

GSIS and SSS: Locating State-Owned Pension Institutions within the Public Governance and Accountability Debate in Light of the GOCC Governance Act of 2011

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I. THE CONTROVERSIES

The Government Service and Insurance System (GSIS) and the Social Security System (SSS) are two government agencies which are no strangers to controversy. In the month of September of this year alone, different cases of unremitted or missing contributions surfaced. In the Autonomous Region of Muslim Mindanao, a reported ₱1.6 billion worth of deducted contributions was supposedly unremitted to the GSIS, leaving government employees in the region unable to avail of benefits such as housing and salary loans.¹ Days later, news broke out about a letter to Ombudsman Conchita

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Carpio-Morales sent by the Department of Education National Employees Union (DepEd-NEU), where they asserted that premium contributions deducted from their salaries, as well as those of 800,000 active and retired teachers and employees for the years 1997 to 2010, were never turned over by either DepEd or the Land Bank of the Philippines.² Describing it as “what could possibly be the biggest and longest-running scam in the DepEd,”³ the anomaly became evident when the DepEd, the Department of Budget and Management (DBM), and the GSIS entered into a tripartite agreement where the DBM agreed to assume payment for the employer’s share in the missing contributions.⁴ The Union pleaded that immediate action be taken against “[t]hose responsible [for] robbing [them] for more than 13 years and [who] have successfully kept it hidden during this period, possibly through collusion.”⁵

Questionable investments have also been highlighted in the news. Who can forget the GSIS-Manila Electric Company (MERALCO) controversy which broke out in 2008? The GSIS, then under the leadership of Chairman Winston F. Garcia, became embroiled in an ownership tussle with the Lopez family who, at that time, was the majority stockholder in the country’s largest electrical distributor.⁶ Although strongly denied by the administration of former President Gloria Macapagal-Arroyo (PGMA), many groups believed that Malacañang was heavily involved in the GSIS’ alleged take-over bid.⁷ Others even went on to accuse officials of using members’ funds

Cite as 57 ATENEO L.J. 906 (2012).

1. Norman Bordadora, *Senate to Trace ₱1.6B in Unremitted GSIS Premiums From ARMM Employees*, PHIL. DAILY INQ., Sep. 12, 2012, available at <http://news.info.inquirer.net/268862/senate-to-trace-p1-6b-in-unremitted-gsis-premiums-from-armm-employees> (last accessed Nov. 15, 2012).
2. Michael Punongbayan, *Ombudsman Asked to Probe Alleged DepEd Anomaly*, PHIL. STAR, Sep. 19, 2012, available at <http://www.philstar.com/Article.aspx?publicationSubCategoryId=63&articleId=850428> (last accessed Nov. 15, 2012).
3. *Id.* (citing Letter from the Department of Education National Employees Union (DepEd-NEU) National President Domingo Alidon (Sep. 17, 2012)).
4. Punongbayan, *supra* note 2.
5. *Id.*
6. See Daxim Lucas, et al., *GSIS on Meralco: Fight Has Just Begun*, PHIL. DAILY INQ., May 29, 2008, available at <http://opinion.inquirer.net/inquireropinion/columns/view/20080529-139412/GSIS-on-Meralco-Fight-has-just-begun> (last accessed Nov. 15, 2012).
7. See GMA News Online, *Malacañang Denies Gov’t. Plans to Take Over Meralco*, available at <http://www.gmanetwork.com/news/story/94365/news/nation/malacanang-denies-gov-t-plans-to-take-over-meralco> (last accessed Nov. 15, 2012) & Gabriela Women’s Party, Gabriela, GSIS Fund Owners,

to benefit PGMA and her cronies.⁸ Also, early this year, some members of the House of Representatives pushed for a congressional inquiry into the subsidized operations of the GSIS Family Bank which, at that time, was operating at an alleged ₱2.5 billion loss.⁹ Despite the foreseen possibility of this staggering figure still rising up to a quarter of a billion pesos, the GSIS continued infusing money into the affiliated bank.¹⁰ Allegations of wrongful and careless management of the contributions of GSIS members abounded.¹¹ With a distinct likelihood that the money may never be recovered, many questioned what they believed to be irresponsible indulgence on the part of the institution.¹²

The SSS has likewise been put in the spotlight when its plan to invest ₱50 billion in different public-private partnership projects in the country was announced.¹³ To accomplish such objective, a higher monthly contribution rate from the members was proposed, which the SSS claimed would later result to a 10% across-the-board increase in pension benefits.¹⁴ Remembering the controversial and risky sale of its ₱62 million shares in MERALCO, the SSS was reminded that “[w]hile there is a need to make good returns on investments for continued service and benefits, it should still be cautious on the management of its member[s]’ contributions.”¹⁵

Denounce Malacanang-Garcia Bid for Meralco Takeover, *available at* <http://gabrielawomensparty.net/news/press-releases/gabriela-gsis-fund-owners-denounce-malacanang-garcia-bid-meralco-takeover> (last accessed Nov. 15, 2012).

8. See Alliance of Concerned Teachers, News Release: “Garcia is Using GSIS Members’ Funds to Enrich Malacañang’s Cronies,” *available at* <http://www.arki bongbayan.org/breakingnews/03-ACTstatementonGarcia.txt> (last accessed Nov. 15, 2012).
9. Ryan Ponce Pacpaco, Bleeding Bank Hurting GSIS, *available at* <http://www.journal.com.ph/index.php/news/top-stories/32580-bleeding-bank-hurting-gsis-solons> (last accessed Nov. 15, 2012).
10. *Id.*
11. *Id.*
12. *Id.*
13. See Maricel Cruz, SSS’ ₱50-b Deals Under Scrutiny, MANILA STAND. TODAY, Aug. 14, 2012, *available at* <http://manilastandardtoday.com/2012/08/14/sss-p50-b-deals-under-scrutiny/> (last accessed Nov. 15, 2012) & Philippine House of Representatives Public Relations and Information Bureau, Lawmaker Wants to Scrutinize SSS ₱50 Billion Public-Private Partnership Projects, *available at* <http://www.congress.gov.ph/press/details.php?pressid=6362> (last accessed Nov. 15, 2012).
14. Cruz, *supra* note 13.
15. *Id.*

Problems relating to the collection, remittance, and most importantly, investment and distribution of these contributed funds are ordinary hazards for social security schemes in general. However, for state-owned institutions such as the GSIS and SSS, these issues take on a different complexion. These entities, being government-owned or -controlled, are found within the sphere of public governance. Given all the controversies surrounding them, they also remain relevant to the public accountability debate, a discussion which has regained significance in the wake of the impeachment proceedings against former Chief Justice Renato C. Corona.¹⁶ During those months of trial, the words “transparency,” “disclosure,” “trust,” and “fidelity” were thrown around as challenges to all those occupying a public office. Once again, the constitutional mandates of “[p]ublic office is a public trust”¹⁷ and “[p]ublic officers and employees must, at all times, be accountable to the people”¹⁸ were reinforced in the national consciousness. Thus, the main question is: How will these institutions be governed and how will they remain accountable to all the relevant stakeholders, taking into consideration the numerous competing interests involved?

This Essay seeks to map out the position of pension fund management within the discourse of public governance and accountability. To do so, it will answer three specific questions: First, what are the peculiar features of state-owned pension institutions?; second, how do these institutions operate and function in a politicized landscape such as the Philippines?; and third, are there effective mechanisms in place to mediate the interplay between politics and public duty? These queries shall be studied in relation to the framework set by Republic Act (R.A.) No. 10149 or the GOCC Governance Act of 2011.¹⁹

II. PENSION FUND MANAGEMENT BY STATE-OWNED INSTITUTIONS

A. Pension Funds

A pension fund, or what is also known as a pension trust, pension plan, or social security scheme, is basically a pool of contributions put in the care and custody of a particular entity which will later on be distributed to its

16. See generally GMA News Online, Timeline: The Chief Justice on Trial, available at <http://www.gmanetwork.com/news/cjtrial> (last accessed Nov. 15, 2012).

17. PHIL. CONST. art. XI, § 1.

18. PHIL. CONST. art. XI, § 1.

19. An Act to Promote Financial Viability and Fiscal Discipline in Government-Owned-or-Controlled Corporations and to Strengthen the Role of the State in its Governance and Management to Make Them More Responsive to the Needs of Public Interest and for Other Purposes [GOCC Governance Act of 2011], Republic Act No. 10149 (2011).

contributing members generally in the form of retirement benefits. Technically, it can refer to the fund properly, which is commonly

established by an employer to facilitate and organize the investment of employees' retirement funds contributed by the employer and employees. The pension fund is a common asset pool meant to generate stable growth over the long term, and provide pensions for employees when they reach the end of their working years and commence retirement.²⁰

Conversely, it may also refer to the institution itself, an “institutional investor, which collect[s], pool[s] and invest[s] funds contributed by sponsors and beneficiaries to provide for the future pension entitlements of beneficiaries.”²¹ In general, its primary benefit is security: it allows the contributing members to accumulate savings over time which they can latch on to for support during their retirement.²² The types of pension trusts differ depending on various factors such as who contributes to the fund or the type of participation (contributory or non-contributory); whether it is optional or compulsory; what sector is covered (public or private); etc.²³

Apart from being a keeper, pension institutions are also financial intermediaries — “[s]ince early withdrawal of funds is usually restricted or

20. Wall Street Global, Glossary of Financial Terms, *available at* <http://gim.wallstreetglobal.com/Glossary4.aspx> (last accessed Nov. 15, 2012). *See also* Investopedia, Pension Fund, *available at* <http://www.investopedia.com/terms/p/pensionfund.asp#axzz2826aGzXR> (last accessed Nov. 15, 2012).

21. E. Philip Davis, Pension Funds, Financial Intermediaries, and the New Financial Landscape (Discussion Paper No. PI-0010) 2, *available at* <http://www.pensions-institute.org/workingpapers/wp0010.pdf> (last accessed Nov. 15, 2012) (citing E. PHILIP DAVIS, PENSION FUNDS, RETIREMENT-INCOME SECURITY AND CAPITAL MARKETS, AN INTERNATIONAL PERSPECTIVE (1995)).

22. Davis, *supra* note 21, at 2.

23. *See* BLACK'S LAW DICTIONARY 3592 (8th ed. 2004). *See also* Davis, *supra* note 21, at 3 (citing Zvi Bodie, *Pensions as Retirement Income Insurance*, 28 J. ECON. LITERATURE 28, 28-49 & E. PHILIP DAVIS & B. STEIL, INSTITUTIONAL INVESTORS (2000)). It provides that —

Pension funds are typically sponsored by employers, such as companies, public corporations, industry or trade groups; accordingly, employers as well as employees typically contribute. Funds may be internally or externally managed. Returns to members of pension plans backed by such funds may be purely dependent on the market (defined contribution funds) or may be overlaid by a guarantee of the rate of return by the sponsor (defined benefit funds). The latter have insurance features in respect of replacement ratios (pensions as a proportion of income at retirement) subject to the risk of bankruptcy of the sponsor, as well as potential for risk transfers between older and younger beneficiaries, which are absent in defined contribution funds[.]

Davis, *supra* note 21, at 3.

forbidden, pension funds have long term liabilities, allowing holding of high risk and high return instruments.”²⁴ Throughout the life of the plan, their collections are intermediated into different financial options such as stocks, bonds, loans, and other investments, allowing the fund to grow and multiply.²⁵ Undoubtedly, one of the most attractive features of the pension fund as an investor is “[the] risk pooling for small investors, providing a better trade-off of risk and return than for direct holdings[.]”²⁶ Therefore, members expect not only that their money will be safely held in trust for them but also that their money will be invested wisely.

B. GSIS and SSS

In the Philippines, there are two central institutions which are entrusted with pension funds: the GSIS and the SSS. Briefly, the former covers government employees while the latter caters to employees in the private sector.²⁷ Regardless, they do have the same optional and mandatory retirement ages: 60 and 65, respectively.²⁸ Also, they both follow the “defined-benefit scheme.”²⁹

The GSIS was born in 1936 through the passage of Commonwealth Act No. 186³⁰ and is now governed by Presidential Decree No. 1146, as amended by R.A. No. 8291 or The Government Service Insurance System Act of 1997.³¹ It was created for the promotion of the efficiency and welfare

24. *Id.*

25. *Id.*

26. *Id.*

27. An Act to Create and Establish a “Government Service Insurance System,” to Provide for Its Administration, and to appropriate the Necessary Funds Therefor [Government Service Insurance Act], Commonwealth Act No. 186, § 2 (1936) & An Act to Create a Social Security System Providing Sickness, Unemployment, Retirement, Disability and Death Benefits for Employees [Social Security Law], Republic Act No. 1161, as Amended, § 8 (c)-(d) (1954).

28. Ernesto Reyes, *The Philippines, in* PENSION SYSTEMS IN EAST AND SOUTHEAST ASIA: PROMOTING FAIRNESS AND SUSTAINABILITY 68 (Donghyun Park ed., 2012).

29. *Id.* at 66. A “defined-benefit scheme” is a pension system where “contributions from current workers pay for the benefits of current retirees[.]” Donghyun Park & Gemma Estrada, *Introduction to* PENSION SYSTEMS IN EAST AND SOUTHEAST ASIA: PROMOTING FAIRNESS AND SUSTAINABILITY 3 (Donghyun Park ed., 2012).

30. Government Service Insurance Act, § 3.

31. Amending, Expanding, Increasing and Integrating the Social Security and Insurance Benefits of Government Employees and Facilitating the Payment Thereof Under Commonwealth Act No. 186, As Amended, and for Other Purposes [Revised Government Service Insurance Act of 1977], Presidential

of government employees.³² Membership in the GSIS is compulsory for all government employees, regardless of their status, except members of the Judiciary and Constitutional Commissions; those serving the Armed Forces of the Philippines and Philippine National Police; and contractual employees.³³ It offers the following benefits to its members:

- (1) compulsory life insurance;³⁴
- (2) optional life insurance;³⁵
- (3) retirement benefits;³⁶
- (4) disability benefits for work-related contingencies;³⁷ and
- (5) death benefits.³⁸

In addition to its social security functions, it is also charged with the administration of the General Insurance Fund which insures all assets and properties that have government insurable interests.³⁹ By July of this year, it has gained ₱46.4 billion in net revenue as a result of “higher contributions of government employees and improved income from equity investments.”⁴⁰ Of this figure, almost half can be attributed to income from investments (₱22.5 billion).⁴¹ At present, it serves 350,000 beneficiaries.⁴²

Decree No. 1146, as Amended (1977). This Decree has been amended by An Act Amending Presidential Decree No. 1146, As Amended, Expanding and Increasing the Coverage and Benefits of the Government Service Insurance System, Instituting Reforms Therein and for Other Purposes [The Government Service Insurance System Act of 1997], Republic Act No. 8291 (1997).

32. The Government Service Insurance Act of 1997, § 3.

33. Revised Government Service Insurance Act of 1977, § 3.

34. *Id.* § 24.

35. *Id.* § 26.

36. *Id.* § 13.

37. *Id.* §§ 15-19.

38. *Id.* §§ 20-22.

39. Government Service Insurance System, The GSIS, available at <http://www.gsis.gov.ph/default.php?type=main&id=28> (last accessed Nov. 15, 2012).

40. *GSIS Says Income Rose 14% to ₱46.4B*, MANILA STANDARD TODAY, Sep. 8, 2012, available at <http://manilastandardtoday.com/2012/09/08/gsis-says-income-rose-14-to-p46-4b/> (last accessed Nov. 15, 2012) [hereinafter GSIS Income Increase].

41. *Id.*

42. *Id.*

As for its counterpart for the private sector, R.A. No. 1161, as amended by R.A. No. 8282 or the Social Security Act of 1997,⁴³ states that the SSS aims to “promote social justice and provide meaningful protection to members and their beneficiaries against the hazards of disability, sickness, maternity, old age, death, and other contingencies resulting in loss of income or financial burden.”⁴⁴ Generally, membership in the SSS is mandatory for employees 60 years old and above and their employers.⁴⁵ As of March 2012, the SSS has 20 million employee-members and a posted revenue of ₱35.3 million for the period of January to March 2012, a combined figure from the contributions and investments.⁴⁶

The common characteristics of the GSIS and the SSS are indubitable. First, both are government-owned or -controlled corporations (GOCCs). As such, they are agencies “vested with functions relating to public needs whether governmental or proprietary in nature, and *owned by the Government of the Republic of the Philippines*.”⁴⁷ Second, and more specifically, they are government financial institutions or those which are “collecting or transacting funds or contributions *from the public* and [which] places them in financial instruments or assets such as deposits, loans, bonds[,] and equity[.]”⁴⁸ Third, they are both governed by *Presidential appointees*:⁴⁹ the GSIS has its Board of Trustees while the SSS has a body called the Social Security Commission (SSC), which perform the same functions.⁵⁰ Fourth, despite these characteristics, what they hold are not public funds or property; but, in fact, *private funds* of the contributing members.

C. The Stakeholders

43. Social Security Law. This law has been amended by An Act Further Strengthening the Social Security System Thereby Amending for This Purpose, Republic Act No. 1161, As Amended, Otherwise Known as the Social Security Law [Social Security Act of 1997], Republic Act No. 8282 (1997).

44. *Id.* § 2.

45. *Id.* § 9.

46. Social Security System, Membership Facts & Figures, *available at* <https://www.sss.gov.ph/sss/index2.jsp?secid=845&cat=6&pg=null> (last accessed Nov. 15, 2012) & Social Security System, Contributions, *available at* <https://www.sss.gov.ph/sss/index2.jsp?secid=849&cat=6&pg=null> (last accessed Nov. 15, 2012).

47. GOCC Governance Act of 2011, § 3 (o) (emphasis supplied).

48. *Id.* § 3 (m) (emphasis supplied).

49. *Id.* § 15.

50. Government Service Insurance System, Members of the Board of Trustees, *available at* <http://www.gsis.gov.ph/trustees.php> (last accessed Nov. 15, 2012) & Social Security System, Corporate Profile, *available at* <https://www.sss.gov.ph/sss/index2.jsp?secid=397&cat=5&pg=null> (last accessed Nov. 15, 2012).

Given the characterization of state-owned pension institutions enumerated in the preceding Section, it can be seen that there are three major stakeholders interacting in this context. They are the State, the governing bodies of the GOCCs, and the contributing members.

I. The State, as the owner of the GOCCs.

The State has made it a policy to be not just an owner of these GOCCs but an active one at that.⁵¹ Since the State owns “at least a majority of the outstanding capital stock” of the GOCCs,⁵² it intends that:

- (b) The operations of GOCCs are rationalized and monitored centrally in order that government assets and resources are used efficiently and the government exposure to all forms of liabilities including subsidies is warranted and incurred through prudent means;
- (c) The governance of GOCCs is carried out in a transparent, responsible[,] and accountable manner[,] and with the utmost degree of professionalism and effectiveness;
- (d) A reporting and evaluation system, which will require the periodic disclosure and examination of the operations and management of the GOCCs, their assets and finances, revenues and expenditures, is enforced;
- (e) The governing boards of every GOCC and its subsidiaries are competent to carry out its functions, fully accountable to the State as its fiduciary, and acts in the best interest of the State; [and]
- (f) Reasonable, justifiable and appropriate remuneration schemes are adopted for the directors/trustees, officers[,] and employees of GOCCs and their subsidiaries to prevent or deter the granting of unconscionable and excessive remuneration packages[.]⁵³

These objectives are not only laudable but also speak of the State’s desire to aggressively assert its ownership rights over the GOCCs. All of these items are directed towards employing a stronger hold over them and making sure that the State reigns in their operations. Presumably, when the State exercises such ownership rights, it does so primarily for the sake and benefit of the contributing members whose funds are entrusted to the GSIS and the SSS.⁵⁴

51. GOCC Governance Act of 2011, § 2.

52. *Id.* § 3 (o).

53. *Id.* § 2 (b)-(f).

54. Governance Commission for GOCCs, Ownership and Operations Manual Governing the GOCC Sector, GCG Memorandum Circular No. 2012-06 [GCG Memo. Circ. No. 2012-06], art. 6 (2012). This Manual is “a DRAFT document that [has] been submitted to the President for his approval.” See Governance Commission for GOCCs, Memorandum Circulars, *available at*

Secondarily, it could be acting for its own sake since any fund mismanagement on the part of these GOCCs will trigger the State's guarantor responsibilities.⁵⁵

Another way of looking at the scope of the State's "extensive participation"⁵⁶ in pension fund management is as follows:

- (a) as regulator;
- (b) as owner;
- (c) as a market participant;
- (d) as a fiduciary agent; and
- (e) as direct intervenor in market operations.⁵⁷

2. The Board of Trustees and the SSC, as the governing bodies of the GOCCs.

Other stakeholders are the governing bodies of the GSIS and the SSS. Considered as "fiduciaries of the State,"⁵⁸ the members of these bodies are answerable to the State directly and to the contributing members indirectly. They are mandated to:

- (a) Act with utmost and undivided loyalty to the GOCC;
- (b) Act with due care, extraordinary diligence, skill, and good faith in the conduct of the business of the GOCC;
- (c) Avoid conflicts of interest and declare an interest they may have in any particular matter before the Board;
- (d) Apply sound business principles to ensure the financial soundness of the GOCC; and
- (e) Elect and/or employ only Officers who are fit and proper to hold such office with due regard to the qualifications, competence, experience[,] and integrity[.]⁵⁹

3. The contributing members, as owners of the funds.

<http://www.gcg.gov.com/memorandumcirculares.htm> (last accessed Nov. 15, 2012).

55. GCG Memo. Circ. No. 2012-06, art. 6.

56. Jeffrey Carmichael & Robert Palacios, *A Framework for Public Pension Fund Management*, in PUBLIC PENSION FUND MANAGEMENT: GOVERNANCE, ACCOUNTABILITY AND INVESTMENT POLICIES 8 (Alberto R. Musalem & Robert J. Palacios eds., 2003).

57. *Id.*

58. GOCC Governance Act of 2011, § 19.

59. *Id.*

Lastly, there are the contributing members, whether government or private employees, who have every right to demand responsible intermediation of their funds. Whether these investments pay off is an important consideration and is a matter of highest concern. After all, these employees worked and labored for years to earn that money which they expect to receive and collect at a higher rate after some time. This right is, in fact, considered protected property —

In a pension plan where employee participation is mandatory, the prevailing view is that employees have contractual or vested rights in the pension where the pension is part of the terms of employment. The reason for providing retirement benefits is to compensate service to the government [and to private companies]. Retirement benefits to government [and private] employees are part of emolument to encourage and retain qualified employees[.]⁶⁰

Consequently, “[t]he funds of the GSIS [and the SSS] shall not be used for purposes other than what are provided for under [their Charters]. Moreover, no portion of the funds ... shall accrue to the General Fund of the national government[.]”⁶¹

It would be a serious mistake to take this listing of stakeholders at its face value and to oversimplify their dynamics. While there are only three major stakeholders, each represent several interests or can be seen acting in different capacities. Thus, the possibility of these interests competing and conflicting with each other is more real than imagined as will be discussed subsequently.

III. THE SOCIALIZATION, POLITICIZATION, AND CORRUPTION OF PENSION FUNDS

A look at the concept of “pet projects,” which is commonly associated with pork barrel legislation,⁶² is relevant at this point. Every government official/politician/person in power has programs which are considered to be of personal importance and significance to him. For this purpose, they are allocated a certain budget to be spent according to their discretion.⁶³ These

60. *Government Service Insurance System v. Montesclaros*, 434 SCRA 441, 448 (2004) (citing 60A AM. JUR. 2D *Pensions and Retirement Funds* § 1620 (1988) & *Government Service Insurance System v. Civil Service Commission*, 245 SCRA 179, 188 (1995)).

61. Revised Government Service Insurance Act of 1977, § 34.

62. See US Legal, *Pork Barrel Legislation Law & Legal Definition*, available at <http://definitions.uslegal.com/p/pork-barrel-legislation/> (last accessed Nov. 15, 2012).

63. Agatha Guidaben, *A Buffet of Pork: ₱25 Billion at Lawmakers' Discretion*, available at <http://www.gmanetwork.com/news/story/265709/news/specialreports/a-buffet-of-pork-p25-billion-at-lawmakers-discretion1> (last accessed Nov. 15, 2012). In this Article, pork barrel was defined as “that portion of the

can cover a wide range of ventures — it can be “in the form of ‘hard’ projects or infrastructure projects such as roads, bridges, school buildings, and the like. Pork barrel funds may also be allocated for ‘soft,’ non-infrastructure projects that are more in the vein of financial assistance like scholarships and livelihood programs.”⁶⁴

That this is a “[p]oliticization in the budget process”⁶⁵ is evident: money is allocated to projects which are beneficial to a limited constituency, instead of the general public, in return for that constituency’s political support.⁶⁶ But its advantage cannot be merely restricted to gaining electoral credit among the voters —

[T]he way in which the political intentions of the President play a role in pork-barrel politics has not been sufficiently elaborated. Simplistic understanding of the pork-barrel does not recognize the fact that pork-barrel is not merely a possession of the local politicians, but rather an outcome of mutual interactions *between the local politicians and the President*.⁶⁷

Thus, pork barrel legislation is also reflective of the relations of the legislator to the President. Management of the discretionary funds can likewise help the official gain political leverage in Malacañang by catering to the Chief Executive’s own pet projects or by simply acceding to his orders and demands. This, of course, does not disregard the truth that there is also social value in these projects. Although advantages can be gained by those with pork barrel funds, it would be an inaccurate generalization to say that the public does not benefit at all from these ventures.

Pension fund management is, unfortunately, not insulated from this type of politicization. These funds can be manipulated in the same way pork barrel funds are. In the previous Section, the State was described as an active stakeholder representing two interests: that of the contributing members as fund owners and that of its own as a guarantor. But when politics and other social policy objectives enter the picture, then the stakeholder State can become confusingly intertwined with the persona of whoever is running the government. The current administration may be able to wield its political

national budget that is widely left to the legislators’ discretion when it comes to how the funds are spent.” *Id.* See also AllWords.com, Pet Project, *available at* <http://www.allwords.com/word-pet+project.html> (last accessed Nov. 15, 2012).

64. Guidaben, *supra* note 63.

65. Kohei Noda, Politicization of Philippine Budget System: Institutional and Economic Analysis on “Pork-Barrel” (A Part of the Policy Research Institute (PRI) Discussion Paper Series (No.11A-04)) 1, *available at* http://www.mof.go.jp/pri/research/discussion_paper/ron219.pdf (last accessed Nov. 15, 2012).

66. See US Legal, *supra* note 62.

67. Noda, *supra* note 65, at 1 (emphasis supplied).

influence over the investment decisions of the members of the governing bodies to favor those ventures that will directly or indirectly advance its own pet projects or programs. After all, while these trustees or directors are public officials, they are also Presidential appointees. Thus, their loyalties can be split among the contributing members, the State, and their superiors in the administration. What is worse is when the problem moves from politicization to actual corruption where pension fund management is maneuvered by those in power to line their own pockets.

When the GSIS or the SSS has funds to be invested, what should be their main consideration? Is it the return they will be getting from these investments in behalf of the contributing members? A resounding “yes” *should* be the answer. But how will the governing boards deal with the pressure, if there is any, coming from the State/administration to intermediate these funds into certain pet projects? Just what are the boundaries of using GOCCs as “significant tools for economic development?”⁶⁸ What happens when under the guise of exercising active ownership over GOCCs, State interference becomes burdened with politics and corruption?

For example, in the middle of this year, the GSIS, along with three other partners, established the country’s largest-ever \$625 million infrastructure fund.⁶⁹ Contributing \$400 million to it, the GSIS is the biggest investor in what was named as the Philippine Investment Alliance for Infrastructure or PINAI. One of the aims of PINAI is “to fund [five to ten] projects costing \$50 million to \$125 million each, including those in the Public-Private Partnership Program of the Aquino administration.”⁷⁰ This move is, of course, understandable and even admirable, seeing as GOCCs’ operations are expected to be “consistent with national development policies and programs.”⁷¹ It would be unfair to treat all projects set by the administrations as pet projects or to indiscriminately view them as plans with corrupt motives. But this case also emphasizes how such decisions made by state-owned pension institutions can be a fertile ground for different conflict-of-interests scenarios, especially when the people in power or those representing the stakeholders are acting for their own greedy, selfish, political, or monetary interests. The gravity of the problem is underscored when it is again noted that what is at stake here are private funds of the contributing members.

68. GOCC Governance Act of 2011, § 2.

69. Christine Ubalde, GSIS, ADB Establish \$625-M Philippine Infra Fund, *available at* <http://www.interaksyon.com/business/39018/gsis-adb-establish-625-mphilippine-infra-fund> (last accessed Nov. 15, 2012).

70. *Id.*

71. GOCC Governance Act of 2011, § 2.

Succinctly, when these stakeholders clash, when they represent interests beyond what is lawful, and when politics come into play, shareholder risks are created. These risks can be categorized as follows:

- (1) failure of the government to meet its retirement income promises;
- (2) use (or misuse) of contributors' funds by the government to meet social policy objectives [or to achieve personal agenda] other than retirement income objectives;
- (3) underperformance of the fund due to the use of the contributors' funds for directed lending or as a captive source of finance for the government; and
- (4) loss of funds due to corruption or mismanagement.⁷²

Does the present Philippine framework for public pension fund management address these concerns?

IV. EVALUATING THE GOCC GOVERNANCE ACT OF 2011 IN RELATION TO PUBLIC GOVERNANCE AND ACCOUNTABILITY PRINCIPLES

A. *The GOCC Governance Act of 2011*

Aside from their respective Charters, the GSIS and the SSS are both governed by R.A. No. 10149 or the GOCC Governance Act of 2011.⁷³ This piece of legislation was born in an era of prevalent abuses and corruption in GOCCs.⁷⁴ This problem is not new; in fact, many administrations have sought to correct and address it.⁷⁵ But it was President Benigno S. Aquino III who made a significant and landmark move to concretize actions to remedy the situation. From the time he started campaigning in 2010 until his election and present administration, the President has always espoused the principle of *Tuwid na Daan*.⁷⁶ In the context of GOCCs, it meant halting the excessive spending as well as curbing the extravagant and lavish remuneration packages and benefits being

72. Carmichael & Palacios, *supra* note 56, at 8-9.

73. GOCC Governance Act of 2011.

74. Melissa R. Encanto-Tagarda, *Corporate Governance in the Philippines: The Emergence of a Regulating Office for State Owned Enterprises (A Paper Submitted to a Conference Entitled "Corporate Governance and Regulation: Outlining New Horizons for Theory and Practice," held at the University of Pisa)* 12, available at http://virtusinterpress.org/IMG/pdf/CORPORATE_GOVERNANCE_IN_THE_PHILIPPINES_The_Emergence_of_a_Regulating_Office_for_State_Owned_Enterprises_by_Melissa_R-_Encanto-Tagarda.pdf (last accessed Nov. 15, 2012).

75. See Encanto-Tagarda, *supra* note 74, at 6-12.

76. Encanto-Tagarda, *supra* note 74, at 12.

received by the officers of these institutions.⁷⁷ Initially, the President expressed his dissatisfaction by issuing Executive Orders which imposed a moratorium on increases in salary, allowances, and bonuses of employees and officers of GOCCs.⁷⁸ Then, through the sponsorship of Senator Franklin M. Drilon and Congressman Joseph Emilio A. Abaya, R.A. No. 10149 was passed into law.⁷⁹

The law is revolutionary because it presents “a paradigm shift in the governance of GOCCs.”⁸⁰ This once again reflects the desire of the State to pursue its active ownership rights over GOCCs. The law can be broken down into six main thrusts which are novel and present new opportunities for the State to reinforce its hold and control over GOCCs and make them more accountable. Briefly, these thrusts are as follows:

- (1) Directors, trustees, and officers of GOCCs are not just directors and officers *per se*, they are also public officials. As public officials, they are subject to the relevant qualifications, disqualifications, and even criminal liabilities, provided for in the Anti-Graft and Corrupt Practices Act⁸¹ and the Code of Conduct and Ethical Standards for Public Officials and Employees.⁸²

77. Francis Lim, *A World-Class GOCC System in the Making?*, PHIL. DAILY INQ., June 22, 2011, available at <http://business.inquirer.net/4931/a-world-class-gocc-system-in-the-making> (last accessed Nov. 15, 2012).
78. See Office of the President, Directing the Rationalization of the Compensation and Position Classification System in the Government-Owned and -Controlled Corporations (GOCCs) and Government Financial Institutions (GFIs), and for Other Purposes, Executive Order No. 7 [E.O. No. 7], § 9 (Sep. 8, 2010) & Office of the President, Prescribing Rules to Govern the Compensation of Members of the Board of Directors/Trustees in Government-Owned or -Controlled Corporations Including Government Financial Institutions, Executive Order No. 24 [E.O. No. 24], §§ 7-12 (Feb. 10, 2011).
79. Encanto-Tagarda, *supra* note 74, at 12.
80. Ma. Angela E. Ignacio, Commissioner, Governance Commission for GOCCs, Philippines’ New Paradigm on Public Corporate Governance 3, Remarks at the 1st Philippine International Corporate Governance Forum in behalf of Chairman Cesar L. Villanueva (Aug. 15, 2012) (transcript available at <http://www.gcggov.com/documents/Speech%20for%20Int%20Phil%20Corp%20Gov%20Forum%2014%20August%202012.pdf>) (last accessed Nov. 15, 2012).
81. Anti-Graft and Corrupt Practices Act, Republic Act No. 3019 (1960).
82. Ignacio, *supra* note 80, at 4-5 & An Act Establishing a Code of Conduct and Ethical Standards for Public Officials and Employees, to Uphold the Time-Honored Principle of Public Office Being a Public Trust, Granting Incentives and Rewards for Exemplary Service, Enumerating Prohibited Acts and Transactions and Providing Penalties for Violations Thereof and for Other

- (2) They are expected to exercise extraordinary diligence in the conduct of the business of GOCCs and not just ordinary diligence expected of directors and officers of private corporations.⁸³
- (3) Their term of office is now limited to one year and any reappointment shall be subject to the results of their performance scorecards.⁸⁴
- (4) The Chief Executive Officer (CEO), head of the management of the GOCCs, is now to be elected by the members of the governing boards from among them and is now subject to their removal and disciplinary powers. This was unlike before when the CEO was appointed by the President. This change realigns the command responsibility — the CEO is accountable to the governing board and it is the governing board which is accountable to the President.⁸⁵
- (5) A “uniform and standard compensation and position classification system” is established so that any possibility of abuse is foreclosed.⁸⁶
- (6) Rationalization of the GOCC sector is mandated, thus it shall be evaluated and irrelevant GOCCs shall be “reorganized, merged, streamlined, abolished or privatized.”⁸⁷

Apart from these thrusts, the most important change brought about by the law is the creation of the Governance Commission for GOCCs (GCG).⁸⁸ This independent agency has a wide range of regulatory, supervisory, monitoring, oversight and coordinating powers over GOCCs, their governing boards, and their officers and employees.⁸⁹ It is the central agency intended to implement the provisions of R.A. No. 10149 and usher in a new era of public governance in the GOCC sector.⁹⁰ Some of the powers of the GCG are:

Purposes [Code of Conduct and Ethical Standards for Public Officials and Employees], Republic Act No. 6713 (1989).

83. Ignacio, *supra* note 80, at 5. *See also* GOCC Governance Act of 2011, § 21.

84. Ignacio, *supra* note 80, at 5. *See also* GOCC Governance Act of 2011, § 17.

85. Ignacio, *supra* note 80, at 5-6. *See also* GOCC Governance Act of 2011, § 18.

86. Ignacio, *supra* note 80, at 6. *See also* GOCC Governance Act of 2011, § 23.

87. Ignacio, *supra* note 80, at 6. *See also* GOCC Governance Act of 2011, § 5 (a).

88. *See* GOCC Governance Act of 2011, ch. II.

89. *Id.*

90. Ignacio, *supra* note 80, at 3-4.

- (a) Evaluate the performance and determine the relevance of the GOCC[;]
- ...
- (c) In consultation with the relevant government agencies and stakeholders, adopt within one hundred eighty (180) days from its constitution, an ownership and operations manual and the government corporate standards governing GOCCs[;]
- ...
- (d) Without prejudice to the filing of administrative and criminal charges, recommend to the Board of Directors or Trustees the suspension of any member of the Board of Directors or Trustees who participated by commission or omission in the approval of the act giving rise to the violation or noncompliance with the ownership manual[;]
- (e) In addition to the qualifications required under the individual charter of the GOCCs and in the by-laws of GOCCs without original charters, the GCG shall identify necessary skills and qualifications required for Appointive Directors and recommend to the President a shortlist of suitable and qualified candidates for Appointive Directors;
- (f) Establish the performance evaluation systems including performance scorecards which shall apply to all GOCCs in general and to the various GOCC classification; [and]
- ...
- (j) Coordinate and monitor the operations of GOCCs, ensuring alignment and consistency with the national development policies and programs[.]⁹¹

Another significant portion of the law is the establishment of the Fit and Proper Rule, which refers to the “standard for determining whether a member of the Board of Directors/Trustees or CEO is fit and proper to hold a position in a GOCC which shall include, but not be limited to, standards on integrity, experience, education, training, and competence.”⁹² The Fit and Proper Rule

provides the framework for instilling professionalism and integrity in the GOCC [s]ector. For example, the Rule provides that Appointive Directors may be reappointed by the President ‘only if he/she obtains a performance score of above average in the ... immediately preceding year of tenure [based on the Commission’s evaluation.]’ Therefore, members of the GOCC [b]oards who refuse to heed the standards of governance ... or who do not meet the target commitments they have made to the Commission run the risk that they cannot be re-appointed by the President by the GCG

91. GOCC Governance Act of 2011, § 5 (a), (c)-(f), & (j).

92. *Id.* § 3 (j).

simply not including their names in the shortlist for re-appointment based on good cause.⁹³

As the title of R.A. No. 10149 states, these Provisions are meant to emphasize financial viability and fiscal discipline in the sector and to mandate State governance and management over it for the public's interest.⁹⁴

B. Testing the Framework

While there is “no single set of governance principles that can be applied universally, [there are certain practices that are of] wide application.”⁹⁵ In *A Framework for Public Pension Fund Management*, Jeffrey Carmichael and Robert Palacios laid down the best practices in terms of governance and accountability that are of specific applicability to state-owned pension institutions.⁹⁶ These are not rigid standards but they do serve as reasonable

93. Ignacio, *supra* note 80, at 9 (citing GOCC Governance Act of 2011, § 17).

94. GOCC Governance Act of 2011.

95. Carmichael & Palacios, *supra* note 56, at 1.

96. *Id.* at 1-48. The following were laid down as the best practices relevant to public pension scheme governance:

- (1) “There should be clarity of roles and responsibilities within the pension fund.”
- (2) “The law establishing the management agency should provide unambiguous conditions under which members of the governing body of the agency can be appointed and removed.”
- (3) “The managing agency should be free from inappropriate interference from the government in pursuing its objectives and meeting its responsibilities.”
- (4) “The processes for formulating and executing scheme policies should be open and transparent.”
- (5) “The structure of delegations permitted within the scheme should be clearly defined.”
- (6) “The management agency should be required by law to establish internal governance structures and processes to minimize corruption, mismanagement, and fraud.”
- (7) “The government should require that the management agency be regulated and supervised by the same agency that is responsible for regulating private pension providers and, where feasible, that it should meet the same standards imposed on private providers.”

Id. at 10-15.

Also, the following were laid down as the best practices relevant to public pension scheme accountability:

- (1) “There should be full and open disclosure about the governance structure of the scheme and the managing agency.”

benchmarks against which the GOCC Governance Act of 2011 can be measured.

Most of these practices are already soundly addressed by the mechanisms provided for in the GOCC Governance Act of 2011 and discussed in the previous Section. There is, however, one principle which is of significant relevance to the problem of politicization of pension funds related previously: “The managing agency should be free *from inappropriate interference from the government* in pursuing its objectives and meeting its responsibilities.”⁹⁷ This means that

[i]deally, the government should remain at arm’s length from the investment decisions of the fund manager. In the event that government wishes to retain the right to direct lending to particular sectors or activities, including financing its own budget deficits, it should do so openly and transparently. Best practice suggests that the law establishing the scheme should identify what is ‘inappropriate interference’ and the directors and trustees should be protected from dismissal for resisting such interference. This naturally is a difficult area: few governments like the idea of having their hands tied or of otherwise being forced to publicly disclose when they choose to use their hand.⁹⁸

For purposes of this Essay, “inappropriate interference” can be seen as the use of pension funds in the same way pork barrel funds are utilized. In other jurisdictions, specific devices are in place to deal with this issue. For example, in New Zealand, when the Minister directs the management of pension funds, these instructions must be disclosed in writing, put before the Parliament, and published.⁹⁹ Other countries such as Ireland are more direct

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- (2) “As part of its disclosure of governance arrangements the managing agency should be required to publish its formal delegations of powers and responsibilities.”
 - (3) “Funding shortfalls should be identified and disclosed, along with the government’s proposed remedial actions.”
 - (4) “The management agency should be subject to regular governance and performance audit.”
 - (5) “The management agency should be required to report comprehensively on its decisions and performance.”
 - (6) “To the greatest extent possible, rewards for performance should be linked to delegated responsibilities and should be risk-based.”
 - (7) “Managers should be required to review periodically the exercise of delegations they have made.”

Id. at 18–21.

97. *Id.* at 12 (emphasis supplied).

98. *Id.*

99. Carmichael & Palacios, *supra* note 56, at 13.

in their approach: pension funds are explicitly prohibited from being invested in government securities.¹⁰⁰ Still there are some which confine the prohibition to “socially initiated investments, or for economically targeted investments, if such investments do not meet the return requirements formulated by the board.”¹⁰¹

As for the Philippines, the GOCC Governance Act of 2011 is understandably general in its treatment of GOCCs. True to its objective of codifying the President’s *Tuwid na Daan*, it is replete with provisions which seek to eradicate abuses and corruption in GOCCs, regardless of type. For example, Section 19 provides that —

Where a member of the Board or an Officer, by virtue of the office, acquires or by virtue of the office, acquires or receives for oneself a benefit or profit, of whatever kind or nature including, but not limited to, the acquisition of shares in corporations where the GOCC has an interest, using the properties of the GOCC for their own benefit, receiving commission on contracts from the GOCC’s assets, or taking advantage of corporate opportunities of the GOCC, all such profits or benefits shall be subject to restitution under Section 24 of this Act, without prejudice to any administrative, civil or criminal action against members of the Board of Directors/Trustees or Officers. This provision shall be applicable notwithstanding the fact that such member of the Board or Officer risked one’s own funds in the venture.¹⁰²

Likewise, Section 20 emphasizes that —

[A]ny and all realized and unrealized profits and/or benefits including, but not limited to, the share in the profits, incentives of members of the Board or Officers in excess of the authorized by the GCG, stock options, dividends, and other similar offers or grants from corporations where the GOCC is a stockholder or investor, and any benefit from the performance of members of the Board or Officers of the Corporation acting for and in behalf of the GOCC in dealing with its properties, investments in other corporations, management of subsidiaries, and other interest, are to be held in trust by such member of the Board or Officer for the exclusive benefit of the GOCC represented.¹⁰³

However, this is not to say that the peculiar situation of state-owned pension institutions is not recognized in the country. Early this year, the GCG issued Memorandum Circular No. 2012-06 or the Ownership and Operations Manual Governing the GOCC Sector and is still awaiting approval from the President.¹⁰⁴ Dubbed as the “Bill of Rights and

100. *Id.*

101. *Id.*

102. GOCC Governance Act of 2011, § 19.

103. *Id.* § 20.

104. GCG Memo. Circ. No. 2012-06.

Responsibilities” for GOCCs,¹⁰⁵ the Manual is important in this era where the State is attempting to be a more active owner over GOCCs. Article 5 is an explicit reiteration of the pursuance of the Government of this goal:

Article 5. *State’s Role and Relationship with GOCCs.* — The State, as the Owner representing the sovereign people, constitutes the controlling interest in, or is the majority stockholder of, GOCCs and Subsidiaries, and thereby exercises all the prerogatives of ownership in every GOCC, including, but not limited to the:

- (a) *Right to register its equity holdings* in the books of the GOCC for all its equity investments therein, together with the *[r]ight to be issued certificates of stock* representing its investments in the GOCC;
- (b) *Right to dividends*, when declared, pertaining to its equity holdings in the GOCC;
- (c) *Right to dispose of its equity investment* in the GOCC, including the right to pursue the reorganization, merger, streamlining, abolition[,] or privatization of a GOCC, under a set of criteria provided for in the Act;
- (d) *Right to representation* in all stockholders’ or members’ meetings of the GOCC, and the *[r]ight to vote* on its shares in all meetings where the stockholders’ or members’ vote is obtained or necessary to undertake or to ratify corporate activities, contracts or transactions;
- (e) *Right to representation*, namely to nominate, elect or appoint, and remove and replace, the members of the Governing Board of every GOCC;
- (f) *Right to formulate and enforce governance standards* to realize its Ownership Policy for GOCCs; and
- (g) *Right to receive a proportional share in the net assets* of the GOCC upon its dissolution.¹⁰⁶

This Section expressly declares that the State acts as a representative of the people. If the analysis is stopped at this point, it may seem that the possibility of overbearing interference by the State/administration, or of political color and/or corruption being injected in the situation is discounted. But there are other provisions in the Manual which counter this sentiment. For example, the autonomy of the governing boards in relation to the State/administration is recognized: “The National Government shall not be involved in the day-to-day management of GOCCs, and the Boards shall be allowed full operational autonomy to achieve the defined objectives of the GOCCs.”¹⁰⁷ And most importantly, a perfect encapsulation of the

105. Ignacio, *supra* note 80, at 7.

106. GCG Memo. Circ. No. 2012-06, art. 5.

107. *Id.* art. 9.

conflicts-rich situation of pension institutions can be found in Article 6 which states:

Article 6. *State's Role and Relationship with GOCCs Holding in Trust the Funds or Contributions of Members.* — The State recognizes the exemplary role of certain GOCCs which are constituted and operated to hold in trust the contributions of their members, such as the [SSS] and the [GSIS], where the role of the State is not that of an active owner or investor, but as a guardian to promote the best interests of the members/contributors, whose contributions are to be prudently invested for their benefit, and also as a guarantor for the contingent liabilities that the State may assume in instances when such GOCCs are financially unable to provide the benefits to the members/contributors of such systems.¹⁰⁸

In explaining this Provision, the Commission said that, “[f]or GOCCs like SSS and GSIS who really do not hold Government Funds, but are actually holding the funds of employees and pensioners, they can invoke Article 6 of the Manual to parry the demands of an Administration on offbeat ‘pet projects.’”¹⁰⁹ What exactly the Provision means and entails would only be further fleshed out in the years to come. When the Manual is already approved and when actual controversies are presented for decision to the Commission, then that is when this will be tested. Its real value in the meantime is the acknowledgment of the unique situation of state-owned pension institutions and a caution that there is a Commission serving as a watchdog and diligently safeguarding the balance between the State’s ownership, the governing bodies’ autonomy, and the contributing members’ benefit.

V. CONCLUSION

There is no question that all those in government service are expected to display the highest degree of fidelity to their sworn duty. This mandate does not discriminate between those serving in state-owned pension institutions and other GOCCs. However, the distinctive characteristics of corporations such as the GSIS and the SSS bring about complex issues that must be properly addressed. The different stakeholders and the numerous interests they represent complicate the picture. Ideally, the State, the governing bodies, and the contributing members are the main interacting parties. However, the fact that there can be a huge gap between what they *should* and what they *can* represent only raises the stakes. These institutions push the questions further: They should be governed properly; but who governs them and how? They should be held accountable; but to whom are they really accountable?

108. *Id.* art. 6.

109. Ignacio, *supra* note 80, at 7-8.

These questions become all the more relevant when pension funds are politicized, socialized, and corrupted by those in power. Just like in the case of pork barrel funds, the legitimate uses to which pension funds are to be put can be easily obliterated. When personal and greedy interests are favored, it is the contributing members, as the rightful primary beneficiaries, who suffer.

The mechanisms to answer these questions, albeit being in their infancy stage, are already in place. The passage of the GOCC Governance Act of 2011, the creation of the GCG, and the issuance of the Ownership and Operations Manual are all positive steps toward the right direction. They constitute an express acknowledgment of the unique positions held by the GSIS and the SSS. What remains to be seen is how these devices will fare in the months and years to come. However, there is one thing that cannot be doubted: no matter how elaborate and well-meaning the framework established is, at the end of the day, it is the people breathing life into it who count. And hopefully, they do so while continuously treading the *Tuwid na Daan*.