6 TRANSPARENCY AND FAIRNESS

In the context of telecommunication regulation, the term *transparency* refers to the openness of the process of exercising regulatory power. *Fairness* refers to the outcome of that process. Transparency is, in effect, a way of ensuring fairness.

Along with such principles as efficiency, objectivity, accountability and adherence to mandate, transparency is one of the most important hallmarks of effective regulation.[1] In fact, all of these principles are inter-related and integral to the success of a regulatory body. Without a reputation for fairness, a regulatory agency is indelibly tainted, its credibility is compromised, and its effectiveness is reduced. An ineffective regulatory agency, in turn, then comes under political pressure from the government, thereby irrevocably altering the nature of its independence. Transparency and fairness, then, are the foundations of regulatory accountability and underpin the very legitimacy of regulatory agencies.[2]

This Chapter outlines the importance and role of transparency in achieving effective regulation through informed public and telecommunication sector participation. The initial sections will explore the conceptual and legal foundations for regulatory transparency. That will be followed by a discussion of the operational and procedural methods of achieving transparency. Along the way, examples and hypothetical scenarios will be used to illustrate the ways in which transparency is crucial to establishing effective regulation.

6.1 The Importance of Transparency and Fairness

Transparent and fair practices are critical to the success of telecommunication regulation. Parties benefit in multiple ways:

- Regulators use transparency to safeguard their legitimacy and efficiency.
- Regulators also obtain information from the regulated industry and other interested parties that they need in order to base their decisions on all relevant facts and diverse views.
- Operators and service suppliers depend on transparency to ensure that their concerns are heard and that they play a role in shaping important decisions.

For transparency to have its full effect, there must be systems and processes in place to allow regulators to gain valuable information, consult all stakeholders, render their decisions, and justify them based on the public interest and the facts provided to them. Evidence of transparency and unbiased decision-making will also help to inoculate regulators from accusations of arbitrary, closed-door decisions for reasons of personal gain or to benefit a certain company or individual.

Moreover, transparency is imperative to avoid *regulatory capture*. As discussed in Chapter 2 of this report, when an agency becomes too dependent on the industry it regulates, it may lose its ability to make tough choices in the interest of the society as a whole. Regulatory capture may take many forms. An agency may be "captured" simply through ongoing personal contacts between regulators and company executives. It may even be subtly dependent on the industry for the main ingredient that any regulator needs to perform his or her job – information about market conditions or a company's operations and practices. Yet, if an agency's deliberations and actions are conducted in the public eye, any indication of regulatory capture or bias can be detected by all observers, including legislators, other companies, and the general public – to whom the agency is ultimately most accountable.

Informed consumers ensure that the regulator does its job and that operators adhere to requirements governing service quality, pricing, billing, and other practices. Transparency and fairness are critical success factors in achieving all the goals in this regard. Thus, although it has many facets, the concept of transparency can be summed up in a single question: Do regulators make their decisions in an open, objective manner that allows them to explain, and be held accountable for, their actions?

It is worth noting that many regulatory authorities are not bound by explicit statutory requirements to follow transparent procedures. Even so, many agencies are engaging in public consultation voluntarily. Indeed, the practice of gaining public input and comments is proliferating.[3] For example, Singapore is increasingly holding public consultations on a range of matters and Botswana recently issued a consulta-

THIS CHAPTER WAS AUTHORED BY:
TRACY COHEN, GRADUATE FELLOW, CENTRE FOR INNOVATION LAW AND POLICY, UNIVERSITY OF TORONTO

Box 6.1: Scenario One: The ISP Licensing Debate

A government authorizes its newly created regulatory agency to begin licensing the country's first competitive Internet Service Providers (ISPs), an action that will affect the earning potential of the incumbent, which is likely, therefore, to hotly contest it. Certain political players have also indicated they do not favour the licensing of new market entrants – even ISPs. Before the government authorizes the sector reform process that includes the ISP licensing proposal, however, it undertakes a nationwide consultation process, holding meetings and seeking input from end users, local community leaders, and owners of small and medium enterprises (SMEs). The consultation process garners widespread support for sector reform. It is clear that the public is sick and tired of paying high prices for inadequate and limited services.

The regulatory agency therefore initiates a tender process for two ISP licences. Ten companies submit bids, including the incumbent and the XYZ consortium. Two investors in XYZ are former business partners of one of the commissioners of the new regulatory body, Commissioner Smith. The commissioner, however, no longer has any business dealings with the XYZ investors or any other licence bidders.

When the regulator awards the ISP licences, one of them goes to XYZ, while the incumbent fails to win one. The next day, news articles appear, reporting not only the licence awards, but allegations that Commissioner Smith holds a financial stake in XYZ. The incumbent, which enjoys close links to the president, requests a presidential inquiry on the licensing process, seeking the resignation of Commissioner Smith and the revocation of both ISP licences.

Responding in a transparent manner, the regulatory body immediately releases Commissioner Smith's full financial statement, which it had secured upon his appointment. The statement reveals that Commissioner Smith severed business dealings with the XYZ investors. The agency also issues a press release detailing the evaluation criterion used in the award of the ISP licences. At a press conference, Commissioner Smith confirms that he had declared his former business dealings with the XYZ investors to the full Commission at the time of his appointment and that he had recused himself from voting on the award of the ISP licences.

The agency's press statements make clear that the licensing was based on sound criteria and legitimate reasoning. The agency also releases statements by community leaders backing the reform process, which they have supported since the consultation process began. These leaders also confirm their commitment in letters to the President, who, satisfied with the legitimacy of the process, eventually calls off any inquiry into the licence awards.

Box 6.2: Measuring Transparency

Transparency is a difficult quality to quantify. In general, however, we can say a certain measure of transparency is present where the following factors are found:

- Stakeholders, including the general public and the regulated industries, are informed and consulted through public comment procedures or hearings prior to decisions.
- The results of that input are reflected in the agency's actual decisions or proposals.
- Proposals and decisions are published and distributed openly to the public.
- There are rules governing decision-making processes that allow the public to hold the agency accountable for its actions.
- Decisions are determined by votes, held in public meetings.
- Citizens and companies have the right or ability to contact regulators and policy-makers to express their views or ask questions.
- The agency staff responds to queries and complaints from its various constituencies.
- Essential information is made available in more than one language, where relevant.
- There are rules requiring disclosure of behind-the-scenes "lobbying" before the regulatory agency.
- There is a code of ethics that governs the behaviour of regulators.
- Regulators must disclose financial interests and avoid conflicts of interest.
- There is a limit on the value of gifts a regulator or legislator can receive.

Box 6.3: Values of Effective Regulation

Accountability	To government, courts, industry and consumers. Accountability embraces independence.
Fairness	Performance of statutory functions in an impartial, equitable, lawful, unbiased and just manner.
Openness and transparency	Policies and procedures accessible to all and simple to use. Public hearings and the provision of reasons for decisions. This value supports all other values.
Effectiveness and efficiency	Streamlined and timely procedures, managed resources; coordinated services and avoidance of duplication. Efficiency need not conflict with transparency.
Integrity and independence	Exercise of statutory powers without interference or external pressure. All stakeholders treated equally and with respect.
Authority/Acceptability	Subject to review or appeal procedures, regulators' decisions should have a quality of finality and be accorded full recognition.
Principled/informed decision-making	Decisions and rules must be based on identified principles and policy. Proper consideration of facts and information will facilitate sound decision-making.
Quality and consistency	Production of accurate, relevant, dependable, understandable information and results.

Source: Adapted from LRCC, Working Paper 25, 1980, and Responsible Regulation, 1979.

tive document on the development of pricing guidelines and principles. In Botswana, regulators at BTA have even delayed a public meeting on this document in an effort to engage greater participation by consumers.

Clearly, regulators are finding reasons to engage in public consultation, even without statutory mandates to do so. Those reasons include:

- *Efficiency and Effectiveness:* Open processes produce better results and create confidence in the regulator. Increased public participation promotes multiple and diverse ideas in decision-making and boosts support for rules and policies, making implementation easier. In addition, transparency can lead to greater efficiency by ensuring that duplication of functions is avoided.

- *Certainty and Reliability:* As discussed in Chapter 2, regulatory credibility and legitimacy build stability, which is required to attract foreign investment. This is particularly important in newly liberalized markets, where investors need to trust that their investments are protected from arbitrary action and that further commercial development will not be thwarted by sudden changes to "the rules of the game".

- *Accountability and Independence:* Openness promotes accountability and legitimacy, reinforcing regulatory independence and reducing political or industry interference. Stakeholders will have confidence that their views will be heard, without bias, by the regulator. And where regulatory actions are exposed to public view, regulators are more likely to engage in careful and reflective decision-making.[4]

- *Continuity:* A stable set of rules governing transparency will transcend political changes and outlast political appointments, ensuring a continuous regulatory record no matter who is in charge of the regulatory agency or which political group is in office.

6.2 Sources of Authority for Implementing Transparency

Governments can often find multiple justifications and legal underpinnings for implementing a transparent regulatory regime. These justifications can be found in domestic law, legal and governmental traditions, and international agreements.

6.2.1 International Trade and Transparency

Many international agreements contain provisions calling for signatories to act fairly and in a procedurally open manner. Those include WTO's basic telecommunications services agreement, the GATS pact (to which the WTO agreement is a protocol) and the North American Free Trade Agreement. For example, Articles III and VI:1[5] of the GATS, and widely adopted WTO Agreement's Reference Paper on telecom regulatory principles[6] reveal the increasing importance member countries place on transparency in their international commercial relations.

There are, of course, differences among signatory countries' legal traditions. Nevertheless, the transparency requirements in many multilateral trade agreements promote a standardization and harmonization of transparency practices. The WTO Agreement, for example, calls for transparency in licensing, interconnection, frequency allocation and universal service. These provisions enhance predictability and inspire investors' confidence. They also ensure that participating governments adhere to core fair trading principles, such as "most favoured nation" (MFN) treatment and non-discrimination among service suppliers from WTO member nations.[7]

6.2.2 Legal Traditions and Principles

In many legal systems, the principles and practices of transparency and fairness derive their relevance from the broader discipline of administrative law. In civil and common law traditions, administrative law dictates how governmental entities – including agencies, courts, commissions, and tribunals – should operate in relation to each other, as well as in relation to those over whom they have jurisdiction.[8] In short, administrative law

Box 6.4: Transparency Requirements in the WTO Regulatory Reference Paper

- Procedures for interconnection to a major supplier must be made publicly available.
- Interconnection agreements or reference offers by major suppliers must be publicly available.
- Universal service obligations must be administered in a transparent manner.
- All licensing criteria, including time frames for decisions on licence applications and the terms and conditions of individual licences, must be publicly available.
- Any procedures for the allocation and use of scarce resources – including radiocommunication frequencies, numbers and rights of way – must be carried out in an objective, timely, transparent and non-discriminatory manner.
- Decisions and procedures of the regulator must be impartial to all market players.
- Current frequency-band plans must be made available, except for specific detailed identification of bands for government use.

Box 6.5: Procedural and Substantive Fairness

Procedural *fairness refers to the quality of processes used to make policies, rules or decisions: namely, whether the processes are open and accessible to all interested and affected parties.*	**Substantive** *fairness refers to the quality of the outcomes of these processes: namely, whether the rules, policies or decisions are fair, consistent, reasonable, and unbiased.*
Procedural fairness has two additional elements: the right to a fair hearing and the right to have an issue decided by an unbiased decision-maker. Together these comprise the rules of natural justice.	

prescribes the rules and procedures for how public decision-makers (and in some cases, private bodies exercising public functions) should operate.[9]

It is a widely accepted legal requirement of public administration that all state institutions and bodies exercising powers granted by statute do so in an open and fair manner. Because regulatory agencies, and the officials that staff them, are usually not democratically elected, they must be subject to high standards of accountability to governments, to the sectors they regulate, and to consumers and the general public.

While the functions and powers of regulators may vary around the world, their essential roles remain the same:

- to defend the public interest and promote competition and universal service;
- to issue service licences and authorizations;
- to regulate price and quality;
- to monitor compliance with concessions and licence conditions; and
- to resolve interconnection and other inter-operator disputes.

Regulators inevitably make decisions that affect individual rights and interests, property and investments. In common-law countries, regulators may also make law by issuing regulations and policy directives, often using their own discretion, which is granted to them by statute. If regulators' decisions are not exercised in a fair and consistent manner, there are various legal grounds and provisions for review and appeal of those actions. It is essential that regulators comply with the provisions of administrative law and exercise their powers transparently.[10]

The specific application of administrative law in different legal systems will vary and is too complex to cover in this Chapter.[11] Regulatory priorities and objectives and the degree of public participation will also differ. But despite variations, the essential principles remain the same:[12] the regulator must act in both a procedurally and substantively fair way (see Box 6.5). These requirements embrace the concepts of natural justice and due process, which include the right to a fair and unbiased hearing.[13]

Judicial review and appeal processes will often be based on one of a number of technical legal grounds. It is therefore important that regulators be familiar with both the legal and practical significance of their actions. The legal principles governing basic regulatory actions such as setting regulations, holding hearings or enquiries, licensing or rule-making are considered in the following subsections. It must be noted that transparency and fairness cannot be separated in administrative law; they are symbiotic. Similarly, all aspects of natural justice and due process are interrelated and cannot be seen as distinct or disparate in operation.

6.2.3 Basic Legal Principles

Where a regulatory agency is empowered by legislation, regulators require legal competence or jurisdiction to act on a matter governed by law. In plain language, this means the agency must have the legal authority to act on a specific matter. The extent of this power is usually spelled out in the enabling legislation and may be seen as defining the agency's legislative mandate. The extent to which a regulator adheres to this mandate is an important benchmark of sound regulation. In addition, statutory authority must be exercised for the proper purpose for which it

Table 6.1: Example of Administrative Agencies and Action

Agencies		*Actions*	
Collegial	***Individual***	***Adjudicative***	***Non-adjudicative***
Authority	Minister	Rule-making	Enquiry
Board	Director-General	Enforcement	Monitoring
Commission	Superintendent	Dispute Resolution	Information gathering
Council	Chairperson	Auctions/bids	Advisory
Tribunal		Licensing/concessions/ permits/authorizations	Supervisory
		Amendments	Implementation of international treaties
		Renewal	
		Policy-making	
		Review and Appeal	

was granted, and decisions should be made in good faith. Delegation of authority to make decisions is precluded unless expressly authorized by statute. Even then, strict procedures for delegation must be followed.

Officials of administrative or regulatory agencies often must use their own discretion in decision-making, subject to the constraints of their legislative mandates. Greater flexibility and discretion is usually required in sectors, like telecommunications, in which there is rapid technological change or where the introduction of competition requires continual adaptation of rules to changing market conditions. The amount of discretion granted will vary in different countries and is delimited in the language and objectives of the governing law, if there is one. The challenge in applying discretion is to miminize the risk of abuse and insulate the regulatory agency from political pressures. Abuse of discretion occurs when a regulator:

- acts in bad faith or for an improper purpose;
- fails to use discretion through rigid application of a rule without considering the particular case in question;
- takes into account factors that are irrelevant to the particular case;
- fails to take into account relevant factors in the case before it;
- acts unreasonably or irrationally;[14]
- lacks independence.

6.2.4 Natural Justice

In the realm of regulatory decision-making, securing consistently sound outcomes is impossible without sound processes. Procedural fairness is rooted in the requirements of natural justice, which has two main requirements: (1) no decisions may be taken, rights affected, or privileges granted, without the benefit of a hearing; and (2) hearings must be conducted by an unbiased arbiter. In telecommunication regulation, natural justice is reflected in the processes of providing notice of actions and giving stakeholders a chance to comment on proposals. More generally, natural justice may call for a variety of actions to ensure informed public participation.

In common law countries, the right to a hearing is recognized as "transcendent". And in many others, hearings are included as part of an "unwritten code" of regulatory practice, even if they are not explicitly required by statute.[15] If a certain public notice and comment or hearing requirement is legally mandated, failure to observe that requirement will render a decision invalid on review in many countries, regardless of what substantive finding a hearing may have resulted in.

6.2.4.1 The Right to a Fair Hearing

Often referred to as the *audi alterem partem* ("hear the other side") rule, this principle requires that those affected by an administrative decision have an opportunity to comment or present their case to the decision-maker. In certain cases, they also may have the right to respond to arguments being advanced by others. A "hearing" need not be oral; the principle can be satisfied by written comments or testimony. In addition, the form of the hearing (and the rules governing it) may vary according to whether it is an investigative (e.g. licence contravention), adjudicative (e.g. dispute) or distributive (e.g. licence award) process. Regardless of the hearing's structure, there usually must be timely advance notice, giving parties a chance to prepare their arguments and participate meaningfully.

In certain cases, market players may have a legally enforceable expectation to a hearing where they may be affected by the exercise of statutory power. Or at very least, they may have an expectation to be consulted before regulatory action is exercised. These expectations arise on the basis of existing informal rules, customs or practices that have been followed either generally or in a particular case.

6.2.4.2 The Right to an Unbiased Arbiter

Many courts have recognised the unqualified right to be heard by an impartial, independent judge.[16] While the principle is usually interpreted to mean that regulators should avoid bias and pre-judgement when making decisions, it really is an umbrella concept for ensuring the quality of decision-making, because

bias is often difficult to untangle from the other factors that may constitute grounds for abuse of discretion.

Bias can be established in a number of ways. It may be apparent, for example, from a recent prior involvement with one of the parties, or from an expression of an opinion before or during a proceeding, indicating a pre-formed view about the proper outcome of the hearing. If bias is established, it will in most cases automatically lead to judicial review of administrative actions.

The imperative to avoid bias extends to cases of perceived bias. Indeed, in many jurisdictions, a mere perception of bias may invalidate a regulatory decision – no matter how unintentional or unconscious the bias might be or whether it actually prejudiced any decision.

Typically, bias may be perceived where an individual holds a direct interest, financial or otherwise, in the outcome of proceedings. Bias may also reflect group attitudes or personal and professional relationships, throwing impartiality into doubt. This can occur where an individual regulator must adjudicate a matter concerning family, friends, rivals, or a company that previously employed the individual. In such cases, a regulator should ensure that any potential conflict of interest has been declared. If necessary, the individual should request to be recused from the matter. The imperative that *"justice must not only be done, but must also be seen to be done"* is vital for regulators.

The need to avoid perceived or real bias raises issues for staffing of agencies, which require a high level of relevant skills and expertise. In most countries – particularly at the highest decision-making levels – agency employees have often come from regulated companies and may fully expect to return to industry (sometimes even to the same positions), after their terms expire. This "revolving door" phenomenon is seen around the world. Prior involvement or affiliation with market players is especially common in emerging economies, where many of the regulatory agency's employees come from the incumbent operator or former PTT. Some may still have a financial interest in that incumbent and, where this is the case, that interest needs to be declared.

Prior experience or affiliation is not *per se* a reason to review a regulatory action, in the absence of some other objective proof of bias. But it is a complicating factor that many governments must take into account. For example, Morocco has drawn heavily on academics to staff its regulatory agency. Only one director of the agency came from the incumbent operator.

Because of the adverse effects bias may have on legitimacy and independence, there should be procedures and practices to ensure scrutiny of any potential biases due to associations with individual market players. In general, public participation, openness in agency deliberations, explanation of the reasons for decisions, disclosure of decisions to the media and the public, and other transparency mechanisms will preclude bias.[17] More specifically, guidelines for recusal, declaration of interests and detailed codes of conduct may be utilized/employed to eliminate any potential for bias.

6.3 Applying Transparency Principles to Regulatory Practices

The general rule in designing a transparent regulatory regime is that all aspects of regulation should be as open and accessible as possible. Transparency should prevail, except in the face of legitimate claims regarding confidentiality, national security or public safety. In addition, transparent and fair procedures should be established at the outset, when a regulatory regime is created. But in order to maintain legitimacy and openness, transparency must be an ongoing process, requiring constant adaptation and vigilance.

One way to analyze transparency is to examine the degree to which operators, industry groups, consumers or other interested parties can access the staff of a regulatory agency and present their views and concerns. Access may be formal, with rules governing the reporting of industry meetings and the inclusion of material in the public record, or it may be informal, governed only by standard rules of business etiquette. The following sections outline ways to infuse transparency into regulatory access procedures, the conduct of the agency and its employees, and the agency's overall operations.

6.3.1 Transparency of Conduct

The concept of transparency in regulation applies not only to agencies, but to the people that run them, as well. The virtues of regulators, including scrupulous non-partisanship and professionalism, are critical. This can be ensured through a variety of mechanisms. For example, the Telecommunications Regulatory Authority Act of India states that individuals may be removed from office for insolvency, conviction of certain offences, physical or mental incapacity, acquiring a financial or other interest that may affect performance, or abuse of authority in a way that jeopardizes the public interest. The law stipulates that no member can be removed for the latter two grounds without a hearing. This section will now turn to various mechanisms to ensure transparent conduct.

6.3.1.1 Codes of Conduct

One way to establish the core public service values that should inform regulation is to adopt and enforce a code of ethical conduct. A range of behavioural and institutional values can be enshrined in such a code, which generally binds all employees from the date they are hired. The content of conduct codes may vary, but they usually should address the following:

- safeguarding agency assets through rules on spending and financial reporting;
- setting rules for professional contact with the sector;
- establishing provisions for disclosure of conflicts of interest;
- spelling out when information may be held confidentially;
- setting rules for contact with the media;
- setting procurement rules;
- establishing methods to report and handle misconduct and what the proper grounds are for disqualification or dismissal.

Box 6.6: BTA's Conditions of Service

In Botswana, the rights and obligations of the Botswana Telecommunication Authority (BTA) and its employees are spelled out in the Conditions of Service, which came into effect in 1997. They cover various issues such as appointments, probation, promotion, salaries, performance management, working hours, leave, transport, travel and travel allowances, housing and rents, disciplinary policy and procedures, grievance procedures, termination of employment, pension and gratuity plans, benefits and allowances.

The code of conduct specifies the behaviour the Authority expects from its employees in several aspects, from general conduct to political activities. Language on these issues includes:

- "The Authority is a public body, and expects staff to conduct themselves at all times in a manner which preserves the good name of the Authority, its political neutrality, credibility and independence."
- "All information obtained during the course of employment with the Authority is confidential, and strictest secrecy shall be observed by all employees in regard to information acquired during the course of their duties."
- "No employee shall tamper with, or make erasures to, any books, papers, computer records, or any other permanent record, or working papers of the Authority without authority. The Authority may take disciplinary action against any employee found to have made such amendments or erasures if, in the opinion of the Authority, such amendments or erasures are misleading, whether or not it was the intention of the employee to mislead."
- "Except with prior authority of the Executive Chairman, no employee of the Authority shall issue any press statement, or take part in any public debate or discussion, on any matter relating to the business of the Authority or purporting to express the views of the Authority an any matter."
- "Employees are discouraged from receiving personal visitors on Authority premises; and such visits should be kept as short as possible."
- "Employees of the Authority shall not accept, or solicit, gifts, fees or hospitality from any person with whom they have official dealings, either in respect of services rendered or in exchange for services to be rendered. Any offer of such gifts, or similar considerations, must be reported promptly to the Executive Chairman."

Source: Effective Regulation Case Study: Botswana, 2001, ITU. Available on http://www.itu.int/ITU-D/treg/Case_Studies/Index.html

Codes can also cover matters such as prohibitions on sexual harassment, health and safety rules, and provisions addressing substance or alcohol abuse. While these may be largely internal administrative matters, public knowledge of them can only serve to enhance transparency of operations and improve sector confidence.

6.3.1.2 Declaration of Interests and Prohibitions on Financial Gain

As discussed above, when an individual regulator holds a financial or material interest in a regulated company, it becomes very difficult to avoid allegations of bias. A prohibition against financial or material gain by regulators is often included in an agency's authorizing legislation. More than 90 per cent of all regulators work under such bans.

While obvious conflicts of interest, financial or otherwise, should emerge when an individual is nominated or hired, codes of conduct can provide a means to require declaration or disposition of current and future financial interests. However, even where this is done, it is not always immediately or evenly administered. For example, in Morocco, the group of "designated individuals", which is one of the two classes of members of the Conseil d'administration (the decision-making body), is subject to prohibitions on holding a personal interest in telecommunications and information technology companies.

In Botswana, board members are always required to declare their interests in any matter before the board and may be asked to recuse themselves. While board members have made declarations, there has not been a need for recusal yet, because board members appear to have avoided any financial interests in regulated companies. With competition, however, the landscape for participation in the sector is changing in many countries. A regulator may well be involved, for example, on the board of directors of a non-regulated company. But the complexion of that involvement may change radically if that company later joins a consortium to bid for a telecommunication licence.[18]

The actual size of the interest held is irrelevant, although for disqualification, it usually needs to be a direct one. The South African Telecommunications Act stipulates that a councillor may be disqualified if that person, or any family member, holds a direct financial or controlling interest in any company in the industry. A comprehensive code of ethics requires that councillors and staff not participate in matters in which they have a personal financial interest.[19]

Meanwhile, rules ought to preclude regulatory staff from using the agency's property, assets and other resources for personal gain or benefit. The disclosure of salaries for public servants is also a useful tool to ensure transparency. In cases where regulatory appointments are made "at pleasure" by governments, for indefinite periods, the cabinet may determine salary and annual raises. The risk of political pressure is reduced by public availability of this information.

To reduce the possibility of misappropriation of funds or misdirected spending, regulators should provide accurate and

timely accounting and all other records of all financial transactions – preferably annually – to the executive, legislature or other oversight entity. Establishing a central authorization office for agency spending is also a useful accountability mechanism. A chief financial or executive officer, accounTable to the commission or the oversight body, should authorize all spending on travel, training, acquisitions or procurement.

6.3.1.3 Gifts, Invitations and Business Courtesies

Companies commonly try to build relationships with suppliers and customers by sending corporate gifts or courtesies, such as tickets to concerts or sporting events. Regulators are often included in the list of recipients. Because of the nature of the relationship between the regulator and the industry, however, rules are required to prevent the development of bias, or the perception of bias, stemming from gifts. There must be a way to define the difference between token niceties and influence-buying or outright bribery. This can be done in a number of ways:

- by a general rule prohibiting any gifts, invitations or courtesies;
- by establishing situational guidelines on acceptance of gifts (e.g. whether there is an impending hearing involving the giver or whether acceptance may be justified on policy grounds, such as to fund or pursue training or developmental programmes);
- by setting guidelines on the nature of the gift. (e.g. meals or invitations to ribbon-cuttings may be acceptable, while leisure resort weekends or substantial cash payments would be forbidden);
- by imposing ceilings on the value of the gift; or
- by requiring the declaration and registration of all gifts in a central register.

Obviously, daily contact between regulators and industry representatives will occur. Professional relationships and even friendships may already be in place, or they may emerge over time. While it is important to always keep these relationships at arms length, they are not, by definition, inappropriate or improper. On the contrary, effective regulation requires a healthy working relationship with stakeholders. Common sense, good judgement, clear guidelines, adherence to principle, and good record-keeping will minimize allegations of bias and ensure professional standards. Where there is any doubt about the appropriateness or motivation behind any gift, it should be declined or referred to an ethics officer, general counsel, or internal investigator for consideration.

6.3.1.4 Training and Performance

Adequate training of staff, at all levels, will help maintain professional standards and cultivate a culture of transparent practice. Standardized training programmes or materials should be developed for this purpose, either internally or externally. Designing and implementing adequate performance evaluation criteria and tools will also ensure that the agency's employees have sufficient knowledge and the necessary skills required for the job. Training and internal career advancement programmes will also counter the common loss of regulatory staff to the private sector.

In Morocco, ANRT struggles to compete with the private sector on salary levels. But it has undertaken enormous efforts to train and promote its staff as a way to win loyalty. With the cooperation of domestic and international institutions, ANRT has developed a variety of short- and long-term training programmes for its officials. The Agency also holds weekly in-house seminars on relevant and timely topics in the sector, which staff may attend on a voluntary basis. Agency staff are also encouraged to take language courses and participate in programmes leading to a degree or diploma at educational institutions in the country or even abroad, so that they may develop new areas of expertise.

6.3.2 Transparency of Operations

Various operational practices may be developed to ensure regulatory transparency through public participation by stakeholders in the sector.

6.3.2.1 Information Disclosure

In order to maintain transparency and regulatory efficiency, the sector must be well informed about what the regulatory agency is doing and how it is functioning. Beyond the public release of decisions and other binding actions, agencies can publish informational pamphlets detailing the roles of its various offices, bureaux and programmes. It can make available an organizational chart and provide names and contact information of commissioners and staff members. It also can provide fact sheets detailing how decisions are made and what matters falls within the scope of the agency's work. All of these measures will help raise the public profile of the agency, facilitate public access and build confidence in its operations.

Governments often require regulatory agencies to draft and publish annual reports describing the agencies' activities, descriptions of decisions, short- and medium-term plans and goals, and financial statements. In effect, these resemble corporate annual reports in some respects. The reports often must be presented directly to oversight ministries within the government. For example, Botswana's Telecommunications Act requires BTA to report to the Ministry of Works, Transport and Communications, a mandate that has led BTA to present an annual report to the Minister.

In Denmark, the National Telecom Agency is required by law to submit an annual report on its activities to the Minister of Research and Information Technology regarding its activities. The report contains any requests for legislative action, as well as any developments regarding universal service and consumer affairs. The Minister then submits this report for discussion to consumer and industry representatives. Making such reports available for public scrutiny is an important way to ensure that the public is informed on the proper role and functions of the regulator. It also boosts legitimacy. The ITU World Telecommunication Regulatory Database indicates that at least 70 per cent of all regulators publish annual reports. Most are publicly available, and at least half of them are published on websites.[20]

In addition to annual reports, an agency may find it useful (subject to resource limitations) to compile an annual or bi-

Box 6.7: Oftel's Management Plan

The following language, included as a foreword to Oftel's draft management plan, is a good example of the approach used by some agencies in publishing strategic planning documents.

Foreword from the Director General of Telecommunications

Consultative document issued by the Director General of Telecommunications, December 2000.

Oftel's draft Management Plan for 2001/02 has been prepared at a time of important developments in the telecoms industry.

The UK telecoms market continues to develop at a rapid pace. Consumers have more choice and keener prices thanks to increasing competition. The mobile market continues to grow, as does use of the Internet. And new technology will increase the availability of higher bandwidth services to businesses and consumers.

On the regulatory front, the new European framework for the regulation of electronic communications continues to take shape. Proposals have been published and are now being negotiated with member states. In the UK, the Government has recently announced its intention to combine the functions of a range of existing regulators, including Oftel, into Ofcom – a new single regulator for the electronic communications sector.

All of this has important implications for Oftel and its work to ensure that consumers get the best deal possible in terms of quality, choice and value for money.

Oftel's draft Management Plan 2001/02 sets out the projects and programmes that Oftel will undertake over the coming year, including the practical implementation of our work on leased lines, local loop unbundling and unmetered Internet access. A number of market and licence condition reviews are planned as part of Oftel's strategy to ensure regulation is appropriate to the circumstances. This is vital as markets undergo significant changes. There are new projects to take forward the Government's plans for Ofcom, and expanded projects to ensure that consumers have the necessary information to choose the service that best meets their needs.

The Management Plan has been published in draft in order to give the consumer groups, industry and Government departments the opportunity to comment on Oftel's proposed work. Oftel's work inevitably has a significant impact on the telecoms market. It is therefore important that we have the views of businesses and consumers to ensure that we are tackling the right issues.

I look forward to hearing your views.

David Edmonds, Director General of Telecommunications

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Source: http://www.oftel.gov.uk/publications/about_oftel/drmp1200.htm

annual work plan, setting out its regulatory objectives and priorities, as well as issues for policy development and agendas for hearings and public meetings. This facilitates effective public participation by giving industry and other stakeholders advance notice of the upcoming events and matters under consideration and allowing them sufficient time to prepare. For example, Oftel in the United Kingdom publishes its management plan each year, setting out its annual work programme (see Box 6.7). Similarly, Ireland's ODTR publishes its current and past work programmes on its website, including the views of an external expert group tasked with reviewing ODTR's strategic focus.

It may also be useful to publish regulatory policy statements, indicating generally how the regulator may rule on certain matters. Regulators generally have this authority, even where there is no specific statutory authorization.[21] However, such statements should not convey the idea that the regulator has prejudged an issue. That would invite allegations that the agency is unwisely limiting its discretion to base its decisions on the specific circumstances found in particular cases.

Figure 6.1: Singapore: IDA's Website

Responses received to the proposed Reference Interconnection Offer (RIO):

1. *Cable & Wireless plc*
2. *East Asia Crossing Singapore Pte Ltd*
3. *Concert Global Networks (Singapore)*
4. *MCI Worldcom Asia*
5. *MobileOne (Asia)*
6. *Equant Singapore*
7. *Singapore Cable Vision*
8. *StarHub*
9. *Qala Pte Ltd*
10. *Macquarie Corporate Telecommunications Pte Ltd*
11. *Harmony Telecommunications Pte Ltd*
12. *British Telecommunications*
13. *Pacific Internet Ltd*

Source: IDA (http://www.ida.gov.sg).

It is also imperative to ensure that regulatory information is conveyed in an accessible and user-friendly manner. It should be offered in plain language – and, where appropriate, in all official languages. In Brazil, Anatel has established a "citizen room", equipped with televisions, video-cassette recorders, computers, fax machines and photocopiers. Users can access Anatel's online databases, archives, and other information. They also may file comments, complaints and licence applications at the facility.[22]

Regulators should utilize all possible means to ensure meaningful public participation, including the Internet, which is increasingly being used for a variety of regulatory tasks, including publishing general information, providing public notice of upcoming meetings or decisions, and allowing online filing of applications and public comments. ITU estimates indicate that 75 per cent of all separate regulators have websites with varying degrees of content and information.[23] Many of them are becoming fully interactive. In the United States, Canada, Germany, and Switzerland, for example, spectrum licence auctions have been carried out entirely online. In addition, many regulators, such as Anatel, also publish online all consultation and discussion documents, as well as licence application forms and procedural instructions, facilitating rapid submission and speedier processing.[24]

Electronic filing of applications, comments and all other materials should be encouraged, with security provided for confidential information. In Singapore, IDA's public consultation announcement for SingTel's proposed Reference Interconnection Offer made clear that all comments IDA received would be posted on its website. IDA put the industry on notice that it would not entertain private, closed-door meetings to discuss the proposal.

The content made available on an agency's website will vary, depending on the agency's financial and human resources and the literacy and Internet access penetration levels in each country. At a minimum, however, an informative regulatory website should include the following:

- telecommunication laws and terms of major licences (including any modifications made to them, together with determinations, directions, orders and conditions attached to the licence);
- interconnection agreements, including prices (where applicable);
- licence application forms and the recipients of all licences granted;
- consultative documents and responses;
- organizational information, including contact details;
- notices of upcoming hearings and proceedings;
- regulatory decisions and explanatory documents;
- complaint procedures and consumer information;
- regulatory and industry codes of conduct and ethics;
- useful links to operators, other regulatory authorities, consumer groups and relevant government departments.

The use of websites, both by the regulator and the industry, is an important means to enhance transparency. It may be beneficial to encourage major operators to provide useful public information on their own websites, such as rates, customer service contact information and billing complaint procedures.

6.3.2.2 The Media

While the Internet is beneficial for regulators in both developed and developing countries, some countries still have minimal development of Internet access. In such cases, broadcasting and print media, including radio and newspapers, remain vital for ensuring that the public has access to important information. Other means of ensuring publicity include press releases, press conferences, industry briefings, seminars and workshops. In Brazil, regulators have used an advertising campaign to raise

Box 6.8: Scenario Two: The Interconnection Dispute

Country "A" has recently implemented reforms to liberalize and deregulate its telecommunication sector, but progress toward competition has become bogged down in disputes over interconnection with the incumbent. The regulator decides to resolve the disagreements by publishing interconnection guidelines, as the country's recently adopted Telecommunications Act mandates. The regulatory agency drafts proposed guidelines, and it decides to engage in public consultation. The agency solicits written comments, holds a formal hearing, and then decides to hold an informal seminar, which is open not only to the operators, but to all stakeholders and the general public.

At the seminar, valuable pricing and technical information is made available to the regulatory agency, supplementing the material submitted in comments and at the hearing. Because the seminar is less formal, it also provides a forum for various market players to tell the commission about their experiences regarding the incumbent's intransigence on interconnection.

Through the seminar, the regulator is better able to identify potentially controversial and litigious issues before publishing final guidelines. In addition, the incumbent and its rivals have an opportunity to share information and concerns with each other, in a moderated and relatively informal setting.

consumer awareness of their roles, functions and activities on behalf of consumers.

Many, if not most, regulatory agencies maintain press offices, which specifically focus on establishing professional and cooperative relationships with the media, including trade journalists. Certainly, the press is unpredictable, and balanced perspectives are not always reflected. Negative coverage can damage the credibility of the agency – but that is perhaps the best reason to actively engage the media in an effort to ensure that the facts are properly reported. Moreover, there are many ways to use the press as an effective publicity and promotional tool. Regulators should be encouraged to issue press releases and foster honest and constructive dialogue with the press. Robust and open access to the media is one of the best ways to ensure transparency and accountability, to the benefit of all parties.

6.3.2.3 Workshops, Seminars and Alternative Dispute Resolution Mechanism

During the transition to competition, regulators often operate under conditions of limited knowledge. Economic, social, and in some cases, political concerns need to be addressed, and a diverse range of opinions and concerns must be considered. In keeping with transparency, regulators must make as much information available as possible. In turn, they are dependent on receiving important information from industry and the broader sector to realize their goals. The two-way flow of information inevitably demands a wide range of processes for information gathering and dispute resolution.

The scenario illustrated in Box 6.8 shows how important it can be to augment formal consultations and hearings with informal methods of information gathering and mediation. One such approach is commonly known as "alternative dispute resolution" (ADR), a set of procedures that may include extensive consultation, mediation and even arbitration, if necessary. The approach places a premium on giving all parties an opportunity to present their arguments in an environment conducive to achieving resolution. ADR can take place in a number of settings. The regulator can choose to hold relatively informal round-table meetings, workshops or seminars to gather data and discuss issues in a non-confrontational manner. In Sri Lanka, for example, regulators embarked on an ADR process to resolve interconnection disagreements among fixed-line operators.[25]

In some cases, regulators may have legislative mandates to adjudicate certain disputes by mediation or arbitration. This is often the case with regard to interconnection. For example, the Moroccan and South African telecommunication laws both require the regulatory agencies to resolve interconnection disputes when parties fail to reach agreement through their own negotiations.

While these forums may produce delays, ultimately they can reduce and resolve conflicts that otherwise would fester for months and years. Moreover, they may be less expensive than formal proceedings, and they serve a useful purpose in promoting transparency, because workshops and seminars function best when there is a free flow of data among parties. While such forums may be less formal than hearings, they should always adhere to the principles of natural justice and reflect principles of due process.

6.3.2.4 Rules of Practice and Procedure

It is also useful to standardize and publish rules of practice and procedure so that interested parties know how to approach regulators. This not only enhances transparency, it also ensures that procedural rigour will prevail, no matter who staffs the agency. FCC in the United States, for example, has published a detailed "practice manual" on its website, explaining how to participate in regulatory proceedings and interact with the agency's staff.[26] This manual includes: all FCC procedures; timetables on key decisions; criteria for decision-making; guidelines for third-party representation; and an explanation of how hearings are conducted.

Once again, the list of guidelines can be expected to vary from one country to the next. The list could include:

- office hours and proper times to communicate with the staff;
- a schedule of public meetings, with rules on quorums and voting;
- information on inquiries, hearings and appearances before the agency (including expert examinations, the withdrawal of papers, appeals of decisions, summons or subpoenas);

- how to file pleadings, including comments, extension requests and applications;
- specifications for pleadings and papers filed with the authority (e.g. page limits);
- circumstances in which requests for intervention or confidentiality will be granted;
- lists of open rule-making proceedings, petitions for rule-making and declaratory rulings;
- information on "content of authority" and "amendment of authority" decisions;
- information on any delegation of authority;
- rules governing appeals and review processes;
- information on enforcement of decisions; and
- licence application procedures and forms.

Rules of practice and procedure are particularly useful in facilitating transparency and have been adopted by many countries for regulating many different industries.[27]

6.3.2.5 Compiling a Public Record

Transparency can also be advanced by ensuring that the agency keeps all records of important meetings, decisions, and the deliberations. All public hearings should be recorded and transcribed, with copies made available to the public. Particularly with regard to major licence awards, it is increasingly important to maintain complete records to safeguard against any later allegations of bias or lack of independence. Some agencies (particularly those with multi-member boards or commissions) record all meetings – or at least those during which major decisions are made. At the very least, detailed minutes of council meetings should be kept for a certain period of time.

Brazil's Anatel publishes the agenda for all board meetings, as does FCC in the U.S. The latter agency also broadcasts its meetings over closed-circuit television. Increasingly, agencies are likely to "webcast" hearings and meetings on the Internet.

Agencies also may choose to make public all official correspondence with regulators and their staffs. Copies of letters may be routed to all members of multi-member commissions and presented in a public file. In addition, a central registry for e-mail communications may be established to store all official e-mails to and from top decision-makers in the agency.

6.3.2.6 Publicizing the Results of Implementation

The industry and the public should be informed, at all times, of the outcomes of consultations, decisions, licence awards, and rule-making proceedings. These actions are at the heart of any agency's efforts to implement policy. Publicizing them serves the dual purpose of keeping stakeholders informed and ensuring that the regulatory agency is seen as effective and efficient.

6.3.3 Transparency of Procedures

Around the world, the degree of transparency in regulatory procedures (and adherence to those procedures) will vary, based on differing legal traditions and whether openness is mandated by statute. For example, FCC is bound by law to follow set and often formal procedures that govern nearly all of its functions and activities.[28] As noted earlier, courts reviewing regulatory action may impose transparent procedures on agencies in pursuit of natural justice and procedural fairness. But even where transparency is not legally mandated, many regulators are opting for it anyway, because they find it useful in building legitimacy. This section outlines some key transparent processes – namely, public participation procedures, notice and comment procedures, consultations and public hearings.

6.3.3.1 Public Participation

As mentioned throughout this Chapter, public participation is vital to both transparency and fairness. It broadens regulators' perspectives and leads them to consider policy questions that have implications for both public and private interests. When regulators consider diverse views, they avoid regulatory capture, increase their capacity for fairness, and boost public confidence in the regulatory process.[29] Moreover, public participation can actually enhance efficiency by leading a regulatory agency to adopt policies and procedures that respond more rapidly and directly to consumers' needs.

In general, procedures for public participation in regulatory activities can and should be more flexible and informal than court procedures. It is a good idea to avoid excessive legalism and to try to minimize the costs and delays that can accompany full-fledged court proceedings. Examples of public participation may include workshops, "town meetings", *en banc* hearings or even Internet chat sessions. More broadly, a degree of public participation can be assured through adopting some of the following procedures:

- publishing advance notice of rule-making proposals or decisions in publications and places likely to be read by persons affected by the rules (for example, in newspapers, offices of telecommunication companies, government newspapers of record and regulatory websites);
- directly notifying affected persons of proposals or decisions;
- holding open press conferences or public hearings;
- modifying or eliminating procedural rules that increase the costs or complexity of participation; and
- in some cases, funding public participation.

Public participation is enhanced by user-friendly processes, access points and technology. Agencies should make liberal use of the Internet, call centres and telephone help lines to communicate with consumers. Realizing the importance of engaging the public, Botswana's BTA has hired a consumer affairs manager, whose responsibility will include organizing meetings around the country to enhance BTA's public profile.

6.3.3.2 Consultation

Requirements to engage in consultation vary. The Anglo-American legal tradition generally mandates consultation before an agency can implement new rules or regulations, while in most parts of Latin America, consultation is usually optional. In Brazil and Mexico, regulators receive some public or industry input through consultative commissions, which represent industry and

Box 6.9: CRTC's Notice Provision for Licensing

CRTC maintains a mailing list of individuals who wish to be contacted when licence applications are filed. The commission will inform those on the list where they can inspect the application in Ottawa and elsewhere, and how they can file to intervene in the case. Applicants for licence renewals are required to broadcast information regarding their applications, allowing consumers to contact them directly. CRTC also allows any interested parties to register to receive notice about any filings or applications regarding specific issues or services, such as carrier rates or conditions of service. Subscribers will then automatically receive copies of any related filings. CRTC also offers a subscription list for copies of filed tariffs.

academia to varying degrees and provide advice and direction to regulators on various matters.[30]

Consultation is a flexible and dynamic process, which may change over time and in different contexts. Consultation can be formal or informal, but there should be consistent and predictable procedures, allowing for some flexibility to cope with unforeseen circumstances. One risk of transparent procedures is the potential for unnecessary delays, so regulators must be sure they do not compromise their goals by overly zealous and inflexible adherence to procedure.

A number of factors are important in designing efficient public consultation procedures. If regulators seek input too early in the process, they run the risk of not providing enough information for parties to formulate knowledgeable responses. Certainly, regulators should avoid using consultation processes as merely a way to "float" undeveloped ideas or "test the waters" for potential actions. Doing so can raise false hopes among proponents of those actions, while needlessly antagonizing potential opponents. In addition, frequent consultations place excessive demands on the industry and may result in "policy fatigue", with diminishing returns in the quality of input from the industry and particularly from public interest groups, which may have fewer resources than companies and thus may be forced to "pick their battles". If consultation is undertaken too late in the decision-making process, however, regulators may be seen as having already decided upon their action and as merely seeking input just for the sake of appearances.

Consultation can take many forms, from requests for written input, to formal hearings, to regular workshops and meetings where information and views can be exchanged. For example, in Argentina and Mexico, industry consultations have been utilized in developing standard terms of concessions for competitive services.

All parties benefit from consultation, even though at times the process may be tedious and may seem costly and counterproductive, in certain respects. Ultimately, consultation usually results in a more well-reasoned decision, with a broader base of support, thus ensuring greater and more immediate compliance.[31]

6.3.3.3 Public Notice

The first step in the consultation process – and part of the administrative or legal requirements of fairness – is the giving of adequate notice of upcoming regulatory actions. The use of the Internet and other media to communicate with the public has already been discussed in Section 6.3.2. One of the most important communication tasks is to provide public notice of official actions or meetings. There are a variety of accepted legal and practical ways to give notice of upcoming procedures, including the use of a website, newspapers, radio and television. In addition, in many jurisdictions, official notice is published in a government gazette or other official publication.

In general, the most important goal is to give adequate, detailed notice to all parties potentially affected by a decision, allowing them sufficient time to prepare themselves to participate meaningfully in the upcoming event or proceeding. What this means in practice may vary, depending on circumstances. In certain rare cases, notice requirements can be waived, and any actions taken can then be evaluated in light of a subsequent hearing.[32] For example, the South African Telecommunications Act requires three months' notice of the proposed adoption of rules, and the proposals must be published, along with an invitation to provide comments. Where the public interest requires that the regulation be enacted without delay, however, the Act allows for immediate action without public notice.

Public notices generally provide a period for consideration and comment. For example, the so-called notice-and-comment practice drawn from the Administrative Procedures Act in the United States provides advanced public notice of any proposed regulations and allows any interested parties to add comments to the public record before final rules are promulgated. Many regulatory regimes around the world include such notice-and-comment processes as a legal requirement for regulators in many different sectors, from telecommunications to securities. Where provided for in legislation, failing to adhere to notice and comment is then a cause for judicial review of a regulator's decision.

The notice-and-comment procedure is useful for most administrative activities, from rule-making to licensing. It has a number of benefits, allowing for public participation and helping regulators to understand and consider the concerns and issues facing interested parties. It also facilitates "buy-in" or "consensus building" within the industry, which aids implementation and compliance.

Comments received should be made publicly available. This can be done either online or by making documents available to be photocopied, perhaps for a nominal fee. Depending on the resources available, regulators can also make a summary of comments and post them or make them available to all parties. In order to assure participants that public comments have indeed been taken into account, regulators may be required to respond directly to arguments put forward in the comments, explaining why the regulator embraced or ultimately rejected those arguments.

Box 6.10: *Ex Parte* Communications in the United States

Proceeding	*Type*	*Rule*
"Permit-but-disclose"	Rule-making	*Ex parte* communications are permissible but subject to disclosure. Copies of written submissions and written summaries of oral presentations need to be lodged for inclusion in the record.
"Exempt"	Declaratory ruling	*Ex parte* communications are permitted.
"Restricted"	Hearing or any proceeding not listed in the other categories	*Ex parte* presentations are prohibited. Any written presentation must be served on all parties and no oral presentations may be made without all parties having received notice and having an opportunity to be present.

Source: FCC.

6.3.3.4 Content and Timing

The precise content of a notice may vary, depending on the nature of the process and the matter to be determined. However, notice should always be given in a recognized or standard format, such as a government register. This does not, however, preclude notice also being provided on websites and through notification services. Notice should contain at a minimum:

- the purpose of the proposed regulation and the legal authority for it;
- the proposed timetable, specifying major steps, including hearings;
- particulars of how to participate; and
- details on where and how to get more information.

It is important to adhere to timetables set at the beginning of public proceedings, because delays can cause frustration and prejudice both public and private interests. Notices of upcoming hearings or meetings should be provided at standard intervals – such as 30 or 60 days – allowing sufficient time for participants to prepare any required written testimony and exhibits. Delays or postponements should be avoided whenever possible.[33]

6.3.3.5 Ex Parte Communications

One measure of transparency is the extent to which operators, industry groups and the public can obtain access to the staff of a regulatory agency to present their views and requests. Transparency and fairness require that regulators be scrupulously non-partisan in giving access to various stakeholders. In addition, when a licence application or other proceeding is pending, the regulator needs to ensure that there are transparent procedures governing such access. Procedures for contacting and communicating with a regulatory staff about the merits of issues in a pending proceeding are called "*ex parte*" rules.

Where there is no statutory basis, *ex parte* rules may still be developed and implemented to protect the regulatory agency's independence and to prevent any single stakeholder from asserting an advantage over others through secret contacts with regulators. *Ex parte* rules also assure that all communications made by the industry to the regulatory staff are included in the public record, making that record the sole source of facts and opinions upon which the regulatory agency will make its decision. Data cannot be secretly compiled and slipped to the regulatory staff, privately, without being made public and subject to comment and rebuttal by all other stakeholders. In addition, all stakeholders may be informed whenever one party has a meeting with the regulatory staff.

One example of how the *ex parte* rule process can be applied may be found in the tender process for Botswana's GSM licences. BTA held a meeting to clarify the bidding requirements, but it required that all potential bidders submit their questions in advance, in writing. Any bidder that attempted a subsequent *ex parte* contact to obtain further information (thus potentially giving it an advantage over other bidders) could be excluded from the process.

A written communication – including an e-mail, fax or letter – may be considered *ex parte* when its submission to the regulator is not disclosed to other parties. An oral communication, such as a meeting or even a phone call, may be viewed as *ex parte* when it takes place without notification to the other parties in the proceeding. Those other parties then may be disadvantaged by not having an opportunity to be present at the meeting – or even knowing that such a meeting was held. *Ex parte* rules may vary according to the nature of the proceeding, the number of parties and the subject of the communication.[34] FCC in the United States has set three categories of proceedings for purposes of its *ex parte* rules, and it follows varying procedures in regard to each (see Box 6.10).

FCC exempts some kinds of communications from *ex parte* rules. These include the following:

- Statements that are inadvertently or casually made about a pending issue.
- Inquiries about the status or timing of a decision (as opposed to arguments for or against a certain action or decision).
- Inquiries about procedural rules (so long as those rules themselves are not the subject of the proceeding).

In the United States, all communications regarding pending issues in a proceeding – *ex parte* or otherwise – are prohibited for a period of one week prior to when a decision is addressed at a public meeting. This "sunshine period" begins when a matter is placed on FCC's "sunshine agenda", indicating that it will be considered at the next FCC meeting.[35] During this "quiet period", FCC will hear no further arguments, informally or formally, regarding its pending action. The period lasts until a decision has been made, the item has been dropped from the agenda, or it has been referred back to

Box 6.11: Confidentiality in Canada

In 1976, CRTC had to evaluate Bell Canada's proposed tariffs for the use of support infrastructure. The Minister of Communications intervened, asking Bell Canada to produce an economic analysis it had performed. The operator resisted, arguing that the document contained confidential information and was unnecessary for CRTC's investigation. After hearing arguments from both sides, CRTC ruled that the analysis was relevant and ordered Bell Canada to furnish a copy of it. The operator then claimed it held a statutory exemption from any disclosure requirement.

In this situation, CRTC had to strike a balance between the advantages of maintaining confidentiality and its need for information to properly complete its task. CRTC argued that effective regulation required the participation of intervenors in public hearings, and those intervenors must have access to relevant information to properly discharge their roles.

CRTC did concede that disclosure should not be ordered where it would directly harm a company. But it ruled that Bell's concerns, which focused on the labour costs underlying pricing, were insufficient to prove direct harm from disclosure. Bell Canada was successful, however, in convincing CRTC that certain labour-cost forecasts would be damaging to the company in future collective bargaining; those data points were redacted from the 46-page document. Otherwise, the document was disclosed.

Source: LRCC, *Access to Information*, 1979.

the commission's staff for further consideration. The goal of this sunshine period is partly to provide the industry with a conceptual finish line for its lobbying and to give the agency time to analyze and weigh the arguments in the record without further influence. Otherwise, presumably, companies would seek to "get the last word in", right up to breakfast before the scheduled 9.30 a.m. meetings.

Other "sunshine" rules aimed at enhancing transparency may preclude secret or private meetings of a commission at any time. That is, any time a quorum of commissioners assembles, it must be in public, or with regulatory staff present. In countries such as Argentina, Brazil, Colombia, Chile and Mexico, there are no equivalent rules, and meetings and disclosure of their content are informal and discretionary. It may be advisable, however, for every regulatory agency to develop some framework, formal or informal, allowing parties to communicate with regulators while maintaining transparency and ensuring fair access to decision-makers on key issues.

6.3.3.6 Hearings

Hearings are an important form of public participation in regulatory decision-making because they are conducted in full view of the direct stakeholders and other interested parties. Legislation often calls for public hearings in certain circumstances, but many countries give regulators discretion over whether or not to convene them. For example, in Argentina, provisions and procedures for hearings are contained in regulations issued by the Department of Communications. Hearings may be held when the Secretary of Communications or the National Communications Commission (CNC) deems them necessary. Once convened, the hearings are open to any interested parties.[36]

The general rule holds that it is better to convene public hearings rather than closed ones, promoting accountability and reducing the risk of subsequent allegations of bias. Regulators usually have some degree of discretion on whether to ask for written testimony to be submitted or to require oral presentations. Closed hearings may be acceptable to safeguard information involving public safety or national security, or, in some cases, a company's confidential or proprietary data. The use of "electronic hearings", held online or using closed-circuit video technologies, is gaining acceptance in some countries.

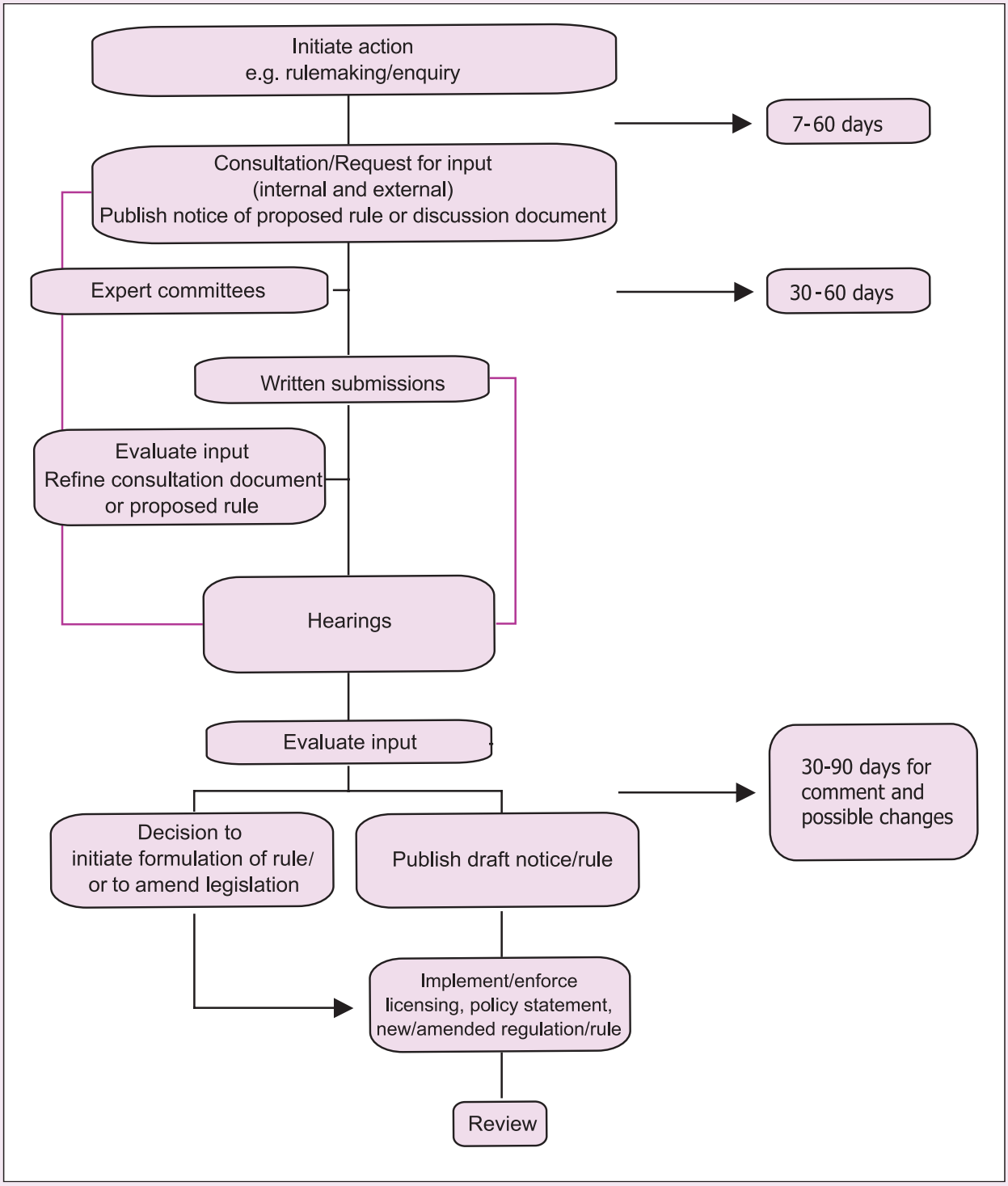
Companies may well fear that the disclosure of commercially sensitive information, business plans, financial data, production costs and other data may harm their interests in the market. In competitive bidding situations, a regulator's failure to ensure secrecy and confidentiality for proprietary information may lead potential licensees not to bid. Yet this data is often absolutely crucial for regulators to make their decisions. Regulators must strike a balance between the need to protect confidentiality and the desire for transparency and public comment on the bids. In some countries, regulators have options in striking this balance. They can place certain portions of submissions under protective orders, or they can make sensitive information available to third parties that sign confidentiality agreements with the company that has provided the data. At the hearing stage, regulators can close portions of a hearing in which sensitive information is discussed.

Some countries' regulators practise strict confidentiality regarding rulings or directives that affect only one company, releasing such rulings only to the company concerned. This practice denies other market players crucial information that may have an impact on them, at least in the future; it should be avoided as far as possible. Regulators and industry players need information to meaningfully participate in public processes. Given that, any party requesting confidentiality should bear the burden of proving the need for it. They could be required to prove, for example, that they face a direct and specific threat of harm from the public release of data.

There are various other aspects of hearing procedures, including the following:

- *Standing:* Generally, the right to participate in a hearing extends to parties directly and immediately affected by the matter. But in certain cases – especially where social objectives play an important role – the right to participate may be more broad, giving other interested parties standing to participate.

Figure 6.2: A Generic Consultation Process*



Expert committees might be required for evaluation and input. The consultation period and the timing allocated will depend on the nature and complexity of the issue. It may be necessary to hold hearings, but in certain cases, such as a basic rule-making, written submissions may suffice. In other cases, it may be possible to skip consultation with experts and the written submission phase, and to proceed directly to a hearing (indicated by dotted line on left). For both options, it may be necessary to obtain further written input to enhance the value of written or oral submissions and hearings. This may be done at the evaluation phase, where a call for further written comments may be made (indicated by dotted line on right). At all times, the process remains subject to review.

* Adapted from ICASA, Decision-making process. This structure is generic and may be adapted to different types of rule or decision-making.

- *Representation:* Countries have different requirements regarding whether parties must or can be represented by legal counsel in hearings. In Venezuela, the employment of lawyers at regulatory proceedings is optional, while in Argentina the participation of a lawyer is mandatory.[37]
- *Delegation:* At times, regulators may delegate certain powers or tasks to a particular commission member or staff expert, or they may make use of expert committees. Regulators usually must have statutory authority to delegate their roles in this manner. Such delegation is rarely permanent, and the delegation may revert back to the original decision-maker, except where a licence approval or registration will be affected.
- *Ancillary Powers:* As a legal matter, regulators have no inherent powers; they may only exercise those granted to them by statute. Such powers may include the right to search and seize equipment; the power to require the production of information and accounting information; the ability to impose fines, and others (see Chapters 4 and 5). For all regulators, some power ancillary to proceedings is implied, such as the power to control the hearing, secure relevant information, adjourn the hearing, or make interim orders. These powers, however, remain subject to the rules of fairness and natural justice.
- *Bias:* The requirement that an arbiter be unbiased extends to the entire hearing process, not just the decision-making aspect. On collegial hearing panels, bias by one member will usually disqualify or taint the entire process. Bias in adjudicating a hearing might be inferred from conduct by panel members or communications between members and parties. For example, bias may be apparent through adversarial or intemperate acts or statements, derogatory statements regarding the character or appearance of a party to the proceeding, or other actions by panel members or commissioners.

6.3.3.7 Funding Public Participation

Placing a premium on public participation does raise the issue of whether all potential stakeholders have sufficient or equal resources to participate in a proceeding. Industry is likely to be well-funded and equipped with experienced lobbyists and regulatory attorneys, who are ready to intervene on a company's behalf. Where resources allow, some regulators may fund participation by groups that otherwise would have insufficient resources to participate on their own. For example, a hearing on subsidies for universal service arguably should include participation by citizens who are meant to be the ultimate beneficiaries of those subsidies. Yet it is exactly those citizens who are least likely to be able to fund their own participation at a hearing.

Such funding itself raises a number of questions regarding who should receive assistance, and the criteria for providing it. How much funding should be approved, how often, and who should be accountable for how it is spent? Where there is a mechanism for underwriting public participation in the regulatory process, there should be highly transparent, clear, and well-publicized application and grant procedures.

6.4 Fairness in Regulation

As we have already stated, the values of transparency and fairness cannot be easily separated or divided into categories. While transparent procedures may be established, a reputation for fairness is crucial in order to ensure credibility, legitimacy and, ultimately, effectiveness. This section highlights a combination of practices, some required by law and some voluntary, that can be employed to maintain fairness in decision-making.

6.4.1 Explaining Reasons for a Decision

Administrative fairness requires that a regulatory agency provide reasons for the decisions it makes. This is particularly important where a licence application or some other request is denied. Explaining the rationale behind a decision serves several important purposes:

- Regulators will be forced to engage in more sound, rational decision-making in the first place, if they know they will be required to produce sound, logical reasons for their actions.
- Providing the reasoning behind a decision gives parties to the proceeding the ability to analyse that decision and decide whether there may be grounds for appeal or review.
- If no reasoning is provided for a decision, a court or other reviewing authority may conclude that there was no rational basis for that decision – and may overturn it.

For these reasons, the explanation of decisions is vital for the ongoing legitimacy and accountability of a regulatory agency. It promotes trust and builds confidence in regulators, and it dissipates any suspicion of bias.

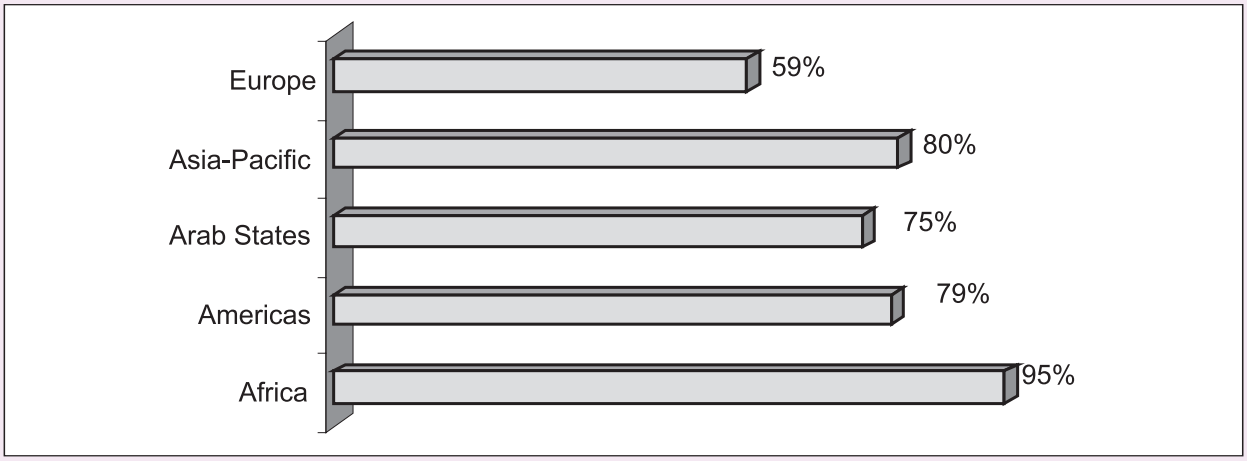
In some countries, such as South Africa, parties have a constitutionally protected right to receive an explanation of any administrative action that affects individual rights. The general requirement to provide reasons for administrative action is usually contained in legislation. Sometimes, however, governments may not routinely provide reasons for their actions unless they receive a written request to do so. Whether required by legislation or not, explaining decisions and actions is a sound regulatory practice that meaningfully supports transparency.

6.4.2 The Right to Appeal and Seek Review

In many countries, regulatory actions are subject to review by other government offices, and in some cases, judicial appeal. The existence of this right is an important tool in ensuring transparency, fairness and independence. It allows societies to hold regulators accounTable for their actions.

Review differs from *appeal* in some respects. In a review, consideration is limited to a narrow, specific issue, whereas an appeal may encompass a fresh, *de novo* hearing. A review usually examines whether the decision-maker exceeded – or acted without – proper jurisdiction. It is not concerned with the correctness or outcome of that decision, but rather with the question of whether power or discretion was exercised lawfully. A review may lead a court or other body to nullify, quash or set aside a regulator's decision, but the reviewer generally cannot supplant the regulator's decision with its own. If requested, it can refer the matter back to the regulator with a mandate to revisit the issue and render a new decision that accords with the law. If a court quashes a decision,

Figure 6.3: Percentage of Regulators Handling Consumer Complaints, by Region



Source: ITU World Telecommunication Regulatory Database, 2001.

the effect is to preserve the status quo and restore the situation to the point before the challenged decision or action.[38]

An appeal, on the other hand, allows for reconsideration of all the issues, facts and law involved in making a regulatory decision. It may result in a new decision on the matter. The right to seek review is a common-law right, which may or may not be provided through legislation. The right to appeal a regulatory action is generally spelled out in a statute and may be extended, in certain cases, to third parties, particularly where there is a strong public interest objective.

In some countries, regulatory decisions remain in force while appeals are pending. Such countries include Australia, France, Jordan and Nepal. In other countries, such as Hungary, Morocco and Zambia, decisions are stayed pending appeal. Many legal systems allow for both alternatives, generally allowing a decision to remain in place, but providing for the possibility of a stay if certain legal criteria are met, such as if a party can prove it will suffer potential irreversible harm without a stay.

In common-law countries, the courts are the usual instruments of review. But other administrative bodies may be given review authority, including government ministers or special appeals tribunals. In Botswana, Cameroon and Singapore, both the minister and the courts have review authority in certain circumstances. In India, meanwhile, appeals of regulatory decisions go to a three-member appellate body, the Telecoms Disputes Settlements and Appellate Tribunal (TDSAT). TDSAT's decisions, in turn, may be appealed to the Supreme Court. In Colombia, the decisions of the CRT are final and can only be reviewed by administrative judges.

Countries allow various time-frames for filing appeals, with some requiring appeals to be filed within 14 to 30 days of a decision's release. The time-frame for resolving a dispute on appeal can vary, as well, from one month to indefinitely.

While they may be costly and result in delays, appeal and review processes are important in ensuring effective regulation because they promote legitimacy and accountability. They can, however, overwhelm a regulatory system if they become subject to abuse. It can be tempting for a company to attempt to win on appeal each and every decision it loses on the regulatory merits, and governments must be careful that they do not invite or condone baseless appeals that bog down the regulatory process. In practice, courts in many countries are reluctant – and perhaps wisely so – to interfere with regulatory agencies that are presumed to base their actions on high levels of specialized expertise. Judicial deference is therefore common.[39] Moreover, as stated in the previous section, regulators can head off the potential for frivolous review proceedings by making transparent and well-reasoned decisions in the first instance.

When a review does take place, it may result in the following:

- An order quashing or setting aside a decision.
- An order restraining proceedings undertaken without jurisdiction or where there has been a breach of natural justice or procedural requirements.
- An order compelling the exercise of jurisdiction or the observance of natural justice or statutory or regulatory procedures.
- An order referring the matter back to the regulator for further consideration.
- An order compelling action unlawfully withheld or unreasonably delayed.
- An order declaring the rights of the parties.

6.5 Consumer Affairs and Complaints

Regulators frequently have mandates to investigate consumer complaints against operators for violations of service terms and conditions, disputed bills, maintenance and repairs. For example, Indotel in the Dominican Republic is authorized to adopt special regulations and resolutions to protect user's rights.[40] In Guatemala, the National Telecommunications Commission must guarantee the rights of the end users and must establish a legal mechanism for customers to file complaints against operators.[41] The requirements of transparency and fairness demand that procedures for filing complaints be accessible.

Box 6.12: Final Checklist – Transparency and Fairness in Public Participation

- Is there a statutory basis for action or jurisdiction to hear and decide on a given matter?
- Is power being exercised for the intended purpose, to further a legislative aim or objective?
- Is there authority to exercise discretion in this matter or must it be decided on the basis of precedent or policy implementation? (For example, does the legislative provision stipulate "may" or "shall"?)
- Have all relevant factors been considered and irrelevant ones excluded?
- Has there been any undue interference with the decision, internally or externally?
- Have the individual merits of this case been considered or is the decision based on pre-existing rules or policies?
- Have actions and decisions been reasonable and timely?
- Have all the procedures required by law been complied with?
- Is there authority to delegate the decision to anyone else? If so, has it been done correctly and have all procedural requirements been strictly followed? For example, has it been done in writing?
- Does a hearing need to be held?
- Has adequate notice been given, in sufficient detail, to enable meaningful public participation?
- Has every party that may be affected by an adverse decision been made aware of the allegations made against them that could account for the adverse decision?
- Has the hearing or consultation process reflected all the principles of fairness and natural justice?
- Has each party had an opportunity to put its case forward, orally or in writing?
- Is the decision based on evidence that has been adduced during the hearing and information presented in writing?
- Have all parties had equal access to the evidence and arguments that the regulator has taken into account when making decisions?
- Have the persons affected by a decision had access to all the necessary information to make a case?
- Have the other parties been given opportunity to respond?
- Have reasons been given that justify the outcome? Do reasons need to be given in writing?
- Is there any conflict of interest and if so, is a recusal indicated?
- Is the decision consistent with similar cases and matters that have preceded it?
- Have all decisions been made in an open, objective and accounTable manner, and have justifiable reasons been given to explain the decision?

Moreover, investigations into those complaints should be transparent and open. Operators should be given opportunities to remedy any complaints before regulatory action is taken.

Regulators should publicize their procedures for handling complaints and should advise both consumers and operators of their rights in investigations. Where resources allow, it is wise to publish data and statistics on consumer complaints and enquiries, with the aim of developing broader awareness in the sector. In 2000, the number of complaints handled by regulators varied from as few as 10 by newly established regulators to as many as 476,092 by FCC.[42]

Regulators may also wish to develop policies dictating optimal or required time-frames for their staffs to respond and resolve complaints. Most regulators report that the average complaint-processing times range from 24 hours to three months, depending on the nature of the complaint or whether it was received orally or in writing. Singapore's IDA requires all operators to report their performance on several measures of service quality, including the time they took to fill service orders, respond to repair requests, and resolve billing inquiries.[43]

6.6 The Costs of Transparency

The value of increased public participation and transparency is well beyond doubt. But transparency is not without costs in terms of time and resources. In some cases, these costs and delays may even be seen to outweigh the benefits of transparency. Excessive procedural details may delay important decision-making, harming the public interest and affected parties. Delays can create uncertainty, raise the costs of attracting capital and adversely affect investment.

There is also a concern that too much consultation may invite industry groups to try to manipulate the regulatory agency and its procedures. And as discussed in Section 6.4.2, the right of appeal can be hijacked by litigious incumbents and new competitors seeking to frustrate or negate regulatory decisions that are not in their favour.

Meanwhile, many regulators bemoan the fact that they must deliberate and make decisions in the "fish bowl" of the public arena. Too much public exposure may be counter-productive, leading parties to adopt intransigent public postures and restrict-

ing the vibrant discussion and debate needed to bring parties to an agreement or consensus.

Despite these potential costs and risks, the costs of not operating in a transparent manner are far higher, particularly because of the risk to legitimacy. Striking a balance between efficiency and transparency may be difficult, but a number of safeguards can be put in place to help in that regard. For example, delays can be minimized through rules that oblige parties to file written comments that stick to the point and do not stray into discussions of extraneous issues. Regulators can pre-circulate written information from intervenors and public interest advocates in a dispute. Regulators can require companies to pay costs and fees, as a way to discourage frivolous pleadings.

6.7 Transparency and Regulatory Capture

Regulatory capture occurs when a regulator becomes governed by the commercial interests of the parties it regulates, rather than by the public interest. As a result, the regulator ultimately becomes a protector of the industry it regulates. Capture – sometimes known by similar monikers such as "cronyism", "clientalism", or "favouritism" – is a complex, subtle phenomenon, which is often difficult to identify. Once evidence of capture emerges however, the independence of a regulator is brought into question and legitimacy becomes difficult to reclaim. Regulatory capture often occurs as a result of faulty design of bureaucracies and institutions, and the risk of capture appears highest in relatively concentrated sectors. It can occur as a result of actions by both by government and industry.[44]

6.7.1 Avoiding Capture

It is unlikely that any agency can fully escape occasional allegations of favouritism, but there are ways to limit regulatory capture. Several of those methods involve transparency. For example, requiring that public records be kept of most, if not all, communication with the industry and other stakeholders will allow for continued scrutiny and expose vulnerable points of contact. Government interventions should also be placed on record and improper contact with regulators – by industry or government ministers – should be precluded. At the very least, laws should require that such contacts be subject to public visibility and accountability.

Public nominations, open nomination hearings, and public interviews of potential candidates for leadership positions will ensure that unbiased persons with the requisite expertise are appointed. Stipulating the required qualifications and expertise for appointment in legislation will assist in setting some objective standard against which conduct can be measured. For example, the South African telecommunications law sets out personal requirements for agency councillors, who must be committed to fairness, openness and accountability, among other requirements.

Another safeguard is to ensure that the appointments and removal processes are structured so that decision-makers may serve limited terms and be removed only for just cause. For example, in Brazil, members of Anatel may be removed under very limited and carefully defined circumstances. The Hungarian Communications Act stipulates that the chairperson can only be removed for action deemed unworthy of the position or if the individual becomes incapable of holding office. Any actions to remove regulators from office should be fully explained to the public, in statements clearly referring to the statutory authority for removal and any other legal basis for action.

6.8 Conclusion

While the benchmarks of effective regulation remain universal, the degree and ease with which they are implemented in each country will depend on a number of factors, including the legal system within which the regulator operates, the degree of the regulator's independence from the rest of government and the industry, and, more practically, on resource constraints. Arguably, developing countries face considerable challenges in this regard, especially in cases where human resources are in short supply and agencies must struggle to retain employees in the face of growing private sector opportunities.

It must be conceded that transparency has costs both in terms of time and money. Moreover, there is no single "transparency" template for regulators to use in every scenario. Time constraints, the facts of a particular case, and the need to balance diverse and opposing interests will lead to different approaches to disclosure and public participation in various situations. Yet many of the practices outlined in this Chapter can be adapted to meet the needs of regulators and the public in both emerging and developed economies – including those in all stages of the transition to competition. Procedures can be simplified and streamlined, and systems may be tailored to circumstances, keeping in mind the ultimate goals of greater openness and participation.

Overall, even where limits exist, the benefits of implementing transparency and fairness in both substance and outcome will far exceed the costs. No regulator can afford to compromise its legitimacy, credibility and effectiveness – all of which rely on the open and accessible practice of regulatory decision-making. As more countries liberalize their telecommunication sectors and embrace both the challenges and benefits of convergence, more regulators will face the task of ensuring that decision-making keeps pace with technological development. Increasing public participation is a means to ensure that all regulators receive the information and input they need to do their jobs in such a rapidly evolving environment.

[1] On theories of regulation, see R. Baldwin and M. Cave, *Understanding Regulation: Theory Strategy and Practice*. Oxford University Press, 1999.

[2] R. Samarajiva, "Establishing the Legitimacy of New Regulatory Agencies" in *Telecommunications Policy Online*, Vol. 24, No. 3, April 2000 (at: http://www.tpeditor.com/contents/2000/samarajiva.htm).

[3] For example, while few countries in Latin America have developed a special system for administrative procedures in telecommunications regulation, due to privatization and liberalization, some have started to modify procedures for adaptation to new circumstances resulting from the introduction of competition between other service providers, e.g. Argentina, Mexico, Panama and Peru. See "Telecommunications Regulatory Structure and Procedure in Latin America", 2000, Draft Report CITEL/American Bar Association.

[4] A. S. K. Wong, "Tools for effective regulation: ensuring transparency" – Moderator contribution to ITU's Global Regulators' Exchange.

[5] GATS Article III, entitled "Transparency", requires Members to publish or make publicly available all government measures related to trade in services. Article VI:1, which addresses "Domestic Regulation", requires Members to administer all measures related to trade in services "in a reasonable, objective and impartial manner".

[6] The Reference Paper on telecommunications regulatory principles is used for consideration as additional commitments in undertaking legally bound schedules of commitments on basic telecommunications. It was drafted by consensus in the WTO Negotiating Group on Basic Telecommunications, 24 April 1996 (see: http://www.wto.org/wto/press/refpap-e.htm).

[7] The notion of "non-discrimination" in GATS and the Basic Telecommunications Agreement is not absolute. The "national treatment" requirement that foreign services and suppliers be treated no less favourably than domestic ones may thus be limited: countries can discriminate in certain circumstances and allow for differential treatment of foreign and domestic telecommunications suppliers, provided they listed such restrictions at the time the Agreement was signed.

[8] The words "agency", "body", "authority", "commission", "council", "entity" are used interchangeably in this Chapter, as are the terms "councillor", "commissioner" and "member" to take account of the various different regulatory structures amongst ITU Members. "Tribunals" are generally specialized forums for hearing particular disputes, or adjudicative forums of appeal. Their procedure is usually more formal.

[9] For example, self-regulating, industry complaints and monitoring bodies common to broadcasting. For a general overview of the principles of Administrative Law, see D. J. Mullan, *Administrative Law. Irwin Law*, 2001, and D. J. Galligan, *A Reader on Administrative Law*. Oxford, 1996.

[10] Not all business conducted by government, agencies or commissions implicates administrative law. Internal operations, such as purchasing and contract are subject to private law. In addition, in a review, the courts will apply differing degrees of scrutiny, depending on the nature of the forum, the nature of the proceeding and the nature of the rights affected. See Mullan, Id.

[11] Whilst public or administrative law principles are generally universal, their precise implementation, particularly with regard to how courts may review administrative action, will vary in different countries with divergent legal systems. While essential principles remain the same, differences emerge in both civil and common-law traditions, and between countries within the same legal tradition.

[12] F. Cardona and S. Synnerström, "Administrative Law Principles and Civil Service Standards" (available at http://www.oecd.org/puma/sigmaweb/acts/civilservice/docs/cardonal.htm).

[13] While these terms have a legal difference in scope, "due process" and "natural justice" encompass the same legal principles.

[14] Reasonableness is an expansive concept and applies both to the process (e.g. excessive delays) and the merits of the case (e.g. reaching a decision that cannot be justified on the facts of the case).

[15] H. Intven, *Telecommunications Regulation Handbook*. InfoDev, 2000.

[16] NewFoundland Telephone Co. v. Newfoundland Board of Communications and Public Utilities [1992], 1. S.C.R. 623.

[17] L. Vandervort, Political Control of Administrative Agencies. Law Reform Commission of Canada (LRCC), Administrative Law Series, 1980.

[18] See Scenario Two (Box 6.8). Sometimes even an appearance of a conflict of interest can be used by a disappointed market player. Scenario One (Box 6.1), which is based on factual circumstances, serves as an apt example.

[19] See Values and Code of Ethics for the Independent Communications Authority of South Africa (at: http://www.icasa.org.za/satra/values_ethics.cfm).

[20] ITU Regulatory Survey, 2001.

[21] Capital Cities Communication Inc. v. CRTC [1978], 2. S.C.R. 141.

[22] Seven of these rooms currently exist in Brazil with plans to establish them in all of Brazil's state capitals by the end of 2001.

[23] ITU Regulatory Database, 1999.

[24] Intven, Id., pp. 1-20. A list of all the web addresses for regulators can be found in the Regulatory Table 1.

[25] R. Samarajiva, Id.

[26] See FCC's website (at: http://www.fcc.gov).

[27] 1998 UK reform proposals suggested that formality be introduced into regulatory procedures for all utilities and placing a statutory duty on all regulators to publish such a code. See Department of Trade and Industry (DTI), *A Fair Deal for Consumers: Modernising the Framework for Utility Regulation*. Green Paper. London, March 1998.

[28] The Freedom of Information Act, the Code of Federal Regulations, and the Federal Communications Act of 1934 (as amended).

[29] See LRCC. Independent Administrative Agencies, Working Paper 25, 1980, and Regulatory Agencies: A Study Team Report to the Task Force on Programme Review, Canada, 1985.

[30] On rule-making generally, see C. M. Kerwin, *Rule-making: How government agencies write law and make policy*. The American University, 1994.

[31] Responsible Regulation. An Interim Report by the Economic Council of Canada, 1979.

[32] LRCC. Independent Administrative Agencies. Working Paper 26, 1985.

[33] Delays will usually only be reviewable if the parties can show that they have been unreasonable and prejudicial, see Mullan, Id.

[34] For example, the rule is generally applicable to decisions that affect limited parties (usually two) but where decisions are of general applicability, such as declaratory rule proceedings, *ex parte* communications are generally permitted.

[35] Certain exceptions apply to general presentations made during public speeches or panel discussions concerning "exempt" or "permit-but-disclose" proceedings.

[36] See Decision 57, 1996, of the Department of Communications of the President of the Republic of Argentina. Public hearings have been held for rate regulation, consumer regulation, universal service, licences and interconnections.

[37] "Telecommunications Regulatory Structure and Procedure in Latin America", 2000, Draft Report CITEL/American Bar Association.

[38] Therefore, in a case where a licence is wrongfully removed, the licence would be restored unless it had expired in the period between the wrongful removal and successful application for judicial review.

[39] See Bell Canada v. Canada (CRTC) [1989], 1 S.C.R. 1722, where the Canadian Supreme Court gave explicit recognition to the principle of specialization of duties.

[40] Article 77, General Telecommunications Law of Dominican Republic, 1998.

[41] Article 13, Telecommunications Sector Law of Honduras, 1995.

[42] ITU Regulatory Survey, 2001

[43] "Effective Regulation, Case Study: Singapore, 2001", ITU.

[44] R. Gonenc, M. Maher and G. Nicoletti, "The Implementation and Effects of Regulatory Reform: Past Experience and Current Issues", OECD, ECO/WKP (2000), 24, 2000.