



Ports Regulation : Global Experience and its Applicability to South Africa

Dr Sheila Farrell

19 November 2013

SFA

Sheila Farrell
Associates Ltd

Imperial College London
PORTeC



Agenda

- Overview of regulation
- South Africa
- Other countries
 - India
 - Australia
 - Peru
- South Africa - what next?



Overview of regulation

Why do we have regulation?

- Because the industry, left to itself, will not produce the desired outcomes
 - *output is not large enough*
 - *prices are too high*
 - *output is not being fairly distributed between different categories of consumer*
 - *there is insufficient investment*
 - *costs are higher than necessary*
 - *technology is outdated*
- Why does this happen?
 - *because there is insufficient competition*
- Why is there insufficient competition?

Natural monopolies

small markets
high fixed costs
differentiated products

Imperfect markets

collusion
anti-competitive practices
transition arrangements

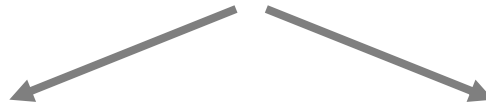
Institutional monopolies

SOEs in strategic industries
planned economies
national champions

Competition is normally preferable to regulation as it produces better outcomes more easily

What are the objectives of regulation?

The objectives of regulation depend on the policy environment



Government wants more competition

- To remove barriers to competition
- To create enabling conditions for competition
- To facilitate transition to competitive markets

Primary objective

Industrial restructuring

Nature of regulation

Dynamic & proactive

Government does not want competition

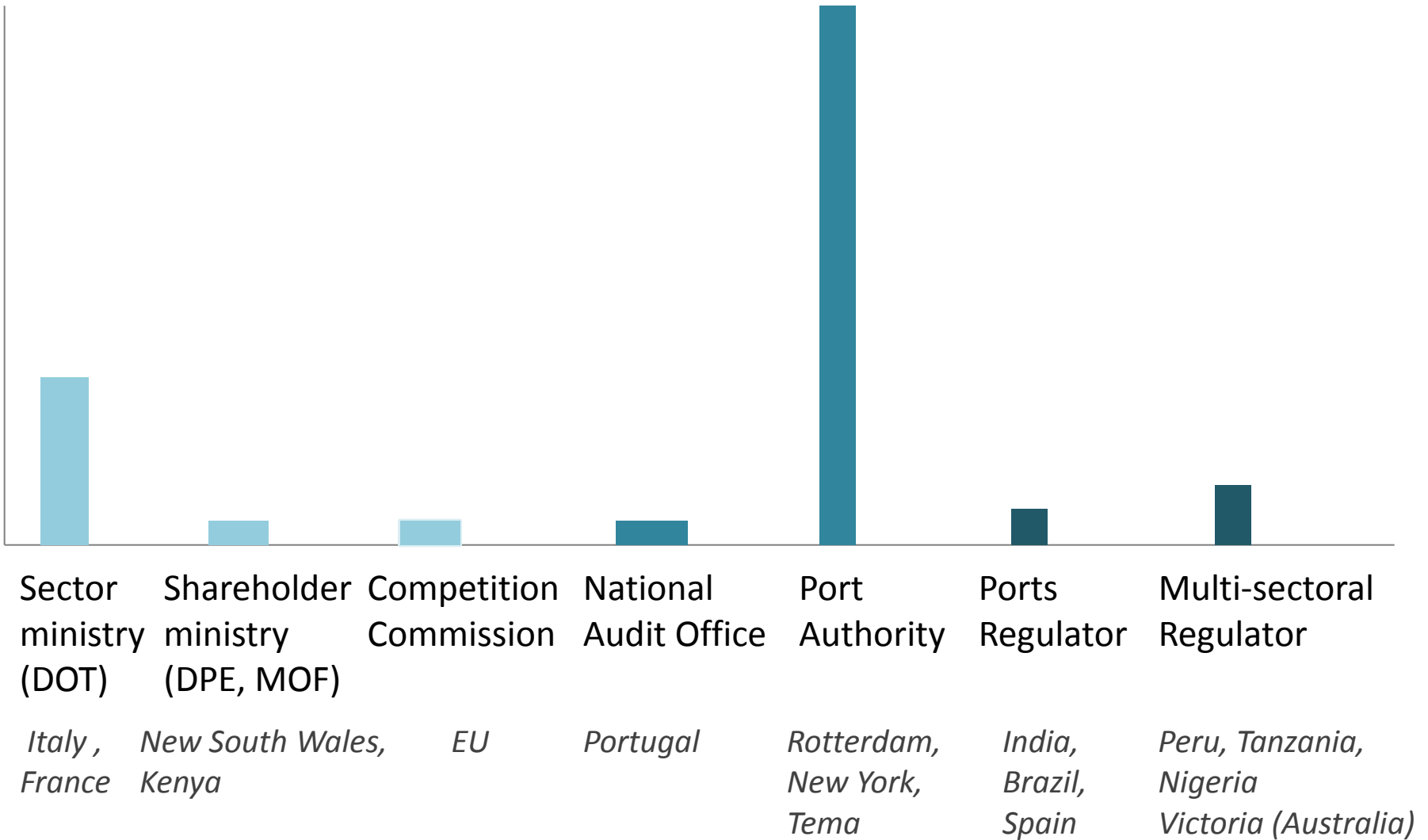
- To generate outcomes similar to those which would be achieved by competition in situations where competition is impossible
- To monitor industry performance & enforce accountability
- To protect consumers & ensure fair prices

Performance auditing & improvement

Static & reactive

Port regulation often involves a bit of both approaches

Where in Government are the regulatory functions located?



Most of these countries have overlapping responsibilities for regulation

Many countries regulate their ports very lightly or not at all

How do these different bodies regulate?

Sector ministry

Performance contracts
Directives
Policy statements
Informal day-to-day contacts

Shareholder ministry

Statement of corporate intent
Shareholder compact
Budget approval

Competition Commission

Ex-post investigations
Ex-ante approvals

National Audit Office

Expenditure reviews
One-off investigations

How do these different bodies regulate?

Port authority

Concession agreements

Leases

Operating licences

Participation in JVs

Port regulator

Tariff regulation

Market access requirements

Performance standards

Compliance rules

Adjudication of complaints

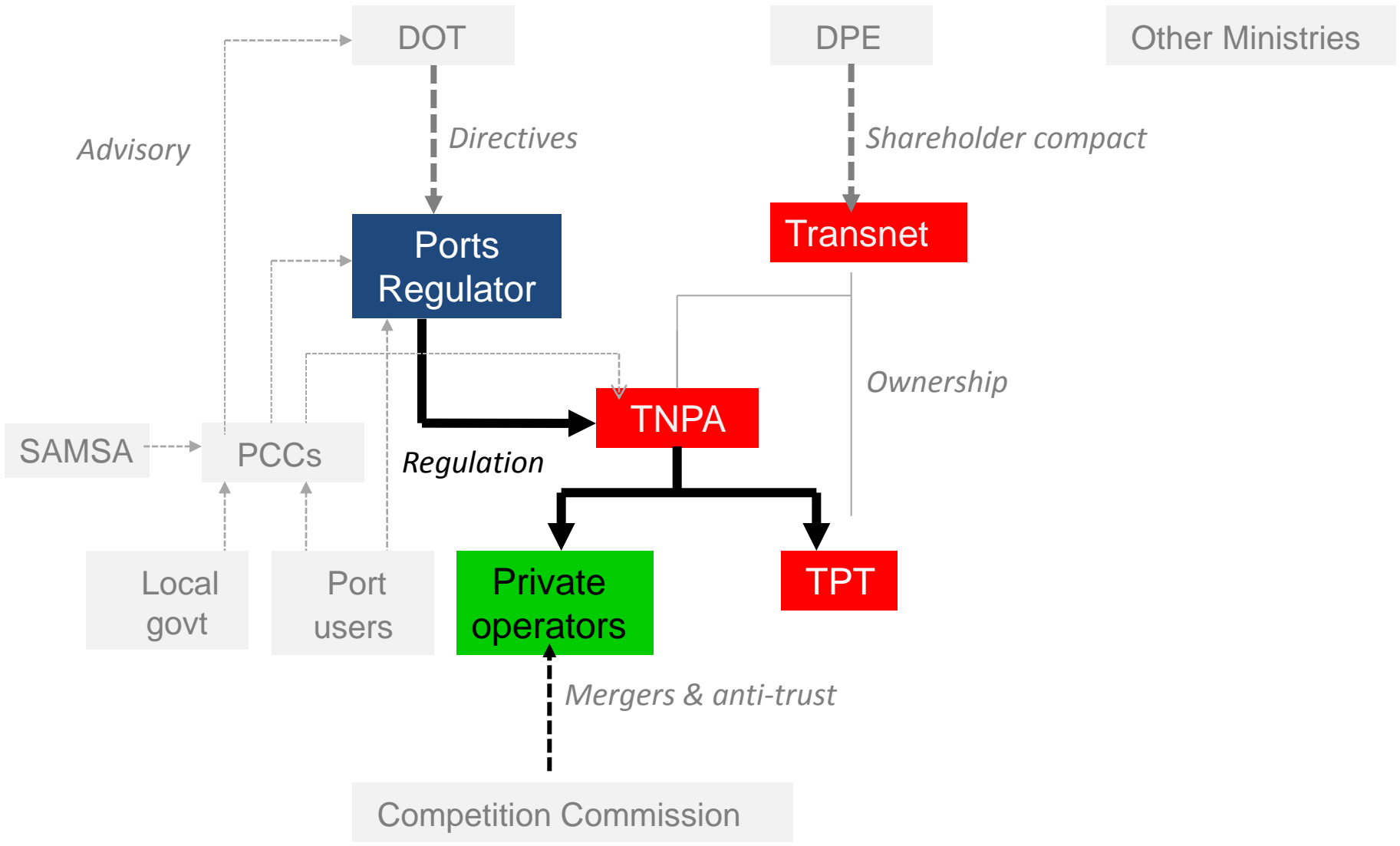
Multi-sectoral regulator

Similar to Ports Regulator

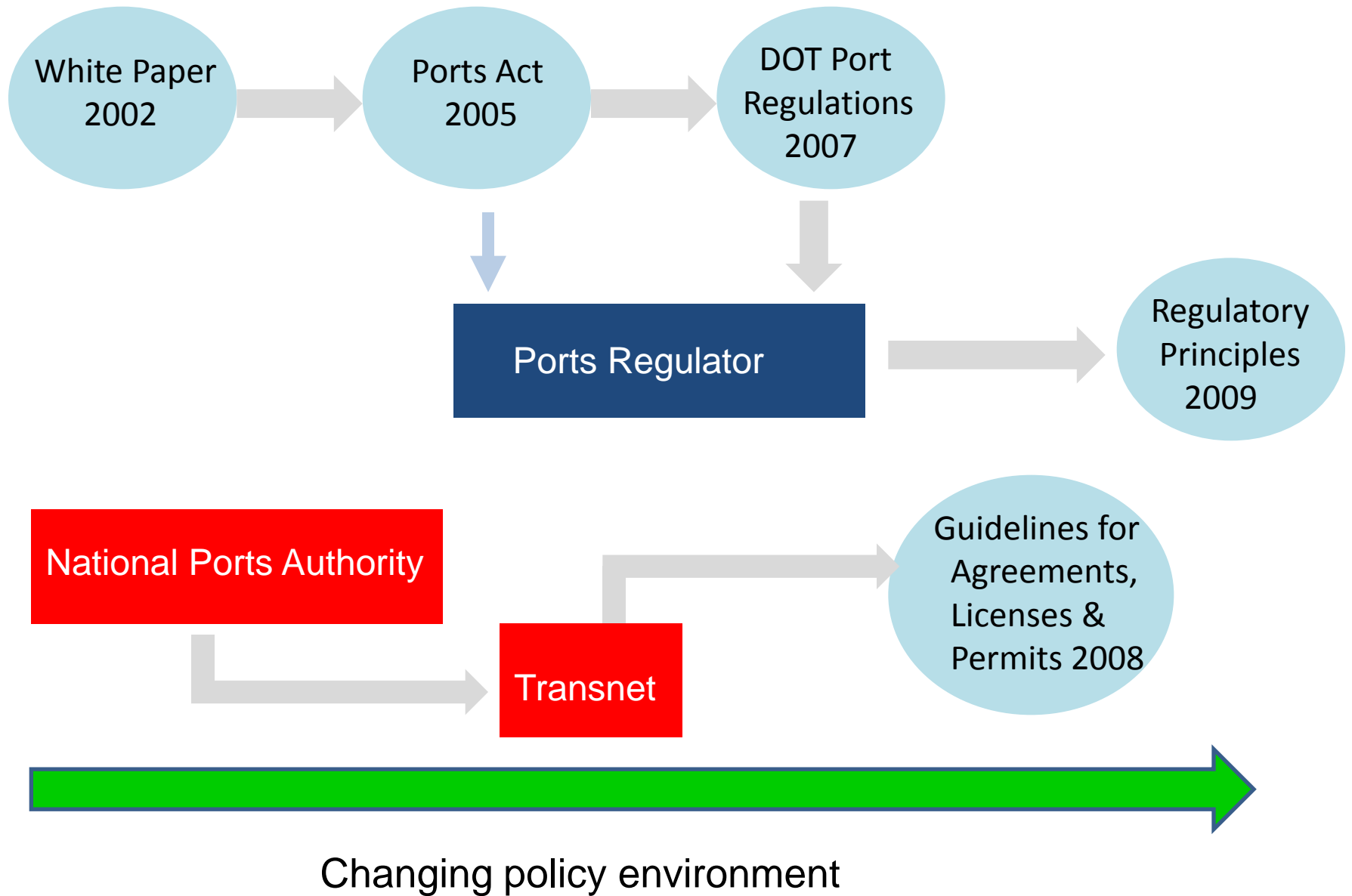


South Africa now

How is ports regulation organised in South Africa ?



How did we arrive at where we are now ?



What do these key statements of regulatory intent actually say ?

2002 White Paper (National Commercial Ports Policy)

Policy

- National ports *SYSTEM* developed exclusively by central govt.
- More competitive ports environment with greater user choice
- Financially autonomous ports with globally competitive costs

Institutions

- Separation of port authority from port operations within Transnet
- Corporatisation of NPA and separation from Transnet at a date to be determined by DPE
- DOT to establish Ports Regulator on a **temporary** basis whilst NPA remains in Transnet
- Private sector participation to be increased through competitively tendered leases & concessions (DPE to issue guidelines)

Ports Regulator

- Prevent rent-seeking by NPA
- Ensure equity in access to port services
- Rule on complaints against monopoly pricing by NPA

Light regulation of services by NPA, fading away as competition increases

Competition Commission available for anti-trust cases

What do these key statements of regulatory intent actually say ?

2005 Ports Act

Ports Regulator objectives

- **Exercise economic regulation** of the ports system in line with the government's strategic objectives
- **Promote equity of access** to port facilities and services
- **Monitor NPA** to ensure that it complies with the Act

Ports Regulator tasks

- Consider NPA's proposed tariffs
- Promote regulated competition
- Regulate the provision of adequate, affordable and efficient port services and facilities.
- Hear & investigate complaints
- Work with Competition Commission on anti-trust issues
- Support other regulatory authorities

NPA remains the main regulator of port services via Section 56 (concessions), Section 57 (licenses) and Section 58 (leases) of the Act

What do these key statements of regulatory intent actually say ?

2007 DOT Regulations

- **Economic participation**
 - Regulator to review public & private sector participation, with recommendations within 12 months
 - Interim regulation to be by means of
 - NPA tariff approval
 - hearing of complaints
 - regulation of prices of service providers other than NPA
- **BBEEE rules**
- **Port Consultative Committees**
- **Access to confidential information**
- **Port limits**

What do these key statements of regulatory intent actually say ?

2008 TNPA Guidelines

Procedure	Application	Characteristics
Section 56 agreements	<ul style="list-style-type: none">• New passenger & cargo terminals• New ship repair facilities• Offshore cargo handling	<ul style="list-style-type: none">• Competitively tendered concessions
Section 57 licenses	<ul style="list-style-type: none">• Stevedoring• Cargo storage• Waste disposal• Private floating cranes	<ul style="list-style-type: none">• Quality licensing• Quantity licensing when faced with capacity constraints
Section 57 registration	<ul style="list-style-type: none">• Bunkering• Diving• Pest control	<ul style="list-style-type: none">• Only requirement is compliance with port rules
Section 65 operating leases	<ul style="list-style-type: none">• Existing terminal operators• Existing ship repairers• Existing rail operators• Existing waste disposal	<ul style="list-style-type: none">• Lease renegotiation linked to semi-automatic issue of Section 57 licenses• Commercial leases not covered by Act

Transnet licenses (TPT & TFR) terminate if 3rd party is authorised to take over

What do these key statements of regulatory intent actually say ?

2009 Regulatory Principles

1. Benefits of regulation should exceed costs.
2. **Competitive neutrality between public and private sectors**
3. Equity (BBEEE)
4. Tariff approval based on Price Cap & Rate of Return approaches
5. **Promotion of competition via quality of service regulation**
6. **Light touch regulation, with more prescriptive approach if this doesn't work**
7. Use of either incentive-based, market oriented instruments or command-and-control approach
8. Use of other approaches (voluntary agreements, moral persuasion, joint regulation etc)
9. Ex-ante Regulatory Impact Statements for significant regulatory interventions
10. **Promotion of competition where appropriate**
11. Engagement with other regulators
12. Consultation with Government on policy trade-offs.
13. Consultation with other regulators
14. Management of unintended consequences
15. Neutrality in respect of different stakeholders' interests
16. Protection of sensitive information
17. Assessment of accuracy and appropriateness of all information
18. **Relationships between connected parties to be assessed in terms of public interest**
19. Active monitoring of the ports industry
20. Public engagement of stakeholders when nationally significant issues are under consideration.
21. Consideration of impacts of actions on foreign investors
22. Periodic regulatory reviews – public submissions every five years on the quality and relevance of the Regulator's policies and methods

Challenges faced by the Ports Regulator

Source: 2012 Port Regulator's Three Year Strategic Plan

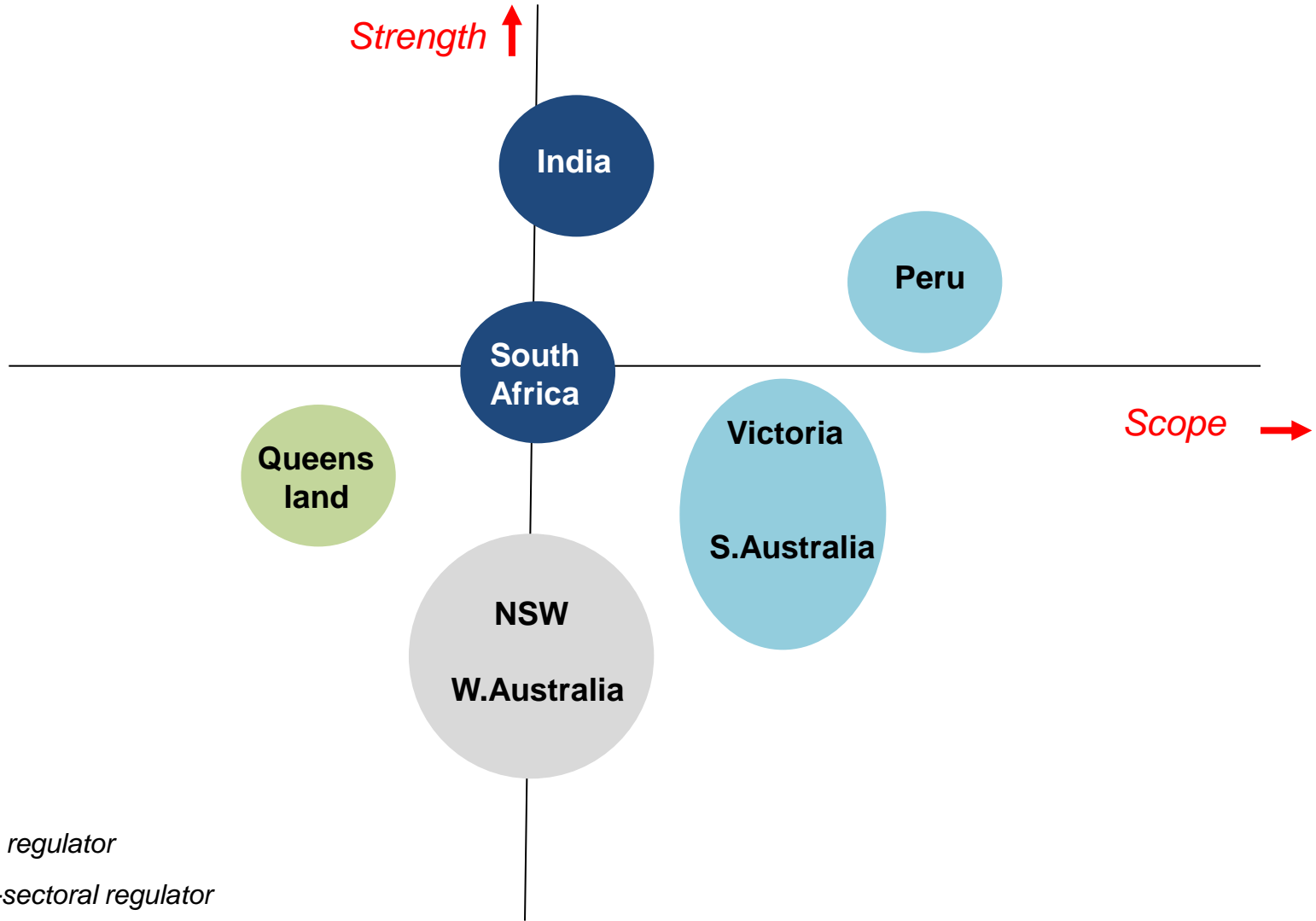
- Failure to separate TNPA from Transnet
- Establishment of a Single Economic Regulator
- Ambiguous policy environment
 - level of port capacity required to support the South African economy
 - whether to increase capacity through squeezing assets or building new ones
- Inert stakeholders
 - tariffs (unstructured, self-interested responses)
 - complaints that are never formalised for fear of victimisation
- Global financial crisis
 - increased risks of industrial restructuring
 - lack of expansionary space for regulatory intervention
- Lack of resources
 - Regulator operating at 45% of full strength





Strategy: deal with most pressing concerns whilst postponing other parts of mandate



Other countries' experience

Regulatory models of interest to South Africa



-  *Ports regulator*
-  *Multi-sectoral regulator*
-  *Competition authority*
-  *Ministry*



India

Heavy handed regulation ending up in a bit of a mess

India: Tariff Authority for Major Ports (TAMP)

Scope

Geographical

12 Major Port Trusts (Union Government)

but not

200 minor ports (State Governments)

Minor ports market share has increased a lot

1997	2012
13%	39%



Institutional

Public Major Port Trusts

- infrastructure & services

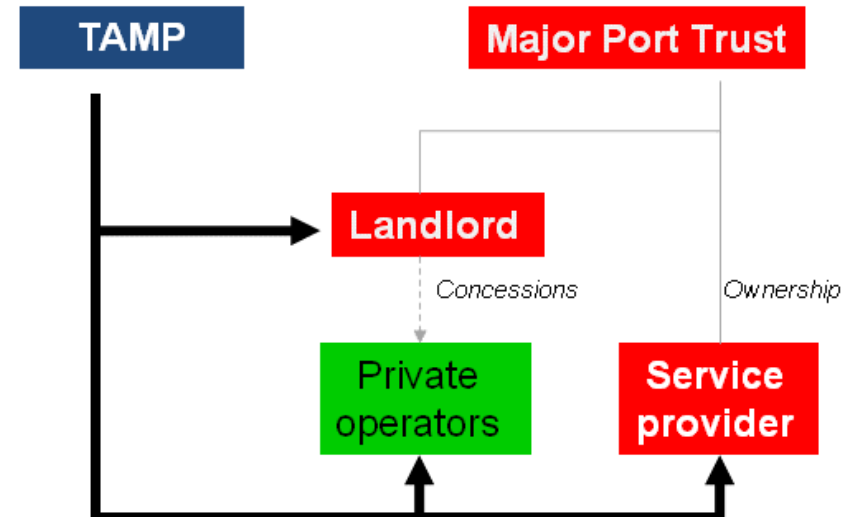
Private sector terminal operators

Regulatory powers

Tariffs only

- inc tariff conditions & lease rentals

Excludes market access, M&A, anti-trust



Objectives

- Reduce & rationalise tariffs
- Create tariffs incentives to increase productivity
- Create a level playing field for private investment

Working method

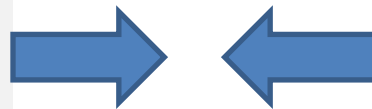
TAMP

- Bottom-up
- Initially reactive
- Case-by-case

Ports Regulator

- Top down
- Initially pro-active
- Establish general principles

Convergence



over time

50-70 tariff decisions p.a.

One tariff decision p.a.

India: Tariff Authority for Major Ports (TAMP)

More deterministic intervention



1997-2005

2005-2008

2008-2012

2013

Process

- Cost plus tariffs
- Interactive hearings
- Policy guidelines
 - Min. of Shipping

- Structured tariffs based on:
 - OPEX
 - return on regulatory asset base
- Indexed to WPI / forecast traffic
- 3 year reviews, with operators keeping 50% of cost savings

- Ex ante tariffs for new PPPs
- Prescriptive costs & concession fee adjustments
- Indexed to 60% of WPI
- 5 year reviews with assumed fall in costs

- Proposals for:
 - abolition of TAMP
 - regulation of higher than reference tariffs
 - performance-linked tariffs
 - conversion of TAMP into a Port Competition Regulator

Outcomes

- Variable tariffs
- Variable costs
- Political opposition

- Confusion
- Arguments
- Non-level playing field

- Drop in private investment
- Operators rebel

- No decision

The story continues

Lessons for South Africa

Difficulties

- Working with individual cases rather than general principles
- Regulating all tariffs rather than focusing on market abuse
- Using tariffs alone to stimulate efficiency gains
- Setting long-term escalation rates when technology, capacities & costs are changing
- Gaining the trust of operators
- High level of regulatory uncertainty diverts investment to other ports

Successes

- Rapid impact of regulation on excessively high tariffs
- Increase in transparency
- Independence & objectivity
 - avoidance of regulatory capture

Need for intelligent and experienced staff ➡ capacity building requirement



Australia

Light-handed regulation: reaching the desired end state

Regulatory framework

- Regulatory principles centrally determined, but implemented at State level
- Focus on establishing competitive markets as alternative to regulation
 - strong parallel action to restructure the ports industry (e.g. Waterfront Industry Reform Authority 1989)
- Light-handed regulation aimed at preventing abuse of market dominance
 - monitoring and transparency of prices
 - negotiated access to port services
 - intervention as the last resort
 - threat of intervention keeps markets competitive without need for costly regulatory institutions
- State-owned facilities required to operate on a competitively neutral basis

Australia has a mature regulatory environment in which most of the hard work has been done

Regulatory institutions

Federal

- Australian Competition & Consumer Authority
- Bureau of Infrastructure, Transport & Regional Economics
- Competition & Infrastructure Reform Agreement (2006) – regulatory review mechanism

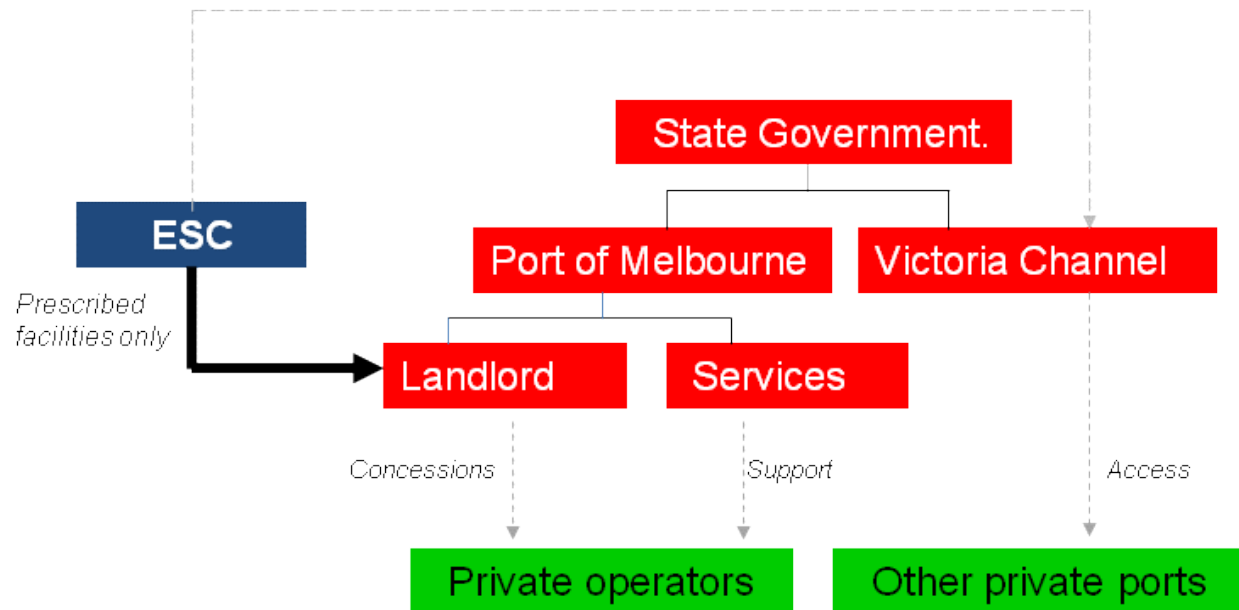
States

State	Regulatory body
Victoria	Essential Services Commission
South Australia	Essential Services Commission
Queensland	Queensland Competition Authority
New South Wales	Portfolio and Shareholder Ministries
Western Australia	Department of Planning & Infrastructure
Northern Territory	Chief Minister

Essential Services Commission

Coverage: port & rail infrastructure, grain handling, water utilities, energy retailers

KPIs : activities/traffic, service quality/performance, tariffs/revenues, financial performance, customer satisfaction surveys, registration of complaints



Policy framework

Move from consensual planning to market competition

1989 - 95

Port reform

- Labour reform
 - downsizing of workforce
 - enterprise-based contracts replace national negotiations
- Private sector restructuring
 - terminalisation
 - industry concentration
 - restrictions on competition to promote investment in world-class facilities
- Increased autonomy for public port authorities

1995-97

Privatisation

- Melbourne split into three
 - landlord port authority
 - port services co. (minor)
 - Victoria Channel Authority
- Three smaller ports sold
- Private sector already in place
 - container duopoly (P&O, Patrick)
 - captive user terminals
 - licensing of smaller service providers

1997 to date

Competition policy

- Abuse of market power mainly in public sector
 - private sector competition doing its job
- Market access disputes resolved in Court
- Large initial fall in tariffs followed by consolidation

Regulatory framework

Less deterministic intervention

1996-2004

- Tariffs for “prescribed services” set by Regulator
- CPI-x regulation applied to tariff “basket”
 - excluding leases & agreements
- Draconian “x” values
 - non-transparent methodology

2004-2009

- List of “prescribed services” reduced
- CPI-x regulation replaced by tariff monitoring
- Tariffs checked against revenue requirements

2009 to date

- Very few “prescribed services” now left
- Form of regulation linked to market power
- KPI-based monitoring
- Threat of intervention still a powerful control

Outcomes

- 50% fall in wharfage rates
- Berth hire charges to end by 2003
- Low profits inhibiting investment

- Improved relationships
- Increase in benchmarking
- Sounder intellectual base

- Increase in negotiating strength of port users
- Customer satisfaction now key aim

Lessons for South Africa

- Requirement for parallel policy action if ports sector is to be reformed
- Competition reduces need for regulation, but must be genuine (no collusion)
- Powerful port users with countervailing power also help
 - but only if they have alternatives available
- Threat of regulation can be as effective as regulation itself
- Ideal “end state” is Regulator putting itself out of business
 - but only after its objectives have been met



Peru

Good intentions but weak implementation

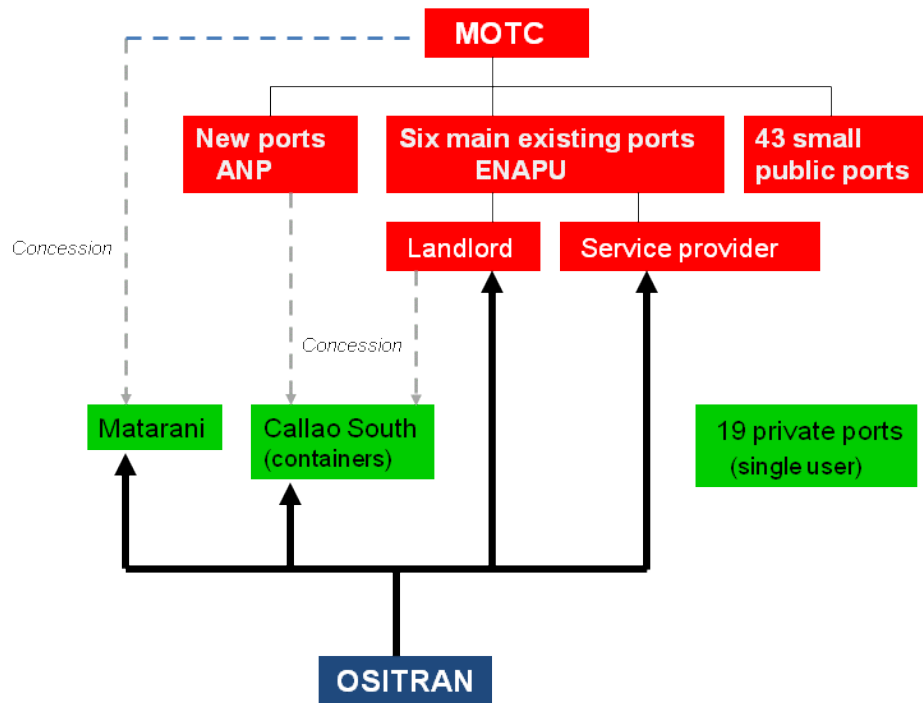
OSITRAN is a multi-sectoral regulator dealing with ports, railways, airports and private sector investments in roads

It deals with two areas of port regulation :

- access rights
- tariffs

Unlike South Africa, Peruvian ports operate like “tool” ports , with common user, open access

- Callao South was first terminal with exclusive private operating rights



Access rights

OSITRAN (2000)

- Right of access to essential facilities
 - port users & port service providers
- Negotiation backed by threat of intervention
- Basic principles:
 - competitive neutrality
 - efficiency improvement
 - promotion of *private* investment
- Back-stop methodology for calculating access charges

ENAPU (2004)

- Three different levels of access
 - resembling TNPA 2008 Guidelines
- Stevedores, land transport & bunker suppliers get automatic access to port
- Marine service providers need formal contract with ENAPU, but few access difficulties
- Cargo handling companies – detailed evaluation of request followed by negotiation or auction of access rights

Tariff regulation

Matarani

- Original tariffs determined by competitive tender for concession
- Then five year tariff reviews, based on $RPI - x$
- Ring-fencing of some major tariff items to protect competition
 - marine services, berthing, wharfage, grain storage

Callao South

As above, but

- $RPI - x$ only applies when income is $> 20\%$ above certain level
- No ring-fencing of individual tariffs

ENAPU

- Initial experiments with many different approaches
 - incremental costs, LRMC, Ramsey pricing, fully distributed costs, efficient business modelling, tariff benchmarking
- In early 2000s adopted cost plus (ignoring inefficiencies)
 - disputed treatment of pensions costs
- Intention to move to price cap regulation in 2009

ENAPU has refused to accept OSITRAN tariff regulation

Further concessioning under consideration

Lessons for South Africa

- State-owned enterprises can outlast Ministers and act as a major blockage to port reform
- Additionality (concessioneing of new infrastructure) provides a firmer regulatory base
- Capacity building in the Regulator only works when there is strong political support



Other interesting countries

- United States (FMC)
- EU (Competition Directorate)
- Brazil (Antaq)

Countries without competition

- Singapore (Maritime & Port Authority of Singapore)
- Dubai (Dubai World/Ruler's Office)



South Africa – where next?

The future shape of port regulation in South Africa depends on three key questions

- Does South Africa want more competition?
 - within ports
 - between ports
- Is South Africa prepared to restructure Transnet?
 - current option is corporatise and separate out TNPA
 - better option is corporatise and separate out TPT
- Should regulation be via Ministry, landlord port or independent regulator?

What do you think?