

Regulatory legitimacy

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Expectations . . .

- Regulatory agencies should
 - Preside over increasingly efficient utility sectors that provide more value for money
- In order to do this, they should be
 - Independent of operators, esp. incumbent
 - Independent of political influence
 - And their actions should be
 - Based on expertise
 - Based on procedural legitimacy

But reality falls short: Regulatory agencies rarely have allies among key players

Government

Regulatory agency

Consumers

Regulated entity/entities

Consumers not happy (generally) because . . .

- Evidence of increasing efficiency & improved performance may not be easy to find
- Regulatory agencies appear to be
 - Not always fully independent of major operator (previous incumbent monopoly), e.g.,
 - Government owns all/part of operator
 - Regulatory Agency employees seconded from operator
 - Not always fully independent of a specific new entrant associated with government, ruling party, military, etc.
 - Subject to political interference
- Their functioning appears to be
 - Opaque
 - Arbitrary, and/or
 - Semi-dormant (news of the regulator, when it comes out, is generally bad)

Managers of regulated firms are unhappy because . . .

- They have one more entity (“who knows less than they do about the business”) telling them what to do and not do
- Regulatory agency is unpredictable

Politicians are unhappy because . .

- This new-fangled regulatory agency is not taking orders/suggestions
- It is complicating actions needed for political survival
- It is not providing cover for politicians

Ministry officials are not supportive because . . .

- Regulation dilutes their powers
- It adds layers of complexity to what they do

Objective of this presentation is

- To trigger innovative thinking about achieving results under non-optimal conditions
- To emphasize legitimacy over formal independence
- To show how a legitimacy strategy can create space for a regulatory agency to function and to show results

Outline

- What is this regulatory independence?
- Necessary conditions for independence
- The sufficient condition: Legitimacy
 - Expertise
 - Procedural legitimacy
 - Communication
 - Engagement with consumers

Independence

- Much talked about in relation to regulation
- What is it?
- Why should regulators have it?

Maximal definition

- *An effective regulator should be independent from those it regulates, protected from political pressure, and given the full ability to regulate the market by making policy and enforcement decisions. The regulator should have the authority and jurisdiction to carry out its regulatory and enforcement functions effectively and unambiguously. And the regulator must be adequately funded from reliable and predictable revenue sources.*
 - *US Federal Communications Commission, 1999*

Note: FCC does not have this level of independence!

Minimal definition

- *The regulatory body is separate from, and not accountable to, any supplier [. . .]. The decisions of and the procedures used by regulators shall be impartial with respect to all market participants.*
 - Adapted from Fourth Protocol of the GATS, Regulatory Reference Paper, 1997, article 5 (only international treaty level instrument on infrastructure regulation)

Regulator-government relations

- Insulation from day-to-day interference by politicians is basic element of good public administration practice
 - Political accountability for policy setting
 - Administrative/legal accountability for implementation
- Additional insulation for some agencies
 - E.g., Attorney-general; Anti-corruption bodies
 - Do regulators fall within this category?

Independence for regulators?

- Does not exist in all cases
 - E.g., Chile, Israel, Nordic countries
- But is needed, when overall governance is poor
- Basic (not sole) rationale of regulation in developing countries (=countries with poor governance) is protection of investors from administrative expropriation
- Analogy: dike to protect island of good governance from ocean of bad governance
 - But it is not enough to build a dike; it must be maintained

How dikes work



Necessary conditions

- Specified appointment procedures of decision makers
 - Based on merit/expertise, not solely political loyalty
- Removal procedures of decision makers
 - Hard to remove; relatively easy to appoint
 - Accountability through transparency
- Reporting relationship
 - “Line” Ministry?
 - Chief executive?
 - Legislature?
- Financial autonomy
 - Certainty; ability to plan; invest in/obtain expertise
 - Prevent use as instrument of pressure

Sufficient condition

- Legitimacy: The way to win independence
 - Expertise
 - Procedural legitimacy
 - Communication
 - Engagement with consumers
- Legitimacy building=dike maintenance

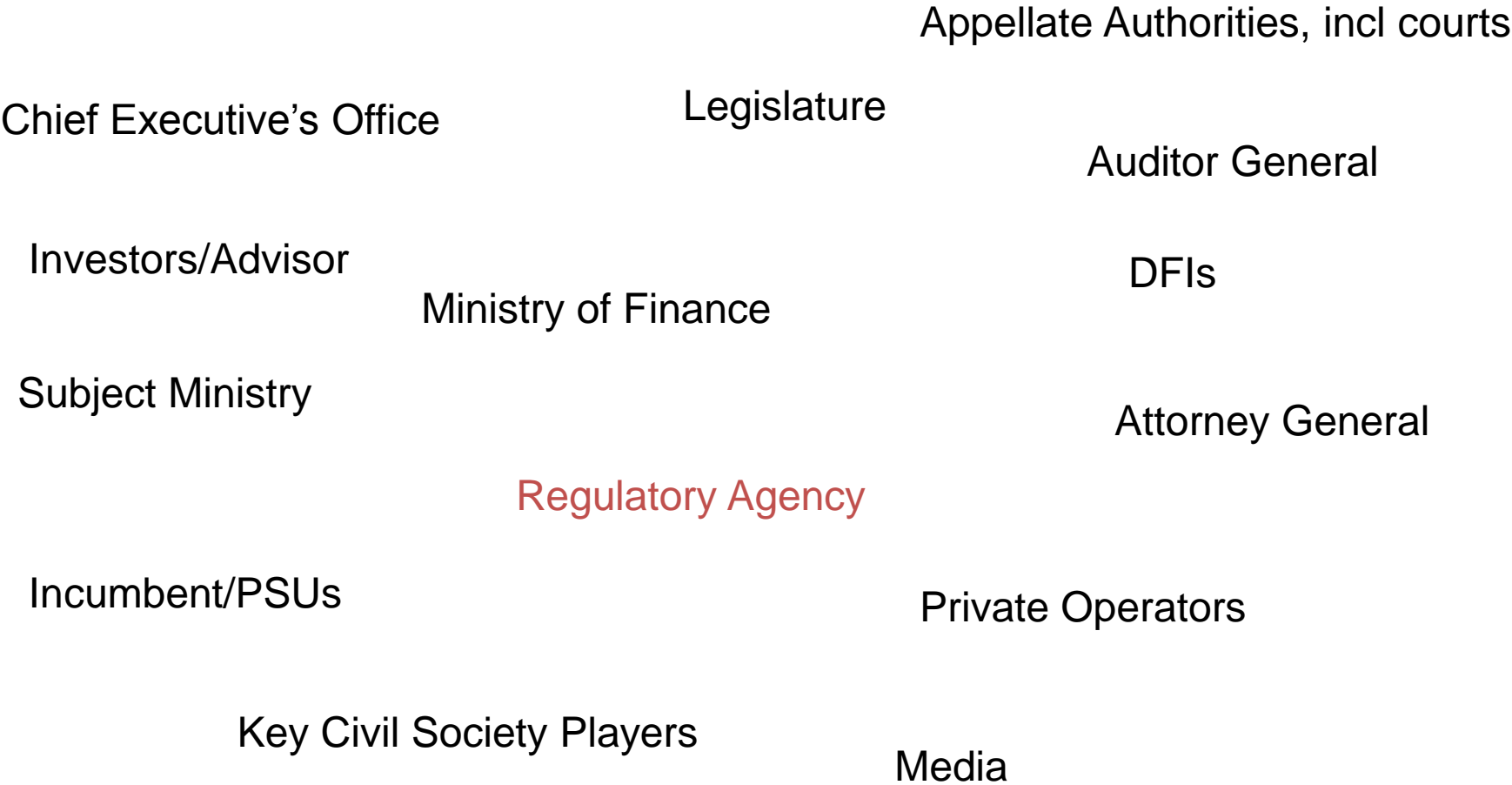
What is legitimacy?

- Acceptance of existence and authority of an entity by those who can affect it or are affected by it
- Distinguished from powers and duties set out in formal legal documents
- A subjective category that resides in the eyes of others

Legitimacy in whose eyes?

- Government
 - “Line” Ministry
 - President’s/PM’s office
 - Finance/Industry
 - Legislature/Judiciary
- “Private”
 - Incumbent/new entrants
 - Public/”opinion leaders”

Actors who can affect/are affected by a regulatory agency



Expertise

- Important, but inadequate by itself
 - Because application of expertise under conditions of imperfect knowledge always involves judgment
- No justification for sector regulation without expertise

Procedural legitimacy

- Legal requirement, in many cases
- Essential ingredient of legitimacy
 - Reinforces expertise-based claims
 - Generates new information; improves information quality
 - Creates conditions for “buy-in” by stakeholders, reducing appeals
 - “Appeal-proofs” regulatory decisions, increasing likelihood of winning if appealed

Procedural legitimacy

- Legal requirement in many countries
 - India: requirement for consultation papers and open houses in TRAI legislation
 - USA: Administrative Procedures Act
 - Sri Lanka:
 - Law states that Telecom Regulatory Commission may hold public hearings and conduct public-notice proceedings
 - Public Utilities Commission Act has both public hearing (formal) and consultation (less formal) provisions
 - In most countries judiciary will ask whether natural justice/due process principles have been followed in considering pleas for review/appeal/writ remedies

Natural-justice principles

- Hear both sides
- Judge must be unbiased
- Make decision based on the record

Communication

- “How do they know you’re expert/ procedurally legitimate/ doing good if they do not know/you don’t tell them?”
- Source of informal power
 - “Sweet talking,” “jawboning” and “framing”
 - Affect the symbolic environment of government--the media
 - Key to public support
- But many regulators are uncomfortable with public communication
 - Because they see themselves in a quasi-judicial role and/or
 - Because they do not know how, having come from administrative backgrounds

Transparency

- Website
- Publication of regulatory manual
- Publication of regulatory priorities
- Publication of accounts
- White papers

Using sector performance for legitimacy?

- Every regulatory agency has to take unpopular decisions
 - E.g., Not permitting certain price decreases because they may harm competition
 - Quality is likely to fluctuate in Budget Telecom Network model,; immediate improvement may not be possible
- Many of its decisions are difficult for lay people to understand
- Need to build a goodwill bank and keep replenishing it
 - Why not focus on customer experience & on giving consumers voice?

How to manage communication with key actors

- Get an accurate stakeholder map for your agency
 - A simple map is not enough; rank and prioritize
- Devise specific non-media communication strategies
 - E.g., reports, presentations, briefings, memos
- Have a media strategy
 - All actors live in symbolic environments made up of different combinations of media

Keys to effective communication (with or without media)

- Know your audiences
 - Primary
 - Secondary
- Craft your message for primary audience
 - But always make sure it does not offend the secondary audiences
- Believe in what you say
 - Knowing the facts will also help

Engagement with consumers

- If you can ensure that consumers get lower prices, they will love you
 - But this is rare, except in telecom
- Value for money increases with either
 - Lower prices
 - Higher quality
- Can you give higher quality?
- Can you give consumers respect?
 - Not common in monopoly environments

My experience

- In privatization agreement, government had committed to a 100+% increase in revenues from domestic basket of services over five years as part of rebalancing
 - Only 10% had IDD, but 60+% of revenues came from international
- I had to give a 25% increase (in Year 1 of privatization; and my first quarter on the job)
 - This amounted to an 80% increase in the monthly rental (from LKR 100 to LKR 180) if increases in call charges were to be kept at reasonable levels

What did I do?

- I issued a decision that included
 - A provision that required the operator to give a credit of the prorated monthly rental for any period more than 7 days without phone service
 - No penalty, just a refund
- Before that, I also conducted an inquiry and issued an order that required the incumbent to refund the monthly rental for a grievously wronged consumer
 - Second story on the evening news
 - Seven managers came in delegation to complain to Secretary of Ministry/Chair of Telecom Regulatory Commission

Kept the pressure on . . . “An improvement in quality is a reduction in price”

- Public lecture with media coverage on quality of service
 - Canadian telco executive, talking about why quality matters
- Tightened the rules
 - 3 days for business consumers
 - 5 days for residential
- Lots of media exposure
- Consumer complaints responded to
 - Started getting hundreds
 - Created a consumer relations unit
- Held operator in violation of license conditions (April 1999)
 - No fine; but they had to give back to consumers equivalent of USD 1 million in illegally obtained connection fees

First public hearing

- On billing
 - 100s of submissions
 - Held hearings in multiple locations
 - Provision for public hearings had been in Act since 1991; nothing had happened until 1998
 - More media

2nd step of tariff rebalancing

- Another 25% increase in revenue in 1999
 - No big issue

Don't wait for the ideal conditions . . .

- Yes, we could have better politicians
- Yes, the legislation could be better crafted; and the judges more reasonable . . .
 - But why wait?
 - Why not achieve results, even with the less-than-optimal tools at hand?
- Good regulatory performance will help improve the conditions for better laws, more reasonable judges and better politicians