Policy Brief

SENATE ECONOMIC PLANNING OFFICE

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Amending the Public Service Act: Setting Boundaries and Opening Possibilities in Public Services and Public Utilities

The 85-year-old Public Service Act is in dire need of updating as many of its features are ill-suited to cater to the current realities.

Instituting much-needed and long-awaited reforms will help bring in more investments and greater competition in key service sectors and consequently, more consumer choices, better prices and improved quality of service.

The SEPO Policy Brief, a publication of the Senate Economic Planning Office, provides analysis and discussion on important socio-economic issues as inputs to the work of Senators and Senate Officials. The SEPO Policy Brief is also available at www.senate.gov.ph.

I. Introduction

The importance of effective, efficient and responsive delivery of public services has become starkly clearer amidst the Coronavirus Disease 2019 (COVID-19) pandemic. Remote learning and working which have become more prevalent require modern, affordable and reliable internet and telecommunications service. Mobility restrictions have highlighted the need for safe and efficient transportation and logistics service that would connect businesses to consumers. Similarly, uninterrupted access to clean water and reliable and affordable electricity to power everything in the modern world have become even more essential in the so-called "new normal".

While the passage of several laws in the past introduced important reforms to some service sectors, the current state of public service delivery remains dismal. Oftentimes, it is described as costly, with inadequate coverage and of poor quality. The policy and regulatory environments appear to be not conducive enough to attract greater investment and more robust competition. Though most of the services have been transferred to the private sector, there are still very few players in key service sectors. This lack of competition has led to an imbalance of market power in favor of the providers and to the detriment of the consumers. As such, there is a need to implement another major reform that would complement the existing package of interventions aimed at further opening up the country to more investments and engendering greater competition in public services and utilities. Specifically, there is a need to review and amend an 85-year-old law, the Commonwealth Act (CA) No. 146, also known as the Public Service Act (PSA).

II. Why amend the Public Service Act?

The PSA was enacted on November 7, 1936 to govern the conduct and delivery of public services in the Philippines. For most of the previous decades, government acted either as the owner, operator, landlord or regulator of the said services. In many instances, it assumed all of these roles at the same time. This resulted in a situation where state-run utilities, usually unhampered by competition, often failed to deliver quality public services. There was little incentive to improve services, to keep up with technological advances, or introduce innovations to improve processes and outputs. Furthermore, owning and operating these utilities had put a tremendous strain on state finances, which significantly contributed to debt accumulation by the national government.

Starting around the 1990s, the Philippines undertook a series of reforms meant to address the government's shortcomings in public service delivery. Major pieces of legislation were enacted, mainly with the aim of opening up some industries to greater private sector investment and participation, such as: 1) Republic Act No. 6957 or the Build-Operate-Transfer (BOT) Law (as amended by RA No. 7718); 2) RA No. 7042 or the Foreign Investments Act of 1991 (as amended by RA No. 8179); 3) RA No. 7925 or the Public Telecommunications Policy Act of the Philippines; 4) RA No. 8041 or the National Water Crisis Act of 1995; 5) RA No. 9136 or the Electric Power Industry Reform Act (EPIRA); and 6) Executive Order No. 219, series of 1995 (as amended by EO No. 32, series of 2001), which established the domestic and international civil aviation liberalization policy.

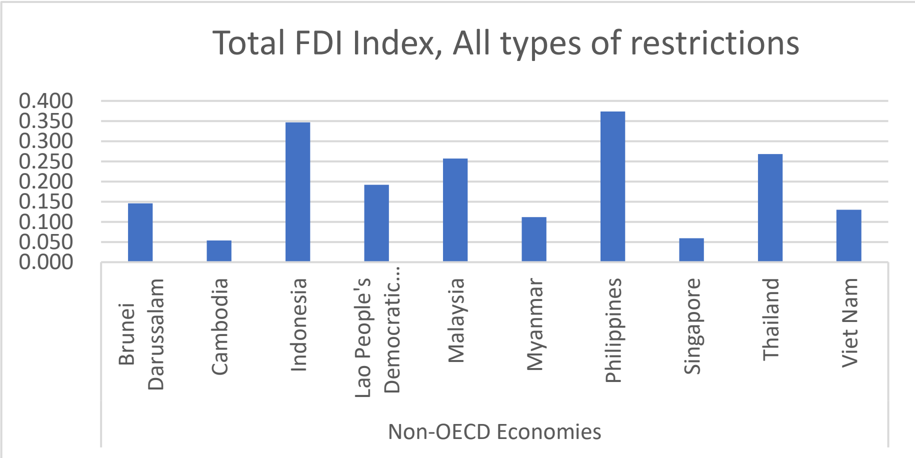
The PSA itself has actually been amended several times. Among these amendments are exemptions from the authorization certificate requirement of the following: 1) CA No. 454 (1939), for steamboats, motorships and steamship lines whether privately owned, or owned or operated by any government-controlled corporation or instrumentality; and for ice plant and ice-refrigeration plant, municipal warehouses, vehicles drawn by animals and bancas moved by oar and/or sail, airships, radio companies, and public services owned or operated by any instrumentality of the national government; 2) RA No. 1270 (1955), for motor vehicles used in special contracts for a limited time and for a specific purpose directly connected with agriculture; 3) RA No. 2031 (1957) for tugboats and lighters; 4) RA No. 2677 (1960) for warehouses but removing ice and ice-refrigeration plants from the exemptions; and 5) Presidential Decree No. 1 (1972) which reorganized the Executive Branch of the national government under the Integrated Reorganization Plan with having Letter of Implementation Nos. 1 and 11 (1972) abolished the Public Service Commission under the Department of Justice and thereby created under the Department of Public Works, Transportation and Communications three specialized regulatory boards—Board of Transportation, Board of Communications, and Board of Power and Waterworks—which shall exercise the pertinent regulatory and adjudicatory functions of the defunct Public Service Commission.

It should be noted though that most of the previous amendments to the PSA were about exemptions, and were administrative in nature. As it stands now, several important features of the law remain frozen in time, ill-suited to cater to the realities of the current situation. Clearly, a major flaw in the law is the lack of clarity in the definition of public services and public utilities. It has been argued that this ambiguity, in relation to certain provisions of the 1987 Philippine Constitution, serves as a major barrier towards greater investment, particularly foreign investments in these sectors. Rules on how public utilities may set their rates, which is another key provision of CA No. 146, have also not been updated. Even the penalty provisions aimed at enforcing such rules on public utilities are outdated and no longer serve their purpose. All of these features of the antiquated 1936 PSA, as amended, need to be modernized to help improve the delivery of essential services.

III. How open is the Philippines to foreign investment and how has this impacted competition?

The Organisation for Economic Co-operation and Development (OECD) periodically releases the FDI Regulatory Restrictiveness Index, which measures statutory restrictions on foreign direct investment (FDI) in 22 economic sectors across 69 countries, including all OECD and Group of Twenty (G20) countries[1]. In the 2020 edition of the Index (Figure 1), the Philippines had the highest index rating among Association of Southeast Asian Nations (ASEAN) countries included in the study (Timor Leste was excluded), which indicates a highly restrictive investment environment compared to its neighbors.

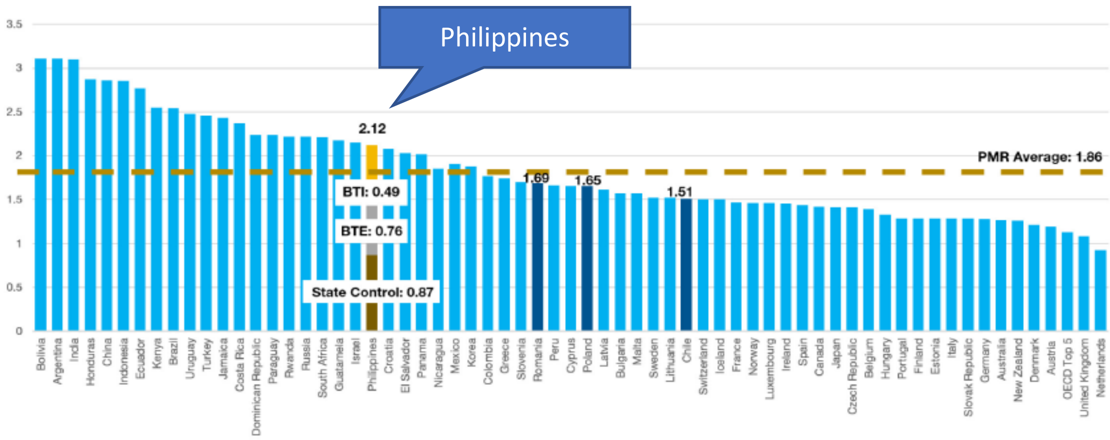
Figure 1. OECD FDI Regulatory Restrictiveness Index, ASEAN Countries, 2020



Source: OECD FDI Regulatory Restrictiveness Index. Data extracted on 21 July 2021 from OECD.stat website.

The World Bank's Product Market Regulation (PMR) indicators (Figure 2) also show that the Philippines have higher levels of regulatory restrictiveness against comparator countries. In the 2018 World Bank report on regulatory restrictiveness, the Philippines scored 2.12 out of 6, indicating a more restrictive environment than the world average (1.86) and also more restrictive than regional peers.

Figure 2. Product Market Regulations Score, 2017

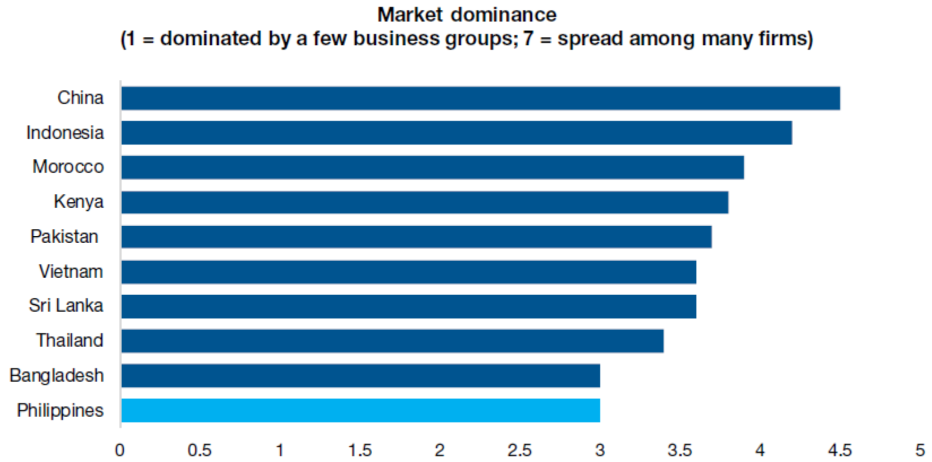


Source: Fostering Competition in the Philippines: The Challenge of Restrictive Regulations, World Bank (2018).
Note: A higher index score indicates greater restrictiveness to competition. BTI stands for Barriers to Trade and Investment, BTE for Barriers to Entrepreneurship.

[1] The Index gauges the restrictiveness of a country's FDI rules by looking at the FDI restrictions in a country such as foreign equity restrictions, screening and approval mechanisms, restrictions on employment of foreigners, and other operational restrictions.

The same report goes on to suggest that Philippine markets seem to be more concentrated relative to regional peers with a higher proportion of monopoly, duopoly and oligopoly markets in comparison (Figure 3). Such a situation means that these markets are more prone to collusion and market power abuse (World Bank, 2018).

Figure 3. Extent of Market Dominance for Selected Countries



Source: Fostering Competition in the Philippines: The Challenge of Restrictive Regulations, World Bank (2018)

These restrictions to investment have all contributed to the Philippines performing poorly in several key industries including internet services and transportation, two sectors that an amended PSA should aim to open up.

The poor state of internet service in the Philippines is well documented in various studies. One such measure is seen in the Inclusive Internet Index 2021 (Table 1), where the country ranks 68th (from 63rd in 2020) among 120 countries, and in the bottom half among ASEAN countries. It has scored low particularly in terms of relevance (64th), affordability (79th) and readiness (80th).

Table 1. Inclusive Internet Index (2020 and 2021), ASEAN Countries (rankings out of 120 countries)

COUNTRY	OVERALL RANKING		AVAILABILITY (rank)		AFFORDABILITY (rank)		RELEVANCE (rank)		READINESS (rank)	
	2020	2021	2020	2021	2020	2021	2020	2021	2020	2021
Singapore	15	12	2	1	29	27	46	41	23	29
Malaysia	35	42	38	46	43	55	33	24	3	6
Thailand	39	49	29	30	24	30	60	76	69	102
Vietnam	50	58	50	54	48	62	41	57	44	52
Indonesia	57	66	55	59	61	84	62	56	40	74
Philippines	63	68	57	60	82	79	59	64	59	80
Myanmar	67	80	74	90	47	59	69	79	57	65
Cambodia	73	83	66	80	71	82	77	89	92	91
Laos	78	88	75	89	73	57	89	100	91	108

Source: The Economist Intelligence Unit (2021), Inclusive Internet Index. Ranks from 1 (best) to 120 (worst).

Similarly, the transportation and logistics industry in the Philippines suffers from many shortcomings. The country scored quite poorly in the 2018 International Logistics Performance Index (LPI) of the World Bank, ranking 60th in the world and 6th among ASEAN countries (Table 2). Amending the PSA would go a long way towards addressing these issues and improving delivery of many public services in the country, but the most important sectors in need of improvement would be the two particular industries discussed above.

Table 2. International Logistics Performance Index (LPI), ASEAN Countries, 2018

Country	LPI Rank	LPI Score	Customs	Infrastructure	International Shipments	Logistics Competence	Tracking and Tracing	Timeliness
Singapore	7	4.00	3.89	4.06	3.58	4.10	4.08	4.32
Thailand	32	3.41	3.14	3.14	3.46	3.41	3.47	3.81
Vietnam	39	3.27	2.95	3.01	3.16	3.40	3.45	3.67
Malaysia	41	3.22	2.90	3.15	3.35	3.30	3.15	3.46
Indonesia	46	3.15	2.67	2.89	3.23	3.10	3.30	3.67
Philippines	60	2.90	2.53	2.73	3.29	2.78	3.06	2.98
Brunei	80	2.71	2.62	2.46	2.51	2.71	2.75	3.17
Lao PDR	82	2.70	2.61	2.44	2.72	2.65	2.91	2.84
Cambodia	98	2.58	2.37	2.14	2.79	2.41	2.52	3.16
Myanmar	137	2.30	2.17	1.99	2.20	2.28	2.20	2.91

Source: World Bank, International Logistics Performance Index, 2018.

IV. Major Areas of Reform in the PSA

There are three major reform areas that would need to be introduced to the outdated PSA, as amended, in order to modernize and turn it into a piece of legislation better suited to address the challenges of regulating public services and public utilities in the present day. These are clarifying the definitions of public services and public utilities; instituting more appropriate rate-fixing mechanisms for these services and utilities; and imposing more meaningful penalties for violations of the law. A fourth reform, aimed at addressing national security concerns arising from opening up public services to foreign investment, would be to introduce a mandatory review of incoming foreign investments in certain critical infrastructure.

1) Defining public service vs. public utility

Of the four proposed reforms, the first one is arguably the most important and has the greatest potential to introduce much-needed improvements in the regulatory environment for public services and public utilities. Introducing a clearer distinction in the definitions of public service and public utility has massive implications with regard to how the government would approach regulations of such, and consequently, the possibility of enticing more players and greater competition in a number of key industries.

Currently, there exists a confusion and ambiguity in the definition and usage of the terms "public service" and "public utility", leading at times to the terms even being used interchangeably. The PSA under CA No. 146, as amended, does not provide a clear statutory definition for the term "public service". Instead, it provides an enumeration of public services[2] covered under the law. The list of public services stipulated in

[2] Any common carrier, railroad, street railway, traction railway, subway 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 railway, marine repair shop, 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. Please note that some of the inclusions (e.g., steamboats, motorships and steamship lines; motor vehicles used in special contracts for a limited time and for a specific purpose directly connected with agriculture; tugboats and lighters; ice and ice-refrigeration plants; municipal warehouses; vehicles drawn by animals and bancas moved by oar or sail; airships; radio companies) in public service had been exempted/repealed through legislative amendments.

Section 13(b) of the PSA, as amended by RA No. 2677, seems to define the concept of what public service is. The same law also uses the term "public utility" under its Section 29 when the subject in question is in the list of public services,[3] but also fails to include a definition for the term.

The manner in which "public utility" was used in the 1987 Philippine Constitution has an important implication on foreign investment. Specifically, Section 11 of Article 12 stipulates 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, nor shall such franchise, certificate, or authorization be exclusive in character or for a longer period than fifty years.*"

While "public utility" was mentioned several times in the 1987 Philippine Constitution, no definition of the term was provided nor a statutory law was passed that would specifically define the term. In the absence of a statutory definition, the Supreme Court, in *Albano vs. Reyes, G.R. No. 83551, July 11, 1989*, has defined public utility as:

> "*A business or service engaged in regularly supplying the public with some commodity or service of public consequence such as electricity, gas, water, transportation, telephone or telegraph service*."[4]

The aforementioned definition was further expanded in *JG Summit Holdings vs. Court of Appeals, G.R. No. 124293, September 24, 2003*, which states that:

> "*To constitute a public utility, the facility must be necessary for the maintenance of life and occupation of the residents. However, the fact that a business offers services or goods that promote public good and serve the interest of the public does not automatically make it a public utility… The principal determinative characteristic of a public utility is that of service to, or readiness to serve, an indefinite public or portion of the public as such which has a legal right to demand and receive its services or commodities*."

The current broad interpretation of public utility not only limits foreign ownership and foreign employment but also limits overall entry of investments. Historically, the definition of public utility was to constrain abuse of monopoly power. Public utilities, due to being natural monopolies, should be subject to tighter regulation, while other public services, which are not natural monopolies, can be eased up to attract more players in these types of services. Any amendment to the PSA should hence rectify the situation and provide a clearer definition of public utility vis-à-vis public service.

The changes in the law should explicitly define the concept of a public utility from public service and even provide a list of industries to be thereafter defined as "public utility". Senate Bill No. (SBN) 2094 or the

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[3] One who has been granted a legislative franchise to operate an ice plant, although not yet an operator of such *public utility*, has sufficient interest or personality either to oppose an established operator's application for an increase in the capacity of his existing plant, or to ask for a joint hearing of said application and the grantee's own application for the issuance of a certificate of public convenience in order to operate under such franchise.

[4] Based on the case of *National Power Corporation v. Court of Appeals (1997)* citing *Albano v. Reyes, G.R. No. 83551 (1989)*.

Senate's Public Service Act of 2021 attempts to do just that as it proposes to make public utility a very specific subset of public service, specifically referring to it as a public service that operates, manages or controls for public use any of the following industries to be henceforth defined as public utilities, namely: 1) distribution or transmission of electricity; 2) petroleum and petroleum products pipeline transmission or distribution systems; 3) water pipeline distribution systems and wastewater pipeline systems; 4) airports; 5) seaports; 6) public utility vehicles; and 7) expressways and tollways.

SBN 2094 also provides a window for other public services to be reclassified as public utilities in the future for as long as they meet certain criteria, upon the recommendation of the National Economic and Development Authority (NEDA) to the President who may recommend to Congress the classification of a public service as a public utility. These criteria, as proposed in the bill, are: 1) the entity regularly supplies and directly transmits and distributes to the public through a network a commodity or service of public consequence; 2) the commodity or service is a natural monopoly that needs to be regulated when the common good so requires; 3) the commodity or service is necessary for the maintenance of life and occupation of the public; and 4) the commodity or service is obligated to provide adequate service to the public on demand. These four criteria would therefore serve to define the limits of a public utility.

Under the new proposed regime, all other industries previously listed in CA No. 146 which are not included in the specific list and do not meet the aforementioned criteria, are then considered to fall under the broader definition of "public services". While public utilities will be subject to more rigid regulatory requirements, this does not mean that public services will be largely left unregulated as they would still be covered by the relevant laws and administrative oversight of the appropriate agencies. Lastly, the proposed amendment also separates the list of designated public utilities into discrete provisions, in order that if any of these provisions would be declared unconstitutional, the separability clause can be applied by the courts.

Why is this reform beneficial?

Defining the boundaries between public utilities and public services will remove the vagueness and ambiguity in the regulatory environment. Vagueness, ambiguity and uncertainty in policies increase regulatory risk, a major cause of concern for potential investors. Regulatory risk is known to greatly dampen investor interest. Potential investors in public utilities in particular, where fixed costs are substantial, are always wary of situations where long-term contracts may not be honored or where policy reversals can happen anytime.

The closed list of industries which will henceforth be classified as public utilities will retain the stricter Constitutionally mandated rules such as maintaining nationality requirements in ownership and control and the need to apply for Congressional franchise. It is assumed that these stricter requirements will assuage fears of exposing these strategic and critical industries to risks that a more open regulatory regime will bring. Meanwhile, removing these restrictions from the rest of the sectors deemed as public services will hopefully bring in more investors, more innovation and more competition, all of which should lead to better services for consumers.

2) Instituting fairer rate-setting methodologies

All private companies even those that are engaged in public service are profit-driven. It is thus imperative that the proposed amendment to the PSA include updated and acceptable methodologies for calculating the most reasonable rates that a public service or public utility can charge to users. Rate-setting is a sensitive matter wherein the regulator must find the correct balance between the interest of the consuming public and the service providers. If rates are set too high, household consumers and other businesses that rely on the public service will suffer. Rates that are set too low, on the other hand, may discourage further investment in public services that would eventually be disadvantageous to the consumers.

In the Philippines, the methodology for determining what constitutes a reasonable rate of return for public services has been laid out in *Republic of the Philippines vs. Meralco, G.R. 141314, November 15, 2002, which states that*:

> *"The rate of return is a judgment percentage which, if multiplied with the rate base, provides a fair return on the public utility for the use of its property for service to the public. The rate of return of a public utility is not prescribed by statute but by administrative and judicial pronouncements. This Court has consistently adopted a 12 percent rate of return for public utilities. The rate base, on the other hand, is an evaluation of the property devoted by the utility to the public service or the value of invested capital or property which the utility is entitled to a return."*

Having a fixed 12 percent rate of return, however, is not always optimal for operators of public services, depending on the size of the firm and the risks associated with operating a public service. Utilizing a single methodology for determining rates across a myriad of public services, each with their nuances, is also not optimal as it is difficult to maintain and offers no flexibility should the situation requires changes in the rate-setting methodology.

Introducing an amendment to the PSA which would give regulators more flexibility in adopting various alternative forms of internationally accepted rate-setting methodologies as it may deem appropriate depending on the situation and promote greater efficiency in operations, would result in a situation beneficial for businesses and consumers alike. Whichever methodologies are ultimately adopted by the regulators, should also be subject to periodic review and updating to ensure they remain relevant, fair and reasonable.

3) Increasing penalties for violators

There is also a need to update the extremely outdated penalty provisions in the PSA. As it stands, CA No. 146 mandates a fine of not exceeding PhP200 per day for violations committed by public service providers. The penalty amount was set back in 1936 and has long since outlived its usefulness as a deterrent to erring firms. Revenues earned by public services are potentially in the millions of pesos per day, certainly far more than PhP200 per day penalty. There is always the possibility that firms would rather pay the said fine instead of correcting whatever prohibited act they are committing if it makes them more money. The penalties for violators under the law thus need to be set at a level high enough to serve as a disincentive for firms to misbehave and to strengthen the regulatory agencies in their enforcement mandate.

The proposed amendments to the PSA aim to introduce greater penalties for violators to address this weakness in the existing law. SBN 2094 seeks to impose a fine not less than the present value of the original fine based on the consumer price index, or imprisonment of not lower than 6 years and not higher than 12 years, or both, in the discretion of the court, as well as disgorgement of profits or treble damages.

"Disgorgement of profits" refers to the giving up or recapturing of profits traceable to a certain transaction or wrongdoing upon demand or by legal compulsion. In short, it refers to profits gained from illegal activities. The term "treble damages" refers to an additional sum, depending on the discretion of the concerned agency or court involved, which is thrice the amount of the monetary award granted. Put simply, "treble damages" is a kind of remedy wherein the amount that is proven in court to have been the damages caused by a particular firm for committing an illegal act will be paid three times the amount by the firm in question.

As regards the increase of the fine, the Philippines could look into the model used in the United States of America (USA) under the Federal Civil Penalties Inflation Adjustment Act, which requires Federal agencies to adjust civil penalty amounts within their jurisdiction for inflation every year. This would ensure that penalties would not become obsolete and virtually meaningless over the course of time. Hence, SBN 2094 provides for the penalty of a fine based on the consumer price index aside from the other proposed penalties.

4) Addressing national security concerns regarding foreign investments in critical industries

Since the proposed amendments to the PSA aim to open up several industries to foreign investors, there will be concerns related to national security risks. While national security has traditionally been limited to military and defense-related industries and infrastructure, the concept has broadened over the past decades and many countries no longer limit their idea of security to these areas alone.

Countries including the Philippines have over the years come to recognize the need for some sensitive economic sectors and industries to be factored into the national security concerns of the country. For instance, ownership or control of a country's water supply or electricity grid would have a tremendous impact on its national security. During those years when key industries like energy and telecommunications were State-run monopolies, there was minimal concern that these would fall under the influence of foreign powers.

With the need to bring in investment to these sectors, particularly when the investment comes from foreign countries whose interests may not necessarily be aligned with those of the host country, there arises the need to place greater safeguards in these industries. This concern becomes magnified when the foreign investment comes from a government-controlled entity, and even more so, when said foreign government has had an adversarial relationship with the country. The challenge then is to balance the interests of maintaining national security and protecting Philippine sovereignty without unnecessarily hampering the entry of much-needed investment and competition which is vital to continually improving key industries.

Wehrle and Pohl (2016) reviewed a number of policy approaches addressing national security in the context of foreign investment and categorized these into the following: 1) partial or total prohibitions of foreign investment in specified sectors (prohibitions); 2) prior government review of all investment proposals that meet legally defined criteria (reviews); and 3) scrutiny systems that identify individual, potentially problematic transactions, which are subsequently subjected to reviews (scrutinies). Countries reviewed in the study tended to use a combination of these approaches (Table 3).

Table 3. Sectors and Activities Associated with National Security Concerns in Selected Countries

Country	Sectors and Activities Associated with National Security
Australia	• Investment in "prescribed sensitive sectors" valued at over AUD 252 million, including: i) security/defense; ii) infrastructure (transport, telecoms and media); iii) natural resources: extraction of uranium or plutonium • Acquisitions of land • Investment of 5 percent or more in the media sector, regardless of value • Business and agribusiness acquisitions over stipulated threshold
Austria	• Security/national defense: defense goods production and security services • Infrastructure: energy and water supply, telecoms, transport and facilities in education and health services
China	• Security/national defense: military and military related businesses • Strategic enterprises: major equipment manufacturing industries • Infrastructure and transportation services, energy and resources, agricultural products, and key technologies
France	• National defense and security; electronic telecoms • Infrastructure: supply of water, electricity, gas, hydrocarbons and other sources of energy • Public health and activities of vital importance under Defence Code; money gambling
Japan	• Security/defense (weapons, nuclear power, airplanes, aerospace) • Infrastructure (electric/gas/water utilities; telecoms, railways) • Public safety (private security service, biological chemicals) • Key domestic industries (agriculture, petroleum, maritime transport)
Lithuania	• Energy, transport, information technology (IT) and telecoms and other infrastructure
Mexico	• Education and port services; shipping companies; construction/operation/exploitation of general railways and public services of railway transportation where foreigners wish to acquire more than 49 percent of capital stock of the company • Other sectors otherwise not restricted under the foreign investment law if investment exceeds a monetary threshold (approximately US$262 million in 2014)
Russian Federation	• Defense (nuclear materials and devices; weapons and military equipment and technology; coding and cryptographic equipment; aviation and space; security assessment and surveillance of infrastructure and means of transportation • Natural resources (geophysical processes, exploration and development of subsoil areas of federal significance, fisheries) • Media (television, radio and certain printing and publishing activities • Monopolies (certain communications and railway companies and natural monopolies
United States of America	• Critical infrastructure (defined as systems and assets, whether physical or virtual, so vital that the incapacity or destruction of such would have a debilitating impact on national security; this includes major energy assets) • Critical technologies (include defense items, export controlled items, chemical and biological weapons proliferation, nuclear proliferation or missile proliferation reasons, and selected items that may threaten plant, animal, or human health) • Businesses that provide products, technical data, technology or services to USA government agencies, state and/or local governments • Potentially any other sector or activity as long as the "covered transaction" is determined by reviewing body that it may have an impact on national security

Source: Wehrle and Pohl, OECD (2016).

The authors also argued that the three distinct policy approaches are different means to "pre-select and filter, among all possible foreign investment proposals, a subset of those foreign investment proposals that a given country deems most likely to threaten its national security. This filter is necessary to reduce the number of transactions subject to review, both to keep the economy open to foreign capital and to reduce the administrative burden for governments and investors alike." They also pointed out that in designing an appropriate policy approach for addressing national security concerns in relation to investments, there are two factors to consider, specifically: 1) characteristics of the asset (industry, sector) subject to investment, and 2) characteristics of the investor.

It is essential that the characteristics of the asset be defined. A country may approach this by prescribing a specific sector list that it considers to be critical or sensitive to national security. The advantage of this approach, where the sectors are clearly and definitely circumscribed, is that there is clarity and predictability for investors. On the other hand, this approach may also limit the flexibility of governments to add or remove sectors to the list as risk analyses change over time. Alternatively, a country may define their own concept of what constitutes “national security” and apply this concept to sectors as necessary when foreign investment is imminent.

The characteristics of the investor is also important to look at. Specifically, governments tend to consider two things: 1) the nationality of the investor; and 2) whether this investor is from the private sector or is under government control.

Typically, countries operate under the assumption that national security is more likely to be threatened by foreign investors rather than investors who are nationals and thus tailor their restrictions accordingly. Additionally, some countries also treat foreign government-controlled investors differently from foreign private investors with regard to determining national security threats, with Australia, Russia and the USA being notable examples of these. The implication here is that foreign government-controlled investors pose a greater potential threat to a country’s security and thus should be subject to greater review or scrutiny before being allowed to invest.

There are a few other safeguard measures proposed under SBN 2094 aimed at protecting the country’s national security. For one, it provides that foreign nationals shall not be allowed to own more than 40 per centum of capital in public services engaged in the operation and management of critical infrastructure unless the country of such foreign national accords reciprocity to Philippine nationals as may be provided by foreign law, treaty or international agreement.

Furthermore, foreign nationals shall be allowed employment in the country only after the determination of non-availability of a competent, able and willing Filipino for the same job. Any foreign national seeking admission to the Philippines for employment purposes and any public service which desires to engage a foreign national for employment in the country must obtain an employment permit pursuant to Presidential Decree No. 442, otherwise known as the Labor Code of the Philippines, as amended.

Lastly, in order to ensure information security, SBN 2084 shall require public services in critical infrastructure to obtain and maintain relevant International Organization for Standardization (ISO) certification attesting to compliance with latest global standards in information security, as prescribed by the Department of Information and Communications Technology (DICT).

It must be noted that there are also already some measures in the 1987 Philippine Constitution that address national security risks. Section 17 under Article XII on National Economy and Patrimony provides that the State may temporarily take over or direct operation of any privately-owned public utility or business affected with public interest in times of national emergency when the public interest so requires (although an enabling law is needed before such takeover powers are exercised). Correspondingly, Section 11 of Article

XII also serves as another safeguard as it allows Congress to amend, alter or repeal the franchise or right to operate of a public utility when the common good so requires.

With all of these safeguard measures to be part of the amendments to the PSA, it is hoped that national security risks would be mitigated without unnecessarily hampering the flow of investment into the country towards the improvement and modernization of crucial public services.

Efforts to legislate amendments to the PSA have been well underway this 18th Congress. Both Houses of Congress have approved on Third Reading their respective versions of the PSA amendments and will already be subject for a Bicameral Conference Committee on their disagreeing provisions. The House of Representatives has approved House Bill No. (HBN) 78 on Third Reading on March 10, 2020 while the Senate has approved SBN 2094 on December 15, 2021. HBN 78 or the "New Public Service Act" under Committee Report No. 5 was sponsored by Representative Sharon Garin as Chairperson of the Committee on Economic Affairs with Representative Joey Sarte Salceda as its principal author.

On the other hand, SBN 2094 or the "Public Service Act of 2021" under Committee Report No. 191, which was in substitution of SBNs 13, 318, 419, 531, 1257 and 1372, was sponsored by Senator Grace Poe as Chairperson of the Committee on Public Services with Senate Minority Leader Franklin Drilon as its principal author and Senators Poe, Francis Pangilinan, Juan Miguel Zubiri, Imee Marcos and Francis Tolentino as co-authors. The Senate has designated Senators Poe, Ramon Bong Revilla Jr., Sherwin Gatchalian, Zubiri and Drilon as conferees to the Bicameral Conference Committee.

V. Summary and Conclusion

Even before the COVID-19 pandemic began, the Public Service Act, as amended, was already in dire need of updating. Many features of the 85-year-old law had simply not caught up to the economic and technological developments in the sectors it had been regulating and governing. This resulted in a regulatory environment that was not conducive to bringing in new investors in several important sectors, particularly in telecommunications and transportation, to the detriment of consumers. The pandemic has only made the need to improve these sectors even more urgent. Amending the law would help encourage the entry of more investors, and the resulting competition and innovation are expected to translate to better prices, wider coverage and quality of services.

In summary, the four key amendments that are needed to modernize the Public Service Act, as amended, should be as follows: 1) provide a clear definition of what constitutes a public utility; 2) increase the penalties for violators of the law to make them more punitive; 3) allow more flexibility in determining appropriate mechanisms for setting rates; and 4) institute a review mechanism to screen investments in critical infrastructure as a means of safeguarding national security. If these four amendments are instituted, it would go a long way towards making the law more relevant and responsive to the needs of the country in the new normal and beyond.

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This Policy Brief was principally prepared by Ms. Irene M. Sanchez with inputs from Microeconomics Sector Head Peter Anthony S. Turingan, under the supervision of the SEPO Directors and the overall guidance of its Director General.