

**Embedding Regulatory Autonomy: The reform of Jamaican  
Telecommunications Regulation 1988-2001**

**Lindsay Stirton and Martin Lodge**

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# Embedding Regulatory Autonomy: The reform of Jamaican Telecommunications Regulation 1988-2001

Lindsay Stirton and Martin Lodge<sup>1</sup>

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Globalisation is said to have diminished the capacity of states to regulate their economies. However, while a body of doctrine has developed concerning the need for capable, independent regulation, there is relative paucity of theoretical discussion concerning the nature of state regulatory capacity, or how this can be enhanced (or is diminished). Existing accounts focus mainly on ability to manage technical complexity and the design of regulatory institutions. This paper seeks to extend the discussion using the idea of the ‘embeddedness’ of political and economic institutions developed by Mark Granovetter, Peter Evans and others. The challenges encountered in embedding a regulatory regime are illustrated by a detailed case study of telecommunications reform in Jamaica which, it is somewhat tentatively argued, represents a successful attempt to bring about embedded regulatory autonomy. The case study illustrates that, while aspects of globalisation challenge national autonomy in regulating rapidly globalising sectors such as telecommunications, other globalisation effects may facilitate increased embedded autonomy within national regulatory regimes.

## Introduction

*“Can we identify more clearly the internal organisational features and patterns of external ties associated with effective state action? Can we find concrete historical examples that illustrate their variations?”*  
(Evans, 1995: 32)

One of the problems facing developing countries is that despite pervasive state intervention, governments frequently lack the capacity for effective regulation. This, it is claimed, is the outcome of what might be called ‘anti-developmental coalitions’ of

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<sup>1</sup> Lindsay Stirton, Department of Law and Centre for Analysis of Risk and Regulation and Martin Lodge, Centre for Analysis of Risk and Regulation, London School of Economics and Political Science. This research is supported by an Association of Commonwealth Universities/British Academy grant for international collaboration and by the Ford Foundation Endowment to the Social Sciences, University of the West Indies. We owe a debt of gratitude to many interviewees in Jamaica at the Office of Utilities Regulation, Cable & Wireless, Digicel, Infochannel, the Ministry of Commerce and Technology, the Cabinet Office and DfID Rob Baldwin, Julia Black, Franklin Brown, Kamau Chionesu, Neville Duncan, Jurgen De Wispelaeere and Chico Gaetani, Ansord Hewitt, Edwin Jones and Martin Minogue provided helpful comments on the draft of this paper. An earlier version was presented at the Annual Conference of the Development Studies Association, University of Manchester, 10-12 September 2001.

powerful societal interests, who attempt regulatory ‘capture’, allied to top state (bureaucratic as well as political) actors seeking predatory policies, coalescing to undermine state regulatory capability (Migdal, 1988, 1994). This problem is increasingly recognised within the international development community, which has come to regard an effective, capable state as a precondition for ‘successful’ policies of social and economic development (World Bank, 1993, 1997) and to see ‘politicisation’ as an impediment to state capacity (Spiller and Savedoff, 1999). At the same time, the national autonomy of states, particularly in developing countries, to regulate and control their economies independently of their international environment is said to be diminished by globalisation (for a synopsis see Randall and Theobald, 1998: 253-255). Put differently, states are said to have lost boundary control. The dilemma for policymakers is well expressed by Peter Evans, “*While globalisation does make it harder for states to exercise economic initiative, it also increases both the potential returns from effective state action and the costs of incompetence.*” (Evans, 1997: 74)

This working paper addresses the problem of capacity-building in developing countries via a discussion of Jamaican telecommunications reform, focusing on attempts by policymakers to strengthen the technical and institutional capacity for regulation. It evaluates the extent to which global factors have impacted upon regulatory capacity in the telecommunications sector as well as the Jamaican government’s response to the challenge of enhancing state capacity to regulate one of its most thoroughly globalised sectors. In conclusion, we suggest a potentially upbeat paradox: that pressures of globalisation may in this case have increased capacity by tipping the balance within domestic politics in favour of a reform-oriented ‘developmental coalition’.

There are two main reasons for choosing the telecommunications sector in Jamaica as a case study. Firstly, Jamaican telecommunications offer an ideal national sectoral lens to study the relationship between globalisation and state regulatory capacity. Jamaica is a small developing country with weak state capacity, heavily influenced by its legal and institutional colonial inheritance as well as by the public sector reform programmes of international organisations, in particular the World Bank. A transnational corporation (Cable and Wireless) has, since 1988 been the monopoly telecommunications provider and sectoral policy has been constrained by the ‘sleeping with an elephant’ effects (Hoberg, 1991) of the neighbouring North American market.

A second reason for the choice of case is that Jamaican telecommunications regulation has been seen a template for reform in other countries. The World Bank has used (and continues to use) Jamaican telecommunications and its regulatory regime post-1988 as a case study of how to design regulatory regimes in systems of high political uncertainty and weak administrative capacity in order to attract private investment (World Bank, 1997: 70; Levy and Spiller, 1994, 1996). More recently, other Caribbean states have attempted to learn from Jamaica’s experience in negotiating its way out of exclusivity agreements and initiating a process of liberalisation and regulatory reform. For example, the East Caribbean micro-states followed Jamaica in adopting a phased approach towards liberalisation, as did Barbados (Financial Times, 9 March 2001).

The case of regulatory reform in Jamaica presents a puzzle to the observer: a small state, dependent on private investment, manages to overcome the monopolistic position of the existing provider and establishes a timetable for liberalisation. Furthermore, it strengthens the authority of a regulatory agency, which is regarded in the Caribbean and the wider developing world as a possible model. Thus both the constraints under which the Jamaican reforms were undertaken as well as the transformation that was achieved have been particularly pronounced. We therefore have a clear case in which the problem of enhancing regulatory capacity in a globalised environment can be studied most effectively.

In this paper we argue that although the Jamaican experience does indeed hold lessons for other countries, these are subtler than existing analyses of this case would suggest (Wint, 1996; Spiller and Sampson, 1996). The next section describes the process of reforming Jamaican telecommunications regulation since privatisation. In the third section we explore the different dimensions of regulatory capacity, and analyse the effects of changes within the Jamaican telecommunications sector on regulatory capacity in an attempt to explain the apparent success of these reforms. In doing so, we add value to the existing literature on capacity-building by showing how institutional capacity is dependent on the embeddedness of institutions within sectoral structures and linkages. The fourth section looks at ways in which changes in the international environment, often attributed to 'globalisation' have affected regulatory capacity-building efforts in Jamaica. In conclusion we argue that if the reform process has been successful then this is not only because of the way in which regulatory institutions and capabilities have been internally strengthened, but also because of the way in which sectoral, societal and international linkages have concurrently been strengthened. This conclusion, we believe, is relevant to policymakers attempting to reform regulatory regimes in developed and developing countries alike.

### **Regulatory reform in Jamaica's Telecommunications Sector**

From the early 1980s, there was a substantial interest in public sector reform, especially in order to attract private investment for economic development. In May 1987, after negotiations with Cable and Wireless, the government announced the creation of Telecommunications of Jamaica (TOJ) as a holding company to take over the existing domestic provider, the Jamaica Telephone Company (JTC) as well as the international service provider, Jamintel. Transfer of ownership from the government to Cable & Wireless proceeded in a cautious way under the Jamaican Labour Party (JLP) government. As signalled in the prospectus for the public share offer, the government intended to retain a controlling interest of 40 per cent of the company, with 21 per cent of the shares being sold to the general public.<sup>2</sup> At the same time a new company, Jamaica Digiport Ltd was established, a joint venture between AT&T and Cable & Wireless, aiming to exploit Jamaican potential to provide low-cost information services (call centres) to the neighbouring North American market.

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<sup>2</sup> Wint (1996) provides an excellent, detailed account of the process of telecoms privatisation in Jamaica.

The initial regulatory arrangements were set out in five licences issued by the Jamaican government to TOJ in 1998 for a period of 25 years (with an option on the part of the licence to renew for a further 25 years).<sup>3</sup> Central to the arrangements was a simplified system of rate of return regulation, guaranteeing the company an after tax return of 17.5-20 per cent on equity. Annual tariff adjustments to keep the rate of return within this range were made by the Minister of Public Utilities. This rate of return, financed almost entirely from the international market, particularly from the termination of inbound traffic to Jamaica, provided a source of funds for cross-subsidising investment in the development of the domestic public switched telephone network.<sup>4</sup>

However, there were some difficulties with regard to the rights extended to TOJ under the 1988 licences. Cable & Wireless later claimed that, read as a whole, the licences created a legitimate expectation of an exclusive right to provide telecommunications services.<sup>5</sup> The legal basis of this is tenuous. While the Telephone Act 1893, which was the principal basis for the licences, gave the government the authority to establish a monopoly over the local wired telephone network, there are problems in any wider interpretation since telephone services are defined by the Act in (pre-Marconi) technology-specific terms.<sup>6</sup> The Act is silent with respect to customer premises equipment (CPEs) and international services, let alone services not envisaged in 1893, such as data transmission, storage and retrieval and other value added services or even fibre-optic transmission, which does not use electronic wires. Cable & Wireless' cellular service, furthermore, was provided under authority of a wireless communications licence some claimed was intended to allow TOJ to provide 'wireless in the local loop' which was crucial to the expansion of the public telephone network given Jamaica's mountainous geography.

Meanwhile, control of TOJ passed to Cable & Wireless in 1989 after a further transfer of shares under the People's National Party administration of Michael Manley, which gained power in the 1989 election. Cable & Wireless tried to take advantage of the government's worsening economic and fiscal situation to secure their help in tightening up Cable & Wireless's legal rights. In order to secure a high price for the sale of the government's remaining shares in TOJ, Manley agreed (in a letter, dated 2 November 1990) to make the necessary amendments to the Telephone Act and to the license. A

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<sup>3</sup> The licences were issued purportedly under authority of the Telephone Act 1893 and the Radio and Telegraph Control Act 1973.

<sup>4</sup> Given the regulated rates of return, such investment, even in unprofitable domestic services, would increase Cable & Wireless's profits, provided the cost of borrowing was less than the allowed returns on equity up to the point where monopoly rents were fully extracted (Averch and Johnson, 1962). Due to the presence of network externalities, this would further increase the demand for, and profits from, termination of international calls leading, depending on ones point of view, to a 'vicious' or 'virtuous' cycle of network expansion.

<sup>5</sup> Minister of Commerce and Technology v. Cable & Wireless Jamaica Ltd. Suit M089/98

<sup>6</sup> But even here, see the decision of the Privy Council in Cable & Wireless (Dominica) v. Marpin Telecoms and Broadcasting Ltd and another [2001] WLR 1123, particularly the dicta of Lord Cooke urging heightened scrutiny of exclusivity arrangements in the light of constitutional protection of free speech, given that the government and the operator had a common financial interest in establishing exclusivity. The Radio and Telegraph Control Act 1973, meanwhile, deals with possession and operation of equipment, and could therefore hardly be the basis of an exclusive right to provide telecoms services.

Telecommunications Bill was introduced to parliament in 1993 the terms of which would have guaranteed the company exclusivity in telecommunications services in, out and through Jamaica.<sup>7</sup> The adverse reaction from many quarters ensured that the proposals were sidelined until after the election of 1997. Changes in the organisation and personnel of government following the election meant that responsibility for telecommunications fell under the portfolio of the newly created Ministry of Commerce and Technology which was headed by a more pro-liberalising minister, Philip Paulwell.

Meanwhile, changes to the structure of utilities regulation in Jamaica were introduced, as a result of which much of the routine work of regulating telecommunications fell to a newly established regulator, the Office of Utilities Regulation (OUR) which began work in 1997. This was created as part of the government's plans for the privatisation of the electricity utility for which World Bank funding was sought. The donor was insistent on the creation of a stand-alone, preferably sector-specific, regulator.<sup>8</sup> The OUR was set up along the lines of British 'Of-type' regulatory offices, but was given cross-sectoral responsibility for the economic regulation of energy, telecommunications, water and aspects of public transport. The 'British' approach was perceived to be less cumbersome and legalistic than the US-style Public Utilities Commission that had been adopted by Jamaica in 1966, as well as being more credible and independent. However, the work of the OUR was handicapped by the legislation establishing it. The Office of Utilities Regulation Act 1995 gave the OUR jurisdiction over 'approved organisations'. However, neither the 1995 Act nor any secondary instruments identified any of the utilities as approved organisations. Thus it could only legally act in an advisory capacity, with decision-making authority vested with the Minister of Commerce and Technology in the case of telecommunications.<sup>9</sup> Although the problem was recognised by the preparatory unit charged with setting up the OUR, legislative changes were not made until 2000.<sup>10</sup> This also affected the financial resources of the OUR because the Office was to be funded through a levy on those approved organisations, which Cable & Wireless declined to pay.

Early attempts at reform within the post-privatisation telecommunications sector were mainly pursued under the Fair Competition Act 1993 which establishes a competition and consumer-protection authority, the Fair Trading Commission (FTC), and also provides a third party right of redress. The FTC adopted a pro-active role in challenging the limits of Cable & Wireless's right of exclusivity. Although a decision was taken internally not to challenge matters covered explicitly by the terms of the 1988 licenses, which were considered to be a matter for Parliament, the FTC identified areas where it could act without directly challenging the legitimacy of the licenses. In 1994, for example, this led

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<sup>7</sup> One witticism made at the time was that if anyone in Jamaica possessed the power of mental telepathy, they would have been in breach of Cable & Wireless's rights envisaged under the Bill.

<sup>8</sup> The sale of the Jamaican Public Service Company (JPSCo) was abandoned in 1996, leading to a withdrawal of World Bank funding of energy projects. In 2001, an 80 per cent stake was sold to Mirant (formerly Southern Energy).

<sup>9</sup> Lodge & Stirton (2001b: 90-95) describe the effects of this on the OUR's attempts to deal with consumer complaints against Jamaican utilities.

<sup>10</sup> The Telecommunications Act 2000 empowered the OUR as the regulator of telecommunications, while the Office of Utilities Regulation (Amendment) Act 2000 empowered the OUR with respect to the other utilities.

to the introduction of competition into the market for consumer premises equipment (albeit not on equal terms as cross-subsidy from the monopolistic part of the market continued). In 1995 following action from the FTC and from Infochannel (an Internet service provider) which had commenced the previous year, Cable & Wireless agreed to allow Internet Service Providers (ISPs) to interconnect with the public telephone network. Some suggested that these early efforts to challenge the incumbent company might have been taken much further. In 1999, action by the FTC under its consumer protection mandate challenged Cable & Wireless's advertising of 'free' voicemail and led to a settlement.

By the late 1990s, further technological, economic and political changes impacted on the relationship between the company and the government. The government, with the approval of Cable & Wireless, signed up to the WTO Agreement on Telecommunications, marking a broad commitment to liberalise the sector.<sup>11</sup> This commitment was cemented in a 1998 statement of policy on telecommunications (Ministry of Commerce and Technology, 1998) which set out a framework for implementing the Jamaican government's obligations under the WTO Agreement. This included the introduction of competition in wireless services (including 'wireless in the local loop' as well as cellular services) and in value added network services (also interpreted broadly) although no timetable was set for implementation of these arrangements. Among the reasons for this policy change was the desire to realise the potential for development of the information technology sector as part of the National Industrial Policy (Government of Jamaica, 1996: 122-4).

Furthermore, consumers were increasingly able to bypass the Cable & Wireless network to make international calls. 'Voice over IP' and 'voice over Internet' technology allowed consumers to make telephone calls through their ISPs, and Cable & Wireless was unable to prevent the increasing use of this technology. In 1998 the Minister of Commerce & Technology issued five new licenses to VSAT operators, under the Radio and Telegraph Control Act 1973. Among other things, operators were using their equipment to bypass Cable & Wireless's international service, and Cable & Wireless was unsuccessful in challenging their right of operators to interconnect with Cable & Wireless's local network.<sup>12</sup> The company was granted leave to apply to the Supreme Court for an order of *certiorari* to quash the issue of these licences (as well as a license issued earlier to Infochannel, an ISP) and an order of prohibition against the future issue of such licences. The decision to grant leave was upheld by the Court of Appeal.<sup>13</sup> Proceedings initiated before a Full Court of the Supreme Court of Jamaica<sup>14</sup> were discontinued, nevertheless, it provided a forum for the Attorney General for Jamaica to assert that the Government of Jamaica had acted unconstitutionally in granting the 1988 licenses.

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<sup>11</sup> The Jamaican government committed itself to new legislation which reflected 'technological advances' and 'pro-competitive practices', but honoured its exclusivity agreement until 2013. It was indicated that following an agreement with Cable & Wireless, an improved commitment would be submitted.

<sup>12</sup> Infochannel Ltd. vs. Cable & Wireless Jamaica Ltd., Suit E014/99.

<sup>13</sup> Minister of Commerce And Technology v. Cable & Wireless Jamaica Ltd. Motion 18/98 [10.11.98].

<sup>14</sup> Minister of Commerce And Technology v. Cable & Wireless Jamaica Ltd. Suit M089/98.



These actions by the Jamaican government can arguably be interpreted as part of a concerted effort to force Cable & Wireless to renegotiate the terms of the 1988 licences. Part of this strategy involved going over the heads of the local Cable & Wireless management and dealing directly with the London operations. This was part of a common strategy agreed upon by the various CARICOM ministers responsible for telecommunications at a meeting in Kingston in 1997. While local Cable & Wireless management was initially opposed to any liberalisation, internationally the priorities of Cable & Wireless were shifting away from a global interest in voice telephony towards business and data-rich markets which were regarded as more profitable. This change in priority, which for some also signalled an intention by the company to sell off its Caribbean operations, was apparently accompanied by an increasing centralisation of operational and strategic decision-making in London.

From Cable & Wireless's perspective, motivation to reach an accommodation with the Government of Jamaica was provided by the US Federal Communications Commission Benchmarks Order of 1997. The effect of this was to reduce the settlement rate for the inbound termination of calls to Jamaica from the US from US\$ 0.575 to US\$ 0.19 per minute (still substantially above cost) by 1 January 2001. In 1999, the United States Court of Appeal upheld the Order.<sup>15</sup> This action was a response to complaints by US operators that were forced to pay nearly \$6bn per annum to foreign operators as part of a traditional accounting rate system, which did not reflect the cost of services. This system had increasingly led to payments from those countries that had liberalised services to those that continued to maintain national monopolies (Braithwaite and Drahos, 2000: 336). This unilateral FCC action substantially diminished over time the main source of Cable & Wireless's profitability in Jamaica (and the wider Caribbean) from which domestic services were cross-subsidised. With the prospect of a reduction in the funds for network expansion, the search for an alternative approach involving significant re-balancing became imperative. Although a rate review in 1999 allowed for some modest re-balancing, further re-balancing is anticipated.

It was thus a combination of legal and technological uncertainty, combined with shifting government preferences towards it and telecommunications-focused economic development as well as shifting corporate priorities and power relations within Cable & Wireless itself that led Cable & Wireless to reach an accommodation with the Jamaican government in 1999. The agreement<sup>16</sup> contained drafting instructions for a new bill on telecommunications in Jamaica, enacted as the Telecommunications Act 2000. A phased, structured transition towards liberalisation was established, in three phases over three years.<sup>17</sup> The Act thus makes possible the shift towards a plural telecommunications market. Authority is granted to the OUR not only as the regulator of Cable & Wireless

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<sup>15</sup> Cable & Wireless plc. v. Federal Communications Commission and United States of America, 344 U.S. App. D.C. 261; 166 F. 3d 1224.

<sup>16</sup> See Cable & Wireless (Jamaica) Ltd 1999.

<sup>17</sup> Part XVII of the Act, which deals with repeal of the Telephone Act 1893 and transitional issues repeatedly refers to powers that the minister "may" exercise as each of the three phase commences. Thus liberalisation is strictly speaking permitted rather than required under the Act.

but also over new entrants to the market.<sup>18</sup> Provision was made for interconnection between different providers/carriers<sup>19</sup> and for an approach to universal service that is consistent with a competitive environment.<sup>20</sup>

On the other hand, the Act served Cable & Wireless's interests by shoring up the incumbent's position in law, for example, by preventing the VSAT operators from engaging in bypass operations without a licence.<sup>21</sup> Nonetheless, ambiguities remained, and legal challenges continued against Cable & Wireless, as part of an ongoing legal dispute between Infochannel (an ISP) and Cable & Wireless.<sup>22</sup> Arguably, although the Telecommunications Act 2000 did not end legal uncertainty, it improved matters for Cable & Wireless because challenges under the Act were likely to be commercial disputes between companies, rather than more politically salient disputes between the company and the government. Supporters of the deal suggested that it offered a necessary compromise between government interest and Cable & Wireless, and pointed to Cable & Wireless's commitment, in return for the shoring up of its rights under its license, to introduce 217,000 new lines in Jamaica. A commitment was also made to upgrade the telecommunications infrastructure in the Montego Bay Free Zone Digiport as well as to invest in scholarships and infrastructure for IT developments.

### **Enhancing Jamaica's Regulatory Capacity**

Existing approaches to the analysis of regulatory capacity tend to focus narrowly on regulatory institutions themselves. Institutional capability is seen as having two dimensions: the ability of regulators to handle technical complexity and the presence of institutional checks and balances to prevent the arbitrary exercise of discretion (see Levy, 1998: 355). The former is a question of organisation and management, the latter one of institutional design. While these two dimensions of the institutional capability are undoubtedly central, to focus exclusively on these two aspects of regulatory institutions is to neglect a crucial third dimension: the manner in which institutions are embedded within a network of social relations. This latter dimension brings into focus that regulation more often than not involves more complex relationships than simple 'regulated industry' and 'regulator' accounts suggest. The need to extend the analysis of regulation to the wider environment and the interaction between potentially multiple

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<sup>18</sup> See S. 4. The spectrum, carrier and service provider licenses were auctioned to two new mobile carriers: Mossel (trading as Digicel) a consortium led by Irish entrepreneur Denis O'Brien, and Cellular One Caribbean, a subsidiary of the US firm Cellular One. US\$ 47.5m and US\$45m were paid by the respective firms for the spectrum rights. Cellular One (Caribbean) subsequently sold its licence to Centennial, which started its service in December 2001.

<sup>19</sup> Part V of the Act.

<sup>20</sup> Part VI of the Act.

<sup>21</sup> Part III of the Telecommunications Act 2000 deals with licensing of services. See especially S. 9 (1)(d). But see S. 75 (2) which arguably establishes a 'grandfathering' right for carriers engaging in bypass prior to the passing of the Act.

<sup>22</sup> Infochannel Ltd. v. Cable & Wireless Jamaica Ltd. Suit No. C/L I.038/2000 [17.8.2000]; Infochannel Ltd. v. Cable & Wireless Jamaica Ltd. S.C.C.A 99/2000 [20.12.2000].

parties has been summarised in the notion of ‘regulatory space’ (Hancher and Moran, 1989, Scott, 1). The argument of this section is summarised in Table 1 below.

**Table 1: Regulatory Capacity and Associated Capacity Building Strategies**

<b>Dimension of Regulatory Capacity</b>	<b>Capacity Building Strategies</b>	<b>Focus</b>	<b>Types of Activities</b>
<i>Ability to manage technical complexity</i>	Human resource development	Supply of professional and technical personnel	Training; salaries; conditions of work; recruitment
	Organisational strengthening	Management systems to improve performance of specific tasks and functions; microstructures	Incentive systems; utilisation of personnel; leadership; organisational culture; communications; managerial structures
<i>Presence of checks and balances against capture and administrative expropriation</i>	Institutional reform	Institutions and systems; macrostructures	Regulatory ‘rules of the game’ policy and legal change, input-oriented transparency mechanisms
<i>Embeddedness of regulatory institutions</i>	Organising regulatory space	Agency-sectoral linkages	Output-oriented transparency mechanisms; opening markets to new entrants; forging intergovernmental alliances

Source: Adapted and expanded from Grindle, 1997: 9

Naturally, the three dimensions of regulatory capacity, strategies and activities to strengthen each dimension are interdependent. Only when the three dimensions are taken together can regulatory capacity be properly analysed and understood. To an extent, they can be viewed as ‘Russian dolls’, so that the ability to handle technical complexity is supported and constrained by regulatory institutions which in turn interact and are shaped by the wider sectoral environment. In practice improvement along one dimension of regulatory capacity may weaken the other dimensions of regulatory capacity: in other words, compromises and trade-offs may have to be made. In doing so it is important to consider the perceived changes in the wider environment in which ‘regulatory capacity’

is being embedded. These challenges, which can be summarised under the rubric of ‘globalisation’, reduce the ‘national autonomy’ of states to establish rules and standards independently of other states or international organisations. However, globalisation is not a one-dimensional concept either, and the effects upon ‘embedded autonomy’ in the sense used in the development literature and addressed here in terms of capacity-building may be ambivalent. Regulatory capacity may be challenged by the influence of factors stressed in the international political economy literature such as transnational companies, international organisations or unilateral actions by hegemonic states. More recent literature concerns the influence of new social movements and so-called epistemic communities (for elaboration on these factors see Lodge and Stirton, 2001a).

### *Organisation and Management of Regulatory Institutions and Processes*

At least since the time of Max Weber (1947, 1991), social scientists have analysed the features of rational bureaucracy. Yet as scholars of developing countries have been at pains to point out, developing country bureaucracies rarely live up to the expectations of rationality and efficiency that Weber’s ideal-type might lead us to expect. A review of research into developing country bureaucracies found the following dysfunctional features of bureaucracy to be paradigmatic: at the top level, overworked management, unwillingness to delegate, weak administrative and technical support as well as a failure to clearly articulate the organisation’s mission; at the middle level, weak management with inadequate organisational systems and controls, unwillingness to delegate (as with top level management) and micro-management of employees; at the operating level, inefficiency and low productivity, overstaffing and under-utilisation of resources. Further, there tends to be inadequate co-ordination and communication between levels (Kiggundu, 1989: 9). Finally, there is a lack of insulation of the organisation from society,


*“The boundaries of the organization are rather porous, leaving the vital technical core of the organisation unprotected and susceptible to abuse by outside societal interests”* (pp. 9-10).

A specific feature of this tendency applicable to regulation is the ‘revolving door’ phenomenon where staff come into regulatory agencies from the industries they regulate and allow the prospect of being hired from the agency back to the industry to influence regulatory decision-making (see Makkai and Braithwaite, 1995).

Merilee Grindle (1997) sees human resource development and organisational strengthening as two primary capacity-building strategies. These strategies could be applied to the organisation and management of regulatory institutions and processes and thus augment the ability of regulatory agencies to handle technical complexity. Addressing issues of training, salaries, conditions of work and recruitment can help overcome constraints on the capacity of individuals to carry out their professional and technical responsibilities (Grindle, 1997:13-15). The issue of organisational strengthening is closely linked to that of human resource development. Strengthening public sector organisations can be achieved through capacity-building measures such as improving recruitment and utilisation of staff, providing incentives for good performance, addressing channels of accountability and communication within organisations, providing

adequate physical resources and encouraging good management practices and decision-making processes (Grindle, 1997: 15-19). Together, these strategies address the first dimension of regulatory capacity attending both to the need to recruit, train and retain professional and technical personnel as well as the need to effectively utilise such personnel within organisations.

The challenges of tariff re-balancing and moving towards a system of ‘price-cap’ regulation within a sector comprising of multiple competing providers will test the ability of the OUR to handle issues of considerable technical complexity to the limit. Nonetheless, the government has sought technical assistance in its efforts to meet these challenges. In 1997, the Ministry of Commerce and Technology approached DfID, the UK development agency for technical assistance to establish the OUR as an independent regulator of Jamaican utilities. The proposal was seen as fitting in well with DfID’s institution-building initiative, and half a million pounds over two years was given for the project, which had a positive impact on organisational strengthening and human resources development. An International Advisory Board to the OUR was created, which exposed the OUR to the advice of senior academic experts on regulation from the UK. A regulatory economist was ‘imported’ from Oftel, the UK telecommunications regulator for eighteen months to work with the OUR technical personnel. Arguably the presence of an expert ‘street level bureaucrat’ (Lipsky, 1979) with whom technical personnel could interact represents a more effective means of human resource development than providing a foreign consultant to lead the organisation.<sup>23</sup> There was also a training component to the budget of the DfID programme, administered by the external consultant which allowed for three seminars to be run in Kingston, as well as for OUR technical personnel to travel overseas for training.

As the DfID project came to an end, further technical assistance was provided by the Canadian development agency, CIDA. Following the DfID precedent, this allowed the OUR to import a former Canadian state regulator. The new consultant had a background in regulatory institutions and procedures rather than particularly ‘econocratic’ issues. This shift in emphasis was to facilitate the OUR in moving towards a more formal, open consultative style, in keeping with the opening up of the telecommunications market for new ants.

Overall, technical assistance has had a positive influence on human resources development and organisational strengthening within the OUR. However, this effectiveness has been somewhat diminished by the slow progress in institutional reform. One representative of DfID felt that the institution-building project would have been more effective, had primary or secondary legislation empowering the OUR as the sectoral regulator come at the beginning rather than at the end of the project. To date, only one employee of the OUR has left to work for the industry, suggesting some degree of resilience against ‘revolving door’ effects. Since 1999, a course on regulation has been included as part of the graduate public administration programme at the Jamaican Mona campus of the University of the West Indies (see Minto, 2001) from which the OUR has

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<sup>23</sup> The latter, more conventional approach was adopted by the Trinidad-Tobago Regulated Industries Commission whose first Executive Director was an external consultant provided to them by the IDB.

already recruited one new member of staff. Such programmes have potentially enlarged the pool of regulatory expertise and thus a potential recruitment base for the OUR as well as for the regulated industries.

### *Institutional Design of Regulatory Institutions*

To be effective, the institutional checks and balances provided by a regulatory framework must be able to cope with two potential pitfalls (see Levy, 1998). On the one hand institutions may be vulnerable to ‘capture’ in the sense that regulatory agencies come to identify their own interests with the interests of the industry they are required to regulate rather than with the public interest. The other, opposite problem is that the regulated industry may be subject to administrative expropriation of their assets (for example where the regulator sets tariffs below the level at which a public utility can recoup its sunk costs). These concerns, linked to established debates on ‘bureaucratic drift’ and ‘coalitional drift’ have attracted a range of solutions in terms of institutional design, stressing in particular the importance of structural and procedural design ‘solutions’ at the institutional ‘hardwiring’ stage.<sup>24</sup> Structural options deal with the allocation of resources and decisional authority, while procedural rules set particular rules and standards which direct an agency to ‘desired’ policy outputs (Macey, 1992). For example, the appropriate incorporation of ‘transparency mechanisms’ into the design of regulatory regimes can alleviate the problem of capture, unresponsive services or ‘loose cannon’ action by regulatory agencies (Stirton and Lodge, 2001). Conversely, Levy and Spiller (1995, 1996) present a sophisticated analysis of the second type of problem. They argue that legal, bureaucratic, political and informal social constraints are substitutable instruments that can potentially prevent administrative expropriation. In their analysis the optimal design of regulatory institutions is contingent on the existing ‘institutional endowment’ of the country in question.

At the same time, however, we should not consider a country’s wider institutional endowment to be exogenous to issues of policy reform. Institutional reform represents a further potential capacity-building strategy (Grindle, 1997: 19-22). Addressing the macrostructures, institutions and systems within which regulatory policy is formulated through constitutional, political and legal reform can widen the range of instruments that can effectively secure protection against administrative expropriation. At the same time, the success or failure of institutional reform “...relates not only to the quality and acceptability of the new rules of the game, but also to their appropriateness to time and place...” (Grindle, 1997: 20). In processes of institutional reform, the sequencing (or ‘choreography’) may be a key determinant of success or failure. Thus Schick (1998) ascribes the ‘success’ of Singapore’s institutional reforms to the sequence by which it first strengthened rule-based government prior to adopting a New Zealand-style ‘contractorised’ public sector.

The most detailed study of institutional safeguards in the Jamaican context was conducted as part of a World Bank funded research project into the institutional

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<sup>24</sup> These issues have increasingly been the concern of lawyers as part of the scholarship of the ‘new public law’ (see Scott, 1996) Arguably, this represents a return to an earlier ‘administration-centred’ tradition within public law (see Harlow and Rawlings, 1984: 39).

foundations of regulatory commitment (see Levy and Spiller, 1994, 1996; Spiller and Sampson, 1996). The project took a favourable view of Jamaican arrangements post-1988, concluding that the 1988 licences provided an effective means of securing commitment through private law mechanisms. This, it was argued, was an optimal solution in order to attract private investment given weak constraints on arbitrary action provided by the party system, bureaucracy, administrative law and informal norms. These conclusions are, to say the least, surprising, given what has been said here concerning the precarious legal position of the Cable & Wireless's purported 'exclusivity'. Our scepticism seems to have been borne out by subsequent developments, specifically the inability of Cable & Wireless to use the courts to prevent incursions of new entrants in competition with them. Furthermore, efforts at institutional reform have proceeded on a different footing from what Levy and Spiller's analysis would have predicted. On the whole, the reforms have used parliamentary, bureaucratic and administrative law more than private law instruments to establish checks and balances on regulatory decision-making.<sup>25</sup>

As already noted, the establishment of the OUR was connected to a World Bank energy project in Jamaica. In part, the failure to address the shortcomings of the Office of Utilities Regulation Act promptly reflects the lack of domestic political commitment to independent regulation, in particular by a minister (Robert Pickersgill) who showed a marked lack of enthusiasm for independent regulation, and for regulatory reform more generally. At the same time it would be overstating the case to see this as a case of 'coercive transfer' (Dolowitz and Marsh, 2000). Such an interpretation would require evidence of a far more detailed blueprint for the creation of regulatory structures and blueprints. The Office of Utilities Regulation (Amendment) Act and the Telecommunications Act 2000 together establish the OUR as an independent regulator, removing powers from the ministries. However, independence is circumscribed to the extent that rules promulgated by the OUR are subject to affirmative resolution by Parliament.<sup>26</sup> A further limitation on the OUR's freedom of action (which was opposed by Cable & Wireless in the reform process) is the direct accountability of the OUR to the Minister of Commerce and Technology (who is also responsible for the allocation of licenses). Further, the ministry had the power (similar to the UK and elsewhere) to issue directions 'of a general nature' to the OUR.

### *Embeddedness of Regulatory Institutions within the 'Regulatory Space'*

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<sup>25</sup> One plausible defence of the Levy and Spiller thesis is that between 1993 (when they conducted their analysis) and 2000 the institutional endowment of Jamaica was transformed. The establishment of the FTC and the OUR may have created a strong(er) bureaucracy, permitting a move away from purely private law instruments for securing regulatory commitment. The degree to which specific directives were 'hardwired' into the Telecommunications Act also indicates some residual distrust of administrative agencies. At the same time, if the institutional resources of a country can be transformed in a mere six years, this limits the value of arguments focussing so heavily on institutional endowment. We are grateful to Ansord Hewitt for this point

<sup>26</sup> Telecommunications Act 2000 S. 4 (5) and S71(1). This 'protection' may in fact be a double-edged sword for the industry, since it allows for both a politicisation of regulation while giving wide discretionary agenda-setting powers to the OUR based on its exclusive right to propose rules.

Embeddedness of state institutions within public space has been a relatively under-emphasised dimension of institutional capacity. However, it enjoys growing attention in the developmental literature (Polidano, 2001) as well as in the literature on state capacity in the developed world which highlights differences in the ability of states to pursue certain policy options in the light of differential degrees of national 'organised societies'. Hancher and Moran (1989) originally developed the image of regulatory space against the implicit assumption in much of the existing literature that regulatory authority is (or at least ought to be) inviolate from private influence. In contrast to images of 'capture', they see the regulatory process as characterised by an interplay of interdependent (state and societal) organisational interests with varying degrees of power and resources, each of which is competing for influence over outcomes. In short, regulatory space is characterised by social relations among actors,

*"The notion of 'regulatory space' focuses attention not only on who the actors involved in regulation are, but on structural factors which facilitate the emergence and development of networks and which contribute to the institutionalisation of linkages"* (Hancher and Moran, 1989: 292).

One way of concretising this rather abstract concept is through the notion of the 'embeddedness' developed within the sub-discipline of economic sociology, principally by Mark Granovetter (1985, 1992; see also Beckert, 1996). Rejecting what he calls the under- and over-socialised conceptions of man common in economics and sociology respectively, Granovetter looks at the way in which "...attempts at purposive action are instead embedded in concrete, ongoing systems of social relations." (Granovetter, 1985: 487). According to this approach networks of interpersonal<sup>27</sup> relationships are central to generating trust and discouraging malfeasance. Granovetter particularly stresses the importance of 'weak ties' in strengthening inter-group relations in contrast with 'strong ties' which serve to reinforce divisions among different small well-defined groups (see Granovetter, 1973).<sup>28</sup>

The implications of Granovetter's approach suggest that the way in which social relations within regulatory space are structured effects the institutional capability of regulatory agencies, potentially providing further, societal, protection against the dysfunctional regulatory outcomes of capture or administrative expropriation. Similarly, Peter Evans argues that capable state institutions produce developmental (rather than predatory) outcomes where "...they are embedded in a concrete set of social ties that binds the state to society and provides institutionalised channels for the continual negotiation and renegotiation of goals and policies." (Evans, 1995: 12; see also Evans, 1997, Polidano, 2001). This argument has also been taken up in the transaction-cost literature which stresses the importance of 'enfranchising' particular constituencies in the regulatory process in order both to monitor and shape the regulatory agency's behaviour and decision-making (Macey, 1992; Stirton and Lodge, 2001).

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<sup>27</sup> Departing from the orthodox assumptions of methodological individualism, we might also add 'inter-organisational'.

<sup>28</sup> One example of the divisive effects of strong ties is Adam Smith's ([1776] 1979: 232) well known observation that, "people of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices."



This suggests an additional fourth regulatory capacity-building strategy, to the extent that networks of inter-personal and inter-organisational relations are subject to the influence of policymakers, this influence can be used to purposefully embed regulatory capacity within the regulatory space. This might be achieved, for example, by providing institutionalised access to the regulatory process for public interest groups (see also Ayres and Braithwaite, 1992) or by allowing new entrants to enter markets to challenge the dominance of incumbents. This strategy corresponds closely to what Andrew Dunsire (1993, 1996) calls collibration, the systematic suppression or amplification of opposed maximisers. At the risk of neglecting the more qualitative aspects of regulatory space, it can be argued that the increasing number of inter-organisational linkages has increased the level of embeddedness of the OUR within the regulatory space. The argument of this section is summarised in Table 2 below.

**Table 2: Embeddedness of Regulatory Institutions Within Regulatory Space**


Linkages between sectoral regulatory agencies and...	Weakly embedded	Strongly embedded
<i>providers</i>	Single monopoly provider for entire sector	Multiple competing providers within one sector
<i>consumers</i>	Poor provision of information, choice, representation and voice	Adequate mechanisms for providing information, choice, representation and voice
<i>other sectors</i>	Sector-specific regulatory agencies	Cross-sectoral regulatory agency exercising authority over a number of sectors
<i>other state agencies</i>	Regulatory authority confined within one agency/department	Regulatory approach shared between overlapping agencies/departments
<i>wider society</i>	Legitimacy based on charismatic authority of individual persons	Legitimacy based on normative rules, and the right of agency to exercise powers under those rules
<i>international actors</i>	National and intergovernmental regulatory policy implemented independently of other states and international organisations and TNCs; epistemic community dominated by national provider	National and intergovernmental regulatory policy supported by agreements between states and with international organisations, TNCs and diverse international epistemic communities

The introduction of competition within the cellular sector strengthened regulatory capacity primarily by providing a counter to the superior organisational resources of the incumbent. In negotiating the Reference Interconnection Offer, for example, the OUR was able to leverage its own resources by balancing Cable & Wireless's view with technical information and advice supplied by Digicel. This was facilitated in part by the shift towards a more open and transparent consultative process as discussed above. Similarly, providing institutionalised consumer representation through the creation of a Consumer Advisory Committee to the regulator created an important channel for consumer views (for detailed discussion see Lodge and Stirton, 2001b). Another example of how embeddedness was 'managed' was the defeat of Cable & Wireless's attempt to remove telecommunications from the scope of the Office of Utilities Regulation Act. This was regarded within the reform community as an attempt to establish a more 'capturable' single-sector regulatory framework. Arguably, maintaining a cross-sectoral regulator at the centre of a network of somewhat countervailing interests of other sectors, reinforced the capacity of the regulator to achieve developmental outcomes (see also Macey, 1992). This trade-off, which is usually discussed in the context of choices between sectoral regulation and reliance of competition law, also represents a choice between sector-specific specialisation (and the subsequent risk of industry capture) and overall coherence of approach across sectors (with the potential inability to maintain oversight over specialised domains).

The presence of other state agencies within the regulatory space can also be seen as contributing to a greater degree of embedded autonomy. Throughout the reform process, informal links with the Office of the Prime Minister (OPM) and the Cabinet Office strengthened and protected the 'developmental coalition' against more traditional elements of Jamaican bureaucracy and politics. The OPM intervened in turf fights between the sectoral ministries and the OUR in a manner that was broadly in support of independent regulation. The separation of the Ministry of Public Utilities into individual ministries responsible for telecommunications, energy, water and transport further embedded the autonomy of the OUR by creating multiple ministerial principles, thus weakening 'strong ties' that may have had the potential to facilitate politicisation.

Under the Office of Utilities Regulation Act 1995 the OUR could be said to be only weakly embedded within the inter-governmental aspects of regulatory space, acting only in an advisory capacity to the minister. The division of responsibility under the Telecommunications Act 2000, with the minister responsible for allocating licences, sector-specific regulation by the OUR with issues of competitive significance to be referred to the FTC strengthen the OUR significantly. Under the new arrangements 'turf fights' and 'hot potato' effects were by no means absent (for example, the FTC and the OUR tried to pass responsibility for dealing with a dispute over ownership rights in 'vanity numbers' to one another). However, the fact that the different agencies and the Ministry of Commerce and Technology were able to establish a co-operative working relationship as part of a 'developmental regulatory coalition' with a shared approach towards market liberalisation and regulation could be seen as having a positive effect on the OUR's regulatory capacity.

Although we have focused attention on linkages between the OUR and other organisations within the national regulatory space, two wider dimensions of embeddedness should also be mentioned: linkages with the wider society as well as linkages with international actors. Without regulatory authority, the legitimacy of the OUR could have been said to rest on Director-General Winston Hay's 'charismatic authority' that is, "...resting on devotion to the specific and exceptional sanctity, heroism or exemplary character of an individual person, and of the normative patterns or order revealed or ordained by him." (Weber, 1947). Hay had the attribute of being simultaneously outside and part of Jamaican society. As a Jamaican national with a background as a former World Bank energy man, his professional career was outside Jamaican politics and administration. He was able to appeal to both expertise and, through regular appearances in the press, claim a popular mandate to apply moral suasion to attempt (with mixed results) to remedy complaints against utilities (see Lodge and Stirton, 2001b). The legislative reforms of 2000 could be said to have brought about a shift towards a more legal-rational basis of legitimacy, although arguably OUR action in May 2001 over Cable & Wireless's cellular service standards revealed a continuing highly personalised style of regulation.

Finally, the relationships within the regulatory space are further shaped by interaction with the wider international environment. 'Globalisation' is often said to diminish state capacity for autonomous regulatory action (and there is evidence of this in the present case, for example in terms of the effects of the FCC Benchmarks Order of 1997). However, the Jamaican case illustrates the way in which the 'developmental coalition' was able to exploit linkages with other states, TNCs, international organisations and an international epistemic community to strengthen its position and enhance the state's capacity to regulate the telecommunications sector. In the case of TNCs, the 'developmental coalition' pursued a deliberate strategy of forging links with Cable & Wireless's international management to overcome an intractable local management that was a legacy of the era of state-owned PTT monopoly. Similarly, the Jamaican government was able to use the WTO Basic Agreement on Telecommunications Services to signal its commitment towards a (rather unspecified) liberalisation of its telecommunications market, thereby strengthening its hand against the incumbent. Furthermore, by linking the OUR with the wider epistemic community in economic regulation in general and telecommunications regulation in particular (through training seminars, visits and invitations to international conferences or merely by the use of modern information technologies), the regulatory space in Jamaica was arguably further linked and therefore embedded into a 'global' knowledge network. This potentially offered a crucial counterbalance to the superior knowledge resources of the  incumbent.

### **What Role Globalisation?<sup>29</sup>**

As already noted in the introduction, globalisation, given its current currency in much of the social science literature, has been associated with numerous trends and tendencies.

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<sup>29</sup> This section adapted from Lodge & Stirton (2001a)

Much of the globalisation literature focuses on abstract arguments among hyper-globalists, who argue that the state has lost the capacity to regulate independently due to global market forces, globalisation sceptics, who regard the internationalisation of the economy as reinforcing existing power structures, and transformationalists who point to the qualitative changes associated with contemporary trends (for summaries, see Held, 1999; Hirst and Thompson, 1999). There is, however an emergent literature that reflects on more focused concerns with regard to regulatory competition and the ability of sovereign states to regulate their domestic economies (for example, Vogel, 1997).

The present paper contributes to our understanding of these concerns, through a detailed discussion of the case study. The Jamaican case shows that, while telecommunications has never been a purely 'national' affair (because of accounting rates and standards), the past two decades have undermined the ability of states to independently regulate their telecommunications industry. The growth of competing transnational carriers, the growth of alternative technologies as well as the action of particular states, such as the USA, in unilaterally changing accounting rates and lobbying international organisations (for example the ITU) reduce the possibility of independent action. However, while these examples indicate a loss of 'boundary control', at the same time, this paper has pointed to various factors which potentially enhance the regulatory capacity of a state. These include the ability to rely on competition by attracting other international telecom operators, to attempt to utilise locational competition to attract inward investment (drawing some inspiration from that 'Celtic tiger', Ireland) and the willingness to produce a 'credible' regulatory regime by 'benchmarking' the regime with other international examples. While the options for establishing a 'credible' regulatory regime might be constrained by factors associated with globalisation, at least in the Jamaican case, we have identified factors which enhance the regulatory capacity of the state, and thereby also its autonomy in regulating the domestic sector.

Furthermore, while our analysis of Jamaican regulatory space and the three levels of regulatory capacity points to the continuing relevance of relationships between state and society, we have noted that such a perspective also needs to take into account the wider international environment. This environment, which is said to have changed with the globalised nature of the telecommunications domain, offers significant resources with which policymakers can alter the relationship between state (as regulator) and society (including the regulated industry). The Jamaican case study shows the value in moving beyond claims of the power of transnational companies or the perceived imposition of regulatory models by international organisations to focus on the actual implementation of regulatory reform at the domestic level. Thus, state regulatory capacity is not autonomous of the international environment, but is defined by its (at least basic) acceptance of authority by participants of the regulatory space (see also Weiss, 1998).

## **Conclusions**

The purpose of this paper has been to use telecommunications policy in Jamaica to show how the rewards of effective state action in the global economic context can be realised, given the right strategies and approaches. Under pressures from international developments in telecommunications, a 'developmental coalition' was able to strengthen all three dimensions of regulatory capacity to facilitate a shift towards liberalisation. At the same time, it should be recognised that regulatory reform is in its early phases, and that that trends towards strengthening regulatory capacity along all three dimensions could just as easily be reversed. Revolving door effects, potential 'bypass' of the regulatory regime by new entrants in the belief that the courts applying the Fair Trading Act 1993 may secure 'better terms' with Cable & Wireless, for example over interconnection, in the short term, or declining public legitimacy as domestic tariffs increase may all challenge the capacity-enhancing effects of the reforms. Such a reversal might be expected, given the existing literature that points to regulatory 'life-cycles' (see Bernstein 1955; Peltzman 1989). Whatever future developments hold for Jamaican telecommunications regulation, the developments so far provide a useful setting for the exploration into the nature of regulatory capacity, and how this can be strengthened in order to bring about developmental outcomes. It is our hope that these lessons will continue to be applied, in Jamaica and elsewhere.

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