Communicating Legitimacy: Key to effective regulation

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1 Introduction

Over the past decade, there has been an explosive growth of telecommunication regulatory agencies throughout the world. The ITU reports that there are now over 84 "independent" telecommunications regulatory agencies in the world as against only ten before 1990. Most of these new agencies are in the developing world (International Telecommunication Union, 1999, p. 5).

Regulatory agencies may be defined as entities within government whose primary function is the channeling and directing of the economic activities of firms through the formulation and enforcement of rules intended to serve the public interest. Because regulation affects the property rights of regulated firms, they are seen as performing quasi-judicial functions and are generally subject to procedural requirements to ensure fairness (due process in US terminology and natural justice in British Commonwealth terminology). Government agencies whose primary functions are the procurement or production of goods or services do not fall within the definition although their actions may channel or direct private sector behavior. Agencies that seek to influence private–sector actions primarily through subsidies are also excluded for the purposes of this paper (Noll, 1985).

The recent rise of regulatory agencies has been driven for the most part by the need to create stable environments that provide significant assurance that capital invested in long-term infrastructure projects will not be subject to arbitrary expropriation. Because all possible exigencies cannot be addressed by legal guarantees, regulatory agencies are being established as dispensers of non-arbitrary decision-making and due process (Noll, 1999; see also, Levy & Spiller, 1994). However, in almost no instance are regulatory agencies being created with this sole objective. Regulatory agencies are being legislatively mandated with the functions of regulating monopoly/oligopoly, regulating for competition, and the achieving of social objectives (such as universal access in the case of telecommunications).

In the developed world too, it is difficult to find a single rationale for regulation. Some regulatory theorists have posited a very limited role for regulation: "Regulation is essentially a means of preventing the worst excesses of monopoly; it is not a substitute for competition. It is a means of 'holding the fort' until competition arrives." (Littlechild, 1984, para 4.11). Others argue for the clear separation between economic regulation, which is thought to be amenable to the "objective" application of technique and therefore appropriate for the experts within regulatory agencies, and social regulation, which is thought to be better left to politicians (Foster, 1992, ch.9). However, close examination of actual practices of regulatory agencies shows far more than the clinical implementation of economic technique (Prosser, 1997). At core, regulation is about the exercise of discretionary judgement. In network industries, if not in all infrastructure sectors, there will be a continuing need for regulation, to perform the three broad functions of regulating monopoly/oligopoly, regulating for competition, and social regulation.

Notwithstanding the rationales underlying their origins, the efficacy, if not survival, of regulatory agencies depends on their success in earning legitimacy in the eyes of the public and key stakeholders. Without that legitimacy, they will lose their independence as well their ability to perform core functions effectively. Stakeholders whose "consent" must be won and maintained through legitimating activities include both private and public entities. Unless the incumbent telecommunications operator and the other licensed operators who directly compete with

the incumbent or who occupy market niches are persuaded of the legitimacy of the regulatory agency, the disaffected among them will "appeal" its decisions. If the appeal is to the courts, there is no threat to the independence of the agency, though its efficacy may be affected, particularly if stay orders are granted. But in most cases, the appeals will be to the executive or the legislature. That can result in a weakening of the independence of the agency, directly, in the form of open pressure brought to bear on it, or indirectly, in the form of behind-the-scenes manipulation or self-censorship by regulators. Because most governments still retain ownership interests in incumbent operators, even if not as sole owners, it is important for the regulatory agency to be accepted as legitimate by the relevant government agencies, usually located in the Ministries of Finance, Industry and Telecommunications. Acceptance of the legitimacy of the regulatory agency, including its relative independence from the executive, by the courts is critical for regulatory efficacy.

Because legitimacy is won and maintained through communicative processes, the regulatory agency must tend not only to direct interactions with the stakeholders, but also seek to create legitimacy through the media which forms an important part of the symbolic environment of the public and private sector stakeholders. While "newspapers of record" are still the most important in bureaucratic circles, the international and domestic business press, domestic electronic media and the Internet are increasing in significance. stakeholders must be distinguished from regulatory

Winning legitimacy from capture (Kolko, 1965; MacAvoy, 1965). Capture describes situations in which the regulatory agency is embedded in such close relationships with the regulated entities that it sees its function as that of safeguarding the interest of the industry above all. Legitimacy in the eyes of the principal stakeholders would accompany capture. However, if legitimacy is defined to include the public interest, one could envisage a situation with legitimacy but no capture. The best test of legitimacy without capture is the grudging acceptance of an obviously abhorrent regulatory decision by a regulated entity. However, in general, legitimacy is associated with a set of decisions over time rather than a single decision.

Legitimacy is not something that can be achieved and then forgotten about. Gaining legitimacy is especially challenging in the early years of a regulatory agency, but legitimacy atrophies unless it is tended to continually. It is not a true "stock" resource that can be earned and stored for future use, except in the form of a reputation that will increase the burden of proof on those who seek to challenge it. In general, thought must be given to each individual action of the regulatory agency in terms of its effect on legitimacy.

2 The claims for legitimacy

It is common to anchor the claim for regulatory legitimacy on expertise (e.g., Foster, 1992, ch. 9). But because expertise is always coupled with judgement, this claim is inadequate on its own. Examination of actual practices of regulatory agencies shows far more than the clinical implementation of economic technique (Prosser, 1997). For certain, good regulatory practice involves expertise and technique. But it is always more than that. In the case of regulating monopoly (including oligopoly or asymmetric competition), the agencies are implementing pricing principles under conditions of imperfect knowledge. In the process, most agencies must address social as well as economic concerns, explicitly or otherwise. They must use rules of thumb, assumptions and understanding gained through experience to bridge the gaps in available detailed and documentable knowledge.

In regulating for competition, exemplified by interconnection, judgement is necessary to select cost methodologies and/or other benchmarks. There can be no manual for dealing with the wild and various stratagems employed by parties to interconnection disputes. Similarly, regulation to achieve social objectives necessarily involves the exercise of judgement. In developing countries the extension of the network is the primary objective of both economic and social regulation. Acceptance of the regulatory agency's judgement on these and other important issues requires that it be seen as having legitimacy.

It is natural for those at the receiving end of regulatory decisions to question the legitimacy of the agencies, especially because these decisions have large economic effects. Questioning the legitimacy of regulatory ac-

tions is even more natural when the agency is new, and the concept of regulation is novel. In addition, the early decisions of the agency are seen as defining the rules of the game and are therefore subject to intense pressure. For many countries, especially those operating in the Westminster tradition of governance, a regulatory agency is neither fish nor fowl. It looks like a government department and tends to be staffed by engineers and accountants; yet it acts quasi-judicially. In Sri Lanka, the very term for regulation in Sinhala, the most widely used official language, was a neologism coined as recently as 1996. In many cases, regulation is a cultural shock. The idea of a transparent process that gives equal weight to new private-sector competitors is difficult to accept for those, particularly in recently privatized firms, who have spent their entire working lives in the clubby world of government bureaucracy. In most developing countries, corruption is a little discussed, but omnipresent, subtext. Given the enormous economic stakes involved, it is not unnatural to suspect that regulatory personnel may be engaging in rent-seeking activities. It is also not unusual to strategically use allegations of corruption to neutralize officials who may be seen to be hostile to one's interests.

Challenges to regulatory authority, especially when they take the form of appeals to executive or judicial authority, or to the legislature, may seem to detract from the mission of building the agency and getting on with the urgent regulatory tasks at hand. But, in fact, establishing the legitimacy of the regulatory agency and thereby pre-empting routine appeals to external authority is at the very core of the establishment of regulatory institutions.

It is natural, especially for experts who look at the developing regulatory institutions from the outside, to privilege the expertise claim, and in some cases to draw policy recommendations that are anchored solely upon it. For example, Noll (1999) concludes from his survey of regulatory problems facing developing countries that regional regulatory agencies that concentrate the best expertise that is available should be established. It is an interesting solution to the narrow problem of shortage of expertise, but opens up a huge problem in terms of legitimacy.

Expertise. The common portrayal of regulation as a technical process has embedded within it an expertise-based claim of legitimacy. Given the complexity of the subject matter, this claim is reasonable. Good regulation requires technical skills that must be learned and continually updated. The claim for legitimacy based on expertise requires the recruitment of qualified personnel, ongoing and highquality training and the effective communication of these initiatives.

Adequate compensation is a necessary, but not sufficient, basis for the expertise-based claim for legitimacy. It is a problem even in developed countries, but the gap between regular government salaries in developing countries and what private-sector operators, especially those with foreign capital or partners, pay can be very large. A few agencies such as the Uganda Communications Commission have been able to get monthly salaries in the $4000-6000 range approved (Tusubira, 1999), but in most countries governments hold regulatory personnel to standard government pay scales or at best to slightly higher scales.

Training is a prerequisite for the expertise-based claim. It can also be used as part of the second-best solution for the problem of low salaries. If it becomes known that a stint in the regulatory agency makes a young person highly employable because of excellent training opportunities, it is possible to attract good people at low salaries. Of course, this requires an acceptance of the revolving-door syndrome; a higher than normal training budget; and a clear-eyed balancing act between training that contributes to work product and training that is an end in itself. The latter balance is best served by integrating short-term training into all regulatory initiatives and eschewing long-term, standalone training in the form of degree programs.

Having good staff and excellent training programs is not enough; expertise must be communicated. The Sri Lankan regulatory authority was established as an underfunded government department in 1991 (Samarajiva, 1997). It had access to external training resources, but almost all the training was offshore and low-key. During this period, the Commission suffered from a perception that it lacked expertise. A more independent and better-resourced Commission was created in 1997 and was able to recruit a modicum of adequate staff by mid 1998. Using external resources, a major training program with domestic and foreign components was initiated. Operators and re-

presentatives from important government agencies were regularly invited to attend regulatory training programs. Not only did the essential dissemination of regulatory knowledge occur; the various stakeholders were informed about the regulatory training activities in a very effective way. As individual staff members emerged as experts in various subjects, the regulatory agency encouraged them to build a profile in the media and elsewhere. International recognitions that were received by staff, such as being elected to leadership positions in international organizations, were publicized.

Openness. The expertise-based legitimacy claim is not adequate by itself. It is essential that the exercise of judgement be legitimated. An essential step in achieving legitimation is the establishment of transparent and inclusive procedures for the reconciliation of conflicting interests using public-interest criteria. Merely establishing transparent procedures is not enough. The facts that such procedures are scrupulously implemented must be effectively communicated to the public and the stakeholders (directly and through the media). Most new regulatory agencies find it difficult to devise transparent and inclusive procedures, especially in the context of the secretive and authoritarian administrative cultures inherited from Ministries or the old PTT administrations. Many fear the risks that open procedures will bring in the hordes and result in chaos on one hand, and that it will make the regulatory process vulnerable to the litigious gaming tactics seen to be bedeviling the US regulatory process (Owen & Braeutigam, 1978; Reich, 1987), on the other.

The Sri Lanka Commission made two major efforts to elicit public and stakeholder input in 1998-99. In early 1998, the Commission exercised a provision for public-notice proceedings in the enabling Act to call for input on the licensing of GMPCS [Global Mobile Personal Communications by Satellite] operators. In mid 1998, the Commission invited written submissions for the first-ever public hearing on the subject of improving billing by fixed-access operators – the incumbent operator and two fixed-wireless competitors that provided approximately ten percent of fixed-access lines. Both actions were taken under legal provisions that had lain dormant for over seven years (Sri Lanka, 1991, Ss. 12 & 17).

Only the direct stakeholders participated in the GMPCS proceeding. The process took some time, but the open procedure that included two rounds of written comments allowed the Commission to identify potentially litigable issues (TRC, 1999b). The incumbent operator accepted the final decision in early 1999. The public hearing on billing was precipitated by the accumulation of difficult-to-resolve consumer complaints, on the one hand, and the incumbent operator's resistance to Commission efforts to improve billing through a tariff determination, on the other. The call for public input yielded over 450 written submissions within a period of two weeks. Over 40 members of the public whose submissions were considered representative of public concerns were invited to make oral presentations at sessions held in the capital and elsewhere. At the end of the first phase, the incumbent operator voluntarily withdrew its opposition to itemized billing. The public participation was extraordinarily informative and orderly. The entire process was completed in around seven months (TRC, 1999a).

In retrospect, it is possible to identify ways to improve and expedite both the public-notice and public-hearing procedures. The Commission is producing a procedures manual for future use. However the point is that both the public-notice and public-hearing proceedings yielded otherwise unavailable information, contributed to compliance and did not result in chaos or inordinate delay.

The conduct of the two phases of the interconnection proceeding by the Sri Lankan Commission in 1998-99 sheds light on the risk of openness giving rise to regulatory gaming, including strategic delay. Following more than a year of acrimony under an interim arrangement, the Commission initiated an alternative dispute resolution process for interconnection among fixed-access operators. When that proved inconclusive, a regulatory determination was made. While extraordinary amounts of consultation, mediation and due process were allowed for, the final determination was somewhat terse and did not detail the supporting reasoning (TRC, 1998). It was modeled on the first interconnection determination issued by the Director General of Telecommunications of the United Kingdom. The UK format is said to have been the result of legal advice and a fear that a legal challenge would delay the introduction of competition (Prosser, 1997,

p. 84). In the UK case, brevity worked. While it did fuel criticism of unaccountable regulation, the determination was implemented without delay. In the case of Sri Lanka, the Commission had to initiate legal proceedings to compel compliance. The incumbent operator appealed the decision and the issue of the reasonableness of the determination is now before the courts. Even though the incumbent operator did not formally implement the determination, financial settlements among the parties were conducted on the basis of the determination, yielding a de facto implementation of most of its provisions. The very fact that the incumbent appealed to the courts, instead of the executive, as was the practice in the past indicated an improvement in the process. Because the Commission had, in fact, practiced regulatory openness throughout the proceeding and documented it well, it was in a very strong position to show the courts that the principles of natural justice had not been violated.

It is too early to tell whether or not regulatory gaming will become established in Sri Lanka. If the court ruling on the interconnection determination upholds the Commission's procedures, the policy of regulatory openness will be reinforced and the likelihood of routine judicial appeals of regulatory decisions will be reduced. Even if the courts were to rule against the Commission, it is most unlikely that too much openness will be the cause. The only unfortunate outcome of such a decision will be increased likelihood of judicial appeals of regulatory decisions.

In the second phase of the interconnection proceeding, the Commission issued a determination on interconnection with mobile operators (Sri Lanka has four). While alternative dispute resolution was not employed, the formal proceeding adhered to principles of openness and due process. The decision on one relatively controversial aspect, the introduction of a calling-party-pays regime, was deferred to a public hearing (TRC, 1999c). The entirety of the two-phase interconnection proceeding, with the exception of calling-party-pays, took around one year, which by international comparison is not excessive.

Open procedures have been described as the sunshine that disinfects the germs of corruption and suspicion of corruption. In addition to fostering open and inclusive procedures, it is important that regulatory agencies engage in a continuous process of reinforcing ethical behavior among their staff (and of communicating these activities to external stakeholders and the public). In Sri Lanka, the Regulatory Commission engaged in a long process of consultation and education to develop mission and vision statements that yielded both results. The mission statement developed through this process read:

– To create the optimum conditions for the telecommunications industry in Sri Lanka by serving:
  - the public interest in terms of quality, choice and value for money,
  - the service providers with equitable access to spectrum and other common resources, and
  - the nation in its drive for socio-economic advancement,
– through a skilled and ethical workforce.

Considerable internal discussion was generated by the question of inserting the word "ethical" into the text halfway through the process. A request by the Director General that staff refuse to accept holiday gift packages from firms and individuals doing business with the Commission (a hoary tradition in Sri Lanka) also contributed to heightened awareness of ethical issues. The mission statement, once adopted, was widely used in Commission publicity.

Public Interest. Openness and due process do not by themselves yield legitimacy. They are necessary for the achievement of legitimacy in the eyes of the operators whose direct financial interests are affected. This is especially so if the procedures of the regulatory agency are subject to judicial review, and indeed receive judicial approval when challenged. What happens in this case is the transference of the legitimacy of the courts (relatively high in most countries). However, true legitimacy requires that the regulatory agency act, and be seen to act, in the public interest. Much has been written about how amorphous a term the public interest is, but its value lies precisely in the opportunity it creates for the rhetorical construction of public-interest rationales for regulatory actions. The public interest is not identical to the consumers' interest. This is especially true in low-teledensity countries where only a minority of the populace enjoys telecommunications services and the inter-

ests of potential consumers in network expansion must also be explicitly addressed. The public interest must not only be rhetorically constructed; it must be constructed through a participatory process. Again, this gives rise to fears of a cacophony of undisciplined voices slowing things down.

The Sri Lanka Commission's effort to elicit public input through the public hearing on billing is one example of building a public-interest based claim for legitimacy. Another was the initiative to develop quality of service rules as required in the Act. The simple course of action was to draft rules based on internal or external expertise, allow the direct stakeholders to comment on the draft rules, and to finalize them. However, this would have excluded consumer input and created the conditions for a watering down of quality standards by the operators. At the cost of slowing the process, the Commission decided to conduct Sri Lanka's first systematic survey of telephone users to formally incorporate the views of the consumers into the process.

In the course of developing rural telecommunications policies, the Commission staff held public consultations that drew as many as 400 people in areas far from the capital city. Systematic efforts were made to identify and induce participation by opinion leaders in villages, supplemented by public-opinion surveys conducted in areas without any telephones provided a sound basis for the Commission's rural initiatives launched in1999 (Samarajiva, 2000). The decision to focus on rural areas in 1999 was in itself a major element in the Commission's public-interest claim to legitimacy.

3 Conclusion

Independent telecommunications regulatory agencies are proliferating partly because long-term private investments in networks require assurances that capital will not be arbitrarily expropriated. Regulatory agencies are being established as dispensers of non-arbitrary decision-making and due process because all possible exigencies cannot be addressed by legal guarantees. Much is being made of various legal provisions ensuring the independence of the regulatory agencies. However, without addressing the challenges of building up the legitimacy of the agencies, independence cannot be assured and efficacy cannot be guaranteed. Without independence and efficacy, the assurances required for long-term private investments will not exist. Without such investment, social goals such as universal access cannot be realized.

The establishment of regulatory agencies is critical to the success of the current wave of institutional reforms of infrastructure and network industries across the world. What this paper has sought to establish is that a multifaceted understanding of legitimacy, that includes claims based on expertise, openness and the public interest, is necessary for the establishment of regulation. Legitimacy must be won and sustained in the eyes of stakeholders and the public. Therefore it involves a great deal of communicative work. Policy solutions that do not address the need for legitimacy, or seek to anchor legitimacy solely on expertise or on one of the other claims, are likely to be ineffective.

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