

Independence: What is it? How to get it? How to keep it?

Rohan Samarajiva

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 independence and show results

Outline

- What is independence?
- Necessary conditions of independence
- Legitimacy: the way to win independence
 - Expertise
 - Procedural legitimacy
 - Showing results
 - Communication

Independence

- 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*

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.

Regulator-government relations

- Insulation from day-to-day interference by politicians is basic element of good public administration practice
 - Political accountability for policy setting
 - But in some countries, independent regulatory agencies have taken over policy functions (de jure for a short time in Morocco; de facto in Bangladesh)
 - Admin/legal accountability for implementation
- Additional insulation for some agencies
 - E.g., Attorney-general; Anti-corruption bodies
 - Should regulators fall within this category?
 - Current UK Prime Minister, while in opposition, expressed concern about OFCOM's independence and lack of accountability to Parliament
 - Is the pendulum beginning to swing back?

Independence for regulators?

- Not in all cases
 - Example of Nordic countries
- Yes, when overall governance is poor
- Basic (not sole) rationale of regulation in developing countries (=countries with poor governance) is protection of investors from arbitrary takings
- Analogy: dike to protect island of good governance from ocean of bad governance

Necessary conditions

- Specified appointment procedures
 - Preferably staggered appointments
- Appointing/removal procedures
 - Hard to remove; easy to appoint (through merit-based procedure)
 - Accountability through transparency
- Reporting relationship
 - “Line” Ministry?
 - President/Prime Minister?
 - Legislature?
- Financial autonomy
 - Certainty; ability to plan; invest in expertise
 - Prevent use as instrument of pressure
 - But experience has shown many instances of profligacy and use of funds for non-regulatory purposes

Sufficient conditions

- Legitimacy: the way to win independence
 - Expertise
 - Procedural legitimacy
 - Showing results
 - Communication
- Legitimacy building=dike maintenance

What is legitimacy?

- Acceptance of the existence and the power 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”

Expertise

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

Procedural legitimacy

- 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: Commission may hold public hearings and conduct public-notice proceedings
 - In most countries judiciary will ask whether natural justice/due process principles have been followed in review/appeal/writ proceedings

Achieve results

- Prioritize
 - Cannot do all things well
- Apply limited resources to
 - High-yield (e.g., interconnection), and/or
 - Winnable (e.g., where incumbent is obviously at fault), and/or
 - Easily explainable problems (e.g., not interconnection)
- Win your battles
 - Winning can be defined in various ways!
- Tell the world about them

Communication

- “How do they know you’re expert/ procedurally legitimate/ doing good if you don’t tell them?”
- Source of informal power
 - “Sweet talking,” “jawboning” and “framing”
 - Affect the symbolic environment of government/industry--the media
 - Key to public support