3)

International air access to the Diosdado Macapagal International Airport and the Subic Bay International Airport is granted to foreign service carriers designated by countries with existing Air Service Agreements and may apply for 3rd and 4th freedom rights without cabotage. Similarly, foreign service carrier not yet designated by their countries with existing

ASA may also apply for the same rights subject to them being designated by their country. Application is evaluated by the Civil Aeronautics Board based on national interest and taking into consideration impact on Phillipine air carriers and domestic civil aviation industry. (EO 500 s2006, Section 3(g)).

Foreign service suppliers may also apply for international air access to development routes or gateways outside Manila (EO 29 s2011), where they can apply for third, fourth and fifth freedoms to the country's airports with no restriction on frequency, capacity and type of aircraft, and other arrangements that will serve the national interest. However, the grant of this privilege is subject to a reciprocity arrangement.

For charter trips and/or individual service transportation within the Philippines, authorization or certification for air taxi operation is only granted to Philippine citizens, and in case of domestic partnership, associations or corporations at least 60% of its equity must be owned by Philippine citizens. (CAB ER 5 s1970, Section 6)

Supporting services for airport operation

Airport operation services. The control, construction, maintenance, operation of airport operation services and facilities on existing international airports are within the power of airport authorities established by the government such as the Manila International Airport Authority, Mactan-Cebu, International Airport Authority, Clark International Airport Corporation (EO 773, s1982, EO 903 s1983, RA 9497 s2008, EO 193 s2013). Foreign service supplier access to this market is therefore limited by virtue of the grant of power to government owned and controlled corporations.

As for the other airports in the Philippines, the responsibility to construct, maintain, operate or expand is lodged with the CAAP Board. (RA 9497 s2008, Section 78).

Air traffic control services. Similarly, the planning, designing, acquisition, establishment, construction, operation, maintenance and repair necessary for aerodromes and other air navigation facilities are lodged with the CAAP Board (RA 9497 s2008, Section 35(l)).

Airman services. An airman license is issued only to qualified persons who are Philippine citizens or qualified citizens of other countries granting the same rights to Philippine citizens (RA 9497 s, Section 35(c)). Such license allows exercise of the privileges of flying, maintaining, controlling, directing, dispatching, instructing or any other civil aviation activity which is regulated and supervised by the CAAP. By definition an airman is “any individual who engages, as the person in command or as pilot, mechanic, aeronautical engineer, flight radio operator or member of the crew, in the navigation of aircraft while under way and any individual who is directly in charge of inspection, maintenance, overhauling, or repair of aircraft, aircraft engine, propellers, or appliances and individual who serves in the capacity of aircraft dispatcher or air traffic control operator.” (RA 9497 s2008, Section 3(n)).

Aviation and Aerospace industry. The Philippine Aerospace Development Corporation (PADC), a government-owned and controlled corporation, which has the mandate to (i) undertake activities and development projects to establish the aviation and aerospace industry in the Philippines including conduct of studies and researches on innovation; (ii) engage in maintenance, repair and modification of aerospace and associated flight and ground equipment and components; and (iii) own and engage in air transport services, gets preferential treatment on foreign loans. The President of the Philippines may guarantee payment of loans, credits and indebtedness or bonds of PADC with foreign government and other international financial institutions. It is also exempted from payment of taxes and duties. (PD 346 s1973, PD 286 s1973, and PD 696 s1975).

Subsidiaries may be established by PADC of which it must own 51 percent of capital stock. The remaining capital stock may be offered to others including the private sector, domestic or foreign. Subsidiaries established by PADC are entitled to the same benefits provided 80 percent of its capital stock is owned by PADC or collectively by PADC and other government agencies. (PD 696 s1975).

Selling and marketing Air Transport services

General Sales Agent. Only Philippine citizens are eligible to apply as a general sales agent, i.e. person engaged in the selling or offering of any air transportation, including negotiation for contracts for air transportation. However, any person engaged in activities of general sales agency at the time of the effectivity of the Economic Regulation are not required to apply for an authority to act a general sales agent (CAB, ER 8, Section 9).

Cargo Sales Agent. Similarly only Philippine citizens are eligible to apply as a cargo sales agency, i.e. on who acts as and who, as principal or agent, sells, or offers for sale, or negotiates contracts for air transportation of cargo. Certificated Air Freight Forwarders already authorized by the CAB are no longer required to apply for authority to act as cargo sales agent (CAB ER 8 s1982, Section 24).

3.5.4 Maritime Transport

Maritime transport can be categorized into two subsectors: international shipping and domestic shipping. Generally, international shipping can be considered as the less protectionist subsector, where existing government regulations for international shipping are mainly concerned with safety, security and environmental protection. The Philippines in particular has one of the most liberal regulatory regimes for international shipping, except for its regulations on safety, security and the environment as an active member and signatory of various international conventions, under the auspices of the International Maritime Organization (IMO) and International Labor Organization (ILO), such as the International Convention for the Prevention of Pollution from Ships and its amendments (MARPOL), International Convention for the Safety of Life at Sea Convention, 1974, as amended (SOLAS), and International Convention on the Standards of Training, Certification and Watchkeeping of Seafarers, 1978, as amended (STCW).

One underlying reason for this relatively liberal regulatory regime for international shipping is the fact that this type of shipping, particularly in container liner services, is mainly provided by foreign shipping lines connecting Manila port, Cebu or Davao port to the regional hub ports such as PTP in Malaysia, Singapore, Kaohsiung in Taiwan, and Hong Kong. But, one of the sectors that benefited in the preparation/settlement was the Philippine overseas shipping industry. At that time, the Philippine overseas shipping industry developed as one of the best in Asia, second only to Japan. The Philippine overseas trade experienced tremendous growth in trade with both the American and countries in the European continents.

Its national container liner shipping industry is highly concentrated with only five Filipino shipping lines (e.g. Eastern Shipping Lines Inc., Loadstar Shipping Co. Inc., Montenegro Shipping Lines Inc., PNOC Shipping and Transport Corporation), mostly providing domestic liner services (accounting for 90% of domestic shipping) and international tramp services.[198] Although the government has supported Filipino shipping companies to engage in international shipping through bareboat chartering program, investment incentives (such as accelerated depreciation, net loss carryover schemes for importation of ships and spare parts under its Domestic Shipping Policy - Republic Act 9295), and tax exemptions (for modernization of the ships), Philippine-registered shipping fleet has continuously declined due to the lack of capital to develop and upgrade the fleet (US$ 30-50 million per ship), high cost of money (5%-7% higher than Hong Kong), antiquated mortgage law (not recognized internationally), time-bound incentives (10 years), and discriminatory fiscal policies for ship purchase (locally built ships are subject to valued added tax (VAT) while imported ships are exempted). As a result, the cost of building a ship becomes more expensive, and the traditional Filipino shipowners cannot afford mainly due to lack of financing and absence of stable government support and lack of enabling laws to comply with various international conventions, rules and regulations. Ship owning and ship operation for overseas trade transitioned from traditional family owned companies to multinational owned corporations and government owned that have access to big financial institutions.[199] However, the Philippines is the largest supplier of highly qualified, competent and certificated seafarers in the world (more than 300,000 deployed seafarers; 20% of supply; roughly US$ 2 billion in remittances). Its leadership is being challenged by China, Vietnam, Russia, and India (Tongzon, 2015).

Like other ASEAN member countries, it is in the domestic shipping and in the registration of ships for international and domestic operations where regulations tend to be discriminatory. Although its 50-year old cabotage law was eased in 2015 with the issuance of Republic Act No. 10668, otherwise known as the Foreign Ships Co-Loading Act, which allows foreign ships carrying imported cargo and cargo to be exported out of the country to dock in multiple ports within the Philippines, *the law, however, does not cover carriage by foreign ships of domestic cargoes or domestic container vans whether loaded or empty within Philippine*

[198] Based on the interviews conducted with the General Manager of the Association of International Shipping Lines, Inc. and President of the Filipino Shipowners Association in 2016.
[199] Result of the Roadmapping on the Maritime Industry Development Program (MIDP) on 21 June 2017.

waters. Hence, domestic shipping or coastal trade remain limited to domestic shippers or nationally registered ships.

As shown in Table 12, for nationally registered ships, there is 40 percent foreign equity limit for foreign shareholders, as domestic shipping is considered a public utility. Similarly, the same limit applies to investments in Philippine ports, port operations and other port-related activities, such as cargo-handling services and ports under concession to the private sector. With regards to manning industry, there is a more stringent foreign equity provision of up to 25 percentage share.

There are also other requirements for operating in domestic shipping. A foreign ship must be registered with MARINA which will evaluate whether its shipping services can provide economic benefits to the region or the whole country. Likewise, leasing/rental of vessels without a crew needs approval from MARINA based on Memorandum Circular 182, while maintenance/repair of vessels must be done at domestic ship repair yards registered with MARINA based on regulations to implement PD 1221. Cargo reservation scheme is still practiced under which transport of government cargoes can only be carried by nationally registered ships under PD 1466. Further, all nationally registered ships must be owned by Filipinos and if owned by corporations, the CEO must be a Filipino and permanent resident and manned 100 percent by Filipino crew. There is a visa requirement for foreign seafarers if they want to disembark from their ships while docking at Philippine ports. The Philippine registry for ships is close which implies that the shipping company is treated in the same way as any other business registered in the country, subject to the full range of national legislations covering financial, corporate and employment regulations.

Water transport services for passengers and freight. In the case of water transport, the public utility limitations above apply to domestic[200] shipping (RA 9295, s2004) as well as overseas[201] shipping by Philippine flag vessels engaged in overseas commercial shipping (RA 9301, s2004).

For Philippine coastal trade, the vessel allowed to engage in Philippine coastal trade is thus limited to those licensed or carrying a certificate of Philippine registry, which is limited to Philippine nationals. (MARINA MC 110, 1995)

The restriction on foreign vessel participation in domestic shipping may be waived by the Maritime Industry Authority (MARINA) through a Special Permit when it deems it is warranted, i.e. no domestic shipping is available. While this may be the case, MARINA's Memorandum Circular in 2013 gives further preference to Philippine registered vessels by giving them flexibility in their operation, i.e. by also allowing them to operate within national territory (for Philippine registered overseas ship) and in international voyages (for Philippine-registered domestic ship). (MARINA MC 2013-04)

[200] This refers to transport of passengers or cargoes by ship registered and licensed to operate in the Philippines and engage in trade and commerce between Philippine ports and within Philippine territorial and inland waters.
[201] This refers to operation of a Philippine shipping enterprise for overseas trade for any kind of shipping operation including transport of passenger or cargoes.

For other coastal trade traversing bays and rivers, grant of bay or river license is also limited to vessels owned by Philippine nationals. And in the case of a juridical person, it is required to at least be 75% owned by Philippine nationals; and use vessels made in the Philippines. (MARINA MC 110, 1995). For persons engaged in the use of ships for carriage of passenger or cargoes in the Philippines, accreditation is required to protect the public and prevent proliferation of incompetency and fly-by-night operations. Only citizens and residents of the Philippines may apply for accreditation. The MC further requires the Chief Executive and Chief Operating Officer to be also citizens of the Philippines

The cross-border supply of services is also affected by some regulatory measures, i.e. discriminatory measures are imposed against foreign service suppliers for consumption of services abroad (Mode 2). In overseas shipping, the availment of import duty and tax exemption for importation of ocean-going vessel and spare parts is conditioned upon the consignment of the vessel to a Philippine registered dry-docking or repair facility for repair or overhaul of the vessel. (RA 7471 s1992, Section 6). Transport of government cargoes by air or water are required to use Philippine flag air carriers or vessels (PD 1466 s1978, Section 2). Cargoes of any persons that have been granted credit or whose obligation is guaranteed by the Philippine government or by a government financial institution are prescribed to use Philippine flag air carriers or vessels (PD 1466 s1978, Section 3). While exceptions may be allowed on the last two items, the conditions for these exceptions are found to be incongruent to another FTA obligation, i.e. the MFN obligations since these exceptions would only apply when there is an international agreement between countries or on the basis of a reciprocal arrangement.

For domestic shipping, additional impairment to market access by foreign service supplier is the rule that domestic marine fleet be manned exclusively by qualified Filipino officers and crew (RA 9295 s.2004, Section 2, RA 9295 IRR s 2014, Section 2.1).

Practice of merchant marine profession. The practice of merchant marine profession (i.e. as marine deck/engineer officer) is limited to Filipino citizens who have passed the licensure examination by the Board of Marine Deck Officers and the Board of Marine Engineers, and issued Certificates of Registration, and Competency. Exemption to this rule is again based on reciprocity, whereby a foreign marine deck officer may be issued a special dispensation to serve on board a Philippine registered vessel engaged in international trade if his/her national administration allows Philippine merchant marines to practice profession on board the foreigner's flag vessel (RA 8544 s1998, Section 28).

Practice of naval architecture and marine engineering. The practice of this profession is restricted to Filipino citizens that have passed the licensure examination and registered as naval architecture and marine engineer with the Board of Examiners, except in the following cases of: (i) officers and enlisted men and civilian employees of foreign governments stationed in the Philippines rendering naval architecture and marine engineering to their government; (ii) naval architects and marine engineer from other countries called in for consultation, or for specific design or project; (iii) any resident that make plans for a boat or

the like with five gross tons or less; and (iv) draftsmen, apprentices, subordinates or those on training under those lawfully engaged in naval architecture and marine engineering (RA 4565, s1965, Sections 11 and 17).

A foreigner may take the licensure examination for naval architecture and marine engineering if he/she can prove that his/her country of citizenship grants reciprocity to Filipinos to practice naval architecture and marine engineering (RA 4565 s1965, Section 27).

Leasing or rental of ships/vessels. Leasing or rental of foreign-owned ships/vessels to a domestic shipping company can be acquired through a bareboat charter arrangement, where the domestic shipping company as lessee has full possession and control of the vessel, and has the obligation to appoint a Filipino master and other crew of the ship during the lease period. Foreign-owned ship bareboat chartered are required to be registered under the Philippine registry. Domestic shipping companies registering a bareboat foreign owned ship are required to:

(i) have a minimum paid up capital
(ii) have their Chief Executive and Chief Operating Officer to be citizens and residents of the Philippines
(iii) have its registered ship to be manned by all Filipino crew

Bareboat chartered vessels are also required to be in the hands of the Philippine bareboat charterer and shall be free from interference by the foreign owner. (MC 104 1995 Section 5(d))

Vessels for domestic operation and fishing vessels. Vessels for domestic operations and fishing vessels for domestic and international operations (under the Philippine flag) are required to be manned by all Filipino officers and crew. Foreign nationals are only allowed as a supernumerary[202].(MC 104 1994, Section 7)

Supporting Services for Water Transport

Port and waterway operation services. For the port and waterway services in the port districts, i.e, territorial jurisdiction within the control and authority of the Philippine Ports Authority and the Cebu Ports Authority, management and operation of these services, as public utility, are required to be under a Philippine national or in the case of a corporation must at least be 60 percent owned by Philippine nationals. (CA 146 s1936, RA 6957 s. 1990, RA 6957 s1990) and RA 7188 s1994). Construction of ports (as a development facility) however, may engage the services of foreign service suppliers.

As for private ports, i.e. a port facility owned by the private sector, its development and operation is subject to national security and public safety regulations and requirements. (PPA AO 06-95, s1995) Thus, it must secure authority from the port authorities and must

[202] A supernumerary is person who is not a crew of the ship whose presence is merely tolerated. The person has no power to interfere in the operation or management of the vessel.

obtain a Certificate of Registration or Permit to Operate. Also, since it involves foreshore lease agreement for pier purposes with the national government (i.e. through the Department of Natural Resources), it is subject to the limitations on land lease arrangement, i.e. such can only be made with Philippine nationals or in the case of associations or corporation must at least be 60 percent owned by Philippine nationals.

Foreign vessels cannot use the Manila North Harbor port either for anchorage or docking or unloading purposes, among others. The Harbor port is limited to providing domestic terminal services only as part of the contractual agreement between for the Philippine Ports Authority and the Manila North Harbour, Inc. (PPA MO 06-2016). The BOC came out with a ruling that the Manila North Harbor can handle international cargoes although this rule is now on hold.[203]

Other supporting ports services. In ports where franchise for management and operation has been awarded to a private entity by the government, the right, privilege and authority to manage all facilities container terminals, gantry cranes or bridge cranes, warehouses storage depots, cold installation and other structures, lie with that private entity (PD 1284, 2.1978). This in effect limits access for a number of service supplier in these support services.

3.5.5 Land Transport Services

There are no restrictions on the number of foreign road and rail transport operators, but like other modes of transport, foreign equity shares are limited to 40 percent as these modes of transport are considered public utilities. However, there are no foreign equity limitations in road transport maintenance and repair services. A maximum of 49 percent is also extended to road and rail-related supported services from other ASEAN member countries, subject to certain conditions. Certificates of public convenience must be obtained however from LTFRB, subject to economic needs test. Certain requirements must be met to obtain the Certificate of Public Convenience, such as proof of public demand, proof that the proposed public service will promote public interest in a proper and suitable manner, evidence of financial capability, valid hauling contract, local government unit zoning clearance for the location of the garage, and compliance with the prescribed weight limits.

Railway transport services. The public utility restrictions apply to railway transport operations in the country, thus limiting participation of foreign service suppliers in this activity. While the construction of such facility may be awarded to a foreign service supplier, its operation and maintenance under the Built-Operate-Transfer Law is limited up to 40 percent foreign equity participation (RA 6957 s. 1990, and RA 7188 s1994).

It is, however, noted that with regard to specific railroad transport operations in the country, these are lodged with government-owned and controlled corporation which effectively limits

[203] Pablo, R. 2016. BOC lays out north port rules for handling foreign cargo. PortCalls Asia. www.portcalls.com/boc-lays-north-port-rules-handling-foreign-cargo (accessed November 2017); Pablo, R. 2016. Manila north harbor operator seeks PPA reversal of ruling on foreign cargo handling. www.portcalls.com/manila-north-harbor-operator-seeks-ppa-reversal-ruling-foreign-cargo-handling (accessed November 2017)

engagement of foreign service suppliers in this activity. The Light Rail Transit Authority is responsible for the construction, operation, maintenance and lease of light rail transit systems in Metro Manila (EO 603 s1980, EO 830 s1982, and EO 210 s1987). The Philippine National Railways has the authority to own and operate railroads, tramways and other kinds of transportation vessels and pipelines between any points in the Philippines. (RA 4156 s1964, and RA 10638 s2013). The Department of Transportation is the franchise holder of the MRT3, which awarded the contract to Metro Rail Transit Corporation to build, lease and transfer the Metro Rail Transit System.

Road Transport services. Only Philippine nationals are allowed to engage in road transport services for passengers and freight. In case of association or corporations, 60 percent of its capital stock must be owned by Philippine nationals. (CA 146 s1936). Proof of Philippine citizenship is required for individual and juridical entity applicants. (LTFRB Application for Certificate of Public Convenience)

3.5.6 Logistics services (Third-party logistics services)

Logistics has been open to foreign investors with a maximum of 100 percent foreign ownership since the Foreign Investment Act (FIA) was implemented in 1998. Based on the FIA definition, this logistics company should be an export-oriented company whose share of international cargoes out of its total cargoes handled exceeds 70 percent. In addition, this export-oriented company should have a paid up capital of more than US$ 200,000 dollars.

However, if the logistics company does not meet any of these conditions and is considered a public utility, a maximum of 40% foreign ownership, based on the 1987 Philippine constitution, applies. Customs brokerage is only reserved for Filipinos.

Several foreign logistics companies have been established in the Philippines, but they are all small and medium-sized companies, doing business for niche markets. Some global shipping companies have not opened local companies, but utilized local agencies due to the small market size and the difficulty of developing business models. The government of the Philippines does not allow foreigners to provide door-to-door delivery and bonded warehouse storage services for international cargoes.

Expensive storage and warehousing services (ownership of which has a limit of 40 percent of foreign equity based on the 1987 Philippine Constitution and RA 7042) and a less developed customs clearance system have constrained the activities of foreign logistics companies. In addition, since most of the major international container shipping lines with their mother vessels do not make direct calls at the port of Manila due to its low cargo base and shallow port drafts, most of the international cargoes are transshipped via other ports like Singapore, Hong Kong and Kaohsiung, which further leads to higher warehousing costs due to the lack of economies of scale.

Freight Transport Agency Services. The limitations on public utility apply to freight forwarding services but only for domestic trading and commerce. Non-Philippine nationals may engage in international freight forwarding services. (SEC-OGC Opinion 10-30 s2010).

Packaging and Customs Clearance Services. Practice of Custom Broker profession. Only persons that have passed the licensure examination given by the Professional Regulatory Board for Customs Broker shall be registered and issued a license to practice the profession. Foreigners may apply for examination subject to a reciprocity arrangement with his/her country of origin. However, special or temporary permits for custom brokers from other countries may be issued in cases of absence or inadequacy of local customs professional brokers for specific projects or period of time. (RA 9280 s2004).

3.6 Regulatory issues and challenges

This section presents the key issues and concerns that were raised during the stakeholder consultations (See Appendix D). The nature of laws and regulations, in terms of how discriminatory they are against foreign companies and to what extent they reduce market access and the level of competition, is not the only issue. Also of concern is how these laws and regulations are implemented. One interesting feature of the Philippine legal and regulatory framework for the DML sector, as mentioned previously is the fact that there are a number of government agencies involved in the provision of implementing laws and regulations depending on the nature or type of transport and logistics services involved. Given that there are a number of agencies involved in the implementation, it is crucial that their regulations are consistent, transparent and coherent so as to provide a predictable and efficient environment for providers and users in the DML sector.

3.6.1 Inconsistent policies

Although integration and coordination are critical to a coherent and well-functioning logistics supply chain, these basic logistics principles are however difficult to achieve in practice. One reason for this is the lack of understanding of the substantial benefits of supply chain integration and coordination. This lack of awareness about the importance of integration and coordination in the logistics chain has led to inconsistent, overlapping or sometimes contradictory policies. One case in point was the case of FedEx (one of the world's top third-party logistics providers), which was granted by the Philippine Civil Aeronautics Board (CAB) in 2011 a permit to operate in the country for five years. The CAB decision was backed by an opinion issued by the DOJ in 2004 on the ground that international air freight forwarders are not covered by the nationality requirement under the 1987 Constitution, hence, may be issued a certificate of public convenience subject to the CAB's pertinent rules and regulations set forth under Republic Act No. 776 and other existing laws".[204] However, this permit was later cancelled by the Philippine Court of Appeals on the ground that

[204] Avendano, C. FedEx can't operate in PH, appellate court rules. Inquirer.net. www.portcalls.com/manila-north-harbor-operator-seeks-ppa-reversal-ruling-foreign-cargo-handling (accessed on 2017).

international freight forwarding is a public utility which is close to foreign entities, based on the Philippine Constitution.

The most recent case was about a terminal operator at the port of Manila whose license to operate starting on 9 June 2017 allegedly was granted by the old board before its old license expired subject to certain conditions, but was not considered to be valid by the new board since it was deemed to have not met the requirements under the new board.[205] These cases illustrate the lack of clear and consistent policies, which not only led to the loss of major and more established logistics providers, but have also made the country less attractive to foreign investors in logistics services.

3.6.2 Lack of coordination and integration

The allocation of regulatory responsibilities for the various aspects of transport and logistics to various government ministries and departments without having one central coordinating agency can also lead to an uncoordinated logistics system. In the Philippines, maritime transport is regulated by the Maritime Industry Authority (MARINA) and its seaports by the Philippine Ports Authority (PPA), except for the port of Cebu which is under the Cebu Ports Authority (CPA), while land transport is under the Philippine Land Transportation Office (LTO), and air transport is under the Civil Aviation Authority of the Philippines (CAAP). Given that there are different government agencies involved in the implementation of policies and regulation of the different modes of transport, it is but critical that effective coordination is achieved. Coordination is particularly important in the policy formulation and implementation for logistics services due to the inter-connectivity and interdependence of the various activities in the logistics chain.

However, the absence of one central coordinating agency to oversee transport and logistics and coordinate the formulation/dissemination of policies and regulations for this sector has emerged as a major problem facing the government and private industry in achieving a coordinated set of regulations for this sector, particularly in relation to multimodal transport operations (*The Philippine Multimodal Transportation and Logistics Industry Roadmap*, 2016).

Moreover, there is lack of an integrated regulatory framework covering all aspects of logistics services, which made it difficult for prospective investors to apply for business licenses, as there are many regulations and business licenses covering all aspects of logistics services under the jurisdiction of different government agencies.

The lack of coordination was further highlighted in the management and operation of semi-autonomous airports in Manila, Subic, Clark and Cebu, which are regulated by separate authorities. The problem lies in the lack of coordination between CAAP and these separate special authorities particularly in the rehabilitation of their runways and other areas associated with air-side operations. The former's agenda and plans do not always jibe with

[205] Banal, C. Port of crawl. Inquirer.net. http://business.inquirer.net/231375/port-of-crawl (accessed on 2017).

those of these special authorities. For example, the very slow response to Mactan-Cebu International Airport Authority's (MCIAA) plan to rehabilitate its runway was reflective of this lack of coordination.

Lack of coordination with customs authorities due to their differences in objectives and lengthy procedures being followed was also cited by the CPA particularly in relation to the disposal and release of seized cargoes and the issuance of import permits for rice imports. Since the decision to auction and release the seized cargoes stored in CPA's terminals lies with Manila-based customs authorities with different objectives following time-consuming procedures for releasing these ceased cargoes, these cargoes have remained in CPA's premises for many months, if not years, causing port congestion and delays with no financial benefits for the port of Cebu. The issuance of import permits for rice with a validity of 7 days is too tight and does not allow sufficient time required in the importation of rice.

Lack of a master plan for transport and logistics was cited as another factor behind the lack of coordination and integration in the development of transport and logistics infrastructure and in the management of the various aspects of transport and logistics operations.

3.6.3 Conflict of interest

Another type of institutional barriers that have reduced the efficiency and international competitiveness of the Philippines' DML sector is poor quality of port governance, which has led to an inefficient and uncompetitive maritime transport sector and thus, to the detriment of the logistics service providers and shippers' international competitiveness.

Although transportation is only one of the many components of logistics, it accounts for the largest component of logistic costs, and therefore plays a critical role in achieving an efficient and cost-effective logistics. Maritime transport in particular is the most important mode of transportation in international trade since the bulk of international freight in terms of volume is carried by sea. This occupies an even more prominent role in the Philippines, an archipelago which can be best connected by an efficient and seamless maritime transport system.

Port efficiency or lack of port efficiency therefore has a significant role in affecting the efficiency or lack of efficiency of the DML sector since port costs account for a large part of maritime transport costs which can be passed unto the DML services providers and shippers by way of increased shipping charges. More importantly, delays or longer transit times due to port inefficiency can also lead to higher inventory costs and thus logistics costs and at worst, could mean a loss of business opportunities.

Except for the port of Cebu, which is under the CPA, all Philippine public ports are under the responsibility of the PPA for their financing, management and operations. PPA is one of the attached agencies under the supervision of the Department of Transportation. Based on the PPA charter, it has both commercial/operational and regulatory functions. The PPA therefore is involved in the ownership, management and operation of Philippine ports and is at the

same time the regulator. This creates a conflict of interest, which is one of the major factors responsible for the high level of port inefficiency and exorbitant port charges to the detriment of port users in the Philippines and the nation's international competitiveness (Basilio, 2003). Specifically, since the PPA obtains part of its revenue from port operations, there is therefore a tendency for the PPA to approve any rate or charge increases applied by the terminal operators.

Although the CPA has regulatory functions independent from the PPA, it also has regulatory and commercial/operational functions over the all ports in the province of Cebu based on RA 7621 enacted in 1991. Based on this charter, the CPA has as one of its purposes to integrate and coordinate the planning, development, construction and operation of ports and port facilities within its territorial jurisdiction, consistent with the needs and requirements of the region. It has the power, *inter alia*, to prescribe its bylaws and such rules and regulations as may be found necessary to promote or enhance its business.

3.6.4 Limited inter-port competition

A related problem is the fact that most ports in the country are under the management of the PPA. This situation leads to lack of inter-port competition and thus lower port efficiency. Although there are advantages from a centralized administration of ports in terms of avoiding investment duplication and excess capacity, there is the tendency for this type of port administration to lead to less competitive port environment.

Should the government's regulatory functions be separated from its commercial/operational functions?

The issue of conflict of interest is actually part of a broader issue of whether or not there should be less government sector involvement in the management and operation of ports with the government acting only as the regulator, to improve overall port efficiency. There are theoretical and empirical arguments for and against this proposition based on the literature but the weight of empirical evidence seems to lean towards the separation argument, with the government playing only the role of a regulator providing the best arrangement in terms of port efficiency.

Reform in port governance has become a mainstream trend among seaports around the world, with different reasons directing change, in the past two decades. Based on the World Bank's Reform Toolkit (2001), the reform has focused on the ways that the private sector should increase its participation in the more explicit aspects of terminal operation and management e.g. lease contracts, Build-Operate-Transfer (BOT), concessions, joint ventures, different types of port models (like service, tool, landlord and privatized ports), and the separation of commercial and regulatory functions of port authorities. To allow the privatized ports to operate in a more commercialized way, the port authority should be nothing more than a landowner and regulator of port/terminal operations.

One good example of this trend is Singapore's Maritime and Port Authority (MPA) – the equivalent to our MARINA. To separate commercial/operational from regulatory functions, the Maritime and Port Authority of Singapore was established on 2 February 1996 by the MPA Act of 1996 through the merger of the Marine Department (which was under the then Ministry of Communications), National Maritime Board and the Regulatory departments of the former Port of Singapore Authority (PSA). MPA's main job has since then been to regulate the port and shipping activities in Singapore while PSA's main job has been to manage and run the port. PSA was subsequently corporatized in order to enhance its flexibility and responsiveness to business opportunities in the fast changing and increasingly competitive port environment. In 2004, to further streamline all maritime-related functions, the industry promotion function for shipping was transferred from IE Singapore to MPA. Before the enactment of the MPA Act of 1996 and subsequent corporatization (a form of port privatization) of PSA, the commercial operations and regulatory functions were under the responsibility of Singapore's state-owned PSA.

This trend is further evidenced by other ports in the developing countries of Asia characterized by shortage of capital and limited access to technology. For these ports (many of which were public-owned) whose resources were limited, more private participation allowed them to have more access to capital and better technology. In Southeast Asian countries, for example, the major ports of Malaysia, Thailand and Indonesia can no longer be considered as pure public ports with their respective governments allowing more private sector participation in the operation of port assets. More private participation also allows ports to be more flexible and autonomous in their operations. Public port financing is not only limited by regulations, but may also be limited by the size of the public sector budget or income. This reliance on public sector income has created some uncertainty on the fate of port infrastructure. This has caused a number of ports to move towards privatization and as a consequence, the reduced dominance of the state over certain ports. Further, a direct involvement of the private sector in the port management can inject more efficient business practices into the system. Due to a clear link between good performance and benefits, private entrepreneurs have the incentive to perform efficiently. This is not inherent in the public sector, which generally relies on state subsidies and protection.

Main motivation and the outcome of this reform in port governance

The main motivation of increasing countries and regions to follow this trend was the widely accepted belief of efficiency enhancement resulting from increasing private sector participation and the separation of regulatory and commercial functions of ports by avoiding a possible conflict of interest which led in some cases to ports becoming a financial burden on the government and the economy. Although the port of Singapore has not been a financial drain to the Singapore government's budget, the separation of these two functions (commercial and regulatory functions) was deemed necessary to enhance further their port efficiency and international competitiveness in the light of increasing inter-port competition. It can be argued that, in addition to other factors, the separation of these two major functions has been a significant factor underlying its the high level of port efficiency, reliability and

international competitiveness. Many empirical studies have provided further empirical support for the link between less government involvement in the management and operation of ports and higher port efficiency and greater international competitiveness. (For example, refer to the studies by Suykens and Van de Voorde 1998; Tongzon and Heng 2005; and Pallis et al. 2010). Tongzon and Heng (2005) provided an empirical support for the above argument that more private sector participation in the port operation is useful for improving port operational efficiency but that full port privatization is not an effective way to increase port operation efficiency. Their study showed that it is better for port authorities to assume the role of regulator and thus limit the private sector participation within the "landowner and operator" functions. In other words, port authorities should introduce private finance, operation and management instead of state funds and administration while they remain in place as regulators. Thus, full private participation will impede the improvement in port performance while some extent of private sector participation can increase the efficiency level, which implies that the extent of private sector intervention in the port sector has an inverted U-shaped effect on port operational efficiency.

Although it is not categorically proven that there exists a direct causal link between the degree of private sector involvement and economic efficiency (Iheduru 1993), deregulation policies have been commonly used in many industries and across many countries (especially to the landside transportation sector), and more private sector participation or less government involvement in the running of ports is perceived to be the most important policy for improving the efficiency of the port sector (Cullinane, Song and Gray, 2002).

Ports can also be considered as a "public good" with substantial positive economic externalities that cannot be left to the profit-oriented private sector. Under this concept, a port does not have to be profitable as long as it provides a vital service and contributes to the economic development of a country by facilitating international trade and providing a vital link between various regions in the country. Moreover, Baird (2000) argued that, due to the specific nature of port investment (long term payback and high capital cost), an almost total dependence on the private sector to provide both port infrastructure and superstructure will result in significantly delayed investments on crucial operation facilities and equipment, which are obviously contrary to the original objective of port privatization.

Wang et al. (2004) suggested that port management and operations can also be undertaken by port authorities in a more commercialized way. Rodrigue (2004), in examining the port authority of New York/New Jersey, which dealt with the management of port's land use, providing support for terminal operators, traffic regulation activities and for a wide array of infrastructures concluded that a centralized inclusive port authority - in terms of a diversified portfolio of activities, infrastructures and terminals within a coterminous geographic and administrative entity - might also provide a successful and stable framework for continuously re-inventing itself and deploying effectively its diversified mandate to serve the needs of port users.

Economic theory fails to provide unequivocal propositions on the issue of the relative efficiency of public vis-à-vis private enterprises (Liu 1995). Based on the principal-agent theory, a private enterprise should be more efficient than a public one. It is believed that transformation from pure public to private ownership or management, even without change in the competition, will be associated with improved efficiency (Hartley et al. 1991; Parker 1994). However, a number of economists (for instance, Vickers and Yarrow 1989; and Estrin and Perotin 1991) have argued *against* the strength of the opinion in favor of private sector ownership or management and suggested that principal-agent problems may also arise in the private sector as a result of capital market imperfections.

3.6.5 Inconsistency and lack of transparency in the implementation of policies and regulations

Based on industry feedbacks obtained at Focus Group Discussions, the following issues were raised which the representatives of the transport and logistics service industry considered as major barriers to efficiency and competitiveness. These issues relate to the lack of consistency and transparency in the implementation of policies and regulations affecting their business operations.

Since the Local Government Code devolved the authority to manage traffic and road use to LGUs, different LGUs have come up with varied, inconsistent and unpredictable regulations, such as the requirement to use separate stickers for passage in areas managed by different LGUs. These different regulations have hampered and slowed the flow of transport across various areas and regions.

Another issue that was repeated by a number of interviewees is the range of obstacles faced by trucking operators. One main concern that directly affects business operations is the inconsistency in terms of operating permits and the number coding scheme between cities and provinces. During the interviews it was found that some cities and districts would not grant passage through and would even require additional fees (often called “pass-through fees”) from delivery trucks. In this case it is a form of corruption from the local government unit (LGU) that hinders operations. Extreme traffic conditions in the Philippines also contribute, causing problems with late deliveries and long work hours for the drivers aside from the unjust fees that raise up costs of operation.

There is also some inconsistency in the implementation of indirect taxes and regulations on warehousing and transportation. While commissions and freight of international air and shipping lines that operate in the domestic market are VAT-exempt due to the MFN policy, local agents' commissions are not VAT-exempt although their freights are. Although there are no limits on the volume of freight and number of operators, there is a limit on the number of custom-bonded warehouses and off-dock warehouses. With regards to on-dock warehouses, there is a limit on the maximum capacity of designated dock spaces. LTFRB limits the number of trucks without any rationale or scientific basis while “road worthiness” of trucks is not clearly defined. There is a duplication of licensing and accreditation requirements set by the Civil Aeronautics Board (CAB) and MARINA has duplicated the

charges – one is charged at the exporting country and another charge imposed at the destination and receiving country. These costs are then passed unto the users of transport and logistics services.

3.6.6 Unnecessarily burdensome regulations

The procedures for obtaining import permits particularly in the case of food imports were cited as unnecessarily burdensome and long and involve several government agencies which are scattered across the various locations. One example cited relates to the new requirement for the importation of food under the Food and Drug Administration which requires a pre-sale certificate to be authenticated by the Philippine consulate in the country of origin with respect to a new seller or source of imports. This new requirement adds more complication and lengthens further the import process, in addition to the different documents involving the Bureau of Customs and Bureau of Internal Revenue and other relevant government departments.

The unnecessarily long proceedings for the disposal of abandoned containers practiced by the customs authorities based in Manila have further slowed down the process of clearing the port of unwanted cargoes and thus contributed to more port congestion and reduced port efficiency, which could lead to higher logistics costs.

Too many documentation requirements and relatively high hefty accreditation fees for small and medium-size freight forwarding companies and brokers at Subic port have contributed to the underutilization of Subic port as their port of choice, which ran counter to the goal of decongesting the port of Manila.

Despite the economic and environmental benefits of using multimodal transportation, the use of multimodal transportation is very limited in the Philippines, not only because of the absence of multimodal transport infrastructure and legal framework, but also to the absence of regulations to foster the use of multimodal transportation.

Special metropolitan authorities created to promote and develop selected airports and seaports outside Manila, such as the Subic Bay Metropolitan Authority (SBMA) and Mactan-Cebu International Airport Authority (MCIAA), have not been included in the distribution of air traffic rights nor been given sufficient attention from their respective departments attached to the DOTr. This has contributed in part to the underutilization of Subic Bay, and has also been partly responsible for the slow progress in the maintenance of its runways.

3.6.7 Lack of effective enforcement and political will

There are also other issues pointing to the lack of effective enforcement of regulations by government agencies, responsible for the implementation. At the height of the port congestion in 2014, port operators – Asian Terminals Inc. (ATI) and International Container Terminal Services Inc. (ICTSI) implemented the Terminal Appointment Booking System (TABS), an online system which requires truckers to book and reserve slots at the ports

before transporting goods. The average price per appointment was PhP 1,000. The TABS was initially implemented to resolve the port congestion problem. It was however claimed that the system did not solve the congestion problem and was instead taken advantage by port operators to generate more revenues, 20 percent of which were remitted to the PPA.

Despite the policy to adopt an Electronic Data Interchange (EDI) in the country and a National Single Window to streamline and cut down on the custom processing time, there is a requirement to submit the manifests for imports and export declarations in both digital and print formats. On the other hand, the rates set by the Cold Chain Association of the Philippines (CCAP) for trucking and distribution of products in the cold chain are not followed.

It was claimed that MARINA who is in charge of regulating the rates or fees charged by container leasing companies has not been effective. Freight forwarders are charged excessively and their excessive charges have not been regulated. These not only add up to the increase in total logistics costs faced by the transport and logistics service providers but also the total landed costs faced by the shippers as these costs and inefficiencies are passed unto them.

Another issue that was also mentioned during the interview was the age of the delivery trucks used. Most of the vehicles in the country are old and outdated but are still in operation. The LTO and LTFRB are the agencies behind inspection and registration of vehicles in order to determine if the vehicles are fit for travel and operation. Coming from the interviews, the agencies are very lenient when it comes to the requirements and most trucks still pass during inspection. If the agencies were to create stricter laws and to conduct more thorough inspections, it would ensure the trucks are fit and efficient for operation. More importantly, trucks that should already be a safety hazard would not be permitted to drive. Another benefit of doing this would be that the demand for models of trucks would grow and it may generate more revenue and economic growth for the country.

3.6.8 Unregulated charges of international shipping lines

International shipping charges were raised as an area where there is a need to regulate, given that foreign shipping lines are introducing new local charges that can lead to higher shipping charges paid by the freight forwarders. Apart from freight rates, freight forwarders are charged with additional charges, such as congestion charges, detention charges, container deposit fees and other charges that shipping lines can introduce anytime. Some of these components can be shifted to the shippers while others have to be absorbed by the freight forwarders themselves.

3.7 Recommendations

Distribution, multimodal transport and logistics services play a crucial role in our economic development process. Apart from facilitating international trade, they contribute to the enhancement of our export competitiveness. Their importance is further accentuated by the

fact that the Philippines is an archipelago, but the cost and inefficiency of transport and logistics services are considered to be quite high by international standards. Various regulatory reforms are needed to improve the competitiveness of the sector.

3.7.1 Reduce the formal restrictions to trade and investment

Introducing more foreign competition into this sector and improving access to the most efficient transport and logistics service providers is crucial to our country's export success. Export of services is also an important component of our country's international trade objective. Enhancing its export of logistics services through liberalization should, therefore, have beneficial effects on our country's overall trade performance and economic growth.

Although the Philippine market for the DML sector is relatively liberalized in terms of the WTO modes of supply 1 and 2, in terms of WTO modes 3 and 4 it is still highly restrictive and protective against foreign competition. To improve market access for foreign investors and foreign talents in this sector to create a more competitive market for DML services requires significant reforms. The key to this is the amendment of the Public Service Act. Under the proposed amendment to the Public Service Act (HB 5828), which has already been approved by the Philippine House of Representatives, transport and telecommunications will no longer be in the list of what is considered “public service or utility”. Having this amendment will also address PPP issues, especially in attracting foreign investment on transport infrastructure projects. Any future amendments must lead to lower transaction costs, non-discriminatory and advantageous to the public.

It is also important to assess the impacts of removing restrictive regulations in the DML sector, including the adjustment costs for SMEs in retail trade for low-skilled workers, and in transport and freight forwarding services. SMEs which do not have the economies of scale and more advanced technology, and low-skilled workers would be directly hurt in a more liberalized environment, with increasing foreign competition from larger and more established enterprises and foreign workers form labor-abundant countries.

The government should therefore come up with ways to mitigate the possible adverse impacts, based on previous liberalization experiences. Through regular and close public consultations, the government would be able to understand the different interests and perspectives of the various stakeholders and endeavor to come up with appropriate programs that can mitigate the negative impacts of deregulation. The government can provide economic incentives for companies to introduce sufficient redundancy packages and skill retraining programs useful in alternative industries that would thrive as a result of structural adjustments brought about by deregulation. These measures are discussed in greater detail in the next section.

3.7.2 Implement complementary reforms

Although an improved market access, less discriminatory, and more transparent regulations would generate substantial economic benefits in the long run, there are, however, certain

short-run adjustment costs and challenges associated with a more liberalized market for this sector.

To mitigate the short-run adjustment costs, the government could start deregulating first those sub-sectors, which can enhance our international competitiveness, and the deregulation must be implemented in a gradual process. In prioritizing these DML services for deregulation, however, the political sensitivities and strategic interests have to be taken into account. There must a clear and transparent timetable for the deregulation process.

Smaller home-grown companies themselves can also mitigate the adjustment costs in the face of more intense competition by offering generous retirement packages for those employees near the retirement age and by improving their efficiency and competitiveness by forging strategic alliances and possible mergers with the more established ones.

They can also tap the outsourcing and subcontracting market – a trend in which some of the logistics functions are outsourced to smaller companies more specialized in certain specific areas. Outsourcing has allowed many companies to concentrate on their niche areas of expertise to remain competitive. Hence, the growth of the outsourcing industry can provide alternative sources of revenues and employment for smaller companies.

Malaysia has successfully adopted various measures to promote inter-firm linkages via sub-contracting arrangements, including fiscal incentives and institutional arrangements, such as umbrella strategy, vendor development scheme and cluster creation. Singapore employed a Local Industry Upgrading program managed by MNC engineers on a rotational basis to provide technical and other types of assistance to small local enterprises. As these measures have worked well in the industrial and manufacturing spheres, there is no reason why these measures should not work in the services spheres.

At the same time, national and regional initiatives should be pursued to enhance the capacity and international competitiveness of the Philippine DML sector (e.g. human resource and infrastructure development, and trade facilitation measures, particularly in the area of customs administration, institution building and government regulations). Moreover, with the right incentives the government can facilitate or foster joint venture and subcontracting arrangements between small to medium-sized local companies and foreign counterparts, to provide more efficient transport and logistics services but also to facilitate technology transfers from more established foreign companies to our local DML industry.

Apart from enhancing transport infrastructure, especially in ports and other critical nodes of the supply chain, logistics training and education should be expanded and enhanced through intra-ASEAN training and exchange programs and adopting common standards and mutual recognition of skills in the DML sector. There has been an attempt by some domestic logistics companies in the Philippines to upgrade logistics skills in their workforce via on-the-job training seminars and courses in partnerships with universities. There has also been an attempt by TESDA in partnership with the Supply Chain Management Association of the Philippines to develop a national certification program and common set of standards for logistics skills from the ground to the supervisory level, and multimodal transport courses.

These initiatives should be institutionalized to improve the supply of logistics professionals and workers in the country.

3.7.3 Address underlying factors for poor regulatory governance

The quality of governance can be improved by addressing the underlying factors for the poor governance problems described in the previous sections. Lack of institutions in terms of having adequate and effective regulatory and legal framework have impeded the implementation of the trade facilitation and capacity-building measures. There is a lack of one lead government agency to oversee DML services and to coordinate the formulation/dissemination of their policies and regulations. Since the DML sector has many dimensions which cannot be under the jurisdiction of one single agency, effective coordination is particularly important in the policy formulation and implementation for DML services due to the inter-connectivity and interdependence of the various activities in the logistics chain. This will not only avoid any duplication and inconsistencies in the formulation and dissemination of policies and regulations to the private sector but will also give DML services sector the special attention that it deserves.

There are cases where different and separate regulations across all ministries for the various aspects of DML services are conflicting and produce complex procedures for business enterprises. There is a need to harmonize all of these regulations. Furthermore, from the interviews with the government agencies, there is currently a lack of communication and consensus among the various government agencies involved in DML issues. Assigning a lead agency would ensure that the flow of information between relevant stakeholders is maintained. It would also provide a central contact point for DML issues. The lead agency should have the responsibility to implement the regulatory measures and the authority to obtain full cooperation and support from the other government agencies involved in the administration of the various aspects of DML. For example, this can be in the form of a leading and coordinating role (i.e. a champion agency) to engage other relevant ministries to collect and build a database for DML services as a basis for conducting performance analysis of this sector and for conducting in-depth studies on economic implications of further deregulation of DML services in the Philippines and ASEAN region.

3.7.4 Establish the regulatory framework for multimodal transport

Given the importance of an integrated approach to the development of a consistent and coherent regulatory framework, a master plan for the DML sector in terms of policies and strategies in consultation with all stakeholders is useful so that we can have a more efficient and effective DML sector and thus a more sustainable trade and economic growth. In some activities in the supply chain, such as customs responsibilities and port management issues, more decentralization can be considered for better efficiency in this sector.

The proposal for the creation of a competent national body within the Department of Transportation for multimodal transport operators, with DTI relinquishing its involvement in sea freight accreditation and regulation, and MARINA and CAB exclusively for unimodal

transportation, has already been agreed upon by DTI and DOTr. This proposed institutional arrangement is in the right direction.

There is also a need to set up an integrated legal framework and accreditation system for MTOs. Malaysia and Singapore's integrated accreditation systems can serve as good examples and best practices in the development of these systems.

3.7.5 Integrate the regulatory framework for DML to improve the ease of doing business

Another related factor is the lack of an integrated regulatory framework that can cover all aspects of DML services. Currently, there are various regulations and business licenses covering the various aspects of logistics services that are under the jurisdictions of different government agencies making it difficult for prospective DML investors to apply for licenses to conduct logistics services in the region. This can provide DML providers a single window for applying for various required licenses to engage in the various aspects of the logistics services and respond to the fast pace developments in the logistics industry.

3.7.6 Separate regulatory from commercial functions

A separation of regulatory functions from commercial functions in the management and operation of ports in the Philippines should be undertaken to avoid a conflict of interest described above. Under the current institutional arrangement, the PPA is vested with both regulatory and commercial functions, and is entitled to have a share from cargo-handling revenues under Letter of Instruction 1005-A. This anomalous arrangement under which the regulator is also partly responsible for port operation and management has resulted in the formulation and implementation of policies and regulations that are detrimental to the welfare of the transport and logistics service providers and users, and thus to the nation's international competitiveness.

A cautionary note however is that less government involvement in the port management and operation does not guarantee an improvement in port efficiency. Just as governments can fail to allocate resources efficiently, there is also such thing as market failure. Although more private sector participation may be a necessary condition for port efficiency improvement, it is not a sufficient condition. In many countries the reason for the poor performance of the maritime sector is related to the lack of the capacity to govern on the part of the state and the lack of the capacity to manage on the part of the private sector. Under these conditions a change in management of port assets does not necessarily result in efficiency improvements if the change in management from government to the private sector does not lead to an improvement in port management.

Moreover, in certain cases the development objective of ports may be more important than its commercial objective particularly in those regions where private sector participation in the construction, maintenance and operation of ports is difficult to achieve. In these cases, the government's role in the construction, maintenance and operation of the ports in these regions is crucial to their economic development.

3.7.7 Provide a review and set up a legal and regulatory framework for those sub-sectors where there are no existing regulations.

More appropriate regulations for the logistics sector might be needed to implement our commitment to the integration of logistics services. For example, there are no specific regulations for the wholesale industry, multimodal and air traffic distribution, and there is no clear definition or classification of e-commerce.

Additionally, the government should look into the behavior of international shipping lines with respect to imposing excessive and arbitrary local charges.

3.7.8 Adopt forward looking regulation

In the case of distribution, continued growth in e-commerce and advances in transportation technology enabling express delivery services will have some regulatory issues and implications. E-commerce has reshaped the distribution channel in a sense that this enables companies to distribute their products directly to their customers (direct retailing) and thus reducing the need for wholesaling. Moreover, the use of the internet for customer ordering and post-transaction services has raised the issue of whether e-commerce should be classified as a public utility or mass media. More discussions in terms of how e-commerce should be classified, its emerging opportunities, risks and challenges should be undertaken between government agencies and the private sector to arrive at appropriate regulatory measures and understand its implications for the industry and the country.

3.7.9 Outlaw pass-through fees

In order to solve the inconsistencies between the districts and cities, the Department of Transportation, along with the Congress, should legally mandate that such pass-through fees are not allowed. This will prohibit local government units from abusing authority over their areas. If there is a law that prevents such hindrances, trucking services will be able to cite it and avoid further complications. This of course means that the enforcement should be efficient and effective. A uniform law addressing the transportation service across the country may be able to alleviate some problems. In June 2006, the DILG issued Memorandum Circular 2016-60 directing LGUs to refrain from collecting or imposing pass-through fees. The problem however is the enforcement. This issue of pass-through fees also relates to the international shipping costs and other charges already discussed previously.

4 Assessment of Philippine regulatory regime vis-à-vis obligations and commitments in trade agreements

Economies engage in free trade agreements (FTAs) with the objective of further expand trade and investment with existing and new potential trading partners. As a rules-based arrangement among FTA members, it promises increased market access for their exports and better treatment to their service suppliers. These entail an undertaking among member economies to adhere to certain principles and obligations in a FTA that are directed at facilitating trade and investment and creating a more stable and predictable environment

In general, FTAs have subscribed to the principles of non-discrimination, free flow, enhanced competition and predictability in rules and regulation. FTAs however, vary on how these principles are translated and set out in the text of the agreements in terms of the specific obligations that member economies must implement and comply with. Some FTAs have a limited scope of application while others have a more expansive coverage.

FTAs on services have since evolved from the General Agreement on Trade in Services (GATS) signed in 1995 toward the tightening of the application of the principles in trade agreements. Newer FTAs that economies have entered into or negotiating now contain provisions that aim to further the opening of markets and improve transparency. These are evident in bilateral or regional agreements especially among like-minded economies that wish to achieve more meaningful outcomes from their engagement in free trade.

While the primary objective of countries in joining FTA agreements is to enlarge markets outside and improve access to existing ones, it is important to note that their liberalization initiatives are not merely driven by this. There is a more fundamental impetus to why countries pursue market opening with or without an FTA agreement. The decision to allow a free or freer flow of services and investment across borders is largely motivated by the prospects of economic gains. As noted, the benefits of trade liberalization do not only accrue from trade in goods.

The removal of barriers, especially regulatory measures that discriminate against foreign service suppliers and investors, has been empirically proven to have a more significant impact to the economy. As inputs to the other sectors and other services, services play not only an important role in the economy but also have a significant impact on their competitiveness.

Certain services sectors have “growth generating characteristics” (Mattoo et al. 2001; Hoekman and Mattoo 2008) which means that the liberalization of these sectors can promote growth in the economy in the long-run. Especially, in the case of backbone services such as financial services in facilitating exchanges, transportation services in facilitating movement of goods and people, and telecommunication services in the transport and flow of communication and information within and across borders. Increasing the contestability in the provision of these infrastructure services by not opening only to domestic providers

allows businesses as well as households to have access to a wide variety and lower priced quality services. In turn, these make them more productive and competitive, especially in the case of the former.

Recent developments in intermediates associated with the fragmentation of production and specialization in tasks and business functions has led to more business services being outsourced and offshored. Countries with a more open environment can attract foreign direct investment in these activities and thereby, increased participation on cross-border trade of services and engagement in the global value chain. It is interesting to note that a wide array of business services is now traded globally across the value chain spectrum. More countries have become involved in the production of services intermediates from design, production, marketing, and distribution to support services to the end-users. Some are embodied at the production stage, as in the case of research and development in the product development stage, while others are embedded from the point of sale such as customer relations or maintenance and repair services. By taking advantage of these developments countries can bring in investments and create employment, and significantly expand the country's economic output.

Against this backdrop the chapter explores the implications of services agreements for the existing regulatory framework and specific regulatory instruments, which limit competition. The review touches upon the FTAs entered into by the Philippines, and the new generation agreements including proposals in on-going negotiations at the multilateral and plurilateral platforms. The final outcome of these negotiations will invariably set the new benchmark in future FTA negotiations that will inevitably necessitate some changes in the current regulatory framework.

4.1 Free Trade Agreements

4.1.1 General Agreement on Trade in Services (GATS)

The GATS is the very first services agreement. As an output of multilateral negotiations on a subject that was relatively new then it was a significant milestone in the history of FTAs. Since it involved negotiations among hundreds of economies coming from different backgrounds it is replete with concessions to address the different development interests of the participating parties.

The GATS Members have the obligation to extend equal treatment and market access to service suppliers of the other Members. As a flexibility however, such obligations apply only to the sectors or subsectors that are in their Schedules and only up to the extent that are inscribed. It is not surprising therefore, to observe that the initial set of commitments of some Members under the Uruguay Round is limited in both sectoral scope and depth.

Nonetheless, Members were expected to undertake further improvements in their commitments in GATS as part of progressive liberalization, which is expected in future

rounds of negotiations. The Doha Round of negotiations, which kicked off in 2001, however, has yet to be concluded.

4.1.2 ASEAN Framework Agreement on Services (AFAS)

AFAS is a trade in services agreement among the ten Member States of ASEAN, which serves as one of its instruments in achieving regional economic integration. Signed in 1995, it is patterned after the GATS in terms of obligations (i.e. market access and national treatment) and approach to scheduling of commitments (i.e. positive list approach).

Consistent with the GATS Article V, AFAS has expanded the scope and depth of liberalization among the Member States of ASEAN beyond their respective commitments in the GATS. This has been achieved through successive rounds of negotiations, and the intensified efforts that were carried through beginning in 2007 as part of the ASEAN Economic Community building process. The latter entailed the setting of specific targets[206] that Member States must comply with in their Schedules in the succeeding rounds of negotiations until its final completion year of 2015[207]. In general it prescribes an undertaking for full market access and national treatment commitments for cross-border supply of services, and an undertaking to commit to schedule at least 70% foreign equity participation for all sectors[208] in market access.

4.1.3 Philippine-Japan Economic Partnership Agreement (PJEPA)

As a bilateral trade agreement between the Philippines and Japan signed in 2007, PJEPA introduced mutually beneficial enhancement to the GATS provisions on services. Unlike the GATS and AFAS, the PJEPA requires Parties to already commit at the level of existing regulatory regime/practice [209] for sectors or subsectors they have agreed to undertake commitments on. The commitments made in PJEPA are therefore, far wider in scope and breadth compared to the AFAS at the time of signing in 2007.

It also requires the Parties to submit a non-binding transparency list of all measures for all sectors/subsectors that do not conform to market access and national treatment obligations.

4.1.4 New generation agreement

The new generation agreement also called the 21st century agreement aims to achieve more meaningful commercial outcomes from the FTA. Learning from the experience with the GATS and other FTAs, the new generation agreement attempts to addresses their perceived weak points with the tightening of obligations that relate to the principles of non-discrimination, competition, and free mobility.

[206] The targets are set out in the AEC Strategic Schedule annexed to the AEC Blueprint (2007).
[207] A new timeline has been set due to delay in the completion of targets by Member States.
[208] These obligations do not apply to financial services and air transportation
[209] Entries in the schedule would have an "SS" marking to indicate that commitments in the schedule reflect current regulatory regime at the time of the entry into force of the agreement.

The new generation agreements have expanded and made the obligations more detailed and fine-tuned according to specific mode of service supply. The obligations for the four modes of service delivery are no longer confined to market access and national treatment as in GATS. The set of obligations for commercial presence consists of most-favored nation treatment, national treatment, prohibition of performance requirements, and senior management and board of directors; while for cross-border supply the obligations are market access, local presence and most-favored nation treatment.

The new generation agreement has also shifted to the negative list approach in scheduling of commitments. Unlike the GATS/positive list approach, the negative list approach requires Members to list all existing measures that do not conform to the obligations, either in Annex I or Annex II. Members must commit at the current regulatory practice and undertake a ratchet obligation (i.e. no backtracking) for measures in Annex I, while they can undertake future measures for those listed in Annex II.

4.1.5 Trade in Service Agreement (TISA)

The TISA is a plurilateral services agreement being negotiated by 23 Members of the WTO to advance the WTO Doha Round services negotiation and achieve faster services liberalization. Since it aims to eventually multilateralize the TISA the proponents[210] are using the GATS framework and building upon this.

The on-going negotiations cover 17 annexes, which are intended to enhance both horizontal and sectoral disciplines on among others, transparency, domestic regulations, localisation, telecommunications, e-commerce, financial services, transport services and delivery services, professional services, and state-owned enterprises.

The proponents have agreed to use a "hybrid" approach to scheduling, which combines the positive and negative list approaches. It will retain the use of the positive listing for market access commitments and adopt the negative list approach for national treatment commitments.

4.2 Restrictive Measures in the Context of Trade Agreements

From a free trade agreement standpoint increasing trade and investment means a more open less restrictive and stable environment to allow for freer flow of trade and investment among participating economies. Reducing or eliminating restrictive measures and improving transparency are key objectives that participating economies aim to achieve in trade negotiations. The agreement should result in what is termed "commercially meaningful outcomes" in which parties agree to the lowering or removal of trade and investment restrictive measures on specific sectors/sub-sectors or activities of interest to the parties.

[210] The TISA negotiations, currently being negotiated by 23 WTO Members, is open to the other WTO Members.

What is considered restrictive measures in international trade and investment are those that discriminate and limit access and participation of foreign investors and service suppliers in a local economy. Trade agreements cluster these restrictive measures according to the following:

a) discriminatory treatment between own national and foreign nationals;
b) discriminatory treatment between foreign nationals;
c) conditions or additional requirements attached to investment of foreign investors;
d) citizen or residency requirement on the governance and management of the entity;
e) imposition of quantitative restrictions or limitations on type of entity to foreign suppliers; and
f) conditions prescribed for cross-border supply.

In addition, parties to the trade agreement agree that measures of general application ('domestic regulation') that are enforced domestically should do not negate their commitment to market opening or liberalization under the trade agreement with excessive and/or unnecessary requirements and procedures. The agreements call upon each party ensure that their domestic regulations are not more "burdensome than necessary".

The trade negotiation perspective, while not the main the purpose of the regulatory and mapping exercise, propounds an underlying framework to understand how the different regulatory measures could affect trade and investment in services. It presents a useful guide in the reading of laws, rules and regulations, and to a certain degree, in ascertaining potential inconsistencies between the policy rationale and the actual measure itself.

This approach moves a step further beyond the usual notion of what is considered restrictive, which is often associated to ownership or equity restrictions. In the context of trade agreements, the participation of foreign investors and service suppliers may be restricted through other means or forms of measures at the pre- and post- establishment (i.e. operation).

These measures may affect: production, distribution, marketing, sale and delivery of a service. And these can come in various forms such as:

- in the purchase, payment or use of a service;
- access to and use of, in connection with the supply of a service; or
- the presence, of persons of another country for the supply of a service in the territory of a country.

The measures could also affect: (i) investors that attempt to make, in making and has made investment; and (ii) their investments with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in a country. Examples of these measures are given in Table 14.

Table 14. Examples of Measures

Stage / Obligation		Pre-Establishment Market Access	Post-Establishment Operation
Scope		Rights of admission Establishment, Acquisition and Expansion	Management, Conduct, Operation and Sale or Other Disposition of investments
National Treatment	Policy	Restriction of foreign nationals (in sectors, subsectors, industry or activity) Ownership Type of legal entity Type of person (natural or juridical) Forms of entry Number of operators/suppliers Number of licenses Quantity supplied Approval/screening Authorization/certification Concession Registration Engagement in private or public sector activity Exchange control Economic need Contribution to economy/subject to determination (i.e. net benefit, public interest) Distribution channel (through commercial arrangement with domestic provider) Priority to citizens and nationals Pre-emptive right (i.e. in case of transfer of right) Residency Legal representative Number of (i.e. students) Local incorporation	Land ownership Land lease Land rights Nationalization Divestment of ownership/equity Exchange control Approval (merger, expansion, relocation) Rules on access to database
Performance Requirement	Conditionality & Requirement	Capitalization Form joint venture Technology Adopt a given rate of royalty under a license contract Adopt a given duration of term of contract Local content (raw and intermediate) Employment/Domestic labor Training Capacity-building of suppliers Relate value of import to export Sale of goods domestically	Local content (raw and intermediate) Domestic labor Training Capacity-building of suppliers Relate value of import to export Sale of goods domestically Exclusive supply Export condition Importation condition R&D activity in the country Carry out environmental and social action Achieve a specific level of job

		Exclusive supply Export condition Importation condition R&D activity in the country Establish investment activity in specific location Local artistic and national values	
Senior Management and Board of Director		Citizenship Residency	Citizenship Residency
Domestic Regulation	Requirements	Qualification requirements Local presence Certification of no criminal record Recognition of jurisdiction Prior notification requirement and screening	Submission of output to authorities Authentication of outputs Price control Submission of reports and financial statements

4.3 Obligations in Trade Agreements

Based on the latest developments and trends the FTA obligations discussed here and used for the assessment are national treatment, market access, senior manager and board of directors, performance requirement, local presence, and most-favored-nation treatment. These obligations are manifestations or translations of the four principles of non-discrimination, freer flow, predictability and competitiveness that all Parties to the FTA agree to adhere to. These obligations are briefly discussed below:

National Treatment (NT)
In NT the Parties are required to extend equal treatment to service suppliers of the other Parties and their domestic service suppliers. Regulatory measures that discriminate between these two groups in the supply or delivery of service are considered non-compliant.

Most-Favored-Nation (MFN) Treatment
MFN is an obligation for Parties to extend the same treatment to service suppliers of Parties to the agreement and that of the non-Parties. A preferential treatment given to service suppliers of a third country (non-Party) is non-conforming to the obligation. This obligation applies to commercial presence and cross-border supply of service.

Senior Management and Board of Directors (SMBD)
For senior management positions this obligation requires Parties not to impose nationality requirement. And while they may require nationality or residency requirement for majority of board of directors it is with a caveat that should not impair the investor's control over his/her investment. This applies to supply of service via commercial presence or investment.

Performance Requirement
This is an obligation that prohibits a Party from imposing performance undertaking or conditions for the approval of an investment or supply of service. The new generation

agreements specify the types of performance requirements that are not permitted, which include the requirement to export a percentage of output, achieve certain level of domestic content, or use or accord preference to goods and services produced domestically. This applies to commercial presence and/or investment.

Market Access (MA)
MA obliges the Parties not to restrict any type of legal entity in the supply of service. It also requires Parties not to impose limitations on the number of service suppliers, value of transactions, number of operations or quantity of services output, and number of natural persons that may be employed. Any such limitations will be a non-conforming measure to the obligation.

In new generation agreements, this obligation applies only for cross-border supply of services. In the GATS and other services agreements patterned after it, the MA obligation applies to all modes of service delivery. Two other restrictions under this obligation may not imposed by the Parties, i.e. limitations on participation of foreign capital (i.e. equity ownership) and type of legal entity they may engage in.

Local Presence (LP)
LP is an obligation for Parties not to require establishment or presence of any form of entity or residency for cross-border supply of services. Any such requirement before cross-border supply is permitted is inconsistent with the obligation.

4.4 Horizontal Measures Inconsistent with FTA Obligations

This section discusses the various regulatory measures that have horizontal or cross-cutting application which do not conform to the FTA obligations. The process involved in undertaking the regulatory mapping and audit of the horizontal and sectoral measures is described in the Box. The key results are also presented.

Box 1. Summary of the Regulatory Mapping and Audit

The regulatory mapping undertaken here was benchmarked against the obligations in new generation agreements. The process entailed assessing the existing regulatory measures affecting the three sectors on whether it has elements that can be considered discriminatory to foreign services suppliers or investors and to what extent are they treated differently. The 1987 Philippine Constitution, the Foreign Investment Act and other national statutes/laws were the main source of regulatory measures since the review was limited to the national or central government level. Close to 150 documents comprising of the Constitution, Republic Acts, Presidential Decrees, Batas Pambansa, and Executive Orders, and agency circulars or orders across Departments were read and reviewed for this exercise.

From the official and legal sources, 65 regulatory measures have been identified, majority or 43 of which are sectoral measures while the remainder are cross-cutting or horizontal. The measures are inconsistent across all six obligations, but majority of the regulatory measures are found inconsistent with the National Treatment obligation (e.g. limitations on equity, requirement for divestment), Performance Requirement Prohibition (e.g. preferential use of domestic input), and Senior Management and Board of Directors (e.g. national or residency requirement). Also, while these regulatory measures impact both investment and cross-border supply of services, majority are directed to foreign investment.

While attempt has been made to be extensive the exercise does not claim to be comprehensive to also take account of differences in treatment between foreign and local service suppliers and investors in terms of the processing or requirements for their application.

The exercise revealed many discriminatory measures in place for these three sectors, which were issued for specific purposes or objectives. Policy-makers and regulators will

A number of Philippine regulatory measures that have horizontal or cross-cutting application do not conform to the FTA obligations. The restrictions exist or are decreed for various reasons. From the mapping exercise, these range from national security, protection of vulnerable sectors or groups, preservation of local autonomy, protection of public morals and health, protection of the right to privacy, to the Filipino first policy. The last one implies preferential treatment to Filipino nationals.

Majority of the horizontal measures differentiate treatment between domestic and foreign service suppliers or investors. This is either by limiting their ownership or participation in certain economic activities or areas. In cases where partial participation or ownership is allowed, the measure requires that control remains with the citizens of the Philippines. The mapping exercise reveals that twenty of these horizontal measures are inconsistent with the NT obligation. These measures pertain or relate to:

- Land ownership and lease as well as homestead arrangement
- Exploration, development and utilization of natural resources in terms of co-production, joint venture, or production-sharing agreements, and cooperative arrangements
- Cooperative organization and membership
- Small and medium enterprises
- Domestic market enterprises
- Activities that may pose risk to public health and morals
- Defense-related activities where engagement requires clearance
- Security-related activities or products where engagement requires clearance
- Indigenous cultural communities or indigenous peoples
- Local autonomy and decentralization
- Re-lending by government-owned financial institutions that are guaranteed by the national government
- Requirements in securing a license for foreign corporations doing business in the Philippines
- Government assistance, counselling, incentives and promotion for micro, small and medium enterprises
- Practice of professions
- Areas or activities as may be dictated by national interest
- Employment of non-resident foreign nationals

Outside of trade agreements, the Philippines maintains two measures that do not conform to the MFN obligation. These measures, which are found in the Constitution and some national laws, allow the Philippines to extend differential treatment between foreign suppliers or investors of different countries. Specifically, these refer to the grant of:

- entry or access of foreign investors or services suppliers to Philippine markets on the basis of reciprocity[211] ; and
- privileges to former natural born citizens of the Philippines[212] of the same rights as Philippine nationals in land ownership or engagement in certain activities/areas such as cooperatives, retail trade and practice of professions.

The Philippines has also adopted some measures relating to incorporation of corporations in the Philippines that are inconsistent with the SMBD obligation. It has adopted measures that prescribe nationality or residency requirements for those in charge of overseeing operations in the country, and involve in corporate decision-making. These measures apply to the following:

- board of directors, where residency in the Philippines is required for its majority
- the Corporate Secretary, where both local residency and Philippine citizenship are required

[211] That is, the same privileges are extended by their home country or country of origin to Philippine nationals.
[212] This means those who have dual citizenship, one of which is Philippine citizenship by virtue of being former natural-born Filipinos.

- a resident agent of a foreign corporation, where residency in the Philippines is a requirement

There is also a requirement for corporations incorporated domestically to set up its principal office within the country.

The Philippines stipulates certain requirements that must be fulfilled by foreign service suppliers or investors in securing approval to engage in certain areas or activities in the country. These include preferential treatment or use of Filipino labor, domestic materials and locally produced goods are policies, and the grant of incentives to certain sectors, areas or activities. While the general policy is enunciated in the Constitution, the specific requirements are carried out in national and special laws:

- The Foreign Investment Act (FIA) specifies that the participation of non-Philippine national in small and medium sized domestic market is permitted provided:
  - its paid-in equity capital is no less than USD200,000; or
  - it involves advanced technology or employs at least 50 direct employees, and with paid-in equity capital of USD100,000.
- The FIA also prescribes that foreign investment in export market enterprise is allowed up to100 percent equity provided it exports at least 60 percent of its products or services
- The Omnibus Investment Code mentions that fiscal incentives may be availed of by enterprises registered with the Board of Investment subject to certain conditions on equity ownership, engagement in pioneer projects, and export of products among others.
- Special laws on exports, economic zones and free port zones also grant a set of fiscal incentives to enterprises located in the zones subject to fulfillment of export requirements. The incentives may include income tax holiday, tax credit for use of local materials and equipment, tax credit on imported materials used for production and packaging of export products, and additional incentives for labor expenses.

The Philippines recently passed a law on data privacy, which applies to the collection, holding, processing of personal information of Philippine citizen or resident. The Data Privacy Act (2012) prescribes certain conditions on who may be involved in the processing of personal information of Philippine citizens or residents. For instance, the Act requires that processing of information outside of the country to have “links in the Philippines”, a form of a localization requirement.

These measures are listed in Appendix E.

4.5 Sectoral Measures Inconsistent with FTA Obligations

A number of regulatory measures affecting the distribution, logistics and transportation services sectors do not also conform with the FTA obligations. These have been found in the Constitution, national laws and government agency orders or circulars.

4.5.1 Distribution Services

The non-conforming measures in the distributive trade services (which is composed of wholesale and retail trade services) impact investment and cross-border supply in a number of areas or sub-sectors. The measures limit ownership or participation by foreign service suppliers, as wells as the grant of incentives to local suppliers. These areas or subsectors affected are:

- retail trade activities
- domestic and international trading of rice and corn
- retailing of rice and corn
- importation and selling of chain saws in the country
- selling of machinery, equipment and spare parts to Philippine shipping enterprises, i.e. grant of tax credits to local suppliers
- local sale, transfer and lease of vessels for domestic shipping companies require approval
- importation, sale, distribution or delivery of dangerous drugs and/or controlled precursors or elements as well as delivery of equipment, apparatus and other paraphernalia for dangerous drugs (NT, DR*)

4.5.2 Logistics and Transport Services

Regulatory measures affecting logistics and transport services are found to be inconsistent with the FTA obligations as they concern ownership and engagement in logistics and transport activities, availment of incentives, employment of officers, crew and staff, and procurement of transport services.

The measures affect all types of transportation services, i.e. land transport (including rail transport), air transport, and water transport both internal waterways and coastal and transoceanic, whether for freight or passenger. While it generally applies to commercial presence or investment, in some instances the measures also impact cross-border supply of services. A case in point is the general requirement to have the repair and maintenance of Philippine registered vessels in Philippine shipyards. Another example is the directive on the use of Philippine flag carriers in the import and export of goods when such service is paid by credit or loan guaranteed by the government or its financial institutions.

The measures also affect supporting and auxiliary services to transport. In the air transport, this includes general sales agency, cargo handling, freight forwarding, navigational air services, maintenance and operation of airport facilities. In water transport, the measures

apply to port operation and management, pilotage, anchorage or docking at berth, marine surveying,

The measures do not apply to transportation services cut and dry, i.e. in the manner categorized and defined in the UN Central Product Classification. The mapping exercise shows extension or overlap with other sectors, which is not limited to services. Fisheries for example, limit the licensing of commercial fishing vessel to Philippine nationals. Another example is in manufacturing where a government corporation is given the mandate to assemble and manufacture aircraft and aviation devices, equipment and contraptions.

Measures affecting business services have implications in the transport and logistics sectors including ship building activities. This primarily involves the limitations on licensing professional services such architectural services, engineering services, naval architecture, mechanical engineering, electrical engineering, merchant marine, airman services, aeronautical engineering, environmental planning, and customs brokers. There are also limitations on leasing and repair and maintenance of transport equipment including vessels.

These measures are listed in Appendix F.

4.6 Assessment of Existing Philippines Commitments in FTAs

The Philippine Schedule of Commitments in the GATS has a very small list of sector and subsector coverage compared to the 155 plus subsectors in the WTO Service Sectoral Classification. But consistent with the GATS Article V provision, commitments of the Philippines in other and succeeding free trade agreements have expanded in scope and depth of commitments.

Compared with the GATS commitments, the Philippines significantly improved its sectoral coverage and market access and national treatment commitments in AFAS. However, the many rounds of negotiations running two decades only produced commitments that are equivalent to current regulatory practice as at the latest package of commitments. Evidently, the Philippines AFAS commitments do not extend any preferential treatment to the other Member States as would have been expected in a FTA, much so in an agreement that is the key tool for services integration in ASEAN. This may change if the target thresholds, particularly the equity targets are complied with in the final round of AFAS negotiations. It is noted that this would necessitate amendments to certain provisions of the Constitution or laws of the country which limits equity participation of foreigners.

Similarly, PJEPA has extensive sectoral/sub-sectoral coverage and deeper level of commitments than GATS, but it also achieved a better set of commitments earlier at the signing and entry into force of the agreement as most of the commitments made by the Philippines were committed at the level of regulatory regime. See Table 15.

Table 15. Comparison of Philippine commitments

Sector	GATS (1995)	AFAS (1997-2015)	PJEPA (2009)
Trade Distribution Services	No sectoral commitment	Commissions Agent's services except rice and corn Wholesale trade of fur services Wholesale trade of snowmobiles and related parts and accessories Franchising Services	Commission Agents' services except rice and corn (SS)
Transport Services	Maritime Transport International transport (passenger and freight) except cabotage and government owned cargoes Leasing/rental of vessel without crew Maintenance and repair of vessel	Maritime Transport International transport passenger except cabotage transport and government-owned cargoes International transport freight except cabotage transport and government owned cargoes Maritime cargo freight services for foreign registered shipping companies Leasing/rental of vessel without crew Maintenance of vessel Repair of vessel Pushing and towing Supporting services for water transport Port and waterway operation services Maritime agency services Other supporting services Classification services Vessel and salvage refloating services provided in ocean and seas	Maritime Transport International Maritime Transport (passenger and freight) except cabotage and government-owned cargoes (SS) Maintenance and repair of vessel (SS) Maritime agency vessel Pushing and towing services Supporting Services for Maritime Transport Port and waterway operation services (SS) Other supporting services for water transport (SS)
	Air Transport Maintenance and repair of aircraft General sales and cargo sales agency	Air Transport (8th Package) Aircraft repair and maintenance Selling and marketing of air transport services Computer reservation system Air leasing without crew Air freight forwarding services Cargo handling Baggage handling Passenger handling	Air Transport Maintenance and repair of aircraft (SS) Selling and marketing services Offline carriers (SS) General sales agent (SS) Cargo sales agent (SS)

	Rail Transport Passenger and freight transportation Maintenance and repair of rail transport equipment	Rail Transport Passenger transportation Freight transportation Supporting services (railroad, street railway, traction railway) Maintenance and repair of rail transport equipment	Rail Transport (SS) Passenger transportation Freight transportation Supporting services (railroad, street railway, traction railway)
	Road Transport Passenger and freight transportation Maintenance and repair of rail transport equipment	Road Transport Passenger transportation Freight Transportation Rental of commercial vehicles with operator Maintenance and repair of road transport equipment Routine cleaning and maintenance services limited to vehicle laundry and car-wash services Supporting services for road transport – parking services	Road Transport (SS) Passenger transportation Freight Transportation Rental of commercial vehicles with operator
		Pipeline Services	Pipeline Services (SS)
	Services Auxiliary to all modes of transport Cargo handling services Storage and warehousing services Container yard and depot services Freight forwarding services	Services Auxiliary to all modes of transport Cargo handling services Cargo handling services at the Subic Bay Freeport Storage and warehousing services Storage and warehousing services at the Subic Bay Freeport Freight transport agency services – International freight forwarding by sea (=) - Domestic freight forwarding by sea	Services Auxiliary to all modes of transport Maritime cargo handling services Storage and warehouse except rice and corn (SS) Freight transport agency services – International freight forwarding by sea (SS) Domestic freight forwarding by sea (SS)

The commitments made by the Philippines in the GATS, AFAS and PJEPA do not necessarily cover an entire services sector and reflect the current regulatory practice. As evident, the sectoral scope could be limited to a small segment of a subsector, while the level of commitment could be lower than what the current regime allows, thus be more restrictive.

In the context of current and future negotiations, participating economies (especially developed ones) at the very least are likely to demand the binding of the current regulatory practice, an outcome which is hoped to be achieved in TISA and new generation agreements.

On a more substantive aspect, the participating economies will focus on understanding the objectives of the regulatory measures, i.e. why such have been adopted and maintained, and

negotiating the easing or relaxation of some of the regulatory measures, i.e. reducing or eliminating these to conform with the obligations of the FTA.

From the perspective of national interest, the more fundamental questions on these regulatory measures are what are the unintended consequences of keeping or maintaining these, are the regulatory measures achieving its intended objectives, and whether these objectives could best be achieved by other forms of regulation.

4.7 Areas or Sectors for Possible Inclusion in Annex II of Trade Agreements

Existing regulatory measures that do not conform to the obligations of a free trade area agreement can be maintained by member countries/economies as part of the allowed derogation. Member countries/economies do not necessarily have to immediately open up or remove existing regulatory measures that discriminate against investors and service suppliers of the other countries/economies in the agreement. These measures subject to negotiations can be scheduled and be part of liberalization efforts that may be taken by member countries/economies in the future.

In FTA agreements that adopt the negative list approach the non-conforming measures are either listed in Annex I or Annex II. Measures in Annex I are scheduled at the level of existing regulatory practice (i.e. based on existing regime) on a standstill basis and with a ratchet obligation. These mean that member countries/economies further commit (i) not to make more restrictive changes to the existing regulatory measures; and (ii) that any unilateral liberalization taken is automatically extended to their FTA partners.

Measures in Annex II list sectors, subsectors, areas or activities in which member countries/economies reserve their right to impose future measures. The listing in Annex II gives them the policy latitude to pursue more restrictive regime that could be discriminatory at any point to the sector/subsector/areas/activities in the list.

Since the scheduling of the measures is subject to negotiations, the aim of the more aggressive parties is to narrow the list in the Annexes and to the extent possible limit those that are scheduled in Annex II by shifting them to Annex I. The listing of non-conforming measures in Annex I provides not only predictability but a window for further market opening.

By and large, the sectors or activities that countries/economies schedule in Annex II are those that they consider of sensitive nature that they need to keep the policy space without any consequential attachments or conditions. In as much as each country/economy differs from each other the expanse of the coverage of Annex II varies subject to what each considers of national interest. Thus, it may cover measures that apply to all sectors horizontally, a sector or a very specific subsector or activity of special interest to the country/economy.

To understand what parties in a free trade agreement, especially in a new generation agreement, would consider acceptable including in Annex II, the TPP Agreement Annex II

Non-Conforming Measures had been reviewed to see what the twelve parties themselves scheduled as their respective Annex II.

Subsequent paragraphs provide a summary of the measures that had been agreed upon by parties in the TPP Agreement to be scheduled in their respective Annex II. The sections are divided into horizontal and sectoral measures.

Cross-Cutting/Horizontal Measures

Majority of the countries have reserved their right to take future **measures on land**, which covers acquisition, ownership and lease, or all types of transactions involving land; and may include land in general, or be specific to urban or agricultural land, residential property or protected areas. This is included in the schedules of Australia, Brunei Darussalam, Chile, Japan, Malaysia, New Zealand, Singapore, and Viet Nam.

Grant of favorable treatment to **indigenous and minority groups** is another area in which majority have taken reservation. The indigenous and minority groups include the aboriginals or indigenous peoples, communities and organization and those considered as minority groups who are socially and economically disadvantaged, or in some instances geographically disadvantaged. This is scheduled by Australia, Canada, Chile, Malaysia, Mexico, Peru, the United States, and Viet Nam.

Similarly, grant of favorable treatment for **small and medium enterprises**, and **cooperatives** have been included by Viet Nam.

Reservation on the **presence of natural persons** is also listed in Annex II on the condition that these are not inconsistent with their obligations in the General Agreement on Trade in Services (GATS). These are taken by countries, which are currently non-labor surplus such as Australia and Brunei Darussalam.

The countries that have federal system of government would have been expected to take reservations on **regional and local government** with respect to measure that these levels of government may take however, only one country (i.e. Australia) has included this in Annex II.

Matters pertaining to government entities, assets and interests have been included in Annex II by most countries. These would refer to measures concerning transfer or disposal of entities and assets, and divestment of interests, as well as devolution of government service to the private sector. Specifically, the countries have reserved the right to take measures on ownership and control by investors and foreign, as well as management of said entities by foreigners.

Other horizontal measures have been listed in Annex II and interestingly, the interest of the countries vary widely:

- New Zealand has taken reservation on matters pertaining or relating to its **territory**, in more specific terms to its foreshore, seabed, internal waters, territorial sea, exclusive economic zone and continental shelf.
- Japan has listed **services that are unrecognized or technically unfeasible** at the time of entry into of the agreement.
- New Zealand has included the approval criteria for **overseas investment**.
- Malaysia has taken the right to reserve measures pertaining to the non-**internationalization of is currency** (i.e. Ringgit).

Additionally, **bilateral and multilateral agreements** made by countries prior to the signing or entry into force of the TPP Agreement or even after as in the case of ASEAN Member States (i.e. Brunei Darussalam, Malaysia, Singapore and Viet Nam) for ASEAN agreements have been included in Annex II. These agreements grant differential treatment or favorable treatment to the parties in the bilateral or multilateral agreements, which they wished to preserve in the context of those agreement. More often this would cover free trade area agreements but other countries have also added agreements relating to aviation, maritime (including salvage), fisheries, port matters, land transport and telecommunication, broadcasting and space transportation.

Sectoral Measures

In the context of national security, some countries have taken reservations on what may be considered **critical infrastructure sectors**, whose "incapacity or destruction may have debilitating effects to on security, national economic security, national public health or safety, or any combination thereof"[213]. The areas or sectors listed in Annex II that may be considered as such include the following:

- The administration of proprietary information by the National Electronic Process (Singapore)
- Arms & Explosives (Singapore, Malaysia, Japan) including wholesale and retail distribution of firearms (Australia)
- Transportation system
  - Airport operation including ground handling services (Australia, Brunei Darussalam, Canada, Japan, Malaysia, Peru, United States, and Viet Nam), and specialty air services (Singapore and Viet Nam)
  - Land transport (Brunei, Chile, Malaysia, Peru, Singapore) including international land transport (Chile and Peru), and supporting services (Singapore)
  - Specialized personnel for transport (Mexico)

[213] This is taken from the US Homeland Security website. The US Homeland Security refer to critical infrastructure sectors as the sectors whose assets, systems, and networks, whether physical or virtual, are considered so vital to the (United States) the country that their incapacitation or destruction would have a debilitating effect on security, national economic security, national public health or safety, or any combination thereof. (https://www.dhs.gov/critical-infrastructure-sectors, retrieved August 04, 2017, 1452)

    - Water transport including cabotage (Australia, Canada, New Zealand, and United States) and supporting services (Singapore)
    - Transportation services via pipeline (Singapore)
- Water and wastewater system
    - Water distribution (i.e. supply of potable water) (Brunei Darussalam, New Zealand, Peru, and Singapore)
    - Water allocation, collection, treatment and distribution (New Zealand)
    - Sewage and Refuse Disposal and Sanitation and other Environmental Services (Chile, Malaysia, Peru, and Singapore)
- Communication system
    - Telecommunication services (Chile, Mexico, Peru, and Singapore)
    - Audio-visual services including broadcasting services (Australia, Brunei Darussalam, Chile, Japan, and Singapore)
- Energy
    - Electricity generation, transmission, and distribution (Brunei Darussalam, Malaysia, Mexico and New Zealand)
    - Electricity utility industry, gas utility industry and nuclear utility industry (Japan)

Areas that may have implication on public morals and health have been listed in Annex II by some countries. Mexico, New Zealand and Singapore took reservations on **gambling and betting services**, with New Zealand also including prostitution services in the list. Due to its potential impact on health, countries such as Australia, Brunei Darussalam, Malaysia, New Zealand and Singapore have included in their respective reservations **wholesale and retail trade of tobacco products and alcoholic beverages.**

Recognizing its importance in the learning, acquisition of knowledge and skills and formation of values and beliefs of their citizenry e**ducation** has been included by a number of countries in their Annex II but its scope is generally limited to **primary and secondary education** only. The countries that listed education include: Australia (primary education), Brunei Darussalam (pre-primary, primary and secondary education), Chile (supply educational services by investors and natural persons), Japan (primary and secondary education), Peru (supply of educational services by natural persons), Singapore (supply of primary, secondary and higher secondary education), and Viet Nam (supply of primary and secondary education)

With the purpose of preserving tradition, culture and heritage, many countries have scheduled **culture including arts** in Annex II though its specific scope vary across countries as seen below:

- Australia (creative arts, indigenous culture, expression and other cultural heritage)
- Canada (cultural industries)
- Chile (arts and culture)
- Malaysia (arts, filming and performances of foreign artist, arts and films imported and distributed into Malaysia, programs licensed for distribution)

- Peru (cultural industries)
- Viet Nam (performing arts and fine arts, and tangible and intangible cultural heritages)

Community services and social security services, specifically as it pertains to **law enforcement and correctional services** are included by majority of the countries including Australia, Canada, Chile, Japan, Malaysia, Mexico, Peru and New Zealand.

A number of them have also scheduled **other social services** which are established or maintained for public purpose. These generally include income security or insurance, social security or insurance, social welfare, public education, public training, health, and child care. For some developed countries this item would include public housing (Australia, Japan, and New Zealand), and public transport and public utilities (Australia and New Zealand).

Specific sectors, products or activities that have bearing on their economic security have been included by such countries such as Brunei Darussalam for **petroleum, and coal reserves**, as well as **silica sand deposits**, and Malaysia and Mexico for **oil and gas**.

Specific economic activities have also been included in Annex II possibly due to their political sensitivity. Generally, these relate to **agriculture, fishery, export products, and handicrafts**. The countries that have taken reservations on their right to take future measure are:

- Australia for agricultural land and agribusiness
- New Zealand for cooperative dairy company, export marketing of kiwi in all markets, allocation scheme for the rights to distribute export products, allocation of distribution rights for wholesale trade service suppliers, and establishment or implementation of mandatory marketing plans for export marketing of products
- Brunei for fisheries and related services to fisheries in territory and EEZ, and logging activities
- Canada for licensing fishing or fishing related activities including entry of foreign fishing vessels
- Chile for activities of foreign fishing and fish landing, first fish landing of fish processed at sea and access to Chilean ports (port privileges) as well as ise of beaches and land adjacent to beaches
- Fisheries in territorial sea, internal waters, EEZ and continental shelf
- Peru for artisanal fishing
- New Zealand for foreign fishing, including fishing landing, first landing of fish processed at sea, and access to New Zealand ports (port privileges)
- Peru for design, distribution, retailing or exhibition of handicrafts that are identified as Peruvian handicrafts.

Reservations in some business services, specifically professional services, have also been made by some countries. Where these have been previously committed in the GATS, the countries have clarified that the reservations should not be inconsistent.

In summary, Annex II allows the countries flexibility to make future measures on sectors, activities or areas listed therein without any conditions or requirements in the context of obligations under an FTA agreement. In essence, it gives them the policy latitude to make any decision and take any measure deemed necessary in the interest of the country at any point in time, notwithstanding any of the obligations in an FTA agreement.

There are certain aspects of commonalities on what the countries consider sensitive areas that serve as basis or may give merit for inclusion of a sector, subsector, area or activity in Annex II. As observed, the measures in Annex II can generally be in the context of protecting and or preserving: (i) national sovereignty; (ii) national security and public safety; (iii) national identity and heritage; (iv) public health; (v) public morals; (vi) minority groups; (vii) vulnerable sectors; (viii) economic stability; (ix) key economic interest; and (x) specific sectoral interests.

However, the scope or details of the measures or even the expanse of the list of measures in Annex II varies across countries/economies. This implies that countries have different degrees of sensitivities or considerations on the same aspects. Take for instance maritime cabotage which some countries scheduled in Annex II while others include it in Annex I. It may be a factor of the existing levels of control or exercise of control by government, i.e. presence or absence as well as the degree of such control that prompts countries to include it in Annex II.

The above presents a guide in considering what areas, sectors or activities to schedule in Annex II that could be palatable to the other parties in an FTA agreement. It is important though to have a clear understanding of the rationale for the measures and the justification why they have to be retained and scheduled in Annex II rather than Annex I. At the end of the day it is about balancing the interest of the country.

4.8 Pros and Cons of the Scheduling Approaches

In new generation agreements such as the TPP, Members of the agreement adopted the negative list approach to scheduling their commitments for trade in services. As discussed previously, this approach lists the existing regulatory measures that a Member maintains that are inconsistent with the non-discriminatory obligations in the trade agreement. Sectors/subsectors/activities outside the list by implication, means that there are no existing discriminatory measures that are applicable to it, and therefore these are open to foreign service suppliers/investors.

The principle and concept of the negative list approach are not new to the Philippines. Its Foreign Investment Act (RA 7042 s. 1991 as amended by RA 8179 s1996) has adapted the concept by requiring the issuance and publication of a Regular Foreign Investment Negative List (RFINL) every two years. The RFINL in a way compiles and specifies the foreign equity limitations that are imposed to foreign investment under existing national statutes/laws. It gives foreign investors a snapshot of investment areas/activities where they

can engage or participate openly or with restrictions. For sectors/subsectors/activities that are in the RFINL, foreign investors can invest up to the level of the equity restrictions that are specified in the list, and 100 percent foreign equity for those sectors/sub-sectors/activities not in the RFINL.

For investors, whether it is domestic or foreign, a negative listing is neat, simple and clear to understand. What is not in the list is open for investment and what is included is open only up to the level that is specified in the list. Thus, for purposes of transparency and ease of doing business the preferred approach is the negative list. It addresses information asymmetry and reduces the search cost for information relevant to investment decision-making.

In the context of trade agreements the negative list approach usually means committing at the level of existing regulatory practice (standstill obligation) and further committing that any future unilateral liberalization taken by a Party would be automatically extended to the other members of the trade agreement (rachet obligation). These are consistent with free trade principles of non-discrimination, openness, transparency and competitiveness.

Countries have different reasons in their preference between the negative and positive list approaches or hybrid approach to scheduling approach. In this section, we attempt to weigh the pros and cons of the negative and positive list approaches, and in the process understand and address some of their perceived weak points of the negative list approach:

1. *Transparent versus Opaque.* In the negative list countries lay down their foreign investment regime as practiced. In the positive list countries only list the sectors/subsectors/activities and the degree of openness they are willing to commit under the agreement. While the latter gives some flexibility to government in scheduling, it does not give investors the full picture and sometimes creates confusion as to the real state of play. Investors looking for stability and predictability in environment may not see this favorably.

   The mechanism for scheduling may also facilitate increased transparency in the system. The negative list approach with the ratchet provision would automatically update the schedule of improvements in the investment regime based on the unilateral liberalization (i.e. reduction or elimination or restrictive measures) undertaken by the country. In the positive list approach, countries have to go through rounds of negotiations to improve their level of commitments. The outcome of which may not necessarily provide or reflect the full information relevant to business.

2. *List or Lose.* The negative list approach requires listing of all discriminatory regulatory measures that affect trade in services. By implication non-inclusion in the list mean that the sector/subsector/activity is open. This 'list or lose' character of the negative list approach has left some discomfort on the potential consequence of inadvertent omission. In some instances, the discomfort generates a level of fear overwhelmingly

overshadowing the potential benefits of the approach. The agreement itself however, could address this concern (subject to negotiation) by allowing room for flexibility in terms of coverage, timing, and scope of application of claims for dispute, to mention a few.

3. *Policy space.* The preference for the positive list approach is argued on the basis of keeping "policy space". Countries are allowed to only schedule the sectors/subsectors/activities they are willing to commit at the level they are comfortable. It thus gives them flexibility to gradually schedule their commitments and latitude to formulate regulatory measures towards greater openness or restrictiveness, without any consequence under the trade agreement. This domain however, is not only true for the positive list approach. The negative list approach grants as much policy space by allowing countries to indicate the areas in which they wish to reserve their rights for future measure in the list (i.e. Annex II).

4. *Treatment of under-developed and sensitive sectors*. The negative list is a two-annex approach. One annex (Annex I) is for areas that committed at the level of existing regulatory practice and are subject to future liberalization (via the rachet mechanism). The other annex (Annex II) is for areas in which countries would wish to maintain flexibility to adopt future regulatory measures. Given this option, countries may list sectors or areas which are under-developed or sensitive for national security reasons under Annex II.

5. *Treatment of new and emerging sectors*. One concern is the difficulty to schedule new or emerging sectors when there is not much information or knowledge about these. As it is emerging, there may be no applicable regulatory measures or these have yet to be developed. It is feared that this lack of existing regulatory measure would force countries to leave this out of the schedule, and therefore as consequence limit the countries from imposing regulation to these sectors. Similar to the treatment of under-developed and sensitive sectors, new and emerging sectors may be scheduled in Annex II. Countries may list it as "new and emerging sectors" and indicate that they reserve their right to adopt future measures.

On the matter of regulation, what the agreement covers or more specifically, what has to be scheduled are those that are discriminatory to foreign investors and service suppliers. The choice of the scheduling approach does not prevent countries from adopting domestic regulation.

6. Treatment of local autonomy. Provisions of the Constitution or the law may grant local autonomy to regional or local government, which make it difficult for the central government to bind them in trade agreements. Countries in this situation have used Annex II of the negative list to maintain the autonomy of the local governments and not bind them to the obligations of the agreement.

The discussion of scheduling approach and the use of negative list approach bring discomfort for a number of reasons. Some of which are discussed above. It also brings to the fore the reality that some countries may not have a well-organized information system - it could be fragmented or non-existent. However, it should be recognized that conducting regulatory mapping and compiling and auditing regulatory measures have its own value in public service. Notwithstanding trade negotiations or regardless of the scheduling approach, having a comprehensive or full information of all regulatory measures affecting trade in services is essential in the running of government, especially in the context improving transparency and enhancing accountability.

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6 Appendix A. Binding Authority of Laws and other Issuances

1. The Constitution as the Fundamental Law

In the hierarchy of Philippine laws, the Constitution (1987) is the supreme and fundamental law. It was ordained and promulgated by the people, from whom all political authority originates.[214] As the fundamental law, all laws, rules, regulations and/or executive issuances must conform to it.[215] To execute the mandate of the people, the Constitution authorized the three co-equal branches of government, to wit: (a) Congress; (b) the Supreme Court; and (c) the President, to exercise certain powers.

The Constitution grants the power to enact laws to the Philippine Congress,[216] and the power to interpret the same in actual cases and controversies, in the Supreme Court.[217] The executive power, on the other hand, is vested in the Executive or the President of the Philippines.[218] In the exercise of their functions, these branches of government issue binding declarations through statutes, rules and regulations, executive issuances, treaties and judicial interpretations. To be valid and binding, these declarations must be consistent with the powers granted by the Constitution, whether made in the direct exercise of the power or delegated to some other entity.

2. Exercise of Legislative Powers by the President

For a time and prior to the adoption of the 1987 Constitution, legislative power was vested in the President of the Philippines. When then President Ferdinand E. Marcos declared Martial Law on September 21, 1972, through Proclamation No. 1081,[219] he granted himself legislative powers to, primarily, prevent or suppress lawless violence, rebellion and insurrection.[220] Subsequently, under the 1973 Constitution,[221] President Marcos abolished the National Assembly and replaced it with an Interim National Assembly,[222] which still included him as member,[223] and where he continued to exercise legislative powers.[224]

The 1976 Amendments[225] to the 1973 Constitution then expressly granted the continuation of President Marcos' exercise of legislative powers until the lifting of Martial Law. Amendment No. 6 granted President Marcos concurrent legislative powers with the Batasang Pambansa.[226] These powers continued to be in full force and effect even after President Marcos lifted Martial Law on January 17, 1981, through Proclamation No. 2045,[227] and when the 1973 Constitution was further amended on April 1981,[228] until 1986.

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214 1987 Constitution, Preamble.
215 Manila Prince Hotel v. Government Service Insurance System, G. R. No. 122156, February 3, 1997.
216 1987 Constitution Article VI, Section 1.
217 1987 Constitution, Article VIII, Section 1.
218 1987 Constitution, Article VI, Section 1.
219 Entitled, "*Proclaiming a State of Martial Law in the Philippines*."
220 Proclamation 1081 (1972), pars. 23-24; *See* Proclamation No. 1104, issued on January 17, 1973, declaring the continuation of martial law.
221 Ratified on January 17, 1973, and which amended the 1935 Constitution.
222 1973 Constitution, Article XVII, Section 1.
223 1973 Constitution, Article XVII, Section 2.
224 1973 Constitution, Article XVII, Section 3.
225 Proclaimed in full force and effect as of October 27, 1976 under Proclamation No. 1595.
226 1976 Amendments, Amendments 5 and 6.
227 Entitled, "*Proclaiming the Termination of the State of Martial Law Throughout the Philippines*."
228 Legaspi v. Minister of Finance, G. R. No. L-58289, July 24, 1982.

After the EDSA Revolution in February 1986, then President Corazon C. Aquino issued Proclamation No. 3[229] on March 25, 1986, promulgating a Provisional Constitution where the President was mandated to continue exercising legislative powers until a legislature is elected and convened under a New Constitution.[230] The 1987 Constitution was ratified on February 7, 1987.[231] Hence, President Aquino lost her legislative powers when members of the 8th Congress were elected on May 1987 and convened on July 27, 1987 under the 1987 Constitution.[232]

Thus, from 1972 to 1976, the President enjoyed exclusive legislative powers. From 1976 to 1986, he enjoyed concurrent legislative powers with the Batasang Pambansa. From 1986 to July 27, 1987, the President again enjoyed exclusive legislative powers. From July 27, 1987 onwards, Congress regained its exclusive power to legislate.

As a consequence of this exclusive or concurrent exercise of legislative powers by the President, his/her issuances through, among others, Presidential Decrees, and Executive Orders are considered as having the validity and binding effect of law, as if these were enacted by Congress.

3. The Power of Subordinate Legislation: Rule-Making Power of Administrative Agencies

While the power to enact laws is vested in Congress, it may properly delegate certain rule-making powers to administrative agencies tasked to implement the law, under the power of subordinate legislation. To be valid, Congress' delegation must establish a standard. This means that the enabling law must define legislative policy, mark its limits, map out its boundaries and specify the administrative agency to apply it. The law must indicate the circumstances under which the legislative command is to be effected. It is the criterion by which legislative purpose may be carried out. Thereafter, the executive or administrative office designated may in pursuance of the above guidelines promulgate supplemental rules and regulations. [233]

Based on the delegated authority by Congress through its enacted laws, the designated administrative agency may issue implementing rules and regulations of the law.

4. Delegated Legislative Powers of Local Government Units

The Constitution divides the Philippines into the following territorial and political subdivisions: provinces, cities, municipalities, barangays, and the autonomous regions in Muslim Mindanao and the Cordilleras. These are local government units that enjoy local autonomy, but are under the general supervision of the President of the Philippines.[234] They are created as both political and corporate bodies. They exercise powers as a political

[229] Entitled, "*Declaring a National Policy to Implement Reforms Mandated by the People, Protecting their Basic Rights, Adopting a Provisionl Constitution, and Providing for an Orderly Transition to a Government Under a New Constitution*."
[230] Provisional Constitution, Article II, Section 1.
[231] Senate of the Philippines, https://www.senate.gov.ph/about/history.asp
[232] 1987 Constitution, Article XVIII, Section 1.
[233] Edu v. Ericta, G. R. No. L-32096, October 24, 1970.
[234] 1987 Constitution, Article X, Sections 1, 2 and 4.

subdivision of the national government and as a corporate entity representing the inhabitants of their respective territories.[235]

Through the Local Government Code, Congress delegated the following powers that affect the operations of business enterprises to local government units (LGU), among others:

a. **The power to generate resources.** This includes the power to levy taxes, fees and other charges, which shall accrue exclusively to the benefit of the LGU.[236] Such power is exercised by the legislative arm of the LGU, the Sanggunian, through the issuance of an ordinance, and cover the local taxes, fees and charges in **Table 1** below:

Table 1. LGU Taxes, Fees and Charges[237]

No.	Local Government Unit	Tax, Fee or Charge
1	Provinces	Tax on transfer of real property ownership
		Tax on business printing and publication
		Franchise tax
		Tax on sand, gravel and other quarry resources
		Professional tax
		Amusement tax
		Annual fixed tax for every truck, van, or any vehicle used by manufacturers, producers, wholesalers, dealers or retailers in the delivery or distribution of distilled spirits, fermented liquors, soft drinks, cigars, cigarettes and other products to sales outlets or consumers within the province
2	Cities	Taxes, fees and charges which the province or municipality may impose
3	Municipalities	Business tax
		Tax on retirement of business
		Fees and charges on business and occupation
		Fees for sealing and licensing weights and measures
		Fishery rentals, fees and charges
4	Barangays	Taxes on stores and retailers with fixed business establishments with gross sales receipts not exceeding PhP50,000 or less, in cities and PhP30,000 or less, in municipalities
		Service fees or charges for the regulation or the use of barangay-owned properties or service facilities
		Barangay clearance
		Fees and charges on the commercial breeding of fighting cocks, cockfights and cockpits
		Fees and charges on places of recreation which charge admission fees
		Fees and charges on billboards, signboards, neon signs and outdoor advertisements
5	Common to All	Service fees and charges for services rendered
		Charges for the operation of public utilities owned, operated and maintained by the LGU within its jurisdiction
		Toll fees and charges for the use of any public road, pier or wharf, waterway, bridge, ferry or telecommunication system funded and constructed by the LGU.

[235] Local Government Code, Book I, Title I, Chapter 1, Section 15.
[236] Local Government Code, Book I, Title I, Chapter 1, Section 18; Book II, Title I, Chapter 1, Section 129.
[237] Local Government Code, Book II, Title I, Chapter 1, Sections 135-140, 143, 145, 147,148, 149, 151-155; DILG Memorandum Circular No. 2009-42, March 27, 2009 (Imposition and Collection of Local Taxes, Fees and Charges)

b. **The power of eminent domain.** This refers to the power to take property for public use, or purpose, or welfare for the benefit of the poor and landless, upon payment of just compensation;[238] and

c. **The power to reclassify lands.** A city or municipality may, through an ordinance passed by the Sanggunian after conducting public hearings for the purpose, authorize the reclassification of agricultural lands to either residential, commercial, or industrial, subject to certain conditions and limitations. The LGUs shall also continue to prepare their respective comprehensive land use plans enacted through zoning ordinances which shall be the primary and dominant bases for the future use of land resources, in accordance with existing laws and subject to certain conditions.[239]

c. **The power to close and open roads.** The LGU, through an ordinance, may permanently or temporarily close or open and local road, alley, park or square falling within its jurisdiction, subject to certain conditions. It also has the power to temporarily close national roads under certain conditions.[240]

These delegated powers are powers that are also exercised by the national government. Thus, in a number of instances, a conflict arises as to the extent of the powers of the national government and the autonomy of the LGU to exercise these powers.

5. Executive Issuances

The President has the power of control over all executive departments, bureaus and offices. In the exercise of such power, he is bound to ensure that all laws are faithfully executed.[241]

In the execution of his/her executive powers, the President may issue the following ordinances:

a. **Executive Orders.** These are acts of the President that provide for rules of a general or permanent character in implementation or execution of constitutional or statutory powers.
b. **Administrative Orders.** These are acts of the President that relate to particular aspects of governmental operations pursuant to the President's duties as administrative head.
c. **Proclamations.** These are acts of the President fixing a date or declaring a status or condition of public moment or interest, upon the existence of which the operation of a specific law or regulation is made to depend.
d. **Memorandum Orders.** These are acts of the President on matters of administrative detail or subordinate or temporary interest which only concern a particular officer or office of the Government.
e. **Memorandum Circulars.** These are acts of the President on matters relating to internal administration, which the President desires to bring to the attention of all or some of the departments, agencies, bureaus or offices of the Government, for information or compliance.
f. **General or Special Orders.** These are acts and commands of the President in his capacity as Commander-in-Chief of the Armed Forces of the Philippines.[242]

[238] Local Government Code, Book I, Title I, Chapter 1, Section 19.
[239] Local Government Code, Book I, Title I, Chapter 1, Section 20.
[240] Local Government Code, Book I, Title I, Chapter 1, Section 21.
[241] Administrative Code of 1987, Book III, Title I, Chapter 1, Section 1.

6. The Binding Force of Treaties and Executive Agreements

International agreements involving political issues or changes in national policy and those involving international agreements of a permanent character usually take the form of treaties.[243] Under the Constitution, all such treaties entered into by the Philippines must be concurred in by two-thirds of all the Members of the Senate to have the binding effect of law under Philippine jurisdiction.[244]

On the other hand, international agreements embodying adjustments of detail carrying out well-established national policies and traditions and those involving arrangements of a more or less temporary nature usually take the form of executive agreements. By long usage, the right of the Executive to enter into binding agreements without the necessity of subsequent Congressional approval has been confirmed. The agreements covered such subjects as commercial and consular relations, most-favored-nation rights, patent rights, trademark and copyright protection, postal and navigation arrangements and the settlement of claims.[245]

7. Decisions and Rule-Making Power of the Courts

The judiciary has the power to interpret the Constitution and laws, rules, regulations and other issuances of the different branches and instrumentalities of government. It has the power to say what the law is in specific cases and controversies. In addition, it has the power to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government.[246] Its interpretation and determination of abuse of discretion is binding as law, unless Congress passes a law establishing different rules or policy objectives that could change such interpretation.

The Supreme Court also has the power to promulgate rules concerning the protection and enforcement of constitutional rights, pleading, practice, and procedure in all courts, the admission to the practice of law, the Integrated Bar, and legal assistance to the underprivileged.[247]

8. Summary

Based on the above, under Philippine laws, the Constitution takes precedence over all other government issuances. Laws, including treaties, promulgated by Congress and consistent with the Constitution take precedence over issuances by the President, and other administrative bodies. Issuances by LGUs, as autonomous political entities and made within the scope of their delegated power are considered valid and binding. Issuances by the President in the exercise of its executive and administrative functions, including entering into executive agreements, and in accordance with law and the Constitution are also valid and binding.

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[242] Administrative Code of 1987, Book III, Title I, Chapter 2.
[243] Commissioner of Customs v. Eastern Sea Trading, G. R, No. L-14279, October 31, 1961.
[244] 1987 Constitution, Article VII, Section 21 and Article II, Section 2.
[245] Commissioner of Customs v. Eastern Sea Trading, G. R, No. L-14279, October 31, 1961.
[246] 1987 Constitution, Article VIII, Section 1.
[247] 1987 Constitution, Article VIII, Section 5 (5).

The Supreme Court is the final arbiter in the determination of whether a law or act of government is consistent with the Constitution and existing laws. Its decisions and interpretations have the binding effect of law, unless Congress changes the law being interpreted.

7 Appendix B. Scope for Logistics Services

Categories	**Codes**
I. Core Freight Logistics Services	
Cargo handling services	CPC 741
Container handling services	CPC 7411
Other cargo handling	CPC 7419
Storage and warehousing services	CPC 742
Transport agency services	CPC 748
Other auxiliary services	CPC 749
II. Related Freight Logistics Services	
(1) Freight transport services	
Maritime Transport Services	CPC 7212
Internal Waterways Transport Service	CPC 7222
Air Transport Services	
. Air freight transport	CPC 732
. Rental of aircraft with crew	CPC 734
Rail Transport Services	
. Freight transport	CPC 7112
Road Transport Services	
. Freight transport	CPC 7123
. Rental of commercial vehicles with operator	CPC 7124
- without operator CPC 83102	
(2) Other related logistics services	
Technical testing and analysis services	CPC 8676
Courier Services	CPC 7512
Commission Agents' Services	CPC 621
Wholesale Trade Services	CPC 622
Retailing Services	
. Food retailing services	CPC 631
. Non-food retailing services	CPC 632
. Sale of motor vehicles	CPC 6111
. Sale of parts and accessories of motor vehicles	CPC 6113
. Sales of motorcycles and snow mobiles & related parts & accessories	CPC 6121
Other supporting services not covered (CPC 743, 7113, 744 excluding 7441, and 746).	
III. Non-core Freight Logistics Services	
Packaging services	CPC 876
Leasing or rental services concerning vessels without crew	CPC 83103
Leasing or rental services concerning aircraft without operator	CPC 83104
Computer and related services	
. Data processing services	CPC 843
. Database services	CPC 844
Management consulting and related services	CPC 865

Notes: CPC 743: Supporting services for railway transport; CPC 7113: Pushing or towing services; CPC 744: Supporting services for road transport; CPC 7442: Highway, bridge & tunnel operation services; CPC 7443: Parking services; CPC 7449: Other supporting services for road transport; CPC 7441: Bus station services; CPC 746: Supporting services for air transport.

8 Appendix C. Institutional setting

1. Administrative agencies

Executive Order 297 or Administrative Code of 1987 defines the distinct types/levels of administrative agencies organized under the executive branch. Formally, an 'Agency' is "any of the various units of the government, including a department, bureau, office, instrumentality, government-owned or controlled corporation, local government or a distinct unit therein". An Agency can either be National or Local, depending on the geographic scope of its influence/responsibility. The following are the different classifications of agencies and their definitions:

- Department – an executive unit created by law:
    - Bureau – "any principal subdivision or unit of any department"
    - Office – any major functional unit of a department or bureau including regional offices
- Instrumentality – any agency of the National Government not integrated within the department framework vested within special functions or jurisdiction by law, endowed with some if not all corporate powers, administering special funds, and enjoying operational autonomy, usually through a charter; includes regulatory agencies, chartered institutions and government-owned or controlled corporations:
    - Regulatory agency – any agency expressly vested with jurisdiction to regulate, administer or adjudicate matters affecting substantial rights and interests of private persons, the principal powers of which are exercised by a collective body such as a commission, board or council
    - Chartered institution – any agency organized or operating under a special charter, and vested by law with functions relating to specific constitutional policies or objectives; includes state universities and colleges and the monetary authority
    - Government-owned or controlled corporation – any agency vested with functions relating to public needs whether governmental or proprietary in nature, and owned (wholly or by majority ownership of stock) by the Government directly or through its instrumentalities

The Departments are created to ensure the functional distribution of the work of the President and for the performance of their functions. Such functions are decentralized. Adequate authority is required to be delegated to subordinate officials to reduce red tape, free central officials from administrative details concerning field operations, and relieve them from unnecessary involvement in routine and local matters. Administrative decisions and actions are required, as much as is feasible, to be made at the level closest to the public. These

Departments are composed of the Office of the Secretaries and staff units under it, including the Undersecretaries and personnel in their immediate offices.[248]

Each Department also has jurisdiction over bureaus, offices, regulatory agencies, and government-owned and –controlled corporations assigned to it by law. The Department's relationship with these offices are characterized by any of the following:[249]

- **Supervision and Control,** which includes the authority to act directly whenever a specific function is entrusted by law or regulation to a subordinate; direct the performance of duty; restrain the commission of acts; review, approve, reverse or modify acts and decisions of subordinate officials or units; determine priorities in the execution of plans and programs; and prescribe standards, guidelines, plans and programs. This is usually the relationship between the Secretaries of Departments and the bureaus, offices and agencies under them.[250]

- **Administrative Supervision** governs the administrative relationship between a department or its equivalent and regulatory agencies or other agencies as provided by law, and is limited to the authority of the department or its equivalent to generally oversee the operations of such agencies and to ensure that they are managed effectively, efficiently and economically but without interference with day-to-day activities. It also includes the authority to require the submission of reports and conduct management audits, performance evaluation and inspection to determine compliance with policies, standards and guidelines of the department; to take such action as may be necessary for the proper performance of official functions, including rectification of violations, abuses and other forms of maladministration; and to review and pass upon budget proposals of such agencies but may not increase or add to them. Regulatory agencies are subject to the administrative supervision of the departments under which they are placed, except government-owned and controlled corporations (GOCCs), which are considered attached agencies to these departments.[251]

- **Attachment,** which refers to the lateral relationship between the department or its equivalent and the attached agency or corporation for purposes of policy and program coordination. The coordination may be accomplished by having the department represented in the governing board of the attached agency or corporation, either as chairman or as a member, with or without voting rights, if this is permitted by the charter; having the attached corporation or agency comply with a system of periodic reporting which shall reflect the progress of programs and projects; and having the department or its equivalent provide general policies through its representative in the board, which shall serve as the framework for the internal policies of the attached corporation or agency. GOCCs are usually attached to departments for policy and program coordination,[252] but enjoy a larger measure of independence from the

[248] Executive Order No. 292 of July 25, 1987, Instituting the "Administrative Code of 1987", Book IV, Chapter 1, Sections 1, 2(3), 3.
[249] Ibid., Chapter 1, Section 4; Chapter 7, Section 38.
[250] Ibid., Chapter 8, Section 39.
[251] Ibid., Chapter 9, Section 43.
[252] Ibid., Section 42.

department to which it is attached than agencies under the supervision and control or administrative supervision of the department.[253]

2. General regulatory procedures

While the power to enact laws is vested in Congress, it may properly delegate certain rule-making powers to administrative agencies tasked to implement the law, under the power of subordinate legislation. To be valid, Congress' delegation must establish a standard. This means that the enabling law must define legislative policy, mark its limits, map out its boundaries and specify the administrative agency to apply it. The law must indicate the circumstances under which the legislative command is to be effected. It is the criterion by which legislative purpose may be carried out. Thereafter, the executive or administrative office designated may in pursuance of the above guidelines promulgate supplemental rules and regulations. [254]

Based on the delegated authority by Congress through its enacted laws, the designated administrative agency may issue implementing rules and regulations of the law.

Administrative agencies created by law to execute the mandate of such law are granted certain rule-making and adjudicative powers by Congress, subject to specific standards. Their relationship to the President, and other government agencies responsible for implementing laws may also be mandated by the statute creating them, or upon determination of the President, in accordance with Executive Order No. 292 or the Administrative Code of 1987.

Under the Anti-Red Tape Act of 2007, Rep. Act No. 9485, all government agencies including departments, bureaus, offices, instrumentalities or government-owned and/or controlled corporations, or local government or district units are required to set up their respective service standards, known as the Citizen's Charter, which should be posted at the main entrance of offices or at the most conspicuous place. The Citizen's Charter must be written either in English, Filipino or in the local dialect and should contain: (a) the procedure to obtain a particular service; (b) the person/s responsible for each step; (c) the maximum time to conclude the process; (d) the document/s to be presented by the customer, if necessary; (e) the amount of fees, if necessary; and (f) the procedure for filing complaints.[255]

When promulgating new procedures, an agency is required, as far as practicable, to publish or circulate notices of proposed rules and afford interested parties the opportunity to submit their views prior to the adoption of any rule. In the fixing of rates, no rule or final order shall be valid unless the proposed rates shall have been published in a newspaper of general

[253] Beja v. Court of Appeals, G. R. No. 97149, 31 March 1992.
[254] Edu v. Ericta, G. R. No. L-32096, 24 October 1970.
[255] *Anti-Red Tape Act of 2007,* Republic Act No. 9485, Section 6.

circulation at least two (2) weeks before the first hearing thereon. In case of opposition, the rules on contested cases shall be observed.[256]

In relation to the above, the Supreme Court in *Commissioner of Customs, v. Hypermix Feeds Corporation,*[257] notes that "When an administrative rule is merely interpretative in nature, its applicability needs nothing further than its bare issuance, for it gives no real consequence more than what the law itself has already prescribed. When, on the other hand, the administrative rule goes beyond merely providing for the means that can facilitate or render least cumbersome the implementation of the law but **substantially increases the burden of those governed**, it behooves the agency to accord at least to those **directly affected a chance to be heard**, and thereafter to **be duly informed**, before that new issuance is given the force and effect of law." (Emphasis Supplied).

In addition, every agency is also required to file with the University of the Philippines Law Center three (3) copies of every rule it adopts. The agency is also required to maintain a permanent register of all its rules and keep it open to inspection by the public.[258]

3. Standards and regulatory impact

Philippine laws do not specifically require administrative agencies to consider international standards during the regulatory process, nor require that they justify any deviation from the same. There is also no mechanism for regulatory impact assessments for proposed rules and regulations.

4. Interagency coordination

While generally laws require that agencies coordinate with other related agencies where the subject matter of any issuance, plan or government action involve cross-cutting issues across agencies, there is no specific mechanism established by law or regulation for inter-agency coordination.

[256] Executive Order No. 292 of July 25, 1987, Instituting the "Administrative Code of 1987", Book VII, Chapter 2, Section 9.
[257] Commissioner of Customs and the District Collector of the Port of Subic v. Hypermix Feeds Corporation, G. R. No. 179579, 1 February 2012.
[258] Executive Order No. 292 of July 25, 1987, Instituting the "Administrative Code of 1987", Book VII, Chapter 2, Section 3.

9 Appendix D. List of stakeholders

1. National Economic Development Authority (NEDA)
2. Department of Trade and Industry (DTI)
3. Department of Transportation (DOTr)
4. Stamm International Inc.
5. Philippine International Seafreight Forwarders Association
6. Aircargo Forwarders of the Philippines, Inc.
7. PortCalls
8. Supply Chain Management Association of the Philippines (SCMAP)
9. SCMAP/United Laboratories Inc.
10. SCMAP/VGL Industries Inc.
11. SCMAP/SSI Schaefer Systems Philippines Inc.
12. SCMAP/Ubiquitous Technologies Philippines Inc.
13. SCMAP/HMR Philippines Inc.
14. SCMAP/Agility Logistics
15. Subic Bay International Terminal Corporation (SBITC)
16. Subic Bay Metropolitan Authority (SBMA)
17. Philippine Ports Authority (PPA)
18. Civil Aeronautics Board (CAB)
19. Port-users Confederation, Inc. (PUCI)/Prudential Customs Brokerage Services, Inc.
20. PUCI/Confederation of Truckers Association of the Philippines
21. PUCI/Ecozone Federation of Forwarders/Brokers/Truckers Philippines
22. PUCI/Customs Brokers Federation of the Philippines
23. PUCI/Customs Bonded Warehouse Operators Confederation Inc.
24. Cebu Port Authority
25. Oriental Port and Allied Services Corporation (OPASCOR)
26. Global Carrier Phils., Inc.
27. Cathay Pacific
28. Ground-Air Logistics Corp (GALCO)
29. Mactan Cebu Int'l Airport Authority
30. Association of International Shipping Lines, Inc. (AISL)
31. Evergreen Shipping
32. AISL/Wallem Philippines Shipping Inc.

33. AISL/MCC Transport Philippines Inc.
34. Wan Hai Lines Ltd.
35. USAID COMPETE
36. Joint Foreign Chambers (JFC)
37. AP Cargo Logistics Network Corporation
38. Magsaysay Shipping & Logistics
39. FedEx Philippines
40. American Chamber of Commerce of the Philippines
41. Japanese Chamber of Commerce and Industry of the Philippines, Inc.
42. Maritime Industry Authority (MARINA)

10 Appendix E. Philippine Horizontal Measures

Introductory Note

1. This section lists existing[259] Philippine regulatory measures of horizontal application or with cross-sectoral implication that differentiate treatment between (i) domestic and foreign service suppliers/investors; and (ii) foreign service suppliers from FTA and non-FTA partners.

2. This section provides a brief description of the regulatory measure, and identifies its source or sources, which includes the Philippine Constitution, national laws, and agency circulars or administrative orders. Note that the description, as provided, does not purport to provide any legal interpretation of the legal or official basis of the measures.

3. As a further note, the list as it is currently drawn may not be exhaustive and would need to be validated by the concerned or relevant agencies of government.

[259] Existing refers to measures adopted and maintained as at the time of this writing.

H01/22

Sector	All Sectors
Sub-Sector	
Obligations Concerned	National Treatment
Level of Government	Central
Measure	Republic Act 7042 s1991, Republic Act 8179 s1996 Executive Order 184 s2015
Description	Small and medium sized domestic market enterprise with paid-in equity capital of less than USD 200,000 is reserved to Philippine nationals. Non-Philippine nationals may engage in small and medium sized domestic market with paid-in equity capital of USD100,000 if they: a) involve advanced technology as determined by the Department of Science and Technology; or b) employ at least 50 direct employees. For clarity: Philippine nationals mean Filipino citizens, or domestic partnership or association wholly owned by citizens of the Philippines; or a corporation organized under the laws of the Philippines under the laws of the Philippines whose equity participation is at least 60 percent owned by Filipino citizens. Domestic market enterprise refers to an enterprise that: a) produces goods for sale, or renders services to the domestic market entirely; or b) if exporting, it fails to consistently export at least sixty percent (60%) of its output.

H02/22

Sector	All Sectors
Sub-Sector	
Obligations Concerned	National Treatment
Level of Government	Central
Measure	Republic Act 6977 s1991 Republic Act 8289 s1997 Republic Act 9501 s2008 Republic Act 10644 s2014
Description	I. Government assistance, counselling, incentives and promotion under the Magna Carta for Micro, Small and Medium Enterprises (MSMEs) (RA 6977 s1991) are limited to enterprises involved in major sectors of the economy, and owned 100 percent by Filipino citizens in single proprietorship or partnership, or juridical entities whose capital or equity is 60 percent owned by Filipino citizens; and not a branch or subsidiary or division of a large enterprise II. MSMEs eligible for assistance are entitled to at least 10 percent of total government procurement value by Government bureaus, agencies and departments. III. Loans of qualified SMEs local and/or regional associations' small enterprises and industries, private voluntary organizations and/or cooperatives may be guaranteed 100 percent and may be provided second level guarantee (i.e. reinsurance). IV. Lending institutions, private or public, are required to set up: (i) at least 8 percent of their loan portfolio for micro and small enterprises; and (ii) at least 2 percent for medium enterprises. V. Additional financing for MSMEs development and promotion are provided under the Start-Up Funds for MSME set up under the Go Negosyo Act. MSMEs are categorized based on total assets as follows: micro : not more than P3,000,000 small : P3,000,001 - P 15,000,000 medium : P15,000,001 - P100,000,000 The above definitions of MSMEs are subject to review and adjustment by the Micro, Small and Medium Enterprises Development (MSMED) Council.

H03/22

Sector	All Sectors
Sub-Sector	
Obligations Concerned	National Treatment Most-Favoured Nation
Level of Government	Central
Measure	The 1987 Philippine Constitution Republic Act 6938 s1990 Republic Act 7042 s1991 Republic Act 8179 s1996 Executive Order 184 s2015 Republic Act 8438 s1997 Republic Act 6734 s1997 Republic Act 9225 s2003
Description	I. Organization of Cooperatives Only Filipino citizens with common bond of interest and residing in the intended area of operation may organize cooperatives. A primary cooperative may be formed by at least 15 or more natural persons. II. Membership in Cooperatives Only Filipino citizens, cooperatives or non-profit organization with juridical personality may become members of cooperatives. III. Rights of Former Citizens Former natural-born Filipino citizens have the same investment rights of a Filipino citizen in Cooperatives.
Note	See measures on agriculture and mass media.

H04/22

Sector	All Sectors
Sub-Sector	
Obligations Concerned	National Treatment Performance Requirement
Level of Government	Central
Measure	Republic Act 7042 s1991 Republic Act 8179 s1996
Description	Foreign investment in export enterprises is allowed up to one hundred percent (100%) ownership if their products and services do not fall within Lists A and B of the Regular Foreign Investment Negative List. As defined in the applicable measure, "foreign investment" means an equity investment made by a non-Philippine national in the form of foreign exchange and/or other assets actually transferred to the Philippines and duly registered with the Central Bank which shall assess and appraise the value of such assets other than foreign exchange.

H05/22

Sector	All Sectors
Sub-Sector	Professional Services
Obligations Concerned	National Treatment Most-Favoured Nation
Level of Government	Central
Measure	The 1987 Philippine Constitution Presidential Decree 541 s1974 Republic Act 8981 s2000 Republic Act 7042 s1991 Republic Act 8179 s1996 Executive Order 184 s2015 Republic Act 9225 s2003
Description	The practice of professions is limited to Filipino citizens, save in cases prescribed by law. The Professional Regulation Commission may upon the recommendation of the Board concerned authorized the issuance of certification of registration or license to: (i) foreign professionals to practice in the Philippines under reciprocity and international agreements; (ii) consultants in foreign-funded, joint venture or foreign-assisted projects of the government; and (iii) employees of Philippine or foreign private firms or institutions pursuant to law, or health professionals engaged in humanitarian mission for a limited period of time. Former natural-born citizens, who are professionals, intending to practice their profession in the Philippines shall apply for a license or permit to engage in such profession from the proper authority.
Note	See measures for specific professions.

H06/22

Sector	All Sectors
Sub-Sector	
Obligations Concerned	National Treatment
Level of Government	Central
Measure	The 1987 Philippine Constitution Republic Act 4860 s1966
Description	Loans or bonded indebtedness of government-owned financial institutions guaranteed by the Philippine Government may only re-lend proceeds of such loans to Filipinos or to Filipino-owned or controlled corporations and partnerships, at least sixty-six and two-thirds percent of outstanding and paid-up capital is held by Filipinos.

H07/22

Sector	All Sectors
Sub-Sector	(Non-Manufacturing)
Obligations Concerned	National Treatment
Level of Government	Central
Measure	(PJEPA)
Description	A foreign firm, engaged in non-manufacturing activities availing itself of peso borrowings, shall observe, at the time of borrowing, the prescribed 50:50 debt-to-equity ratio. Foreign firms covered are: a) Partnerships, more than 40 per cent of whose capital is owned by non-Filipino citizens; and b) Corporations, more than 40 per cent of whose total subscribed capital stock is owned by non-Filipino citizens. This requirement does not apply to banks and non-bank financial intermediaries.
Note	Check official/legal basis of entry in PJEPA.

H08/22

Sector	All Sectors
Sub-Sector	
Obligations Concerned	National Treatment Senior Management and Board of Directors Most-Favored Nation Treatment
Level of Government	Central
Measure	Batas Pambansa Bilang 68 s1980
Description	I. Domestic Corporation For a corporation that is formed and organized under Batas Pambansa Bilang 68 (The Corporation Code of the Philippines): a) it must comply with the ownership by citizens of the Philippines as required by existing laws and the Philippine Constitution b) its place of principal office must be in the Philippines c) majority of its directors or trustees must be residents of the Philippines d) its Corporate Secretary must be a citizen of the Philippines II. Foreign Corporation A foreign corporation, formed and organized under the laws of another country/state can do business in the Philippines if said country or state also allows Filipino citizens and corporation to do business in their territory, and if the corporation is of good standing and it has secured a license from the Securities and Exchange Commission. The resident agent of a foreign corporation has to be a resident of the Philippines or a domestic corporation lawfully transacting in the Philippines.

H09/22

Sector	All Sectors
Sub-Sector	
Obligations Concerned	National Treatment
Level of Government	Central
Measure	Presidential Decree No. 442 s1974
Description	Foreigners (or aliens) seeking admission for employment or employers intending to engage foreigners for employment have to secure employment permits from the Department of Labor. Employment permits may be granted to foreigners only after determination of non-availability of a person in the Philippines able and willing to undertake the services for which the foreigners were desired.

H10/22

Sector	All Sectors
Sub-Sector	
Obligations Concerned	National Treatment
Level of Government	Central
Measure	Presidential Decree No. 442 s1974
Description	A foreign individual, organization or entity may not give any donations, grants or other forms of assistance, directly or indirectly, to any labor organization, group of workers or any auxiliary bodies such as cooperatives, credit unions and institutions engaged in research, education or communication, in relation to trade union activities, without prior permission from the Secretary of Labor.

H11/22

Sector	All Sectors
Sub-Sector	
Obligations Concerned	National Treatment Most-Favoured Nation
Level of Government	Central
Measure	The 1987 Philippine Constitution Commonwealth Act No. 141 s. 1936 Republic Act 7042 s.1991 Republic Act 8179 s1996 Executive Order No. 184 s.2015 Republic Act 9225 s2003
Description	I. The Philippines reserves the rights to adopt or maintain any measure with respect to all lands of public domain, not alienable or disposable. Lands of public domain not alienable or disposable include forest or timber lands, mineral lands and national parks. II. Alienable or disposable public lands, which are limited to agricultural lands or for agricultural purposes, may be: a) owned by Filipino citizens, associations or corporations duly constituted in the Philippines with foreign equity participation not exceeding 40 percent b) leased to Filipino citizens, associations or corporations duly constituted in the Philippine with foreign equity participation not exceeding 40 percent c) available for homestead arrangement only to Filipino citizens subject to the land area or number of hectares that may be granted or allowed for such purpose. III. Alienable or disposable public lands for residential purposes or for commercial, industrial, or other productive purposes other than agricultural may be: a) owned by Filipino citizens, associations or corporations duly constituted in the Philippines with foreign equity participation not exceeding 40 percent b) leased to Filipino citizens, associations or corporations duly constituted in the Philippines with foreign equity participation not exceeding 40 percent subject to the land area or number of hectares that may be granted or allowed for such purpose. IV. Alienable or disposable public lands for the purpose of founding a cemetery, church, college, school, university, or other institutions for educational,

	charitable or philanthropically purposes or scientific research may be: a) owned by Filipino citizens, associations or corporations duly constituted in the Philippines with foreign equity participation not exceeding 40 percent b) leased to Filipino citizens, associations or corporations duly constituted in the Philippine with foreign equity participation not exceeding 40 percent subject to the land area or number of hectares that may be granted or allowed for such purpose. Former natural-born citizens of the Philippines may be a transferee of private lands subject to the land area or number of hectares that may be granted or allowed for their own use or for business. Former natural-born citizens of the Philippines refer to those who have lost their Philippine citizenship by acquiring the citizenship of another country.

H12/22

Sector	All Sectors (Natural Resources)
Sub-Sector	
Obligations Concerned	National Treatment Senior Management and Board of Directors Performance Requirement Most-Favoured Nation
Level of Government	Central/National Regional
Measure	The 1987 Philippine Constitution Republic Act 8438 s1997 Republic Act 6734 s1999 Presidential Decree 1067 s1976
Description (Option 1)	I. All natural resources such as lands of the public domain, waters, minerals, coal, petroleum, and other mineral oils, all forces of potential energy, fisheries, forests or timber, wildlife, flora and fauna, and other natural resources are owned by the State. II. For the exploration, use, development of natural resources, the Philippines may enter into a co-production, joint venture, or production-sharing agreements with Filipino citizens, or corporations or associations with at least 60% equity participation by Filipino citizens. III. Only Filipino citizens and cooperative fish farming may be allowed to engage in small-scale utilization of natural resources. IV. With respect to natural resources found in the autonomous regions of the Philippines, control and supervision in the exploitation, exploration, development, enjoyment and utilization of these resources lie with the regional governments of these regions. V. Use and development of waters shall be by administrative concession. A water permit is mandatory for the appropriation of water or the acquisition of water right to use water, take or divert water from water source in any manner and for any purpose allowed by law.
Note	See measures on small scale and large scale mining activities. See measures on energy exploration and other mineral exploration activities. See measures or entries relating to supply and distribution of water and management of sewage system, public utilities, and infrastructure development projects. Refer to measures on domestic corporation.

H13/22

Sector	All Sectors
Sub-Sector	
Obligations Concerned	National Treatment Performance Requirement Senior Management and Board of Directors Most-Favoured-Nation Local Presence Market Access
Level of Government	Central Local
Measure	The 1987 Philippine Constitution Republic Act 7160 s1991
Description	The local government units in the Philippines enjoy local autonomy. Local government units are territorial and political subdivisions that refer to municipalities, cities, barangays and provinces.

H14/22

Sector	All Sectors
Sub-Sector	
Obligations Concerned	National Treatment Performance Requirement Senior Management and Board of Directors Most-Favoured-Nation Local Presence Market Access
Level of Government	Central Local
Measure	The 1987 Philippine Constitution Executive Order 220 s1987 Republic Act 8438 s1997 Republic Act 6734 s1989
Description	The Philippines grants autonomy to the autonomous regions in Muslim Mindanao and the Cordilleras.

H15/22

Sector	All Sectors
Sub-Sector	
Obligations Concerned	National Treatment Performance Requirement Senior Management and Board of Directors Most-Favoured-Nation Local Presence Market Access
Level of Government	Central Regional
Measure	The 1987 Philippine Constitution Republic Act 8371 s1987 Executive Order 220 s1998 Republic Act 8438 s1997 Republic Act 6734 s1989
Description	The Philippines recognizes, promotes and protects the rights of the indigenous cultural communities. Indigenous Cultural Communities (ICC) or Indigenous Peoples (IP) refer to a group of people or homogenous societies identified by self-ascription and ascription by others, who have continuously lived as organized community on communally bounded and defined territory, and who have, under claims of ownership since time immemorial, occupied, possessed and utilized such territories, sharing common bonds of language, customs, traditions and other distinctive cultural traits, or who have, through resistance to political, social and cultural inroads of colonization, non-indigenous religions and cultures, became historically differentiated from the majority of Filipinos. ICCs/IPs shall likewise include peoples who are regarded as indigenous on account of their descent from the populations which inhabited the country, at the time of conquest or colonization, or at the time of inroads of non-indigenous religions and cultures, or the establishment of present state boundaries, who retain some or all of their own social, economic, cultural and political institutions, but who may have been displaced from their traditional domains or who may have resettled outside their ancestral domains.
Note	Refer to measures relating to CAR and ARMM

H16/22

Sector	All Sectors
Sub-Sector	
Obligations Concerned	National Treatment Senior Management and Board of Directors Performance Requirement
Level of Government	Central
Measure	Republic Act 7042 s1991 Republic Act 8179 s1996 Executive Order 184 s2015
Description	Investments in activities that are defense-related, where engagement requires clearance authorization from the Secretary of the Department of National Defense, are reserved to Philippine nationals unless provided for in specific laws. Non-Philippine nationals may be allowed to engage in the manufacture and repair of defense-related products if substantial amount of its output is exported. The extent of foreign equity share is specified in the clearance authorization granted. Philippine nationals refer to Filipino citizens, or domestic partnership or association wholly owned by Filipino citizens; or a corporation organized under the laws of the Philippines whose equity participation is at least 60 percent owned by Filipino citizens.
Note	Refer to measures on domestic corporation. See measures on construction of defense-related structures.

H17/22

Sector	All Sectors
Sub-Sector	
Obligations Concerned	National Treatment Senior Management and Board of Directors Performance Requirement
Level of Government	Central
Measure	Republic Act 7042 s1991 Republic Act 8179 s1996 Executive Order 184 s2015
Description	Investments in security-related activities or products, where engagement requires clearance from the Chief of the Philippine National Police, are reserved to Philippine nationals unless provided for in specific laws. Non-Philippine nationals may be allowed to engaged in the manufacutre or repair of these products if substantial percentage of its output is exported. The extent of foreign equity share is specified in the clearance authorization granted. Philippine nationals refer to Filipino citizens, or domestic partnership or association wholly owned by Filipino citizens; or a corporation organized under the laws of the Philippines whose equity participation is at least 60 percent owned by Filipino citizens.
Note	Refer to measure on domestic corporation.

H18/22

Sector	All Sectors
Sub-Sector	
Obligations Concerned	National Treatment Performance Requirement Senior Management and Board of Directors Most-Favoured-Nation
Level of Government	Central
Measure	Republic Act 7042 s1991 Republic Act 8179 s1996 Executive Order 184 s2015
Description	The Philippines may maintain and adopt measures pertaining to activities that may pose risk to public health or morals.

H19/22

Sector	All Sectors
Sub-Sector	
Obligations Concerned	Local Presence
Level of Government	Central
Measure	Republic Act 10173 s2012
Description	Entity processing personal information of all Filipino citizens inside or outside the country is required to have a link with the Philippines. Such link means but not limited to: a) The contract has been entered in the Philippines b) A juridical entity not incorporated in the Philippines has central management and control in the Philippines c) An entity that has branch, agency, office or subsidiary in the Philippines and the parent or affiliate of the Philippine entity has access to personal information d) The entity has other links in the Philippines, e.g. it carries on business in the Philippines or the personal information was collected by an entity in the Philippines.

H20/22

Sector	All Sectors
Sub-Sector	
Obligations Concerned	National Treatment Senior Management and Board of Directors
Level of Government	Central
Measure	1987 Philippine Constitution
Description	When national interest dictates the Philippines may maintain and adopt measures that will reserve certain areas of investments to Filipino citizens, or to corporations or associations with at least 60 percent equity participation by Filipino citizens.
Note	Refer to measure relating to domestic corporation

H21/22

Sector	All Sectors
Sub-Sector	
Obligations Concerned	Performance Requirement
Level of Government	Central
Measure	1987 Philippine Constitution
Description	The Philippines may adopt or maintain any measures that: a) accord preference to qualified Filipinos in the grant of concessions, privileges and rights covering the national economy and patrimony; b) promote preferential use of Filipino labor, domestic materials and locally produced goods, and will make them competitive; and a) encourage the use of appropriate technology and regulate its transfer.

H22/22

Sector	All Sectors
Sub-Sector	
Obligations Concerned	National Treatment Performance Requirement
Level of Government	Central
Measure	Republic Act 9184 s2002 Republic Act 9184 Revised Implementing Rules and Regulations s2016
Description	Procurement of Goods On procurement of domestic and foreign goods, in the interest of availability, efficiency and timely delivery of goods, the procuring government entity may give preference to the purchase of domestically-produced and manufactured goods, supplies and materials that meet the specified or desired quality. The procuring government entity is to give preference to materials and supplies produced, made and manufactured in the Philippines, subject to the conditions herein below specified. The award shall be made to the lowest Domestic Bidder, provided his bid is not more than fifteen percent (15%) in excess of the lowest Foreign Bid.(a) A domestic bidder can only claim preference if it secures from the DTI a certification that the articles forming part of its bid are substantially composed of articles, materials, or supplies grown, produced, or manufactured in the Philippines. For clarity, ▪ The preference shall be applied when the lowest Foreign Bid is lower than the lowest bid offered by a Domestic Bidder. The Procuring Entity shall ensure that both bids are responsive to the minimum requirements as specified in the Bidding Documents.(a) ▪ For evaluation purposes, the lowest Foreign Bid shall be increased by fifteen percent (15%). ▪ In the event that the lowest bid offered by a Domestic Bidder does not exceed the lowest Foreign Bid as increased, the Procuring Entity shall award the contract to the Domestic Bidder at the amount of the lowest Foreign Bid.(a) For clarity, goods as used here refer to all items, supplies, materials and general support services, except Consulting Services and infrastructure projects, which may be needed in the transaction of public businesses or in the pursuit of any government undertaking, project or activity, whether in the nature of equipment, furniture, stationery, materials for construction, or personal property of any kind, including non-personal or contractual services, such as, the repair and maintenance of equipment and furniture, as well as trucking, hauling, janitorial, security, and related or analogous services, as well as procurement of materials and supplies provided by the Procuring Entity for such services. The term “related” or “analogous services” shall include, but is not limited to, lease of office space, media advertisements, health maintenance services, and other services essential to the operation of the Procuring Entity.(a)

	Supply of Goods Only the following are qualified to participate in the bidding: a) Duly licensed Filipino citizens/sole proprietorships; b) Partnerships duly organized under the laws of the Philippines and of which at least sixty percent (60%) of the interest belongs to citizens of the Philippines; c) Corporations duly organized under the laws of the Philippines, and of which at least sixty percent (60%) of the outstanding capital stock belongs to citizens of the Philippines; d) Cooperatives duly organized under the laws of the Philippines; or e) Persons/entities forming themselves into a joint venture, i.e., a group of two (2) or more persons/entities that intend to be jointly and severally responsible or liable for a particular contract: Provided, however, That Filipino ownership or interest of the joint venture concerned shall be at least sixty percent (60%). For this purpose, Filipino ownership or interest shall be based on the contributions of each of the members of the joint venture as specified in their JVA.(23.5.1.1a) Foreign bidders may be eligible to bid under the following conditions: a) When provided for under any Treaty or International or Executive Agreement as provided in Section 4 of the Act and this IRR; b) When the foreign supplier is a citizen, corporation or association of a country, the laws or regulations of which grant reciprocal rights or privileges to citizens, corporations or associations of the Philippines; c) When the goods sought to be procured are not available from local suppliers; or d) When there is a need to prevent situations that defeat competition or restrain trade.(23.5.1.2a) Procurement of Infrastructure Projects For Infrastructure Projects the following persons/entities are allowed to participate in the bidding: a) Duly licensed Filipino citizens/sole proprietorships; b) Partnerships duly organized under the laws of the Philippines and of which at least seventy-five percent (75%) of the interest belongs to citizens of the Philippines; c) Corporations duly organized under the laws of the Philippines, and of which at least seventy-five percent (75%) of the outstanding capital stock belongs to citizens of the Philippines; d) Cooperatives duly organized under the laws of the Philippines; or e) Persons/entities forming themselves into a joint venture, i.e., a group of two (2) or more persons/entities that intend to be jointly and severally responsible or liable for a particular contract: Provided, however, That in accordance with Letter of Instructions No. 630 (LOI 630), Filipino ownership or interest of the joint venture concerned shall be at least seventy-five percent(75%): Provided, further, That joint ventures in which Filipino ownership or interest is less than seventy-five percent (75%) may be eligible where the structures to be built require the application of techniques and/or

	technologies which are not adequately possessed by a person/entity meeting the seventy-five percent (75%) Filipino ownership requirement: Provided, finally, That in the latter case, Filipino ownership or interest shall not be less than twenty-five percent (25%). For this purpose, Filipino ownership or interest shall be based on the contributions of each of the members of the joint venture as specified in their JVA.(23.5.2.1a) Foreign bidders may be eligible to participate in the procurement of Infrastructure Projects when provided for under any Treaty or International or Executive Agreement as provided in Section 4 of the Act and this IRR.(23.5.2.2)
Note	See measures on infrastructure development projects.

11 Appendix F. Philippine Sectoral Measures Affecting Distribution, Logistics and Transport Services

Introductory Note

1. This section lists existing[260] Philippine regulatory measures that apply or affect trade distribution, logistics and transport services sectors. The measures are sectoral in nature and have to be read in conjunction with the horizontal measures. To the extent possible, the measures are classified as either affecting investment or cross-border trade in services.

2. This section primarily covers measures that differentiate treatment between (i) domestic and foreign service suppliers/investors; and (ii) foreign service suppliers from FTA and non-FTA partners. It also covers measures that prohibit specific areas or activities for reasons of national security and interest, and regulate certain areas or activities for reasons of public interest.

3. This section provides a brief description of the regulatory measure, and identifies its source or sources, which includes the Philippine Constitution, national laws, and agency circulars or administrative orders. Note that the description, as provided, does not purport to provide any legal interpretation of the legal or official basis of the measures.

4. For purposes of classification, the United Nation Central Product Classification (CPC) Version 1.1 was used as reference. The sectoral definition, scope or usage in the source of the regulatory measure may not necessarily or exactly correspond to the CPC on a one-to-one basis.

5. As a further note, the list as it is currently drawn may not be exhaustive and need to be validated by the concerned or relevant agencies of government.

[260] Existing refers to measures adopted and maintained as at the time of this writing.

S01/43

Sector	Retail Trade Services (CPC 62)
Sub-Sector	Retail Trade Services
Obligations Concerned	National Treatment Performance Requirement Most-Favored Nation
Level of Government	Central
Measure	Republic Act 8762 s2000
Description	**Investment** Foreign-owned partnerships, associations and corporation formed and organized under the laws of the Philippines can engage or invest in retail trade business provided: a) the enterprise's paid-up capital is more than the equivalent of US2,500,000. b) the enterprise is specializing in high-end or luxury products with paid up US$250,000. Enterprises, with paid-up capital of more than USD2,500,000 and with 80 percent foreign equity participation are required to divest at least 30 percent of its equity to the public through the stock exchange within 8 years from the start of operation Former natural-born citizens of the Philippines have the same rights as Filipino citizens. Retail trade under the applicable measure refers to any act, occupation or calling of habitually selling direct to the general public merchandise, commodities or good for consumption. It does not include: a) Sales by manufacturer, processor, laborer, or worker, to the general public the products manufactured, processed or products by him if his capital does not exceed One hundred thousand pesos(100,000.00); b) Sales by a farmer or agriculturist selling the products of his farm; c) Sales in restaurant operations by a hotel owner or inn-keeper irrespective of the amount capital: provided, that the restaurant is incidental to the hotel business; and d) Sales which are limited only to products manufactured, processed or assembled by a manufactured, processed or assembled by a manufacturer though a single outlet, irrespective of capitalization.

S02/43

Sector	Agriculture Manufacturing Wholesale Trade Services Retail Trade Services
Sub-Sector	(Rice and Corn Industry)
Obligations Concerned	National Treatment Performance Requirement
Level of Government	Central
Measure	Republic Act 3018 s1960 Presidential Decree 194 s1973
Description	**Investment** The National Food Authority (NFA) may allow an alien (non-Philippine citizen), association or corporation partly or wholly owned by non-Philippine citizens to engage in the rice and corn industry subject to the following conditions: a) there is an urgent need for foreign investment in the undertaking, as certified by the NFA, and that the same will not pose a clear and present danger of promoting monopolies or combination in restrain of trade. b) the alien, association, corporation or partnership shall have the necessary financial capability and technical competence. c) the alien, association, corporation or partnership shall submit a development plan acceptable to the NFA. The NFA, from time to time, shall set the minimum total investment required for the undertaking. It may also impose other reasonable conditions, as may be necessary. Non-Philippine associations or corporations are required to transfer at least 60 percent of their equity to Filipino citizens at a period prescribed by the NFA. For this purpose, the rice and corn industry includes the following activities: a) Acquiring by barter, purchase or otherwise, rice and corn and/or the by-products thereof, to the extent of their raw material requirements when these are used as raw materials in the manufacture or processing of their finished products. b) Engaging in the culture, production, milling, processing and trading, except retailing, of rice and corn; Provided, that the designation of the area in the culture and production, as well as the trading of the produce in the domestic or foreign markets, shall be under the direction and control of the NFA.

S03/43

Sector	Manufacturing and Services Incidental Wholesale Trade Services Retail Trade Services
Sub-Sector	(Firecrackers and Pyrotechnic Devices)
Obligations Concerned	National Treatment Local Presence
Level of Government	Central
Measure	Republic Act 7183 s1992 Executive Order 184 s2015
Description	**Investment and Cross-Border Trade in Services** Only Filipino citizens or entities 100 percent owned by Filipino citizens shall be issued a license to manufacture or deal in wholesale or retail sale of firecrackers and pyrotechnics devices in the country. Any person desiring to manufacture or distribute firecrackers and pyrotechnics devices in the country must file his application for license or business permit with the Chief of the PNP, through the provincial director of the province where the business is located. Importation of finished products is prohibited. Only licensed manufacturers are allowed to import chemicals and explosive ingredients.

S04/43

Sector	Manufacturing Forestry Wholesale Trade Services Retail Trade Services
Sub-Sector	(Chain Saws)
Obligations Concerned	National Treatment
Level of Government	Central
Measure	Republic Act 9175 s2002
Description	**Investment and Cross-Border Trade in Services** A permit must be secured from the Department of Environment and Natural Resources to import, manufacture, sell, possess and use chain saws in the Philippines. The permit may be issued by the Department to any applicant that: a) has a subsisting timber license agreement, production sharing agreement, or similar agreements, or a private land timber permit; b) is an orchard and fruit tree farmer; c) is an industrial tree farmer; d) is a licensed wood processor and the chain saw shall be used for the cutting of timber that has been legally sold to said applicant; or e) shall use the chain saw for a legal purpose. Co-production, joint venture or production-sharing agreements entered into by the State for the exploration, use and development of natural resources including forests or timber are limited to Filipino citizens, or corporations or association at least sixty per cent of which is owned by Filipino citizens. Ownership and lease of alienable public lands are limited to Filipino citizens, associations or corporations duly constituted in the Philippines with foreign equity participation not exceeding 40 percent.
Note	See measures pertaining to land ownership and lease. See measures pertaining to exploration, use and development of natural resources.

S05/43

Sector	Manufacturing Wholesale Trade Services Retail Trade Services Water Transport Services
Sub-Sector	Manufacturing Wholesale trade services of machinery, equipment and supplies (CPC 6118 and CPC 6128) Non-specialized store retail trade services of other transport equipment (CPC 62182) Specialized store of retail trade services of machinery equipment and supplies (CPC 62287 and CPC 62289) Retail trade services on a fee or contract basis, of machinery, equipment and supplies (CPC 6258) Rental Services of Vessels for Coastal and Transoceanic Water Transport with Operator (CPC 65130) Rental Services of Vessels for Inland Water Transport with Operator (CPC 65130) Leasing or rental services concerning vessels without operator (CPC 73115)
Obligations Concerned	National Treatment
Level of Government	Central
Measure	Republic Act 7471 s1992 Republic Act 9295 s2003 MARINA Circular 104 s1995
Description	**Investment** Local manufacturers or dealers who sell machinery, equipment or spare parts to Philippine shipping enterprise are entitled to tax credits for the full amount subject to the approval of the Secretary of Finance upon recommendation by MARINA. *(RA 7471 s1992)* **Investment and Cross-Border Trade in Services** Local sale, transfer and lease of vessel acquired under MC 104 s1995 for domestic operations and fishing vessel/boat requires approval of MARINA. Domestic shipping companies/operators intending to acquire vessels for water transport services must be accredited by MARINA. Any person intending to charter or lease or import a fishing vessel (except those fish carriers) must have clearance from BFAR indicating that the vessel/owner/charterer is qualified for issuance of a new Commercial Fishing Vessel License. MARINA upon determination that the capability of MARINA

	registered shipyards to build classed vessels is below 500 GRT in quantities sufficient to meet domestic demand is mandated to discourage all Philippine domestic operators from importing new or previously owned vessels that are less than 500 GRT. Vessels built in MARINA registered shipyards are to be given priority in the Philippine Registry and be allowed to operate in domestic trade. *(RA 9295 s2003)*
Note	See measures on accreditation and licensing of water transport services, domestic shipping companies and fisheries. See measures pertaining to bareboat charter and leasing of vessels.

S06/43

Sector	Agriculture Manufacturing Services Incidental to Manufacturing Wholesale Trade Services Retail Trade Services Transportation Services
Sub-Sector	(Dangerous Drugs)
Obligations Concerned	National Treatment
Level of Government	Central
Measure	Republic Act 7042 s1991 Republic Act 8179 s1996 Republic Act 9165 s2002 Republic Act 10640 s2014 Executive Order 184 s2015 Dangerous Drugs Board Regulation No.1, s.2004
Description	**Investment and Cross-Border Trade in Services** Unless authorized by law, the following include acts considered unlawful and subject to penalty under the RA 9165 (Dangerous Drugs Act of 2002): a) Importation of Dangerous Drugs and/or Controlled Precursors and Essential Chemicals b) Sale, Trading, Administration, Dispensation, Delivery, Distribution and Transportation of Dangerous Drugs and/or Controlled Precursors and Essential Chemicals c) Maintenance of a Den, Dive or Resort where any dangerous drug is used or sold in any form d) Manufacture of Dangerous Drugs and/or Controlled Precursors and Essential Chemicals e) Illegal Chemical Diversion of Controlled Precursors and Essential Chemicals f) Manufacture or Delivery of Equipment, Instrument, Apparatus, and Other Paraphernalia for Dangerous Drugs and/or Controlled Precursors and Essential Chemicals g) Cultivation or Culture of Plants Classified as Dangerous Drugs or are Sources Thereof For clarity, dangerous drugs include those listed in the Schedules annexed to the 1961 Single Convention on Narcotic Drugs, as amended by the 1972 Protocol, and in the Schedules annexed to the 1971 Single Convention on Psychotropic Substances as enumerated in the annex the Dangerous Drug Act. The Dangerous Drug Board has the power to reclassify, add to or remove from the list of dangerous drugs. As authorized by law, and for reasons relating to health and morals,

	the manufacture and distribution of dangerous drugs are reserved to Philippine nationals. *(RA 7042 s1991 and RA 8179 s1996)* Philippine nationals is defined as Filipino citizens, or domestic partnership or association wholly owned by Filipino citizens; or a corporation organized under the laws of the Philippines with at least 60 percent equity participation by Filipino citizens.

S07/44

Sector	Other professional, technical and business Services Wholesale Trade Services Retail Trade Services Research and Development Services Higher Education Services
Sub-Sector	(Practice of Pharmacy Profession)
Obligations Concerned	National Treatment Local Presence
Level of Government	Central
Measure	Republic Act 10918 s2016
Description	**Investment and Cross-Border Trade in Services** <u>Practice of Profession</u> Only persons licensed and registered with the Board of Pharmacy and the Professional Regulation Commission are allowed to practice the profession of pharmacy. Only Filipino citizens and foreign nationals whose country of citizenship allows reciprocity and possessing the qualification requirements may apply for licensure examination. For clarity, practice of pharmacy refers to the following with or without fee paid, directly or indirectly: (i) preparation, compounding or manufacturing, preserving, storing, distribution, procurement, selling or dispensing of any pharmaceutical products or its raw materials; (ii) rendering of services such as clinical pharmacy services, drug information services, regulatory services, pharmaceutical marketing, medication management or whenever expertise or technical knowledge is required; (iii) engaging in teaching scientific, technical or professional pharmacy courses; (iv) dispensing pharmaceutical products in situations where supervision of dispensing is required; (v) chemical, biological, or microbiological analysis and assay of pharmaceutical products, food and dietary supplements, health supplements and cosmetcis; (vi) phycio-chemical analysis for medical devices; (vii) administration of adult vaccines; (viii) conduction or undertaking of scientific research; and (ix) other services requiring pharmaceutical knowledge.. <u>Practice through Special Permit</u> A foreign citizen may perform professional services within the scope of pharmacy under a special temporary permit from the Board of Pharmacy and the Professional Regulatory Commission subject to the following conditions: (i) the person is an internationally renouwed pharmacist or expert; (ii) there is no available Filipino expert in the field; (iii) the person is required to

	work with a Filipino registered and licensed pharmacist. Dispensing and Sale of Pharmaceutical Products No pharmaceutical product shall be compounded, sold or resold or made available to the consuming public except through a retail drug outlet approved by FDA (See entry on Opening and Operation of Outlet below). Pharmacy owners who are non-pharmacist, medical representatives or professional services representatives, pharmacy support personnel, pharmacy technicians, pharmacy assistants, pharmacy aides or any other persons performing functions involving handling of pharmaceutical products have to be duly certified by the appropriate government agencies after undergoing an accredited training program. No person, other than pharmacy graduates may render such activities/services without undergoing a comprehensive standardized training program. Sale and Distribution of Pharmaceutical Products Licensed manufacturers, importers, distributors and wholesalers of pharmaceutical products are to sell only to licensed pharmaceutical outlets. Opening and Operation of Retail Pharmaceutical Outlet and Establishment Application for retail pharmaceutical outlet and establishment shall only be approved if applied for by a Filipino registered and licensed pharmacist, either as owner or as pharmacist-in-charge.
Note	See horizontal measure on practice of profession

S08/44

Sector	Manufacturing Wholesale Trade Services Retail Trade Services
Sub-Sector	(Adulterated or Misbranded Food, Drug, Device or Cosmetic)
Obligations Concerned	
Level of Government	Central
Measure	Republic Act 3720 s1963 Executive Order 175 s1987
Description	The Philippines prohibits the manufacture, importation, exportation, sale, offering for sale, distribution, transfer of any food, drug, device, or cosmetic that is adulterated or misbranded.
Note	

S09/44

Sector	Manufacturing Services Incidental to Manufacturing Wholesale Trade Services Retail Trade Services Environmental Services
Sub-Sector	(Toxic and Hazardous Wastes; Nuclear Products and Wastes)
Obligations Concerned	
Level of Government	Central
Measure	The Philippine Constitution s1987 Republic Act 6969 s1990 Executive Order 184 s2015
Description	The Philippines, consistent with national interest, has the right to: e) regulate, restrict, and prohibit the importation, manufacture, processing, sale, distribution, use and disposal of chemical substances and mixtures that present unreasonable risk and/or injury to health or the environment; f) prohibit the entry, even in transit, of hazardous and nuclear wastes and their disposal in the Philippines; and g) prohibit the manufacture, testing, storage and transit of nuclear weapons, devices and parts of it.
Note	Related to the General Exception and Security Exception Chapters of an FTA agreement.

S10/44

Sector	Manufacturing Wholesale Trade Services Retail Trade Services
Sub-Sector	(Packing and Packaging Materials)
Obligations Concerned	
Level of Government	Central
Measure	Republic Act 6957 s1990 Republic Act 7718 s1994 Republic Act 9003 s2001
Description	The Ecological Solid Waste Management Act of 2002 prohibits the following activities related to packing or packaging materials: a) The manufacture, distribution or use of non-environmentally acceptable packaging materials. b) Importation of consumer products packaged in non-environmentally acceptable materials.
Note	Related to the General Exception Chapter of an FTA agreement.

S11/44

Sector	Transportation Services Communication Services Energy Services Ship building and Ship Repair
Sub-Sector	(Public Utilities and Public Service)
Obligations Concerned	National Treatment Senior Management and Board of Directors
Level of Government	Central
Measure	Commonwealth Act 146 s1936 Commonwealth Act 454 s1939 Republic Act 386 s1949 Republic Act 2031 s1957 Republic Act 2677 s1960 Presidential Decree 666 s1975 The Philippine Constitution s1987 Executive Order 125 s1987 Executive Order 125-A s1987 Republic Act 9295 s2003 Republic Act 9136 s2001 MARINA Circular 09 s2015 Relevant Supreme Court Decisions
Description	**Investment** Only Filipino citizens, or associations or corporations organized under the laws of the Philippines with 60 percent capital owned by Filipino citizens can be granted a franchise, certificate or authorization to operate a public utility. Participation of foreign investors in the governing board of a public utility company shall be proportionate to their share in its capital. All executives and managing directors of a public utility company must be Filipino citizens. No public service is to operate in the Philippines without possessing a valid and subsisting certificate of public convenience or certificate of public convenience and necessity, as the case may be. Public Utility or Public Service Definition *(CA 146 s1936 as amended by CA 454 s1939 and RA 2677 s1960)* The term "public service" includes every person that now or hereafter may own, operate, manage, or control in the Philippines, for hire or compensation, with general or limited clientele, whether permanent, occasional or accidental, and done for general business purposes, any common carrier, railroad, street railway, traction railway, sub-way motor vehicle, either for freight or passenger, or

	both with or without fixed route and whether may be its classification, freight or carrier service of any class, express service, steamboat or steamship line, pontines, ferries, and water craft, engaged in the transportation of passengers or freight or both, shipyard, marine railways, marine repair shop, [warehouse] wharf or dock, ice plant, ice-refrigeration plant, canal, irrigation system, gas, electric light, heat and power water supply and power, petroleum, sewerage system, wire or wireless communications system, wire or wireless broadcasting stations and other similar public services: Provided, however, That a person engaged in agriculture, not otherwise a public service, who owns a motor vehicle and uses it personally and/or enters into a special contract whereby said motor vehicle is offered for hire or compensation to a third party or third parties engaged in agriculture, not itself or themselves a public service, for operation by the latter for a limited time and for a specific purpose directly connected with the cultivation of his or their farm, the transportation, processing, and marketing of agricultural products of such third party or third parties shall not be considered as operating a public service for the purposes of this Act. <u>Common Carrier Definition (RA 386 s1949)</u> Common carriers refer to persons, corporations, firms or associations engaged in the business of carrying or transporting of passengers or goods by land, air, water for compensation, offering their service to the public. <u>Exemptions</u> Exempted from the Definition of Public Service *(CA 146 s1936 as amended by CA 454 s1939, RA 2031 s1957 and RA 2677 s1960)* (a) Warehouses; (b) Vehicles drawn by animals and bancas moved by oar or sail, and tugboats and lighters; (c) Airships within the Philippines except as regards the fixing of their maximum rates on freight and passengers; (d) Radio companies except with respect to the fixing of rates; (e) Public services owned or operated by any instrumentality of the National Government or by any government-owned or controlled corporation, except with respect to the fixing of rates. (As amended by *CA 454, RA 2031, and RA 2677)* Further exemptions from the scope of public utility or public services as prescribed in specific laws a) PD 666 s1975 (Providing for Incentives to the Shipbuilding and Ship Repair Industry) excludes ship building and ship repair yards from the coverage of public utility/public service. b) RA 9136 s2001 (Electric Power Industry Restructuring Act)

	excludes power generation and supply of electricity from the scope of public utility/public service
Note	See measures pertaining to specific transport and logistics services.

S12/44

Sector	Construction Services Other Professional, Technical and Business Services (CPC 83) Supporting Services for Transport (CPC 67)
Sub-Sector	Supporting Services for Road Transport (CPC 675) Supporting Services for Water Transport (CPC 676) Supporting Services for Air or Space Transport (CPC 677) Water Distribution Services for Mains (CPC 692) Consulting and Management Services (CPC 831) (Operation and Management of Infrastructure Projects)
Obligations Concerned	National Treatment
Level of Government	Central
Measure	Republic Act 6957 s1990 Republic Act 7188 s1994
Description	**Investment** Infrastructure or development projects normally financed, and operated by the public sector may be wholly or partly financed, constructed and operated by the private sector under Contractual Arrangements. In the construction stage, the proponent of the project may engage the services of foreign and/or Filipino contractor, and obtain financing from foreign and/or domestic sources. For the operation of a facility, the facility operator for infrastructure or development projects requiring public utility franchise must be Filipino or if a corporation must be duly registered with the SEC and owned up to at least 60% by Filipinos. These projects include power plants, highways, ports, airports, canals, dams, hydropower projects, water supply, irrigation, telecommunications, railroad and railways, transport systems, land reclamation projects, industrial estates or townships, housing, government buildings, tourism projects, public markets, slaughterhouses, warehouses, solid waste management, information technology networks and database infrastructure, education and health facilities, sewerage, drainage, dredging, and other infrastructure and development projects as may otherwise be authorized by the appropriate Agency/LGU.
Note	See measures on public utility and public service. See measures on local government.

S13/44

Sector	Air Transport Services (CPC 66) Wholesale Trade Distribution (CPC 61) Retail Trade Distribution (CPC 62)
Sub-Sector	Air Transport Services of Passengers (CPC 661) Air Transport Services of Cargo (CPC 662) Wholesale Trade Services Except on a Fee or Contract Basis (CPC 611)/ Wholesale Trade Services Except on a Fee or Contract Basis, of Other Transport Equipment (CPC 61182) Wholesale Trade Services on a Fee or Contract Basis (CPC 612)/ Wholesale Trade Services, on a Fee or Contract Basis, of Other Transport Equipment (CPC 61282) Retail Trade Services (CPC 62)
Obligations Concerned	National Treatment Most-Favored Nation Senior Management and Board of Directors Domestic Regulation
Level of Government	Central
Measure	Republic Act 776 s1952 Presidential Decree 1462 s1978 Presidential Decree 1278 s1978 Republic Act 9498 s2008 CAB Economic Regulation 3 s1970
Description	**Investment** <u>Air Commerce or Transportation (Domestic or Foreign)</u> A Certificate of Public Convenience and Necessity (CPCN) or a special permit is required before any person can be permitted to engage in air commerce and transportation, domestic or foreign, except in cases provided in the Constitution or international treaty. The permit authorizing a person to engage in domestic air commerce and/or transportation is limited to Filipino citizens except as may be authorized in the Constitution and existing treaty/treaties. No person shall engage in air commerce unless there is in force a permit issued by the Board. The CPCN or special permit is issued by the Civil Aeronautics Board (CAB). For foreign carriers the permit must be approved by the President of the Philippines. For clarity, air commerce and domestic air commerce are defined as follows: Air commerce means and includes air transportation for pay or hire, the navigation of aircraft in furtherance of business, or the

navigation of aircraft from one place to another for operation in the conduct of business.

Air transportation refers to service or carriage of persons, property or mail, in whole or in part, by aircraft

Domestic air commerce means and includes air commerce within the limits of the Philippine territory.

Aircraft Owned by Philippine Citizens

Aircrafts that are owned by a citizen of the Philippines and not registered outside the country are eligible for registration in the Philippines. An aircraft registered in the Philippines acquires a Philippine nationality.

Foreign owned or registered aircraft may be registered in the Philippines if use exclusively for aero clubs purposes.

Air Carrier or Operator

An air carrier or operator refers to a person who undertakes, whether directly or indirectly, or by a lease or any other arrangements, to engage in air transportation services or air commerce. The term may likewise refer to either a "Philippine air carrier" or a "foreign air carrier" as indicated by the context *(RA9497 s2008)*.

Philippine Air Carrier
An air carrier that is a citizen of the Philippines may apply for an air operator certificate with the CAAP, which is a certificate that such is properly and adequately equipped and has demonstrated the ability to conduct a safe operation. Such certificate is only issued to an air carrier that has a valid CPCN.

For clarity, a citizen of the Philippines is defined as:

a) An individual who is a citizen of the Philippines
b) A partnership of which each partner is a citizen of the Philippines
c) A corporation or corporation created or organized under the laws of the Philippines of which the directing head and two-thirds of the board are citizens of the Philippines, and in which 60 percent of the voting interest is owned or controlled by persons who are citizens of the Philippines
(RA 776 s1952 and RA 9498 s2008)

Purchase of an Aircraft

	No domestic air carrier can purchase an aircraft without a previous approval from the CAB. Air carriers must submit a plan or plans to acquire additional aircraft. The application must be accompanied with project studies, which much indicate the economic feasibility of the aircraft intended to be acquired for the identified purpose. Carriers intending to incur indebtedness for the purchase of aircraft must file an application with the CAB for authority. *(CAB ER 03 s1970)* <u>Aero Clubs</u> Foreigners residing in the Philippines who are members of aero clubs organized purely for recreation, sport of development of flying skills may be issued permits as a pre-requisite for any aeronautical activities within the Philippines permits.
Note	See measure on public utility and public service.

S14/44

Sector	Air Transport Services (CPC 66)
Sub-Sector	Air Transport Services of Passengers (CPC 661) Air Transport Services of Cargo (CPC 662) (Foreign Air Carrier)
Obligations Concerned	Most-Favored Nation Treatment
Level of Government	Central
Measure	Republic Act 776 s1952 Executive Order 219 s1995 CAB Economic Regulation 1 s1960 Implementing Rules and Regulations of EO 219 and EO 32 s 2011
Description	**Cross-Border Trade in Services** <u>Foreign Air Carriers</u> *Permit/Certificate of Public Convenience and Necessity* Foreign air carriers intending to operate in the Philippines under existing bilateral Air Services Agreement (ASA) must apply for a Foreign Air Carrier's Permit (FACP) with the Civil Aviation Board (CAB) in accordance with Chapter IV of the Economic Regulation 1. Only foreign air carriers designated by their governments can be granted a FACP by the Board. No person can engage in air commerce or transportation without a permit issued by the CAB. *(RA 776 s1952)* Foreign air carrier is defined as an air carrier that is not a citizen of the Philippines, and/or an air carrier other than a domestic air carrier. *Frequency and Capacity* Grant of frequencies and capacities as well as new routes or traffic points for foreign air carriers is the sole prerogative of the Board and subject to the confirmation of the President of the Philippines Exchange of traffic rights and routes with other countries is subject to national interest and reciprocity. The determination and establishment of a bilateral air service relations with another country or territory is upon the recommendation of the CAB. Negotiations leading to ASA are to be undertaken by the Philippine Air Negotiating Panel. *Freedoms of the Air* In respect of international services, the award of Third and Fourth Freedoms of the Air is to be exchanged on the basis of reciprocity and value for the Philippines. The Fifth Freedom of the Air is secondary and supplemental to the third and fourth freedoms of the

	air, and is only granted if it contributes to development of routes and destinations or serve national interest, subject to reciprocity and other arrangements. For clarity, the following are the definitions of freedoms of the air: Third Freedom of the Air refers to the privilege granted by one State to another State to put down in the territory of the first State, traffic coming from the home State of the carrier. Fourth Freedom of the Air refers to the privilege granted by one State to another State to take on in the territory of the first State, traffic destined for the home State of the carrier. Fifth Freedom of the Air refers to the privilege granted by one State to another State to put down and take on, in the territory of the first State, traffic coming from or destined to a third State.
Note	This refers to hard rights of air transport services, which is usually not included in free trade agreements.

S15/44

Sector	Air Transport Services (CPC 66)
Sub-Sector	Air Transport Services of Passengers (CPC 661) Air Transport Services of Cargo (CPC 662) Rental Services of Aircraft with Operator (CPC 664)
Obligations Concerned	National Treatment
Level of Government	Central
Measure	CAB Economic Regulation No. 2 s1969 CAB Economic Regulation No.5 s1970
Description	**Investment and Cross-Border Trade in Services** <u>Charter Trips Within the Philippines</u> Air Taxi Operators are required to secure an authorization in the form of Air Taxi Operator Certificate issued by the Civil Aviation Board (CAB). Only Philippine nationals may apply for Air Taxi Operator Certificate. For clarity, the following definition applies: Air taxi operator refers to an air carrier utilizing a small aircraft for charter trip or individual service transportation within the territory of the Philippines with proper certification or permit from the CAB. Charter trip means air transportation performed by an air carrier holding a Certificate of Public Convenience and Necessity or air taxi operator certificate where the entire capacity of one or more aircraft has been engaged in the movement of persons and their luggage or movement of property. Philippine national is defined as a citizen of the Philippines, a domestic partnership, entities or corporation 60 percent of capital is owned citizens of the Philippines. <u>International Charter Trips</u> No air carrier can conduct international charter trips without specific authority from the CAB. Where such charter trip is only in transit in the Philippines, no such authority or permit is required. International charter trips refer to such trips wherein the passenger or cargo originate from or are destined for the Philippines. Air carriers are not permitted to engage, directly or indirectly, in solicitation for a charter trip except after the contract for such has been signed. Air carriers may not employ, directly or indirectly, any person for the purpose of organizing such charter trip except

	after the contract for such has been signed. <u>Charter Participants</u> Charter participants may be solicited only from the bonafide members of an organization, club or entity and their families, and may not be brought together by means of solicitation of the general public.
Note	See measures on public utility and public service. See horizontal measures on Philippine registered corporation.

S16/44

Sector	Supporting and Auxiliary Transport Services (CPC 67)
Sub-Sector	Supporting Services of Air Transport (CPC 677) (General Sales Agent, Cargo Agent, Air Freight Forwarder and Off-Air Carrier)
Obligations Concerned	National Treatment Domestic Regulation
Level of Government	Central
Measure	Republic Act 776 s1952 CAB Economic Regulation 4 s1970 Presidential Decree 1462 s1978 CAB Economic Regulation 8 s1982 The Philippine Constitution s1987
Description	**Investment** <u>General Sales Agent</u> No person can act as general sales agent without a valid permit or authorization from the Civil Aviation Board. Only the citizens of the Philippines are eligible to apply as general sales agent, except those who are acting as such at the time of the effectivity of the CAB Economic Regulation 8 s1982. The applicant must have a minimum paid-up capitalization of PHP500,000.00. For clarity, a general sales agent refers to a person, not a bona fide employee of an air carrier, with authority from an airline, by itself or through an agent, sells or offers for sale any air transportation, or negotiates for, or holds himself out by solicitation, advertisement or otherwise as one who sells, provides, furnishes, contracts or arranges for, such air transportation. <u>Cargo Agent</u> No person can act as cargo agent without a valid permit or authorization from the Civil Aviation Board. Only the citizens of the Philippines are eligible to apply as cargo agent, except those who are acting as such at the time of the effectivity of the CAB Economic Regulation 8 s1982. Applicant must have a minimum paid-up capitalization of PHP 250,000. Any person authorized by the CAB to operate as air freight forwarder may act as cargo sales agent without the need for another authorization from the CAB. Such cargo sales agent can only act as principal. For clarity, cargo sales agent means any person who does not

	directly operate an aircraft for the purpose of engaging in air transportation or air commerce and not a bona-fide employee of an air carrier, who, as principal or agent, sells or offers for sale any air transportation of cargo, or negotiates for, or holds himself out by solicitation, advertisement, or otherwise as one who sells, provides, furnishes, contracts or arranges for, such air transportation of cargo. <u>Air Freight Forwarder</u> No person can engage in air freight transportation without a Letter of Authority issued by the CAB. A corporation, partnership or association applying to engage in air freight forwarding must have 60 percent or more of its voting interest owned by citizens of the Philippines. No air freight forwarder can adopt a business name without securing approval from the CAB. No air freight forwarder can directly engage in the operation of aircraft in air transportation. This limitation does not prohibit charter of aircraft by an air freight forwarder from a direct air carrier operating charter trips and special services. For clarity, air freight forwarder means any indirect air carrier which, in the ordinary and usual course of its undertaking, assembles and consolidates or provides for assembling and consolidating such property or performs or provides for the performance of break-bulk and distributing operations with respect to consolidated shipments, and its responsible for the transportation of property from the point of receipt to point of destination and utilizes for the whole or any part of such transportation the services of a direct air carrier. <u>Off-line Carriers</u> No person may operate or act as off-line carriers without authorization from the CAB. For clarity, an off-line carrier refers to any foreign air carrier not certificated by the Board, but who maintains an office or who has a designated or appointed agents or employees in the Philippines, who sells or offers for sale any air transportation in behalf of said foreign air carrier and /or others, or negotiate for, or holds itself out for solicitation, advertisement or otherwise, sells, provides, furnishes, contracts or arranges such transportation.
Note	See measures on public utility and public service. See measures on air carrier or operator.

S17/44

Sector	Supporting and Auxiliary Transport Services (CPC 67)
Sub-Sector	Supporting Services for Air Transport (CPC 677) Cargo Handling Services (CPC 671) Storage and Warehousing Services (CPC 672) Navigational Aid Services (CPC 763)
Obligations Concerned	National Treatment
Level of Government	Central
Measure	Executive Order 778 s1982 Executive Order 993 s1983 Republic Act 6639 s1987 Republic Act 7227 s1993 Executive Order 193 s2003 Republic Act 9498 s2008 Executive Order 712 s2008 Executive Order 64 s2011 Republic Act 386 s1949
Description	**Investment** <u>Public Airports</u> The planning, development, construction, operation, maintenance and expansion of airports in the Philippines except for airports under the judrisdiction of designated separate authorities are lodged with the Civil Aviation Authority of the Philippines (CAAP). The planning, design, acquisition, establishment, construction, improvement, maintenance, and repair necessary aerodromes and other necessary facilities are also lodged with the CAAP. Airport certificates are issued by the CAAP for the operation of any airports that serve any scheduled or unscheduled passenger operations of air operator or foreign air operator aircraft. The certification certifies that the airport is properly and adequately equipped and able to conduct safe operations. <u>International Airports</u> *Ninoy Aquino International Airport* The Manila International Airport Authority (MAIAA) has control and supervision over the Ninoy Aquino International Airport (or the Manila International Airport). The MAIAA has the responsibility to construct, maintain, operate and provide airport facilities and services in the NAIA. It has the function to provide services, whether on its own or otherwise, within the NAIA and approaches to it, which includes the following:

	a) aircraft movement and allocation of parking areas of aircraft on the ground; b) loading or unloading on aircraft; c) passenger handling and other service directed towards the care, convenience and security of passengers, visitors and other airport users; and d) sorting, weighing, measuring, warehousing or handling of baggages and goods. The MIAA may enter into a Memorandum of Agreement/ Understanding, contracts and other arrangements as may be feasible with government agencies or private entities operating or providing services in the Authority. *Mactan-Cebu International Airport* The Mactan-Cebu International Airport Authority (MCIAA) has control, management and supervision of the Mactan International Airport in the Province of Cebu and the Lahug Airport in Cebu City, and such other airports as may be established in the Province of Cebu. The MCIAA is responsible for the construction, maintenance, operation and provision of facilities or services necessary for the efficient functioning of the airports. The MCIAA may provide the services, whether on its own or otherwise, within the airports and the approaches in connection with the maintenance and operation of the airports. *Diosdado Macapagal International Airport* The Clark International Airport Corporation (CIAC) has the responsibility to develop, operate, manage and maintain the Clark Civil Aviation Complex including the Diosdado Macapagal International Airport. The CIAC may engage in aviation, aviation-related services, and aviation-related logistics activities. It is also responsible for all lease and business arrangements pertaining to these services /activities.. *Subic International Airport* The Subic Bay Metropolitan Authority has the authority to establish and regulate the establishment, development, and maintenance of utilities, other services and infrastructure in the Subic Special Economic Zone including airport operations in coordination with the Civil Aeronautics Board.
Note	See measures pertaining to infrastructure development projects. Related to State-Owned Enterprises.

Sector	Manufacturing Maintenance, Repair and Installation Services (CPC 87) Supporting and Auxiliary Transport Services (CPC 67)/Supporting Service for Air or Space Transport (CPC 677) Other Professional, Technical and Business Services (CP 83)/Scientific and Other Technical Services (CPC 835) Research and Development Services (CPC 81) Air transport services (CPC 66)
Sub-Sector	Manufacturing of aircraft, space craft and parts (CPC 496) Manufacturing of engines, turbines and parts (CPC 431) Maintenance and repair of aircraft (CPC 87149) Maintenance and upkeep of aircraft not involving repair (CPC 67790) Mechanical testing and analysis of aircraft (CPC 83563) Research and experimental development of aircraft (CPC 81130) Air Transport Services of Passengers (CPC 661) Air Transport Services of Cargo (CPC 662) (Aerospace Development)
Obligations Concerned	National Treatment
Level of Government	Central
Measure	Presidential Decree 346 s1973 Presidential Decree 286 s1973 Presidential Decree 841 s1975 Presidential Decree 696 s1975 Executive Order 904 s1983
Description	The Philippine Aerospace Development Corporation (PADC), an attached agency of the Department of Transportation, has the mandate to undertake all manner of activity, business or development projects for the establishment of a reliable aviation and aerospace industry.. The PADC, by itself or through its subsidiary/subsidiaries may undertake the following: a) The design, assembly, manufacture, and sale of all forms of aircraft and aviation/aerospace devices, equipment or contraptions, and studies or researches. b) The development of local capabilities in the maintenance, repair/overhaul, and modification of aerospace and associated flight and ground equipment and components thereof in order to provide technical services and overhaul support to government agencies owning aerospace equipment, the Philippine Air Force, the national airline, foreign airline companies, foreign air forces and to the aviation industry in general. c) The operation and provision of air transport services, whether for cargo or passengers on a scheduled, or charter basis on domestic and/or international scale. It is authorized to borrow funds from any source, private or government, domestic or foreign. It is authorized to hold public agricultural lands and mineral lands in excess of the areas permitted to private corporations, associations and persons by the laws of the Philippines for a period not exceeding twenty-five years renewable by the President of the Philippines for another

	twenty-five years;
Note	See horizontal measures on public utility and public service. See measures pertaining to infrastructure development projects. Related to State-Owned Enterprises..

S19/44

Sector	Water Transport Services (CPC 65)
Sub-Sector	Coastal and Transoceanic Transport Services (CPC 651) Inland Water Transport Services (CPC 652) (Domestic Shipping/Coastwise Trade and Overseas Shipping)
Obligations Concerned	National Treatment Local Presence
Level of Government	Central
Measure	Republic Act 1937 s1957 Presidential Decree 761 s1975 Executive Order 125 s1987 Executive Order 125-A s1987 Republic Act 9295 s2004 MARINA Circular 110 s1995 MARINA Circular 105 s1995 MARINA Circular 181 s2003 MARINA Circular 03 s2006 MARINA Circular 02 s2009 MARINA Circular 14 s2009 MARINA Circular 23 s2009 MARINA Circular 01 s2010 MARINA Circular 04 s2011 MARINA Circular 02 s2013 MARINA Circular 04 s2013 MARINA Circular 12 s2015
Description	**Investment and Cross-Border Trade in Services** <u>Domestic and Overseas Shipping</u> *Certificate of Public Convenience* Domestic ship operators and owners must secure a Certificate of Public Convenience (CPC) from the Maritime Industry Authority (MARINA) to engage in domestic shipping and overseas shipping. Exempted from securing a CPC from the MARINA are operators or owners of the following: a) Boats used for parasailing b) Personal watercrafts c) Ships for dredging, with dredging company also the owner of the ship d) Ship exclusively for training e) Stationary floating restaurants and hospitals f) Power barges g) Ship used for salvaging h) Ships used for pilotage i) Floating storage facilities j) Offshore drilling k) Ships used solely and exclusively for company/personal use, which is not offered for hire or compensation to the

	public Only Filipino citizens or commercial partnerships wholly owned by Filipinos or corporations at least 60 percent of capital is owned by Filipinos may qualify as domestic ship owner or domestic ship operator. *Vessel Incidental to Business Activity* An enterprise registered with the Board of Investments (BOI), whether entirely owned or not by foreign nationals may register its own vessel if it is to be used exclusively to transport its own raw materials and finished products into the Philippines as an incident to its manufacturing, processing or business activity. A certification from the BOI must be secured that the vessel is an essential element in the operation of the registered project with the BOI. Ships exclusively for company use or those not engaged in public service in any ports or areas in the Philippines or whose operations do not come under Republic Act 9295 and its Implementing Rules and Regulations are exempted from securing a Certificate of Public Convenience (CPC). (MC 14 s2009) *Certificate of Registry and Ownership (PD 761 s1975 and MC 02 s2013)* All types of ships operating in the Philippine waters regardless of size and utilization with or without power including fishing vessels, and those below 3 gross tonnage (GT) must register with and issued a Certificate of Registry and Certificate of Ownership. (See entry on commercial fishing Vessel not covered are warships and naval ships, ships of the Philippine Coastguard, vessels of foreign ownership temporarily used in Philippine water for less than one year (i.e. transient civilian vessels of foreign country), and inflatable boats used for rescue. Vessels for domestic trade and overseas trade must register with the MARINA's Register of Philippine Vessel or Registry of Philippine Ships for protection under the Philippine laws and to have the right to fly the Philippine flag. Registration covers vessels of domestic ownership of more than 15 GRT. Ships acquired through bareboat charter under Presidential Decree 760 s1978 may be issued a temporary Certificate of Registry. No Certificate of Ownership will be issued. Ships acquired through importation or bareboat chartering may be issued a Provisional Certificate of Registry in order to facilitate

	delivery of the ship to any port in the Philippines. *Coastwise Trade License (MC 12 s2015 and MC 110 s1995)* No vessel is allowed to engage in coastwise trade without a Coastwise Trade License (CWL) from MARINA. The CWL is a separate and distinct from the other certificate that MARINA issues for the operation of the vessel. The right to engage in coastwise trade is limited to vessels with Certificate of Philippine Registry. Application for CWL requires submission of the Certificate of Philippine Registry/Certificate of Ownership. Foreign vessels may be granted special permits by the MARINA for coastwise trade. Special Permits for temporary utilization of vessels for domestic trade may be issued by the MARINA under the following circumstances: a) There is no existing vessel operating the proposed route b) There is no available local vessel to transport the cargo to meet the shipping requirement c) The proposed vessel is contracted by private/public entities d) Vessels carrying foreign tourist and operation calls at domestic port as part of its itinerary For clarity, temporary utilization means operation of foreign-owned/registered or Philippine-registered vessel in the domestic trade for an aggregate period of less than one year. *(MC 02 s2009, MC 04 s2011)* Foreign ships that operate temporarily in the Philippines under a contract with the government or its instrumentalities, or that of sovereign entity with an agreement with the government to enter into commercial purpose are required to apply for Special Permit. The verification that no existing suitable vessels are available is no longer necessary. *(MC 04 s2011)* Foreign ships with Special Permits to engage in commercial and domestic trade within the Philippine territorial waters for more than 3 months must have 50 percent Filipino crew; and 100 percent Filipino for Special Permit of more than 6 months. *(MC 02 s2009)* Movement of ships owned by another sovereign entity performing any governmental function based on a treaty or agreement, including ships incidental to such functions are to be in accordance with international and practice governing such ships. *(MC 04 s2011)* Commercial ships for purely sports, recreation and tourism purposes are to be issued license specific for their areas of

	operation. *(MC 12 s2015)* *Special Permits for Philippine-registered ship (MC 105 s1995 and MC 04 s2013)* Special permits may be granted by MARINA to Philippine registered ships allowing giving them flexibility to operate domestic or international. The Special Permit allows domestic shipping to operate for international voyages, and while those Philippine-registered ships for overseas shipping are allowed to operate within national territory. Philippine-registered ships registered for overseas operation and intending to operate domestically must submit a Certificate of non-availability of ships in the domestic trade from the PISA. *Special Permits/Exemption for Companies(MC 105 s1995)* Oil companies that will need foreign-owned or Philippine registered overseas vessels for temporary use in domestic trade to carry or transport passengers, cargoes or both need to apply for Special Permit with the MARINA. Private/public corporation, partnership or association and other entities utilizing vessels for oil exploration and drilling activities, offshore surveying, dredging, construction, underwater cable laying, floating hotel and/or other recreation center, training/research ships, storage faciltiies and other similar activities have to apply for Exemption Certificate. Carriage by foreign ship of own empty containers (considered as ships gear) between domestic ports is exempted from securing special permits. *Bay and River License (MC 12 s2015 and MC 110 s1995)* No vessel is allowed to engaged in the business of towing or carrying of articles of passengers in bays, harbors, rivers, inland waters navigable from the sea without a Bay and River License. Grant of bay or river license is limited to vessels owned by Philippine nationals. In the case of a juridical person, at least be 75% of its capital must be owned by Philippine nationals. Said juridical person must use vessels made in the Philippines. (MARINA MC 110, 1995) Vessels exempted from obtaining a bay and river license are: a) Vessels of three tons or less b) Yacht, launches and other craft used exclusively for pleasure and recreation c) Ships boat and launches, bearing the name and homeport of the vessel d) Vessels owned by the Philippine Government Application for Bay and River License requires submission of the Certificate of Philippine Registry/Certificate of Ownership.

	Pleasure Yacht License (MC 12 s2015 and MC 110 s1995) Yacht used and employed exclusively as pleasure vessels may be licensed to allow the yacht to travel from port to port in the Philippines, and to foreign port without entering or clearing customhouse. Such license is issued only to Filipino citizens. (MC 110 s1995) Application for license requires submission of the Certificate of Philippine Registry/Certificate of Ownership. *Accreditation of Domestic Shipping Enterprises (MC 03 s2006 and MC 01 s2010)* All persons, natural or juridical, authorized by law to engage in the use of ships for the carriage of passengers or cargoes between various ports and places in the Philippines, for hire or compensation, with general or limited clientele, whether permanent, temporary or incidental with or without fixed routes for contractual or commercial purpose, are required to be accredited by the MARINA. The requirement for accreditation also applies to tanker owners and operators operating as domestic shipping enterprise. These include entities acquiring or operating tankers or tanker-barges including the following: a) Supply ships for fishing transporting fuel/oil to fishing vessels, shipyard and other industrial companies; b) Floating Storage Units (FSUs) and Floating, Production, Storage and Offloading Units (FPSO); c) Government-owned tankers in commercial trade; d) Ships used in collecting used oil, slop & oily water and fuel for own use; and e) Vegetable oil tankers and other food grade oil tankers. Accreditation is a pre-requisite to the grant of permits, licenses or authorities, VAT exemption and other incentives. Accreditation is limited to citizens and permanent residents of the Philippines, commercial partnership wholly owned by Filipino or a corporation 60 percent owned by Filipino, or cooperative duly registered with relevant government agency. In case of corporations, the Chief Executive Officer and Chief Operating Officer or their equivalent must be citizens and permanent residents of the Philippines. *Accreditation of Shipping Companies for International Voyages (MC 181 s2003)* All shipping companies acquiring ships to be registered under the Philippine flag or operate Philippine-registered ships for

	international voyages must be accredited by MARINA. Only shipping companies established under Philippine laws and authorized to engage primarily in overseas shipping may apply for accreditation.
Note	See measures on public utility and public service. See measures on overseas shipping in relation to Philippine-registered or flag vessels. See measures pertaining to use and availability of ports for vessels engaged in coastwise trade.

S20/44

Sector	Water Transport Services (CPC 65) Wholesale Trade Distribution (CPC 61) Retail Trade Distribution (CPC 62)
Sub-Sector	Coastal and Transoceanic Transport Services (CPC 651) Inland Water Transport Services (CPC 652) (Domestic Shipping/Coastwise Trade) Wholesale Trade Distribution (CPC 61) Retail Trade Distribution (CPC 62)
Obligations Concerned	National Treatment
Level of Government	Central
Measure	Republic Act 10654 s2015 Republic Act 9295 s2004 MARINA Circular 04 s2015
Description	**Investment** *Incentives (MC 04 s2015)* Domestic ship operators and owners intending to invest in International Association of Classification Societies (IACS)-classed brand new or newly constructed ships in the domestic shipping industry may avail of incentives granted for the modernization/improvement and upgrading of domestic merchant fleet. Incentives are given to domestic ship owners or operators operating as 'liner' or 'tramper'. A liner service refers to the operation of domestic ship operator which publicly offers its service without discrimination for the carriage of passengers and/or cargoes, has regular ports of call or destination, and fixed sailing schedules and frequencies. A tramp service refers to the operation of a cargo which mostly does not run in any regular line but takes cargo whenever the shippers desire, is hired on a contractual basis, or chartered by any one or few shippers, under mutually agreed terms and usually carries full cargoes or bulk commodities. *Importation of Vessel* MARINA evaluates and determines the progressive capability of MARINA- registered shipyards to build and construct new vessels below 500 GRT for the domestic trade. Upon determination of sufficient capability to meet domestic demand, all domestic ship operators are to be discouraged from importing new or previously owned vessels. Registration of vessels built in MARINA-registered shipyards are given priority for entry in the Philippine Registry. *Importation or Construction of Fishing Vessels* Prior to the importation or the construction of new fishing vessels or gears, or the conversion into a fishing vessel, the

	approval/clearance of the Department of Agriculture must first be obtained in order to manage fishing capacity.
Note	See measures on fisheries and fishing vessels

S21/44

Sector	Water Transport Services (CPC 65)
Sub-Sector	Coastal and Transoceanic Transport Services (CPC 651) Inland Water Transport Services (CPC 652) (Domestic Shipping, Overseas Shipping and International Shipping)
Obligations Concerned	National Treatment Most-Favored Nation Treatment
Level of Government	Central
Measure	Presidential Decree 1466 s1978
Description	**Cross-Border Trade in Services** Services of the Philippine flag air carriers and vessels must be used in the transport of persons, import and export of cargoes between the Philippines and a point outside whenever such service for transportation is paid from proceeds of loans or credits granted or guaranteed by government or any of its financial institutions. This requirement may be waived (i) when services of suitable Philippine vessel is not available; (ii) as may be provided for or agreed in international treaties/agreements; and (iii) on the basis of reciprocity; and (iv) as determined by the Philippine Export Council.
Note	Related to Government Procurement chapter of a free trade agreement.

S22/44

Sector	Water Transport Services (CPC 65)
Sub-Sector	Coastal and Oceanic Water Transport Services (CPC 651) (Overseas Shipping and International Shipping)
Obligations Concerned	National Treatment Performance Requirement
Level of Government	Central
Measure	Republic Act 1937 s1957 Republic Act 7471 s1992 Republic Act 9301 s2003 Republic Act 10668 s2016 Executive Order 125-A s1987 Executive Order 125 s1987 Presidential Decree 761 s1975 Presidential Decree 1221 s1977 MARINA Circular 105 s1995 MARINA Circular 166 s1996 MARINA Circular 102 s2003 MARINA Circular 182 s2003 MARINA Circular 02 s2013 MARINA Circular 04 s2013 MARINA Circular 01 s2015
Description	**Investment** <u>Overseas Shipping under Philippine Flag</u> Ownership and operation of overseas shipping of cargo or passenger or both under the Philippine flag is limited to Philippine Shipping Enterprises. The grant of franchise, certificate or any form of authority to carry cargo or passenger or both is limited to the same. For clarity, Philippine Shipping Enterprise means Filipino citizens or commercial partnerships wholly owned by Filipinos or corporations at least 60 percent of capital is owned by Filipinos. *Certificate of Public Convenience* Domestic ship operators and owners intending to engage in overseas shipping must secure a Certificate of Public Convenience from the MARINA. *Certificate of Registry and Ownership (PD 761 s1975 and MC 02 s2013)* All types of ships operating in the Philippine waters regardless of size and utilization with or without power including fishing vessels, and those below 3 gross tonnage (GT) must register with and issued a Certificate of Registry and Certificate of Ownership. Vessels for domestic trade and overseas trade must register with

	the MARINA's Register of Philippine Vessel or Registry of Philippine Ships for protection under the Philippine laws and to have the right to fly the Philippine flag. Registration covers vessels of domestic ownership of more than 15 GRT. *Income Tax/Incentive* Importation of spare parts for repair or overhaul of the vessel is also exempted provided such is consigned to a Philippine dry docking or repair facility accredited by MARINA and registered as a customs bonded warehouse. A Philippine shipping enterprise is exempt from taxes on income derived from overseas shipping for a period of ten years provided these are reinvested and not withdrawn within ten years after the expiration of the exemption period. *(RA 7471 s1992)* *Officers and Crew* Officers and crew of Philippine vessels operating in coastwise trade and in the high seas must be citizens of the Philippines. (RA 1937 s1957) Ships registered under MARINA Circular 102 s 2003 for international voyage must be completely manned by Filipinos *(MC102 s2003)* A Philippine registered ship for overseas shipping may under certain circumstances to be determined by MARINA may have on board supernumeraries. For clarity, a supernumerary refers to a person who is not a crew of the ship and whose presence onboard is for a specific purpose other than to perform navigation, operation and management functions. *(MC102 s2003)* <u>Philippine-Registered Ships on Temporary Overseas Operation</u> *Special Permits for Philippine-registered ship (MC 105 s1995 and MC 04 s2013)* Special permits may be granted by MARINA to Philippine registered ships allowing giving them flexibility to operate domestic or international. The Special Permit allows domestic shipping to operate for international voyages, and while those Philippine-registered ships for overseas shipping are allowed to operate within national territory. Philippine-registered ships registered for overseas operation and intending to operate domestically must submit a Certificate of non-availability of ships in the domestic trade from the PISA. Philippine registered ship documented for domestic operation that may be allowed to engage in overseas shipping must be at all times

	during its overseas operation be under full management and control by Filipino owner and operator and manned by Filipinos with valid licenses and certification. <u>Co-Loading Arrangement</u> *Clearance for Foreign Vessels to and from Coastwise Ports and Co-loading Agreement)* A foreign vessel from a foreign port is allowed to carry a foreign cargo to its Philippine port of final destination after being cleared from port of entry. It may also carry a foreign cargo by another foreign vessel at the port of entry to the same Philippine port of final destination under a co-loading agreement. A foreign vessel departing from a Philippine port of origin to its foreign port of final destination is allowed to carry foreign cargo intended for export. Under a co-loading agreement, it may also carry foreign cargo by another foreign vessel through a domestic transshipment port to its port of final destination.
Note	See measures on public utility and public service. See measures on certification, registration and licensing of vessels for domestic and overseas shipping. See measures relating to incentives. See measures relating to transient foreign vessels.

S23/44

Sector	Water Transport Services (CPC 65)
Sub-Sector	Coastal and Transoceanic Transport Services (CPC 651) Inland Water Transport Services (CPC 652) (Roll on-Roll off Shipping)
Obligations Concerned	National Treatment Most-Favored Nation Treatment
Level of Government	Central
Measure	Executive Order 170 s2003 Executive Order 170-A s2003 Executive Order 170-B s2003 Executive Order 204 s2016 MARINA Circular 23 s2009
Description	**Investment and Cross-Border Trade in Services** <u>Roll On-Roll Off Shipping</u> *Certificate of Public Convenience* The operation of Roll on-Roll off (Ro-Ro) vessel between Ro-Ro terminals in the Philippines requires a Certificate of Public Convenience (CPC) issued by the MARINA. *(EO 170s 2003)* Domestic ship owners or operator granted to operate a Ro-Ro missionary routes must apply for a CPC. *(MC 23 s2009)* *Incentives* Domestic ship owners or operators that have been granted to operate a Ro-Ro missionary routes in the Philippines are entitled to incentives granted under MARINA Circular 23 s2009. *Ro-Ro Operations in the ASEAN Ro-Ro Project Network (EO 204 s2016)* For Ro-Ro operation under the ASEAN Ro-Ro Project Network, the Ro-Ro definition includes the Chassis Ro-Ro (or Cha-Ro) as part of the Ro-Ro service. For clarity, the following definitions are applied: Ro-Ro operation refers to the method of loading and discharging of vehicles between vessel and shore via a ramp, whether: a) Self-powered (such as cars, trucks, containers on chassis attached to a prime mover, buses, motorcycles) and/or b) Containers on chassis loaded unto the Ro-Ro ship by prime mover (or tractor head) at the port of origin and unloaded from the Ro-Ro by a different prime mover (tractor head) at the port of destination.

	Ro-Ro vessel refers to a ship type or design duly approved for Ro-Ro Operations. Ro-Ro terminals refer to a network of terminals all over the Philippines, regardless of distance covered and linked by Ro-Ro vessels.
Note	See measures on domestic shipping. See measures on overseas shipping in relation to Philippine-registered or flag vessels. See measures relating to certification, registration and licensing.

S24/44

Sector	Water Transport Services (CPC 65)
Sub-Sector	Coastal and Oceanic Water Transport Services of Passengers (CPC 6511) Coastal and Oceanic Water Transport Services of Freight (CPC 6512) Rental Services of Vessels for Coastal and Oceanic Water Transport Services with Operator (CPC 6513) (International Shipping/Overseas Shipping)
Obligations Concerned	National Treatment
Level of Government	Central
Measure	Republic Act 1937 s1957 Presidential Decree 760 s1975 Presidential Decree 866 s1976 MARINA Circular 182 s2003 MARINA Circular 01 s2015
Description	**Investment** <u>Charter or Lease of Vessel</u> Foreign owned vessel may be leased to Philippine nationals for exclusive use in coastwise or domestic trade and issued a temporary Certificate of Philippine Registry. Prior approval by MARINA is required for the charter or lease. *(PD 760 s1975)* Companies which qualify to bareboat charter ships are allowed to acquire and register up to 20 ships under the Philippine flag. *(MC 01 2015)* Any foreign-owned vessel under charter or lease to a Philippine national used for coastwise trade must be entirely in the hands of Philippine nationals and free from foreign interference. *(PD 760 s1975)* Chartered or leased foreign vessel may be used for overseas shipping on the following conditions: a) Operation is entirely in the hands of Philippine nationals and free from interference from the owner of the vessel b) Registered vessel is completely manned by Philippine nationals except in the case of specialized fishing vessel and in cases as may be determined by MARINA. *(PD 760 s1975, PD 866 s1976 and MC 102 s2003)*
Note	See measures relating to Philippine-registered vessels/ships and accreditation.

S25/44

Sector	Manufacturing Services (CPC 88) Maintenance, Repair, and Installation (Except Construction) Services (CPC 87)
Sub-Sector	Other manufacturing services, except of metal products, machinery and Equipment (CPC 881) Manufacturing Services Performed on Metals and Metal Products, Machinery and Equipment, Owned by Others (CPC 882) Maintenance, Repair, and Installation (Except Construction) Services (CPC 87) (Ship Building and Ship Repair)
Obligations Concerned	National Treatment
Level of Government	Central
Measure	Presidential Decree 666 s1975 Presidential Decree 1221 s1977 Republic Act 7471 s1992 MARINA Circular 95 s1994 MARINA Circular 104 s1995 MARINA Circular 178 s2002 MARINA Circular 06 s2009 MARINA Circular 09 s2015
Description	**Investment** <u>Ship Building and Ship Repair</u> *Certificate of Registration (PD 666 s1975, MC 95 s1994)* No shipyard, graving dock, marine railways or marine repair shop and no person or enterprise shall engage in the construction and/or repair of any vessel without a Certificate of Registration and license for such purpose from the MARINA. (*MC 95 s1994* and RA 9295 s2003) *Exception as Public Utility* The business of constructing and repairing of vessels and part are not considered as public utility and no Certificate of Public Convenience is required. *(PD 666 s1975)* *License* All persons, Filipino citizens or foreign national, corporation, partnerships or cooperatives engaged or intending to engage in boat building or boat repair must secure a license from the MARINA. *(MC 09 s2015)* No shipyard, graving dock, floating dock, liftdock, marine railway, marine repair shop, shipbreaking yard/facilities and no person or enterprise shall engage in the construction and/or repair/shipbreaking of any watercraft or any phase or part thereof

	without a valid license from the Maritime Industry Authority. The applicant must be a Filipino citizen or a corporation/partnership at least 60% of the authorized stock of which is owned by Filipino citizens except for joint ventures which are registered with the Securities and Exchange Commission, the board of Investments and/or Export Processing Zone Authorities. *(MC 95 s1994)* *License Plate (MC 06 s2009)* A license plate must be acquired and displayed in the premises of entities engaged in boat building and repair. For clarity, a license refers to an authorization or certificate giving permission to the entity to engage in boat building. **Cross-Border Trade in Services** Any structural conversion/rehabilitation of a vessel acquired under MARINA Circular 104 s1995 requires approval from MARINA and must be undertaken at MARINA registered shipyards. *(MC 104 s1995)* All Philippine-owned and registered vessels are to have their repair, improvement, alteration, reconditioning, conversion or drydocking with MARINA registered ship yards unless exempted by MARINA for specific cases. *(PD 1221 s1977 and RA 7471 s1992)* The spare parts for repair or overhauls of Philippine-owned and registered vessels are exempted from payment of duties and taxes on the condition that necessary repairs are to be undertaken in a Philippine dry-docking or repair facility accredited with MARINA. *(RA 7471 s1992)* Only shipyards licensed by the MARINA are authorized to undertake or carry out dry-docking activities for all Philippine-registered ships except motorized bancas with outriggers. *(MC 178 s2002)*
Note	See measures on public utility and public service. PD 666 s1975 excludes shipyard from the coverage of public service.

S26/44

Sector	Other Supporting Services for Water Transport (CPC 67690)
Sub-Sector	(International Shipping and Maritime Enterprises)
Obligations Concerned	
Level of Government	Central
Measure	MARINA Circular 186 s2003
Description	Maritime enterprises have to be accredited by the MARINA. Maritime enterprises include a ship manager, ship agent, a multimodal transport operator and any other similar enterprises, whose activities consist of representing, within the Philippines, as an agent the business interest of shipping lines or companies.
Note	See horizontal measures for domestic corporations, especially on resident agents of foreign corporation

S27/44

Sector	Supporting and Auxiliary Transport Services (CPC 67)
Sub-Sector	Cargo Handling Services (CPC 671) (Marine Surveying)
Obligations Concerned	National Treatment Most-Favored Nation Treatment
Level of Government	Central
Measure	MARINA Circular 108 s1995
Description	Marine surveying companies are required to secure a certificate of authority to conduct loadline assignment or certificate of appointment as loadline assignor, for the appropriate certificates issued by them to be considered valid for purposes of vessel registration. The Certificate issued to qualified marine surveying companies authorizes them to conduct loadline assignment and to issue loadline certificates. The marine surveying company must at least have one of the licenses as naval architect and marine engineer, mechanical engineer, maritime safety engineer, chief marine engineer, master mariner with at least one year work experience. Marine surveying refers to all types of marine surveys, inspections, technical researches and publication services for purposes of admeasurements, SOLAS, classification, loadline assignment, marine insurances, maritime liens, certification, estimates and cost evaluation and other related services. Loadline assignment refers to loadline (freeboard) drafts and actual positioning of loadline markings on vessels.
Note	See measures on professional services particularly those referring to naval architecture, marine engineer, and mechanical engineer.

S28/44

Sector	Water Transport Services (CPC 67)
Sub-Sector	Supporting Services for Water Operation (CPC 676)
Obligations Concerned	National Treatment
Level of Government	Central
Measure	Presidential Decree 857 s1975 Republic Act 6957 s1990 Republic Act 7160 s1991 Republic Act 7621 s1991 Republic Act 7188 s1994 PPA Administrative Order 006 s1995
Description	**Investment** <u>Public Ports</u> The authority to construct, maintain, operate and provide public ports, both port facilities and services, is with the Philippine Ports Authority (PPA) except for port districts outside its jurisdiction. For port districts under its jurisdiction, the PPA can provide the port services and approaches by itself, by contract or otherwise. The PPA has mandate to control, regulate and supervise pilotage and conduct of pilots within the port districts For clarity, port districts refer to territorial jurisdiction under the control, jurisdiction or ownership of the Authority over an area declared as such. <u>Cebu Ports</u> The Cebu Ports Authority (CPA) has the authority to (i) manage, administer, operate, improve, develop and coordinate or govern all port activities within its jurisdiction; and (ii) provide and maintain port facilities including buildings and installations. The CPA has jurisdiction over all seas, lakes, rivers, and all navigable inland waterways within the Province of Cebu, including Cebu City and all other highly urbanized cities which may be created. <u>Private Ports</u> Development of private ports is encouraged subject to requirements of national security and public safety. A private port facility may be established upon general approval by the PPA, and CPA in areas within their respective jurisdictions.

	The private port may be issued a Certificate of Registration or Permit to Operate for 25 years but not to exceed the term of the foreshore lease arrangement with the DENR. For clarity, the following definition applies: (i) Private port means a port facility constructed and owned by a private person or entity authorized by the government either as a private non-commercial port, private commercial port, private river port or Marina. (ii) Foreshore is defined as the part of the land immediately in front of the shore which is between high and low water marks and alternately covered with water and left dry by the flux and reflux of tides and not located in a port zone (iii)foreshore lease agreement refers to a contract of lease of foreshore and offshore for the purpose of constructing and operating a private port <u>Construction, Operation and Management</u> The private sector may engage in the construction, operation and management of infrastructure/development project such as port and port facilities as per Republic Act 6957 s1990 and RA 7188 s1994. Services of foreign contractor may be engaged wholly or partially in the construction of the facility but for operation and maintenance of facilities requiring public utility franchise such is limited to 40 percent foreign equity.
Note	See horizontal measure on land ownership and lease. See measures relating to infrastructure development projects. See measures on land reclamation Related to State-Owned Enterprises.

S29/44

Sector	Supporting and Auxiliary Transport Services (CPC 67)
Sub-Sector	Supporting Services for Water Operation (CPC 676)
Obligations Concerned	National Treatment
Level of Government	Central
Measure	MARINA Circular 110 s1995 PPA Memorandum Order 08 s2016
Description	**Cross-Border Services** Foreign vessels cannot proceed and use the Manila North Harbor for terminal services such as anchorage, docking at berth, unloading of cargo or other purposes. The measure is part of the contractual arrangement of the PPA with the Manila North Harbour, Inc. that it should only provide for domestic terminal services under the Contract for the Development, Operation and Management of Manila North Harbor. All ports and places in the Philippines are open to vessels lawfully engaged in coastwise trade subject to provisions of law. (MC 110 s1995)

S30/44

Sector	Fisheries
Sub-Sector	(Commercial Fishing)
Obligations Concerned	National Treatment
Level of Government	Central
Measure	Presidential Decree 761 s1975 Republic Act 8550 s1998 Republic Act 9295 s2003 Republic Act 10654 s2014 MARINA Circular 02 s2013 MARINA Circular 104 s1995
Description	**Investment** <u>Commercial Fishing Vessel</u> *Certificate of Registry and Ownership (PD 761 s1975 and MC 02 s2013)* All types of ships operating in the Philippine waters regardless of size and utilization with or without power including fishing vessels, and those below 3 gross tonnage (GT) must register with and issued a Certificate of Registry and Certificate of Ownership. License to commercial fishing vessel shall be issued only to Filipino citizens, or association or corporations with at least 60 percent equity participation by Filipino citizens. Such license or interest in equity shall not be sold, transferred or assigned, directly or indirectly to any person not qualified to hold such license. The license is valid only for a period determined by the Department of Agriculture. *Officer and crew* Domestic merchant fleet and fishing vessels must be manned by qualified Filipino officers and crew. *(RA 9295 s2003 and MC 104 s1995)* No foreign officer is allowed on board except as supernumerary or as may be allowed by the Bureau of Fisheries and Aquatic Resources (BFAR). *(MC 104 s1995)* For clarity, commercial fishing is defined as the taking of fishery species by passive or active gear for trade, business & profit beyond subsistence or sports fishing, to be further classified as: i) Small scale commercial fishing - fishing with passive or active gear utilizing fishing vessels of 3.1 gross tons (GT) up to twenty (20) GT; ii) Medium scale commercial fishing - fishing utilizing active gears and vessels of 20.1 GT up to one hundred fifty (150) GT; and iii) Large commercial fishing - fishing utilizing active gears and vessels of more than one hundred fifty (150) GT. *Licenses and Permits for Conduct of Fishery Activities* The Department of Agriculture determines and issues the number of licenses and permits for the conduct of fishery activities subject to harvest control rules and reference points as determined by scientific studies or best available evidence. Preference shall be given to resource

	users in the local communities adjacent or nearest to the municipal waters.
Note	See measures on certification, registration, licensing of domestic shipping. See measure on chartered or leased foreign vessel including fishing vessel. See measures related to fisheries.

S31/44

Sector	Land Transport Services (CPC 64)
Sub-Sector	Road Transport Services (CPC 643) Railway Transport Services (CPC 642)
Obligations Concerned	Domestic Regulation National Treatment
Level of Government	Central
Measure	Executive Order 125-A s1987 Executive Order 292 s1987 Republic Act 7160 s1991
Description	**Investment** Owners and operators for public land and rail transportation facilities and services are required to secure a Certificate of Public Convenience from the Department of Transportation. For public land transportation services by motorized vehicles except tricycles, the CPC or permits authorizing operation is to be secured from the Land Transportation Franchising Regulatory Board (LTFRB). Grant of franchise for the operation of tricycles within the territorial jurisdiction of a municipality is with the concerned local government unity. Only Filipino citizens, or associations or corporations organized under the laws of the Philippines with 60 percent capital owned by Filipino citizens can be granted a franchise, certificate or authorization to operate a public utility.
Note	See horizontal measures pertaining to public utility and public service, a See measures relating to infrastructure development projects

S32/44

Sector	Land Transport Services (CPC 64)
Sub-Sector	Railway Transport Services (CPC 642) Road Transport Services (CPC 643) Transport Services via Pipeline (CPC 644)
Obligations Concerned	National Treatment
Level of Government	Central
Measure	Republic Act 4156 s1964 Republic Act 6366 s1971 Presidential Decree 741 s1975 Republic Act 10638 s2014
Description	The Philippine National Railways (PNR), a government corporation attached the Department of Transportation, is mandated to provide the nationwide railroad and transportation system. In particular, it has the power to own, operate railroad trainways, bus lines, truck lines, subways, and other kinds of land transportation, vessels, and pipelines, for purposes of transporting passengers, mail and property between any points in the Philippines. Republic Act 10638 s2014 grants the extension of the franchise of the PNR for another 50 years commencing in 2014.
Note	See horizontal measures on public utility and public service. See measures relating to infrastructure development projects Related to State-Owned Enterprises.

S33/44

Sector	Land Transport Services (CPC 64)
Sub-Sector	Railway Transport Services (CPC 642)
Obligations Concerned	National Treatment
Level of Government	Central
Measure	Executive Order 603 s1980 Executive Order 830 s1982 Executive Order 201 s1987
Description	The Light Rail Transit Authority, an attached agency of the Department of Transportation, is primarily responsible for the construction, operation, maintenance, and/or lease of light rail transit systems in the Philippines. It may as a corporate entity: (a) contract any obligation or enter into, assign or accept the assignment of, and vary or rescind any agreement, contract of obligation necessary or incidental to the proper management of the Authority; and (b) carry on any business, either alone or in partnership with any other person or persons.
Note	See horizontal measures on public utility and public service. See measures relating to infrastructure development projects Related to State-Owned Enterprises.

S34/44

Sector	Other Professional, Technical and Business Services (CPC 83) (Professional Services)
Sub-Sector	Architectural Services (CPC 832) Engineering Services (CPC 833) (Naval Architecture or Marine Engineering)
Obligations Concerned	National Treatment Most-Favoured Nation Local Presence
Level of Government	Central
Measure	Republic Act 4565 s1965
Description	**Investment and Cross-Border Trade in Services** The practice of naval architecture or marine engineering requires a Certificate of Registration from the Board of Examiners for Naval Architects and Marine Engineer, which is granted after passing a qualifying examination. Only Filipino citizens may apply for examination to practice of naval architecture or marine engineering. Foreigners may apply for examination under a reciprocity principle, i.e. the country of citizenship of the foreigners also permits Filipino citizens to practice the profession without restriction or after an examination. A firm, partnership, association and corporation may engaged in the practice of naval architecture or marine engineering provided it is under the supervision of a naval architect or marine engineer with valid Certificate of Registration. For clarity, the practice of naval architecture and marine engineering embraces the services in the form of plans, specifications, estimates, or supervision of the construction, alteration, or structural survey of any floating vessel or equipment, self-propelled or otherwise; plans or layouts, specifications, estimates, or supervision of the installation of marine power plants and associated equipment ; management, maintenance or operation of any shipyard, grave dock marine slipways, and any facility for the salvage, repair or maintenance of floating vessels or equipment.
Note	See horizontal measures on professional services See measure on marine surveying.

S35/44

Sector	Other Support Services n.e.c (CPC 85990) (Professional Services)
Sub-Sector	Business Services of Intermediaries and Brokers (Custom Brokers)
Obligations Concerned	National Treatment Most-Favoured Nation Local Presence
Level of Government	Central
Measure	Republic Act 9280 s2004
Description	**Investment and Cross-Border Trade in Services** The practice of customs brokers profession requires a Certificate of Registration issued by the Professional Regulatory Board for Customs Broker to applicants who have passed the licensure examination. The application for licensure examination is open to Filipino citizens, and foreigners whose country of citizenship grants reciprocity. A special or temporary permit may be issued by the Board to professional customs brokers from other countries in cases where their services are immediately needed in the absence or inadequacy of local professional customs brokers. For clarity, customs broker profession involves services consisting of consultation, preparation of customs requisite document for imports and exports, declaration of customs duties and taxes, preparation signing, filing, lodging and processing of import and export entries; representing importers and exporters before any government agency and private entities in cases related to valuation and classification of imported articles and rendering of other professional services in matters relating to customs and tariff laws its procedures and practices.
Note	See horizontal measures on professional services

S36/44

Sector	Other Professional, Technical and Business Services (CPC 83) (Professional Services)
Sub-Sector	Engineering Services (CPC 833) (Mechanical Engineering)
Obligations Concerned	National Treatment Most-Favoured Nation Local Presence
Level of Government	Central
Measure	Republic Act 8495 s1998
Description	**Investment and Cross-Border Trade in Services** The practice of mechanical engineering in the Philippines requires a Certificate of Registration issued by the Board of Mechanical Engineering to applicants who have passed the qualifying examination. Certification of registration is granted as per the following category and rank: profession of mechanical engineering, mechanical engineer, and certified plant mechanic. Filipino citizenship is required for applicant for the profession of mechanical engineering and mechanical engineer. No foreign mechanical engineer or mechanic may practice mechanical engineering or be given a certificate unless his/her country of citizenship also permits Filipino citizens to practice in their country. No firm or company may be registered or licensed for the practice of the profession. Individual persons properly registered and licensed as a mechanical engineer may obtain and register with the Securities and Exchange Commission as 'Mechanical Engineers', and/or 'Architect and Mechanical Engineer' and no person may be a member or associate unless he/she is a registered or licensed mechanical engineer. For clarity, mechanical engineering involves the performance of the following: (i) consultation, valuation, investigation and management services requiring mechanical engineering knowledge; (ii) engineering design, preparation of plans, specifications and project studies or estimates for mechanical equipment, machinery or processes of any mechanical works, projects or plants; (iii) management or supervision of the erection, installation, testing and commissioning of mechanical equipment, machinery or processes in mechanical works, projects or plants; (iv) management, supervision, operation, tending or maintenance of any mechanical equipment, machinery or processes in mechanical work, projects or plants; (v) management or supervision of maintenance, sale, supply or distribution of mechanical equipment parts or components; (vi) teaching of mechanical engineering professional subjects in government recognized and accredited engineering schools; and (vii) employment in government as a professional mechanical engineer, registered mechanical engineer , or certified plant mechanic if the nature and character of his/her work is in in the profession requiring professional knowledge of the science of mechanical engineering.
Note	See horizontal measures on professional services. See measure on marine surveying.

S37/44

Sector	Other Professional, Technical and Business Services (CPC 83)

	(Professional Services)
Sub-Sector	Engineering Services (CPC 833) (Electrical Engineering)
Obligations Concerned	National Treatment Most-Favoured Nation Local Presence
Level of Government	Central
Measure	Republic Act 7920 s2000
Description	**Investment and Cross-Border Trade in Services** The practice of electrical engineering in the Philippines requires a Certificate of Registration issued by the Board of Electrical Engineering to applicants who have passed the qualifying examination. Certification of registration is granted as per the following category and rank: profession of electrical engineer, registered electrical engineer, and registered master electrician. Filipino citizenship is required for applicant for the profession of electrical engineering, registered electical engineer, and registered electrical engineer. No firm or company may register or be licensed for the practice of electrical engineering. Individual persons with properly licensed as electrical engineer may form a partnership association among themselves with members individually responsible for their respective acts. For clarity, the practice of electrical engineering involves rendering electrical engineering services in the form of (i) consultation, investigation, valuation and management of services requiring electrical engineering knowledge; (ii) design and preparation of plans, specifications and estimates for electric power systems, power plans, power distribution system including power transformers, transmission lines and network protection, switchgear, building wiring, electric machines, equipment and others; (iii) supervision of erection, installation, testing, and commissioning of power plants, substation, transmission lines, industrial plans and others; (iv) supervisions of operation and maintenance of electrical equipment in powers plants, industrial plants, watercrafts, electric locomotives and others; (v)supervisions on the manufacture and repair of electrical equipment including switchboards, transformers, generators, motor apparatus and others; (vi) teaching of electrical engineering subjects; and (vii) taking charge of the sale and distribution of electrical equipment and systems requiring engineering calculations or applications of engineering data.
Note	See horizontal measures on professional services

S38/44

Sector	Other Professional, Technical and Business Services (CPC 83) (Professional Services)
Sub-Sector	Engineering Services (CPC 833) (Electrical Engineering)
Obligations Concerned	National Treatment Most-Favoured Nation Local Presence
Level of Government	Central
Measure	Presidential Decree 1570 s1978
Description	**Investment and Cross-Border Trade in Services** A certificate of registration is required to practice the profession of aeronautical engineering. Such certificate is granted to individuals who have passed the qualifying examination conducted by the Board of Aeronautical Engineering. Qualified to take the examination are Filipino citizens or foreigners who are qualified under existing laws. Temporary certificate of registration may be granted as aeronautical engineers to practice aeronautical engineering to the following: (i) aeronautical engineers from other countries for consultation or for a specific design, construction or project, (ii)) any person from foreign countries employed as technical officers or professors in such specialized branches of aeronautical engineering as may, in the judgment of the Commission be necessary and indispensable for the country; (iii) For clarity, the practice of aeronautical engineering shall constitute in holding out oneself as skilled in the knowledge, science, and practice of aeronautical engineering, and as qualified to render professional services as an aeronautical engineer; or offering or rendering, or both, on a fee basis or otherwise, services such as planning, designing, analyzing, constructing, assembling, installing, altering or maintaining of aircraft structures, power plants or accessories through scientific or accepted engineering practice, or the teaching of the same in any university, college, institute, or school of learning duly recognized by the Government of the Philippines.
Note	See horizontal measure on professional services

S39/44

Sector	Other Professional, Technical and Business Services (Professional Services)
Sub-Sector	(Merchant Marine)
Obligations Concerned	National Treatment Local Presence
Level of Government	Central
Measure	Republic Act 8544 s1997 Republic Act 10635 s2014
Description	**Investment and Cross-Border Trade in Services** Practice of merchant marine officers requires a Certificate of Registration and Certificate of Competence issued by the Maritime Industry Board after passing the examination for Marine Deck Officer and Marine Engineer Officer. Only Filipino citizens are qualified to take the licensure examination. Practice of merchant marine profession refers to the application of fundamental and known principles of navigation, seamanship and engineering to the peculiar condition of navigation and requirements of on board management, operation and maintenance of main propulsion and auxiliary engines, stability and trim of the vessel and cargo and cargo handling. Also covers (i) the proper handling and stowage of cargo on board ship; (ii) safe watchkeeping of the vessel's navigation; (iii) maritime education and training of cadets and other marine professionals; (iv) employment with government which requires knowledge and expertise of a merchant marine officer. For clarity, Merchant Marine Officer refers to marine deck or engineer officer: Merchant Marine Deck Officer refers to a duly registered, certified and licensed master mariner, chief mate, and officer-in-charge of a navigational match. Merchant Marine Engineer Officer refers to duly registered, certified and licensed chief engineer, second engineer, and officer-in-charge of an engineering watch in a manned engine room or designated duty engineer in a periodically unmanned engine-room and coastal engineer.
Note	See horizontal measure on Professional Services See measure on marine surveying.

S40/44

Sector	Air Transport Services
Sub-Sector	(Airman Services)
Obligations Concerned	National Treatment Most-Favored Nation
Level of Government	Central
Measure	Republic Act 9498 s2008
Description	**Investment** An airman must secure an airman's license, which is a written authorization or permit, to exercise the privileges of flying, maintaining, controlling, directing, dispatching, instructing or any other civil aviation activity. The license specifies the capacity in which the holder is authorized to serve. The airman's license is issued by the Civil Aviation Authority of the Philippines to qualified persons who are citizens of the Philippines or of other countries granting similar rights and privileges to citizens of the Philippines. For clarity, an airman refers to any individual who engages, as the person in command or as pilot, mechanic, aeronautical engineer, flight radio operator or member of the crew, in the navigation of aircraft while under way and any individual who is directly in charge of inspection, maintenance, overhauling, or repair of aircraft, aircraft engine, propellers, or appliances and individual who serves in the capacity of aircraft dispatcher or air traffic control operator.
Note	See measure on aeronautical engineer and mechanical engineer.

S41/44

Sector	Other Professional, Technical and Business Services (Professional Services)
Sub-Sector	(Aeronautical Engineering)
Obligations Concerned	National Treatment Most-Favored Nation Local Presence
Level of Government	Central
Measure	Presidential Decree 1570 s1978
Description	A certificate of registration is needed to practice aeronautical engineering issued by the Board of Aeronautical Engineering to individuals who have passed the qualifying examination conducted by the Professional Regulation Commission and the Board. Qualifying examination is open to citizens of the Philippines or of a foreign county qualified to take the examination under existing laws. The practice of aeronautical engineering constitutes holding out oneself as skilled in the knowledge, science, and practice of aeronautical engineering, and as qualified to render professional services as an aeronautical engineer; or offering or rendering, or both, on a fee basis or otherwise, services such as planning, designing, analyzing, constructing, assembling, installing, altering or maintaining of aircraft structures, power plants or accessories through scientific or accepted engineering practice, or the teaching of the same in any university, college, institute, or school of learning duly recognized by the Government of the Philippines.
Note	See horizontal measures on professional services and airman services.

S42/44

Sector	Other Professional, Technical and Business Services (Professional Services)
Sub-Sector	(Environmental Planning)
Obligations Concerned	National Treatment Most-Favored Nation Local Presence
Level of Government	Central
Measure	Republic Act 10587 s2012
Description	**Investment and Cross-Border Trade in Services** A Certificate of Registration and a Professional Identification Card or a special permit is necessary to practice or offer the practice of environmental planning. The Certificate and Identification Card or special permit is issued to persons who have passed the licensure examination. Qualified to take the examination are the citizens of the Philippines or of other countries, which has a policy of reciprocity in the practice of the profession. A consulting firm, partnership, corporation, association or foundation may engage in the practice of environmental planning in the Philippines if it has been issued a Certificate of Registration by the Board and the Commission. Such Certificate is issued if the majority of the partners of the partnership or majority of the Members of the Board of Directors in the case of corporations are registered and licensed environmental planners. The practice of profession in the consulting firm, partnership, corporation, association or foundation must be carried out by duly registered and licensed environmental planners. The practice of environmental planning embraces the following: a) Providing professional services in the form of technical consultation, rendering of technical advice, plan preparation, capacity building and monitoring and evaluation of implementation involving the following: i) National, regional or local development and/or physical framework and comprehensive land-use plans; ii) Zoning and related ordinances, codes and other legal issuances for the development and management, preservation, conservation, rehabilitation, regulation and control of the environment, including all land, water, air and natural resources; iii) Planning and development of a barangay, municipality, city, province, region or any portion or combination thereof; and

	iv) Development of a site for a particular need or special purpose, such as economic or ecological zones; tourism development zones; and housing and other estate development projects, including the creation of any other spatial arrangement of buildings, utilities, transport and communications; b) In relation to the activities enumerated in paragraph (i), preparing the following studies: i) Pre-feasibility, feasibility and other related concerns; ii) Environmental assessments; and iii) Institutional, administrative or legal systems; c) Curriculum and syllabi development in licensure examinations for environmental planners and teaching in academic institutions and conducting review courses in environmental planning; d) Serving as expert witness, resource person, lecturer, juror or arbitrator in hearings, competitions, exhibitions and other public fora; conduct of hearings, competitions, exhibits and other public fora; e) Ensuring compliance with environmental laws including the acquisition of regulatory permits.
Note	See horizontal measures on professional services.

S43/44

Sector	Legal and Accounting Services (Professional Services)
Sub-Sector	Accountancy (CPC 822)
Obligations Concerned	National Treatment Most-Favored Nation Domestic Regulation
Level of Government	Central
Measure	Republic Act 9298 s2004
Description	Practice or offering of the practice of the accountancy profession requires a Certificate of Registration and a Professional Identification Card, or a Special Permit issued by the Professional Regulatory Commission and the Board of Accountancy. The Certificate and Identification Card is issued to examinees who have passed the qualifying licensure examination. Only Filipino citizens are qualified to take the examination. Foreigners or citizens of other countries may be allowed to practice accountancy in the Philippines in accordance to existing laws and international treaties entered into by the Philippines. Foreigners can practice in the Philippines on a reciprocity basis. Foreigners have to prove that their country of citizenship allows Filipino citizens to practice of the same profession without restriction. Special or temporary permits may be granted to foreign certified professional on the following grounds: a) for consultation or for a specific purpose which is essential for the development of the country, and where there is no Filipino certified public accountant qualified for such consultation or specific purposes; b) to be engaged as professor, lecturer or critic in fields essential to accountancy education in the Philippines and his/her engagement is confined to teaching only; and c) he/she is an internationally recognized expert or with specialization in any branch of accountancy and his/her service is essential for the advancement of accountancy in the Philippines.
Note	See horizontal measures on professional services.

S44/44

Sector	
Sub-Sector	(Toll Road Operation)
Obligations Concerned	National Treatment
Level of Government	Central
Measure	Republic Act 7160 s1991 Republic Act No. 2000 Presidential Decree 1112 s
Description	Contracts in behalf of the Republic of the Philippines with persons, natural or juridical, for the construction, operation and maintenance of toll facilities such as but not limited to national highways, roads, bridges, and public thoroughfares are open to citizens of the Philippines and/or to corporations or associations qualified under the Constitution and authorized by law to engage in toll operations. The award of such contracts is subject to the approval of the President.
Note	