

The Philippine Port Sector

PPA: A Case of Regulatory Capture^[1]

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Introduction

The Philippines is an archipelagic country, consisting of more than 7,000 islands. Like the various pieces of a jigsaw puzzle, these islands need to be linked together by an efficient and seamless transport system.

Unfortunately, the inefficient sea transport and distribution system in the country has served through the years as an effective barrier to domestic trade. It has stymied countryside development, efforts to improve productivity at the farm level, and promote tourism and the global competitiveness of our exports. Worse, these inefficiencies have resulted in the high cost of transporting goods as well as in the degradation of the quality and quantity of the products being shipped. To a large extent, the high domestic transport cost and the attendant problems in transporting our goods between the islands can be traced to the inefficiencies in our ports.

Because of the vast powers being enjoyed by the Philippine Ports Authority (PPA), it has become a convenient strategy for vested interests to simply capture it so that they can easily reap economic rents at the expense of public interest/welfare.

According to G. Villaseñor, "a regulatory agency is said to be under *regulatory capture* when it exhibits any of the following:

- It furthers the industry's interests at the expense of consumers;
- It is more responsive to the industry pressures;
- It has become too identified with the industry;

- It has become overly protective of the regulated firms;
- It is passive, largely rubber-stamping the firms' decisions; and
- It adopts the regulated utilities' objectives as its own.

Simply put, when a regulatory agency brushes aside the common good in favor of private interest or some special group, then it is guilty of capture. George Stigler theorized that governments do not end up creating monopoly in industries by accident. Rather, they regulate at the behest of producers who capture the regulatory agency and use regulation to prevent competition.^[3]

In the Philippine setting, because the government receives dividends from PPA's operation, it becomes a party to the ill effects of regulatory capture.

Flaws in the PPA Charter

The inefficiencies in port operations and administration are a product of the flaws in the port policy, embodied in the Charter of the Philippine Ports Authority (PPA), that make the authority very susceptible to regulatory capture.

- **PPA has both developmental and regulatory powers.** Regulatory capture results from the combination of developmental and regulatory functions in the PPA charter. The developmental function allows the PPA to work closely with all the operating elements in port development and operations (shipping, cargo handling, terminal operations) – the same parties it is supposed to regulate.
- **Conflict of interest.** PPA's Charter (PD 857) allows it to share from revenues in cargo handling by at least 10%. In the past, PPA share from cargo handling revenue even reached a high of 33%. This provision constitutes a clear case of "conflict of interest" because the regulator benefits from its own regulation. It is not surprising, therefore, why PPA almost always approves petitions for a rate increase even when there are no petitioners, no public hearing/s

conducted, and/or no financial statements evaluated by the PPA to ascertain the economic or financial justification for the rate increase. [4] In one case, the implementation of a rate increase did not even have a Board approval. [5] Table 1 shows the rate increases approved by the PPA in recent years.

In August 2002, President Arroyo directed the PPA to adopt a universal rate for collecting the government share from the revenues of cargo handlers – 10% for domestic ports and 20% for international ports. The PPA announced that it revised its rules on the bidding of cargo handling contracts to comply with the presidential directive. Instead of using “the highest share to PPA” rule as basis for winning a contract, PPA will now use “the lowest service rate” as basis since its share from cargo handling revenues is already fixed. This is laudable if indeed the award of cargo handling contracts will be done through public bidding. What the PPA failed to mention is that under PPA Administrative Order 01-2001, the renewal of expired and expiring cargo handling contracts will not be subjected to public bidding.

Table 1. Annual Increases in Cargo Handling Rates In Per Cent

YEAR	DOMESTIC		FOREIGN	
	Arrastre	Stevedoring	Arrastre	Stevedoring
1998	12%	40%	8%	40%
1999			20%	
2000	10%	10%	8%	8%
2001	10%	10%	10%	15%
2002			10% /a	10% /a
Compounded Growth	35.5%	69%	69%	91%

a/ 10% rate increase this year was granted only to the operators at MICT and South Harbor.

The conflict of interest issue only exacerbates the presence of regulatory capture because the PPA also benefits from the effect of its regulation. Hence, it has loyalty to its partners in development and to itself, thereby diminishing further its loyalty to the public.

- **Bias towards multiple cargo handling.** And because of the “unusual” benefit PPA gets from cargo handling operations, it encouraged, nurtured, and perpetuated a system based on “multiple” cargo handling. The more cargoes are handled, the more revenues are generated – ergo, the higher the share of PPA (from cargo handling) . In 2001, out of the total revenue generated by PPA from port operations, its share from cargo handling accounted for 18% (This

figure still does not reflect the share of PPA from the International Ports, MICT and South Harbor). And because of this, even shipping companies have gone into cargo handling. Although containerization has brought about positive effects like (a) reduced breakage/quality deterioration of cargoes, and (b) increased security of cargo / reduced pilferage, the number of steps involved in handling the cargo have remained the same. Self-interest and loyalty to its partners further encourages inefficiency in cargo handling which gives it more profit.

- **The port is a huge government monopoly.** PPA's Charter provides it with vast powers – i.e. PPA owns, maintains, develops and regulates the ports. It is also vested with taxing powers – to fix rates and collect dues such as wharfage, berthing/usage fees and revenue share from cargo handling (arrastre and stevedoring). PPA boasts of the fact that it does not get a single centavo from the national government for its budgetary requirements. In fact, as a government owned and controlled corporation, it declares 50% of its net income as dividend to the national government. This is one of the major reasons why PPA increases its rates – so that it can generate more revenues for itself and for the national government. But the question is: “Is PPA, first and foremost, a revenue-generating agency or a service-provider?” There is no doubt that the PPA should generate revenues to finance its port development and maintenance activities. But confiscating resources from the business sector and the consumers in favor of the government is another story.

Table 2. PPA Revenues and Net Income (2000-2002) In Million Pesos

	2001	2002/a
Port Revenues	4,720	3,640
· Fixed Fee from ICTSI	1,400	1,230
· Revenue from Cargo Handling Share	837	430/b
Net Income	1,640	2,120

a/ January to September b/ ATI only

SOURCES OF BASIC DATA: PPA Financial Reports, News article written by Teresa Visita of Malaya.

Sharing its profits with the government in the form of dividends makes it regulate further against the public interest because now the government also becomes a partner in sharing the returns from the inefficiencies in cargo handling.

The Regulatory Pitfalls

In an article entitled "Regulatory Dilemma in Southeast Asia", D. Nikomborirak reported that "...years of regulatory experience in many developed countries reveal that regulations, like markets, can also "fail". Regulatory failure may occur for two reasons. The first is associated with the "capture theory"... and the second from the fact that the regulator itself is not perfect. We must not forget that by creating a regulator, we entrust an enormous amount of responsibility and power unto a single body. This resembles an autocratic government."^[6] In the case of the PPA, the following can be observed:

- *Too much discretion.* The administration of the Philippine port system is highly centralized. All government ports (with the exception of the Port of Cebu which is under the Cebu Port Authority and a handful of ports located in the Special Economic Zones) scattered in various parts of the country are being managed by a centralized port authority, the PPA. In contrast, none of the successful and well-managed ports cited in the world is administered by a centralized system of port administration. Each port has its own authority, whether under the jurisdiction of the national or local government. A decentralized system of local port authorities each operating independently creates the environment for inter-port competition, thereby satisfying one of the important conditions for an efficient market in the port sector. The fact that PPA owns the public port system and regulates private ports eliminates the possibility of inter-port competition. In fact, the PPA almost succeeded in the past in issuing a memorandum circular that would change the status of a private commercial port into a non-commercial port if it happens to be located near a PPA port.
- *Too little transparency.* Policy formulation and administration in well-managed ports worldwide is carried out by a Board dominated by the private sector with limited degree of government participation. In the Philippines, however, policy formulation and implementation lacks transparency and, in most cases – railroaded. This happens because private sector participation in policy formulation and implementation is virtually non-existent. Of the 9 board seats, only 1 comes from the private sector. Moreover, public hearings are not

carried out properly. Board Resolutions, on the other hand, are a product of the decisions of a 3-man Board Committee or BoardCom. In almost all cases, the PPA Board simply ratifies or adopts the resolutions of the PPA BoardCom.

- *Insufficient Autonomy.* D. Nikomborirak argues, “competent and well-qualified commissioners, assuming they can be found, still does not guarantee efficient regulation. For the regulator to be able to perform its task effectively, a certain degree of independence from the government is required. As a common practice, regulatory agencies are run and managed on a full-time basis by commissioners whose appointments have fixed terms. Unfortunately, the same cannot be said about the PPA Board. As mentioned earlier, the PPA Board is government-controlled. Six out of nine Board members are cabinet secretaries who do not have the time to attend all PPA Board meetings.

Regulatory capture is inherent in many Presidential Decrees (PD) issued during martial law because the developmental and regulatory functions were vested in one body – it being assumed that the government agency and public interest are one. This was prostituted when private sector interests began to replace some of the government functions like cargo handling, terminal operations, etc. Then private sector interests, supposed to be regulated, became partners instead because of the sharing arrangement in cargo handling. This reveals the care needed in privatizing ports – lest privatization further exacerbate the damage done to public interest.

Cases

There are many examples in the PPA that demonstrate this phenomenon of regulatory capture. For this paper, the following cases will be discussed to show (a) the close relationship between the PPA and the sector it is supposed to regulate as well as (b) the regulatory pitfalls they exemplify.

- **EO 59**

Executive Order No. 59 (s. 1998) is a classic manifestation of the misconception plaguing the PPA operation as a developmental and regulatory body. PPA supported the proponents of a monopoly and excluded the paying public, but

nonetheless assumed that it would be the one representing the public interest since it is the regulatory body. Trouble is, the regulatory function is completely subdued by the developmental and profit making relationships among the PPA, the port players, and the government who partakes of dividends – while the public continues to pay excessively. It is only with the strong advocacies made by the private sector that the PPA and other government agencies have become conscious of the public interest.

On December 28, 1998, President Joseph Estrada issued Executive Order (EO) No. 59 directing the Philippine Ports Authority (PPA) " *to adopt and implement a program for further rationalization, modernization, and improvement of port services and facilities in government ports.*" Under the existing Charter of PPA (PD 857), PPA is mandated to develop sea port terminals, other facilities and ancillary services in the port areas. However, the EO argued that the government does not have sufficient funds to finance the modernization of these public-owned ports. To address this "constraint", EO 59 was issued for the purpose of promoting and encouraging the " *participation of the private sector by requiring all existing facility operators and service providers such as cargo handling operators, shipping companies and port workers and labor to unify into one corporation by merger, consolidation, buyout, joint venture, or by any other similar means to manage, operate and develop the entire government port without need of a public bidding.*"

Port modernization and greater private sector participation are laudable objectives. However, what is highly questionable in EO 59 was the manner by which port privatization and modernization will be carried out, to wit:

1. *Creation of a big private monopoly.* The contract was supposed to be awarded to a "consortium" organized two months before the issuance of EO 59. The Consortium is composed of terminal operators, cargo handling companies and big shipping lines.
2. *Bundling of port services.* This means that all port services, including ancillary services will have to be provided by the private port monopolist.
3. *Negotiated Contract.* The operation and development of the ports will be awarded to the port monopolist without the benefit of a public bidding, contrary to the principle of transparency being promoted by the government.

4. *Nationwide coverage.* This is not only a monopoly of one port but of the entire port system.
5. *The establishment of a nationwide Portworkers' Social Amelioration Fund (PSAF).* This issue will be discussed at length as a separate example of regulatory capture.

PPA vigorously supported the Consortium, arguing that (a) ports are natural monopolies, (b) the volume at the North Harbor, the biggest domestic port in the country, is even too small to warrant competition (i.e., having several terminal operators); and (c) competition will only increase the project cost since there will be duplication of investments in equipment. The PPA disregarded the evidence and arguments raised by those opposing EO 59 (*see Tables 3 and 4*), saying that the loudest critics of the monopoly scheme have nothing to do with the ports. [\[7\]](#) In fact, during the Economic Mobilization (EMG) meeting in Malacañang, the representative of the Consortium declared that "*there is no monopoly because we are one big happy family.*"

Table 3. Cargo Volume at the Ports of Manila (1998)

INTERNATIONAL STANDARD	
- One operator can handle profitably 200,000 TEUs annually	
- One berth with two ship-to-shore gantry cranes	
- Sufficient back-up land	
NORTH HARBOR (excluding breakbulk)	706,000 TEUs/year
SOUTH HARBOR / MICT	1,148,000 TEUs/year
- South Harbor (ATI)	410,000 TEUs/year
- Manila International Container Terminal (ICTSI)	738,000 TEUs/year
ICTSI and ATI are operating profitably	
- ATI Net Income (7/98-6/99)	P212 M up 49%
- ICTSI Net Income (1-6/99)	P251 M up 35%

TEU – Twenty Equivalent Units

SOURCE OF DATA: PPA, Financial Reports, News articles

Table 4. Studies on Two Operators for the Manila North Harbor

CONSULTANTS	Two Operators FIRR	Two Operators INVESTMENT
PPA-Halcrow	20%	US\$512 M
EMG-ORSP	25%	US\$ 225 M
PCCI-Consilium	30%	US\$ 247 M

EMG – Economic Mobilization Group; ORSP – Operations Research Society of the Philippines; PCCI – Philippine Chamber of Commerce and Industry

NOTE: It is interesting to note that the project cost based on the PPA-Halcrow study is twice that of the ORSP and Consilium studies. The high cost is a form of an “entry barrier” which the PPA placed to discourage investors and to convince the policy-makers that having two operators, while financially feasible, is costly.

In its obsession to implement EO 59, PPA rushed the formulation of the Bid Terms of Reference (TOR) under a Single Terminal Operator (STO) . And in order to project an image that everything was transparent and above-board, PPA conducted a public consultation. However, PPA withheld the dissemination of vital information to the public (by excluding Annexes A-W) – thus depriving the public the opportunity to intelligently comment on the draft TOR.

President Estrada turned deaf ears on the pleas from Congress to correct the port privatization policy (*see Table 5*). What changed his mind later on was the need to reverse the damage done on his presidency by the “juetengate” exposé of Governor Chavit Singson. Hence, on October 30, 2000, President Estrada in his address to the nation announced a host of policy reforms including the rescission of EO 59 (“There is a perception that EO 59 will create a monopoly in port services. Thus EO 59 which involves the further rationalization of port services and facilities in government ports is hereby revoked” *Towards a Common Ground*). The following day, October 31st, he issued EO 308 formally rescinding EO 59 and directing the PPA to subject the privatization of the Manila North Harbor to competition (by dividing it into two terminals) and public bidding.

Table 5. Congressional Resolutions related to EO 59

<p>COCAFAM Resolution No. 016 (September 1999) – “Requesting the President to amend EO 59 and adopt a system that requires competitive and transparent bidding among interested service providers”.</p>
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House Resolution No. 1659 (August 2000) – “Requesting the President to rescind EO 59 and direct the PPA to adopt a policy which promotes inter- and intra-port competition and requires competitive and transparent bidding among interested port investors and operators.”

House Resolution No. 1740 (August 2000) – “Urging the President to direct the PPA to hold in abeyance finalization of the bidding for the privatization and modernization of the Manila North Harbor under a Single Terminal Operator, until such time that His Excellency shall have acted on House Resolution No. 1659 (“Requesting the President to rescind EO 59 and declare competition at the North Harbor”).

But the PPA has a commitment to fulfill. On November 7, 2000, the PPA published in the major dailies a “Notice of Invitation to Pre-Qualification for the Privatization of the North Harbor under the Single Terminal Operator scheme” – i.e., monopoly.

The beginning of 2001 saw the change in government leadership. The PPA, under the new dispensation, presented to the private sector a new Alternative Development Plan for the Manila North Harbor. Under the proposed plan, the North Harbor will be divided into three (3) terminals, instead of two (2) terminals as mandated under EO 308 (s. 2000). The new PPA general manager promised to have the draft Bid Terms of Reference (TOR) completed for comment by the end of August 2001. In the meantime, the PPA started constructions at the Marine Slipway (MSW) area of the North Harbor costing roughly P300 million. The question is: “How will this affect the Bid Terms of Reference (TOR) being drafted by the Coordinating Council for Private Sector Participation (CCPSP)?” Because of the controversy that erupted as a result of an anomaly in the bidding of the MSW^[8], President Arroyo directed the PPA last December (2002) to stop the modernization of the North Harbor and instead concentrate on the smaller ports in the regions. But PPA is bent on continuing the construction and completion of North Harbor’s Terminal 1. The more intriguing thing is, after two years, the results of the CCPSP study was presented to the National Port Advisory Council (NPAC) last month.

· PSAF

Last April, the issue of setting up a Portworkers Social Amelioration Fund (PSAF) has been, once again, brought to the fore at the National Port

Advisory Council (NPAC) – Permanent Committee on Port Labor Relations. This is not the first time the issue has been raised. Rate increases in the past were approved by the PPA and paid for by the cargo shippers for the establishment of a Port Labor Trust Fund. The PSAF story highlights the close relationship between the PPA and the cargo handling sector.

What's in the law? Under the labor code, employers are required to pay employees separation and retirement benefits to its employees in cases of termination of employment and retirement from service. Under the law, it is clear that the payment of separation and past benefits is a liability of the employer to his employees.

The term "redundancy or separation benefits for portworkers" first appeared in EO 212 (s. 1994) issued by President Ramos on November 28, 1994 "*Accelerating the De-monopolization and Privatization Program for Government Ports in the Country*". Section 5 of this EO specifically directs the Philippine Ports Authority (PPA) to adopt measures to protect the interests of redundant and displaced PPA and port personnel resulting from the implementation of the government's de-monopolization and privatization programs. Towards this end, the *PPA shall provide redundancy or separation benefits as may be authorized under existing laws*. Likewise, the PPA shall ensure that the welfare and security of tenure of port workers are assured in every port that is privatized."

In January 1995, the PPA issued Memorandum Circular (MC) 05-1995 granting an increase in cargo handling rates for the purpose of raising funds for the Port Labor Trust Fund that will be established. In this instance, it was the cargo owners/shippers who contributed to the Port Labor Trust Fund (*see Box 3*). One question that may be asked is: "Where is the Port Labor Trust Fund now?"

EO 212's implementation was delayed due to objections of the labor sector arguing that the privatization of the ports would result in the inability of some cargo handlers to shoulder the retirement requirements of port workers who would be displaced. The labor sector claimed that

- PPA was their main employer and that they were merely sub-contracted to perform the services which the PPA was not capable of rendering

- The cargo-handling contracts granted by the PPA was only for a limited period, a year at most
- The rate adjustments granted by the PPA were insignificant compared to the rising costs of providing the service. There were even cases when cargo handlers were forced to dip into the retirement fund that they have already established.

In other words, the port workers' bone of contention hinges on the argument that it's not the cargo handler's responsibility to provide for the separation benefits but of the PPA. The PPA, on the other hand, argues that the payment of separation benefits is a private liability of the cargo handling operators.

In May 1996, the portworkers staged a nationwide strike to dramatize their concerns and to pressure the PPA to act on them. As a result, a Tripartite Oversight Committee was formed to resolve the problem. The strike ended with the signing of a Memorandum of Agreement (MOA) that addresses labor concerns such as –

- Security of tenure
- Recognition of existing collective bargaining agreements (CBAs) and CBA benefits
- Respect for existing labor laws
- The establishment of a Portworkers' Social Amelioration Fund (PSAF)
- Workers participation in the (cargo handling) enterprise
- Prohibition against unfair competition in the cargo handling business

In September 1996, National Union of Portworkers in the Philippines (NUPP) submitted to the DOTC a proposal for the creation of – (a) *Portworkers Social Amelioration Program (PSAP)*. The PSAP is a "scheme designed to acknowledge the contribution of the port workers in the maritime transport industry to the overall effort to advance the economy by giving them their just share in the fruits of the production and to augment their income, specially during periods of need and distress, as well as to institutionalize the mechanism to implement the program."^[9] The program is said to be a private-sector initiative among the cargo handlers and the port workers. PSAP aims to augment the income of the

port worker by compensating them and their families in cases of death, disability, retrenchments, and retirements; and providing for benefits such as emergency loans, salary loans, educational loans, housing loans, and year-end cash bonuses; and (b) *Portworkers Equity Program (PEP)*. The idea is for the workers to be co-owners of the company that employ them through the purchase of not more than 25% of the company's shares of stocks. The Fund is supposed to be raised by collecting from the shippers an additional cargo handling fee of P1.50 per ton per port. Given the estimated annual cargo volume of 80 million metric tons, total collections for PSAF would be roughly P240 million yearly.

Nothing happened to the NUPP proposal to create PSAP and PEP. However, the strong objection of labor to the implementation of EO 212, convinced then President Ramos to rescind EO 212 with EO 410^[10] on Labor Day. He also issued a Memorandum Order to the Chairman of the PPA Board "directing the PPA to finalize the implementing mechanisms, including provisions for funding, and ensure immediate implementation of the Portworkers Social Amelioration Program (PSAP) which shall provide additional benefits to port workers and their families nationwide... not later than May 22, 1997." Unfortunately, despite the Presidential order, PSAP remained as a mere concept. The reason is obvious: "There was no legal framework that justifies its implementation".

On November 12, 1997, the Philippine Chamber of Arrastre and Stevedoring Operators (PCASO), NUPP, and the Domestic Ship owners Association (DSA) entered into a MOA for the purpose of "identifying, pursuing and promoting common business interests and discussing the feasibility and propriety of coming together for the purpose of establishing port service operations... which produce mutually beneficial results." This initial agreement was concretized with the signing of another MOA on October 7, 1998, this time including the big terminal operators at the MICT and South Harbor, that calls for the creation of a "consortium" for the purpose of establishing a Joint-Venture company "to develop the Manila North Harbor, operate its facilities, improve its efficiency, increase government revenue, reduce government expenditure for port maintenance at the least cost to the users." And to provide the legal framework for this plan, President Estrada issued on December 28, 1998 EO 59. As discussed previously, EO 59 called for the creation of a private monopoly as well as the establishment of a PSAF.

In anticipation of the implementation of EO 59, the Portworkers Social Amelioration Program, Inc. (PSAP Inc.) was organized on March 30, 1999. Among the trustees of PSAP, Inc. are representatives from labor, shipping and cargo handling sectors.

EO 59 was never implemented for lack of an IRR (Implementing Rules and Regulations). This time, it was the private sector (not the labor sector) that opposed its implementation mainly due to the port monopoly that it sought to create. And because of this, the PPA had to issue, on March 16, 2000, PPA AO 01-2000 to "operationalize" the PSAP on the basis of a PPA Board approval. But PPA AO 01-2000 was also never implemented for lack of a legal basis.

In early May, the port workers at the Manila North Harbor staged a strike for PPA's failure to address their 5-point demand - i.e., security of tenure, recognition of existing unions, recognition of existing CBAs, establishment of PSAF and non-payment of their past benefits. On May 8, 2000, the PPA signed an "agreement" with the port workers, attested by the Labor Secretary, promising to pay the past service benefits of port workers whose cargo handling companies was taken over by the PPA Special Takeover Unit (STU). The PPA committed to pay each port worker one-month equivalent salary for every year of service. The total amount was estimated at P250 million. In previous instances, PPA argued that the past benefits of portworkers are liabilities of the cargo handling operators. This time, the PPA was ready to assume the liability. Hence, PPA management started paying the portworkers their past service benefits on May 15, 2000 even without the benefit of a PPA Board approval. It was only on May 23, 2000 that the PPA Board ratified the actions of the PPA management.^[11] If a Port Labor Trust Fund was established as a result of the cargo handling rate increase in 1995, why would PPA pay the portworkers their past benefits in 2000?

On May 29, 2000, the PPA once again issued another Memorandum Circular (PPA MC 26-2000) re "*Port Labor Trust Fund*". The PPA MC simply reiterated what has already been required under PPA MC 05-1995. However, on October 31, 2000, President Estrada issued EO 308 rescinding EO 59. And with the rescission of EO 59 goes the legal framework for the establishment of PSAF.

With EO 59 gone, the new leadership of the PPA saw the necessity of issuing another order (PPA AO 01-2001) for the establishment of a Port Labor Trust Fund. This time, however, as part of PPA's "heal and build" policy, the requirement of the Port Labor Trust Fund was linked with the renewal of expired and expiring cargo handling contracts.

The PPA was quick to pay for the unpaid benefits of the workers claiming these to be done because of its subsidiary liability. Perhaps they also construe labor as their public interest segment rather than the shippers. Again this is because labor contractors are their "developmental" partners, like the shipping companies, brokerage and terminal operators.

· **PPA AO 01-2001**

PPA Administrative Order 01-2001 seeks to grant the renewal of expired and expiring cargo- handling contracts without public bidding, contrary to what the law dictates. The private sector cited EO 40 (s. 2001) and EO 109 (s. 2002) issued by President Arroyo mandating government agencies to subject to public bidding all procurement (including cargo handling) and contract award. PPA requested the Office of Government Corporate Counsel (OGCC) for an opinion on the matter. OGCC in its opinion (No. 234) affirmed that indeed cargo handling is covered by EOs 40 and 109. Instead of implementing the advice, PPA requested the OGCC to reconsider its opinion. OGCC did reconsider its opinion (No. 282). Early this year, Congress passed into law RA 9184 (Government Procurement Reform Act) which defines as a matter of policy, in all cases, the following principles: transparency and competition through public bidding, monitoring, accountability, etc. When the issue was brought up by the private sector at the NPAC for the purpose of making sure that PPA policies are consistent with the law, PPA said they will seek another legal opinion from the OGCC.

On July 2, 2001, the PPA issued PPA AO 01-2001 " *Guidelines for the Issuance of Probationary and Long-Term Contracts for Expired and Expiring Cargo Handling Contracts*" as part of the government's "heal and build" policy. A key component of this AO is the establishment of a Port Labor Trust Fund is a key requirement in the renewal of the cargo handling contract/s.

- For the issuance of a 2-year "probationary" contract, the cargo-handling operator must make "available a port labor trust fund for

the retirement and separation of concerned port workers" among other requirements.

- For the award of a long-term contract (maximum of 10 years), the establishment of a *Port Labor Trust Fund* is required. The amount must be deposited in authorized bank/s sufficient to be used for the retirement and separation benefits of individual port workers employment term, or a program for the same trust fund secured through an accredited service provided.

The private sector immediately objected to this, citing the benefits one could derive from competition, transparency, and greater private sector participation through public bidding.

Despite the objection, PPA proceeded with the implementation of AO 01-2001. In an opinion sought by PPA this year, the Office of the Government Corporate Counsel (OGCC Opinion No. 234 s. 2002) confirmed the private sector's contention that the cargo-handling service is covered by Executive Orders 40^[12] and 109^[13] issued by President Arroyo, which require competitive public bidding in the contract award. Instead of following the advice, the PPA has requested the OGCC to reconsider its opinion on the matter. OGCC did reconsider its opinion (No. 282).

One possible explanation that has been put forward why the PPA does not want to subject the renewal of expired/expiring cargo handling contract is because of the possibility that the incumbent cargo handling operator might fail to win in the bidding. If it happens, then the payment of the past benefits becomes due. The trouble occurs when the cargo-handling operator does not have the fund to answer for the liability. Hence, the need to renew the contract via negotiation and not public bidding so that the liability will not fall due. This probably is a compromise for the inability of the government to establish the PSAF.

Early this year, Congress passed into law Republic Act (RA) No. 9184 *Government Procurement Reform Act*, which requires as a matter of policy, the principles of transparency, competition through public bidding, accountability in government procurement and contract

award, including cargo handling contracts. It remains to be seen if PPA AO 01-2001 will be revised to conform to the law.

What needs to be done?

Reforming the PPA is a tough act and the enemy of the reform program is not only PPA but also its so-called *direct* clients. While the recently issued EO 170 and EO 170-A *Promoting Private Sector Investments in the Road-RORO Terminal System* (now popularly known as the Strong Republic Nautical Highway) is a step in the right direction, there is still an urgent need to correct the flaws in the PPA Charter.

Amending the PPA Charter to make it more dynamic and responsive to the needs of the port users and the economy in general requires legislative action. The following principles may be considered in amending the PPA Charter:

- *Separation of the regulatory and development functions of the PPA.* Port administration requires redefining the regulatory as well as the developmental functions of the port authority. The development of general port plans as well as the formulation of broad policies and guidelines in port administration may be given to the DOTC. However, the development of these ports will have to be the domain of the private sector. The independent port authorities, on the other hand, will have to ensure that the specific regulations are in place to encourage efficiency, promote competition and general safety within the port.
- *Deletion of the provision authorizing the PPA or the independent port authorities to share from cargo handling revenues.* This will remove the "conflict of interest" described in early part of the paper. This presupposes that PPA will become regulatory rather than developmental in operation. The development function can be transferred to the private sector. In fact, EO 170 encourages and promotes private sector participation and investment in RO-RO shipping which include, among others, the construction and development of RO-RO terminals.

- *Establish more independent port authorities.* To promote inter-port competition and to decentralize port administration, independent port authorities must be established and managed mainly by Boards composed mostly of representatives from the private sector. International best practice indicates, “none of the successful and well-managed ports cited in the table above is administered by a centralized system of port administration. Each port has its own authority, whether under the jurisdiction of the national or local government. A decentralized system of local port authorities each operating independently creates the environment for inter-port competition, thereby satisfying one of the important conditions for an efficient market in the port sector...the consistent practice of utilizing competition, whether intra-port or inter-port rivalry, is no accident. Competition is regarded as the primary market force in regulating the operator’s business behavior, motivating them to produce higher levels of service quality, disciplining them to reduce costs.”[\[14\]](#)
- *Increase private sector representation and participation in the Board of the independent port authority.* Again, successful ports worldwide are run by independent boards (of directors) and professional managers carefully appointed to represent and serve the interests and aspirations of the local community and industry. Importantly, this form of decentralized administration is predicated on the fact that a local port authority can respond to market conditions more quickly than a centralized authority can. It is no coincidence that a dynamic and responsive board makes a considerable difference in the performance of a port. Although the constitution of a port authority in the international scene offers a diversity of practice, there is invariably a strong commonality among them such as a strong community and industry representation with a degree of government participation in the board. The utilization of the private sector (or privatization) in port functions has been carefully predicated on the strategy of generating competition among the operators within the port.[\[15\]](#)

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[1] A paper presented during the International Conference on Challenges to Development: Innovation and Change in Regulation and Competition at the Edsa Plaza Hotel on October 13-15, 2003.

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[3] Genalyn B. Villasenor, "Understanding and Preventing Regulatory Capture," Congressional Planning and Budget Office (CPBO) Discussion Notes (July 2000).

[4] On August 26, 2001, the Distribution Management Association of the Philippines (DMAP) together with the Consumer Complaints Center (CCC) filed a formal petition to the PPA requesting the PPA to nullify four (4) Memorandum Circulars concerning the cargo-handling rate increases of 2000, 2001 and 2002 for "lack of due process" in the approval of said rate increases. To date, the only action PPA made on the petition was to refer it to the Office of the Government Corporate Counsel (OGCC).

[5] On December 20, 2001, the PPA Board approved Board Resolution (BR) No. 1987 advising the PPA Management to implement, effective January 12, 2002, the "additional" 10% rate increase in the cargo handling tariff of the operators at MICT and the South Harbor as previously approved by the PPA Board on January 11, 2001 (PPA BR No. 1858). The January 11, 2001 approval referred to was already implemented on February 01, 2001 and does not speak of an additional 10% rate increase to be granted at a later date to the operators at MICT and South Harbor. What was required of the operators was to comply with the productivity rate to be no less than 25 moves per ship

hour and to increase it further by not less than 10% (i.e., productivity rate) by 01 July 2001.

[6] Deunden Nikomborirak. *Regulatory Dilemma in Southeast Asia*. TDRI Quarterly Review Vol. 13 No. 1 March 1998.

[7] They are only the port users who have the biggest stake in the modernization of the ports because they are the ones who will pay for its cost and operation.

[8] This is now a subject of a plunder case filed against PPA officers.

[9] Concept Paper on the Port workers Amelioration Program, National Union of Port Workers-Philippines, 1996.

[10] Executive Order 410 *"Repealing EO 212 s. 1994 In Recognition of the Power of the PPA under P.D. No. 857 to Implement the Policy of Accelerating the De-monopolization and Privatization of Government Ports in the Country"*.

[11] During a Congressional public hearing, the PPA argued that it "merely advanced" the payment of the portworkers' past benefits. PPA hopes to be reimbursed by the winning bidder in the North Harbor privatization. The private sector objected to the plan of incorporating the "amount" to the project cost for two reasons: (1) the winning bidder has nothing to do with the liability and (2) incorporating the amount paid to the portworkers as past benefits will unnecessarily jack up the project cost of the North Harbor project. In December 2002, President Arroyo ordered the PPA to shelve the North Harbor Modernization Program and instead use the available fund for the construction of small ports in the countryside. The question now is: "How will the PPA be reimbursed for the amount they advanced for the payment of the portworkers' past benefits?"

[12] **EO 40, s. of 2001** *Consolidating Procurement Rules And Regulations For All National Government Agencies, Government-Owned Or Controlled Corporations And Government Financial Institutions, And Requiring The Use Of The Government Electronic Procurement System and its Implementing Rules and Regulations (IRRs)*.

[13] **EO 109, s. of 2002** *Streamlining The Rules And Procedures On The Review And Approval Of All Contracts Of Departments, Bureaus, Offices And Agencies Of The Government, Including Government-Owned Or Controlled Corporations And Their Subsidiaries*.

[14] Yee, Peter. *Port Administration Lessons Applicable for the Philippines* (2000).

[15] Yee.