

The regulatory body is separate from, and not accountable to, any supplier of basic telecommunications services. The decisions of and the procedures used by regulators shall be impartial with respect to all market participants.<sup>34</sup>

It should be noted that this definition does not require independence or even separation from other units of government. For example, Japan has not created a separate telecommunication regulatory agency and continues to regulate the industry through a government ministry.

This issue of the regulatory agency's relationship to the rest of the government is perhaps the most problematic aspect of independence. As a threshold matter, it is useful to ask how regulatory agencies are unique in needing insulation from political pressures.

It could be argued that any form of public administration requires a degree of protection from day-to-day political pressure in order to be efficient and unbiased. The civil service protections written into many constitutions and laws around the world testify to this. Clear separation of the policy-setting function from the policy-implementation function is a basic element of sound public administration.<sup>35</sup> It allows policy-makers to be held politically accountable, while regulators are held legally and administratively accountable. Additional insulation from political pressure may be necessary for certain exceptional government positions, such as attorneys general, officials of central banks, and officials of bodies that investigate corruption.

Telecommunication regulatory agencies also differ from other government entities, however, because of the unique historical development of sector reform in many countries. Where governments previously maintained PTT operating structures, they may still retain significant – even controlling – shares in the incumbent operator. Where this is the case, the government may feel obliged to exert pressure upon its regulatory authorities to favour the incumbent over other market entrants. Indeed, the government (usually through a communications ministry) may find pertinent policy rationales, such as universal access programmes, for protecting the interests of the incumbent, in which the government itself is a primary investor. In such cases, it may be argued that telecommunication regulatory agencies do require extraordinary protections from political influences that are not extended to other government entities.

Even so, insulation from day-to-day political pressures does not necessarily translate into complete autonomy from government. According to regulatory theorist William H. Melody:

The term *independence* as used in the context of telecom reform ... does not imply independence from government policy, or the power to make policy, but rather independence to implement policy without undue interference from politicians or industry lobbyists. It implies independence to acquire special skills, to manage without interference and to be accountable for results according to specific performance criteria. In principle, it is no different than a delegation of specific responsibilities, authority and accountability for the performance of specific activities, as takes place in any large organization.<sup>36</sup>

Independence is important not as an end in itself, but as the means to practise effective regulation. The efficacy of regulation is measured not by the strength of safeguards against political interference, but by the improvement of connectivity, value for money, and choice for the users.

#### 2.4.2 *Achieving and Maintaining Independence*

The necessary conditions for independence, in the form of statutory provisions regarding appointments, removals, reporting authority and financial autonomy, are discussed in Chapter 3. The key to actually achieving and maintaining independence is legitimacy.

Legitimacy is the acceptance of the existence and the power of an entity by those who can affect it or are affected by it. It is distinguished from powers and duties set out in formal legal documents. Legitimacy is a subjective category in that it resides in the eyes of others. Without it, a regulatory agency will not be able to function effectively.

A regulatory agency must win legitimacy in the eyes of both private sector and government stakeholders. It certainly must be accepted as legitimate by other government officials and agencies, including finance, industry, or communications ministries and legislative or parliamentary committees. Moreover, if incumbent operators and new market entrants do not respect the agency's decisions, they will continually appeal them to another authority. Appeals to the courts may not directly threaten the agency's independence, although continual stay orders may erode the efficacy of the agency's actions. But appeals to the executive or the legislature can directly weaken an agency's independence if they lead to political pressure, behind-the-scenes manipulation, or self-censorship. Excessive and never-ending appeals indicate weak legitimacy.<sup>37</sup>

It is natural for those at the receiving end of regulatory decisions to question the legitimacy of the agencies that make those decisions, especially when rulings have a large economic impact. Where regulators are suspected of corruption, legitimacy is, of course, particularly questionable. Even squeaky-clean regulators can face allegations of corruption. Regulatory transparency, coupled with ethical practices, can insulate regulators from such charges (see Chapter 6). Operators can assault a regulatory authority's legitimacy through the process of "gaming" the system – filing numerous and onerous appeals or using the mass media to continually question regulators' decisions or motives.<sup>38</sup> Regulatory authorities can counteract such gaming activity by seeking prior input in their decisions, by adopting decisions through transparent processes, and by carefully explaining the reasoning behind those decisions, in the press and in the decisions themselves.

Because legitimacy is won and perpetuated through communicative processes, the regulatory agency must not only maintain its interaction with stakeholders, but also seek to create legitimacy through the media, which form an important part of the symbolic environment of 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.

Legitimacy can be asserted and maintained by effectively communicating expertise, as well as through transparency and commitment to the public interest. Of course, the agency also has to show results. The following is a discussion of the elements of establishing and maintaining regulatory legitimacy and, therefore, independence.

#### 2.4.2.1 Expertise

Effective 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 high-quality training, and the effective communication of these initiatives. It also means the ability to obtain external expertise when required.

Providing adequate compensation is a necessary basis for claiming expertise. Virtually all agencies face recruiting and retention problems caused by the gap between government salaries and what the private sector can and will pay. Training is another prerequisite for any expertise-based legitimacy claim. Agencies facing the problem of low pay relative to the private sector may use the opportunity to train their own employees as a way to attract and keep good people. The morale premium enjoyed by an energetic organization under effective leadership should also not be neglected. Effective leadership and expertise can be communicated and developed in several ways, including through the presentation of speeches and appearances at key industry and intergovernmental conferences.

#### 2.4.2.2 Transparency<sup>39</sup>

Expertise is inadequate by itself. It must be complemented by the establishment of transparent and inclusive procedures for reconciling competing interests based on the public interest. Comprehensive procedures for assuring transparency would include creating and rigorously maintaining mechanisms for accountability at all levels. Most new regulatory agencies find it difficult to devise and implement such transparent and inclusive procedures. Many fear that open procedures will make the regulatory process vulnerable to litigious delays and other legalistic tactics. But experience has shown that transparency and expeditious regulation need not be mutually exclusive.<sup>40</sup>

#### 2.4.2.3 The Public Interest

True independence requires the regulatory agency to act – and be seen to act – in the public interest. Much has been written about how amorphous the term *public interest* is, but its value lies precisely in the fact that it can be identified and defined through the process of constructing rationales for regulatory actions. This process must be one that allows maximum public participation. It should be noted that the public interest may not always be identical to the existing consumers' interests. This is especially true in low-teledensity countries where only a minority of the populace currently enjoys telecom services. Here, the needs and interests of *potential* consumers in network expansion are just as pressing and must be explicitly addressed.

#### 2.4.2.4 Efficacy

It is not possible to undertake any of the above actions without engaging in substantive regulatory activity. Rather, the regulatory agency must plunge right in, addressing the pressing regulatory issues that confront it in a rapidly changing market. If it does not act, someone else will. The operators will take matters into their own hands or other government agencies will step into the vacuum created by inaction. Legitimacy can be achieved, then, only by effectively communicated actions and results, not by the eloquence of excuses.

Results must not only be achieved, but they must be seen to be achieved. Undue modesty does not serve the cause of legitimacy. Public communication about decisions that have been taken, proceedings that are under way, and initiatives that are about to begin provide useful information and decrease uncertainty for all stakeholders. They also signal to other government actors that the regulatory agency is alive and well and taking care of business.

#### 2.4.2.5 Credibility

It is an unfortunate truth that power becomes real only when exercised. In the regulatory context, this means that credibility often cannot be achieved without an assertion of authority or even a conflict or dispute. In order to gain routine compliance by operators, it is sometimes necessary for a regulatory agency to signal unequivocally that it is in charge. Given the high stakes involved in such an action, best efforts should be made to pick issues that are significant, “winnable” and easily explained to the media.

Unfortunately, regulatory agencies rarely enjoy the luxury of picking the battles that will define them. The first case of a licence-condition violation by the incumbent that was taken up by the Sri Lankan regulatory agency in early 1999 met the criteria.<sup>41</sup> The incumbent had violated licence conditions and its approved tariffs by collecting substantial deposits from new customers without providing prompt connections. The regulator adopted a careful but firm approach and received supportive media coverage. As a result, the operator decided not to appeal the agency's licence-condition violation order and instead paid more than USD 1 million in compensation to the affected customers. Regulators are not always so successful, and some cases end up in the courts.

Strong leadership can also augment the credibility of regulatory authorities. Especially where regulatory bodies are recently created political institutions, the regulatory body will develop a reputation based not only on its initial decisions but also by the reputation and comportment of its leadership.

## 2.5 Conclusion

Regulation is not about achieving perfection. In a perfect world, regulation would not be necessary. Markets would operate perfectly, as would governments, and universal access to ICT services would be achieved. But what exists in reality – at least for the foreseeable future – are markets characterized by oligopoly, rife with bottlenecks at essential facilities, and subject

to incumbents' continual efforts to extend market power from one segment to another.

While governments are far from perfect, they will usually intervene when markets fail or it is necessary to strive for important national goals such as universal access or broadband infrastructure buildout. Given the mandate to regulate in the public interest, continuing government intervention in the ICT sector is to be expected. The form and extent of such intervention is often the only real issue.

The performance of imperfect markets can be improved through government intervention, but it also can be undercut. The challenge in designing and creating regulatory mechanisms is to ensure not only that good outcomes are produced, but that the "regulatory risk" – the potential to generate bad outcomes – is minimized.<sup>42</sup> The ethical principle that dictates "above all, do no harm" applies to policy-makers and regulators as well as doctors.

This is important not only for the purpose of improving sector performance, but also in terms of addressing the problem of investor perception. If investors believe, rightly or wrongly, that regulatory risk is high, they will not invest in a country or

will take into account the risk in their investment decisions. In the former case, sector performance will suffer from the lack of capital for network rollout and improved quality and choice. In the latter, the yields from privatization and licensing will be much reduced and investment will be biased toward the short term and the high yield, again deleteriously affecting sector performance.<sup>43</sup>

A regulatory agency's freedom to operate independently is important not merely for the sake of a political principle. What is important is effectiveness. The defining issue for any meaningful discussion of regulatory bodies is whether they operate effectively in pursuit of the public good. Effectiveness requires continual maintenance and reinforcement of legitimacy. Only by taking concrete steps to build and reinforce legitimacy, on a day-to-day basis, can agencies maintain the kind of accountability and effective governance necessary to satisfy the needs of current and potential users of ICT services. The importance of effectiveness is reflected in the title and theme of this report. The remaining Chapters therefore focus on the various elements of effective and transparent regulatory practice and explore how governments can incorporate them into the operations and activities of their regulatory institutions.

<sup>1</sup> ITU World Telecommunication Regulatory Database (2001).

<sup>2</sup> ITU World Telecommunication Regulatory Database (2001).

<sup>3</sup> However, there are differing views about the degree of participation in the policy function that the regulator should have.

<sup>4</sup> In countries with highly developed separation of powers such as the United States, the boundary between policy and regulation is sometimes breached through overlap. The US Federal Communications Commission, for example, has an Office of Plans and Policy and engages in a form of policy-setting through the rule-making process. The National Telecommunication and Information Administration (NTIA), which is part of the Department of Commerce in the executive branch, has formal policy jurisdiction. The U.S. Congress also gets involved in fairly detailed policy-setting through its committees. For an example of the interplay of these agencies, see Shields, Peter (1991), "The politics of the telecommunications policy process: The example of the FCC's price cap initiative", *Policy Studies Journal*, Vol. 19, No. 3/4: 495-513.

<sup>5</sup> Canadian Telecommunications Act, Statutes of Canada, Chapter 38, section 8. At: <http://www.crtc.gc.ca/eng/LEGAL/TELECOM.HTM>

<sup>6</sup> International Telecommunication Union (1997, September 23). Telecommunication Development Bureau, ITU-D Study Groups, "Recommendations emerging from the study of Question 2/1, telecommunication policies and their repercussions at the level of institutional, regulatory and operational aspects of services", Document 1/193 (Rev.1)-E. Geneva: ITU; Wellenius, Bjorn & others (1993). Telecommunications: World Bank experience and strategy. World Bank Discussion Papers 192. Washington, D.C.: World Bank.

<sup>7</sup> The regulatory function is not introduced by the reforms; it is separated and made explicit. Before the reforms, the monopoly operator performed certain regulatory functions while the Ministry performed certain others.

<sup>8</sup> ITU World Telecommunication Regulatory Database indicates that 43% of all countries have introduced partial or full competition in local services. For example, RDSL (2000, March 9).

<sup>9</sup> ITU World Telecommunication Regulatory Database indicates that 106 member countries have privatized at least some part of their incumbent operator.

<sup>10</sup> See Chapter 1, section 1.3.1

<sup>11</sup> Levy, Brian and Spiller, Pablo (1994). "The institutional foundations of regulatory commitment: A comparative analysis of telecommunications regulation". *Journal of Law, Economics & Organization*, 10(2): 201-246; Wellenius, Bjorn and others (1993). Telecommunications: World Bank experience and strategy. World Bank Discussion Papers 192. Washington, D.C.: World Bank.

<sup>12</sup> Prosser, Tony (1997). *Law and the regulators*. Oxford, UK: Clarendon Press.

<sup>13</sup> For an example of the perceived relation between investment and regulation in the business media, see Bidoli, Marina (2001) "Local not lekker if you're used to better: Telkom's monopoly and a weak regulator chasing away foreign investors", FutureCompany [online publication of the *Financial Mail*], April 13, cover story. <http://www.futurecompany.co.za/2001/04/13/covstoryb.htm>

<sup>14</sup> The regulation of mergers and acquisitions under competition law allows for a degree of *ex-ante* intervention.

<sup>15</sup> *InfoDev Telecommunications Regulation Handbook*, Toronto: McCarthy Tétrault; Intven, Hank, editor (2000) (<http://www.infodev.org/projects/314regulationhandbook/>)

<sup>16</sup> See "Effective Regulation, Case study: Brazil, 2001", ITU, p. 20. [http://www.itu.int/ITU-D/treg/Case\\_Studies/Index.html](http://www.itu.int/ITU-D/treg/Case_Studies/Index.html)

<sup>17</sup> ITU survey, 2001.

<sup>18</sup> Organisation for Economic Co-operation and Development (2001). *Communications Outlook 2001* (Paris: OECD), p. 276.

<sup>19</sup> Here, the incumbent's inability to capture the new market is due to various unusual conditions such as war, rather than any great achievement on the part of the new entrants or policy success on the part of the government or the regulatory agency.