

Rethinking Institutional Endowment in Jamaica: Misguided Theory, Prophecy of Doom or Explanation for Regulatory Change?

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Introduction

‘Institutions matter’. Institutionalists of all stripes have spilt a great deal of ink justifying this claim, pointing to the various institutional factors that influence politics and policies. One of the central concerns of ‘new institutionalism’, and the ‘economic institutionalism’ strand within this literature in particular, has been the rational design of political and administrative institutions (for an overview of the institutional literature of the 1990s see Hall and Taylor 1996, Immergut 1998). Early approaches within this tradition tended to focus on the ‘principal-agent’ relationship, particularly the problems that legislatures face in trying to control their administrative agents (Moe 1984, McCubbins, Noll & Weingast, 1987, 1989) More recently, this approach has broadened to accommodate a broader conception of overall transactions costs in the public sector (especially Horn 1995). Within this tradition, particular prominence has often been accorded to the ‘commitment problem’ associated with the non-simultaneous performance of reciprocal action by interdependent actors, and with maintaining the flow of benefits to particular constituencies from particular policies over time (for example Moe, 1989; Zeckhauser and Horn 1989).

These broad developments have been mirrored in the literature on regulation, where concern has expanded from the evaluation of different incentive mechanisms which

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can be written into the ‘regulatory bargain’ (cf. Veljanovski 1991, Armstrong, Cowan and Vickers 1994) to the analysis of the incentives facing governments and utilities providers to comply with, or defect from the terms of the regulatory bargain itself (Levy & Spiller 1994, 1996; Newberry, 1999). The following seeks to critically assess and extent one particular account of the commitment issue in regulatory governance, that of Brian Levy and Pablo Spiller in their book Regulations, Institutions and Commitment. For them, the central problem of regulatory design is establishing credible and effective regulatory institutions (‘regulatory governance’) without which states will find it problematic to attract private investment due to (real or perceived) threats of ‘administrative expropriation’, particularly in network industries with their sunk costs and high degree of asset-specificity typical of natural monopolies. Levy and Spiller’s distinct contribution is their analysis of how a country’s background pattern of legislative, judicial and administrative arrangements contributes to solving the so-called ‘commitment problem’, by acting as mechanisms for restraining expropriation of investors assets by predatory governments.² Three fundamental dimensions are said to underlie any regulatory commitment: (1) substantive, written restraints on discretionary action of the regulator, (2) restraints hindering reversal or amendment of the overall regulatory regime, and (3) institutions safeguarding these restraints. A country’s specific institutional endowment provides a unique set of constraints and resources that should be taken into account in achieving a viable balance between flexibility and credibility. The repertoire of institutional commitment mechanisms available from which policy-makers must select in the design of regulatory institutions principally includes the following:

- ‘Hardwiring’ the regulatory bargain in precisely specified legislation effectively enhances credibility in systems of divided institutions sharing legislative power, which present obstacles to the amendment of legislative provisions without broad support throughout the legislature. In Westminster-style democracies, in which the government of the day is usually in a position to mobilise a majority in parliament, this is a relatively less useful mechanism for securing commitment.

² Interest groups, social norms and administrative capabilities are included as part of the institutional endowment, but their explicit effects are not modelled by them, though some anecdotal evidence is presented in their country studies. We have attempted to analyse in detail the role of informal institutions can play in enhancing regulatory credibility elsewhere (Stirton and Lodge 2002).

- Delegation across tiers of government, typically to independent regulatory agencies, minimises the threat of administrative expropriation by instituting a degree of independence from the political process. The source of funding of regulatory agencies (by legislative appropriation or through a levy on the regulated industry, for example), employment security of agency staff and method of appointment contribute to the effectiveness of delegation as a commitment mechanism, as does the extent of political oversight. Generally, delegation across tiers of government is more likely to reduce or eliminate (the risk of) administrative expropriation in ‘merit’ regimes than in states which more or less closely approximate patronage or ‘spoils’ systems at senior levels (see Horn 1995: 97-104).
- Legally binding license provisions setting out the privileges and responsibilities of service providers offer an alternative source of ‘hardwiring’ in regimes in which a credible and independent judiciary upholds private law and associated rights. The protection of private property rights has been developed in some jurisdictions to recognise the concept of ‘regulatory takings’³ and various cognate doctrines requiring compensation for some forms of severe administrative expropriation (c.f. Miceli and Segerson 1994, 1996). License provisions offer a less secure commitment mechanism in jurisdictions where such doctrines are less thoroughly developed or where the judiciary has an ambiguous record of upholding contractual obligations and property rights against government.

It follows that there is no one-size-fits-all solution to the regulatory problem, but rather that rational regulatory design matches regulatory incentives (the content of the regulatory bargain) with the particular set of institutional mechanisms for restraining commitment available in a given country (securing compliance with the regulatory bargain). And in countries whose institutional endowment confers few effective commitment mechanisms, the discretion inherent in some more sophisticated forms of incentive regulation may make them inappropriate, due to the concomitant risk of administrative expropriation. As Levy and Spiller (1996: 6) put it, ‘the institutional

³ Regulatory takings occur where regulatory action devalues private property to an extent that it requires compensation by the government.

realities of regulatory governance in some countries might limit the range of regulatory options to third- or even fourth-best’.

This paper attempts to re-assess the reform of telecommunication in Jamaica, one of Levy and Spiller’s original country studies, in the context of their prescriptions and predictions about the relationship between institutional endowment and regulatory design.⁴ The course of the evolution of Jamaican telecommunications regulation over the last ten years raises could be said to come as a ‘surprise’ to the Levy and Spiller framework. They characterise Jamaica as follows: a country with alternating parties in government; in which the executive dominates the legislature; with a weak bureaucracy and few substantive informal restraints on arbitrary decision-making, but with a credible and independent judiciary (at least as far as private law rights are concerned). Given this ‘institutional endowment’ they argue, ‘hardwiring’, through legally binding license provisions represents the only means of generating commitment. To allow for effective enforcement, licence provisions need to be unambiguous, basing the regime in a set of simple rules. The Jamaican Telecommunications Act 2000, however, seems to stand in defiance of Levy and Spiller’s predictions and prescriptions. Jamaica adopted a regime involving substantial discretion and (relatively) more complex rules, and in which detailed legislation and delegation to an independent Office of Utilities Regulation were used to supplement the protection of telecommunications providers.

This paper is not intended as an exercise of description aiming to outsmart theoretically informed research nor as an attack on their central assumption that regulation’s sole concern should be the attraction of private investment and the promotion of efficiency.⁵ Rather its aim is to resolve certain puzzles presented by Levy and Spiller’s analysis, in the light of subsequent developments. In other words, it is an exercise in immanent critique. There are several reasons why this is worthwhile: Firstly, Levy and Spiller’s work represents, if not the ‘leading edge’, then certainly part of the settled core of scholarship applying what has variously been

⁴ Jamaica is arguable the key country study (see Levy & Spiller 1996, xi). The other comparison countries in their original account were Chile, the Philippines, the United Kingdom and Argentina. The Jamaican country study was conducted by Pablo Spiller and Cezeley Sampson (Spiller and Sampson, 1996).

⁵ For two sides of this well-established debate, see Foster (1991) and Prosser (1997).

called the ‘rational choice institutionalism’ or ‘institutional economics’ paradigm to questions of regulatory governance. If their theory (or some modified version of it) holds up under a retrospective evaluation of the predictions they make, then this should generate confidence in the approach in general; alternatively, if it is shown to be a poor predictor of later developments, we have a basis for challenging perhaps not only their particular interpretation, but also the approach more generally. Second, because Levy and Spiller raise important practical as well as theoretical concerns about the role of the private sector in infrastructure projects, and because their approach yields specific (and sometimes counter-intuitive) prescriptions about the design of regulatory institutions in developing countries, this is not an ivory-tower exercise: it matters whether their approach stands up! A third, and related, point is that their (World Bank-funded) work has been influential in shaping World Bank policy beyond the narrow field of telecommunications sector reform, specifically in exploring the preconditions of the ‘effective state’ (World Bank 1997). An assessment of their work is therefore relevant to an overall assessment of the role of international technical bureaucracies in shaping the policies of developing countries.

The paper offers three scenarios through which the diagnosed incongruence between empirical change and the Levy and Spiller framework can be assessed. It first explores the development of Jamaican telecommunications regulation. Then it develops three different interpretations of this incongruence. Finally, this paper points to some of the shortcomings inherent in the use of purely ‘private law’ instruments, and the emphasis on minimising discretion as the basis of protecting infrastructure investors against administrative expropriation.

Developing Jamaican telecommunications regulation

The regulatory arrangements in Jamaican telecommunications have changed considerably since the research for Regulation, Institutions and Commitment was completed in the early 1990s. Without aiming to offer a detailed account of the origins and evolution of the regulatory regime (for such an account, see Lodge and Stirton 2002a; also Wint 1996; in comparative perspective with other Commonwealth Caribbean countries, Lodge and Stirton 2002b), this section surveys the developments of the past two decades, emphasising those aspects of regulatory change that are most relevant to an assessment of Levy and Spiller’s institutional endowment hypothesis.

(a) Partial Divestment and Initial Regulatory Arrangements (1987-1988)

In Jamaica the shift from public ownership to privatisation occurred as a gradual drift, rather than as the result of any clear sectoral strategy. In an attempt to secure private investment in its ageing telecommunications system, and also to attract private sector telecoms expertise, the Jamaica Labour Party government of Edward Seaga announced in May 1987 that it had reached agreement with Cable & Wireless (C&W) for the partial transfer of ownership. A holding company, Telecommunications of Jamaica (TOJ) was set up and into which ownership of the Jamaica Telecommunications Company (JTC) and Jamintel (respectively the domestic and international providers) was transferred. The divestment of government shares, to Cable & Wireless and to the general public through flotation on the Jamaican stock exchange, proceeded gradually under the Jamaican Labour Party government (JLP), the avowed intention being to retain a 40 per cent controlling interest in the company (ToJ 1988).

The resultant mixed enterprise was governed via two parallel mechanisms. Firstly, both the Government of Jamaica and Cable & Wireless had private law privileges and obligations in terms of the shareholder agreement (as well as a common ownership interest in the strong financial performance of the enterprise). Secondly, the Government of Jamaica issued five licenses to TOJ covering domestic and international wired telephony, wireless telegraphy equipment, terminal equipment and faxes and teleprinters. Significantly, at the time no attempt was made to update the framework legislation under which licenses were issued, and authority for the all-island telephone license remained under the Telephone Act 1893, while permission for the operation wireless facilities was given in terms of the Radio and Telegraph Control Act 1973.

The domestic and international telephone licenses were both issued for a 25 year period, with the option for the licensee to renew the licenses for a further 25 years and were based on a simplified rate-of-return mechanism that guaranteed the company an after-tax return of 17.5 to 20 per cent on equity. The Minister of Public Utilities was required to adjust tariff levels annually to maintain the rate-of-return level, which was financed mainly from the termination of international telephone services profits which

allowed for the cross-subsidisation of the expansion of the domestic telephone network (c.f. Myers 2001)

(b) Full Privatisation and Regulatory Uncertainty (1988-1993)

TOJ's brief history as a mixed enterprise came to an end following the election of a Peoples National Party (PNP) governing in 1988. Jamaica's worsening financial situation forced the sale of the government's remaining stake in TOJ. Control of TOJ passed to C&W in 1989, with the government selling its remaining shares the following year. This gradual (and unplanned) shift from predominantly publicly-owned enterprise, through mixed enterprise to private ownership and control is captured in Table 1, below, taken from Wint (1996).

Table 1: ToJ Stock, Sales of Government Holdings

Date Shares Were Sold	Number of Shares Sold	Buyer of Shares	Price of Shares (J\$)	Proceeds from Shares		Percentage of Government Shares	
				J\$m	US\$m	Sold	Remaining after sale
July 23, 1987	102,336,848	C&W	1.00	102.3	102.3	11	72
October 2, 1987	183,479,960	C&W	1.00	183.5	183.5	19	53
September 28, 1988	126,500,000	Public	0.88	108.5	108.5	13	40
July 13, 1989	193,136,730	C&W	1.20	231.8	231.8	20	20
November 16, 1990	193,136,730	C&W	1.74	336.1	336.1	20	0
Total				962.2	155.8		

Source: Wint 1996, p.56 from ToJ, Various Years

A number of concerns regarding the scope of C&W's rights under the various licenses emerged from this time. No attempt was made to modernise the legislative framework for telecommunications regulation at the time at which the licenses were issued, and the legal basis of any presumed exclusivity on the part of C&W was, to say the least, insecure. To rectify this, Prime Minister Michael Manley agreed (in a letter, dated 2 November 1990) to make the necessary amendments to the Telephone Act 1893 and to the licenses. Pursuant to this, a Telecommunications Bill was introduced to parliament in 1993, the terms of which would have guaranteed the company exclusive control of telecommunications traffic in, out, and through Jamaica. However, this was met with vehement opposition, and these attempts to 'update' Jamaica's telecommunications legislation were subsequently abandoned.

(c) Challenges to the Incumbent (1993-1998)

Following the failure of the Telecommunications Bill, a number of challenges to the rights of the incumbent emerged. Firstly, Jamaica enacted a competition law, the Fair Competition Act 1993, establishing a Fair Trading Commission (FTC). The FTC adopted a pro-active role in challenging TOJ's monopoly in areas not explicitly covered by legislation and by the licenses (which they took to be a matter for Parliament to resolve). For example, this led, in 1994, to the introduction of competition into the market for consumer premises equipment (albeit on non-equal terms as cross-subsidy of C&W equipment continued). In 1995, following action from the FTC and from Infochannel, an Internet service provider (ISP), Cable & Wireless agreed to allow interconnection of ISPs with the public switched telephone network.

This opening of the market in Internet services became increasingly significant not only because of the growth of data traffic relative to voice telephony, but also because the emergence of 'voice over Internet Protocol' technology which facilitated the provision of 'call-back' services through which the public could bypass C&W's international gateway. In 1988, the Minister for Commerce and Technology, Phillip Paulwell, issued five new licenses to operate VSAT (very small aperture terminal) communications facilities. C&W was to attempt unsuccessfully to prevent the use of these international communications facilities for the provision of call back services, first by disconnecting providers of call-back services⁶, and later by attempting to quash the decision of the Minister of Commerce and Technology in issuing the licences.⁷ The failure of C&W to protect its presumed exclusivity against the challenge by call-back providers underlines the tenuous legal protection that the 1988 licenses had provided, particularly in the face of technological change.

(d) Setting a Course for Liberalisation (1998-2000)

Following the third successive election victory of the PNP in 1997, the Government of Jamaica began to establish a more self-consciously liberalising stance towards the telecommunications sector. The Government became a signatory to the WTO

⁶ See the 'Infochannel' cases: Infochannel Ltd v. Cable & Wireless Jamaica Ltd, Suit E014/99; Infochannel Ltd v. Cable & Wireless Jamaica Ltd, Suit No. C/L I.038/2000 [17.8.2000]; Infochannel Ltd. v. Cable & Wireless, S.C.C.A. 99/2000 [20.12.2000]

agreement on basic telecommunication services (see Fredebeul-Krein and Freytag 1997), committing itself to modernising its legislative framework and to liberalisation, but respecting TOJ's exclusivity in fixed-line telephony until 2013. More detailed plans for implementing these commitments were set out in a comprehensive statement of policy⁸, which also committed the government to re-negotiating the 1988 licenses, although this did not commit the Government to a specific timetable for reform (Ministry of Commerce and Technology 1998).

A second related area of development followed the establishment in 1997 of the Office of Utilities Regulation (OUR), as part of the Government of Jamaica's commitments under a World Bank energy sector liberalisation project. The OUR took the form of a cross-sectoral agency with responsibility for telecommunications, electricity, water and aspects of public transport, headed by a Director-General. The Office of Utilities Regulation Act 1995 provided for the OUR to have jurisdiction over 'approved organisations'. However, the Act did not designate TOJ as an approved organisation, nor did any ministerial order, ostensibly on the grounds that more thoroughgoing regulatory reform, in accordance with the Government's telecommunications sector policy, was pending. Formally, therefore, the OUR acted only in its capacity as advisor to the Minister, although the creation of the OUR did serve to concentrate regulation-related expertise within a single agency, and developed a measure of credibility and respect related to its consumer representation and advocacy activities.

(e) A Legislative Framework for Liberalisation (2000-2003)

Partly as a result of pressure put on C&W by the Government of Jamaica (itself part of a concerted effort by the Governments of CARICOM countries), but also due to the threat to C&W's strategy of cross-subsidising domestic services from international services (see Table 2, below) resulting from the US Federal Communications Commission 'Benchmarks Order' of 1997⁹, C&W reached an agreement with the

⁷ Ministry of Commerce and Technology v. Cable & Wireless Jamaica Ltd. Suit M089/98

⁸ The document was prepared by Cezley Sampson who seems to have revised his earlier view of the utility of the 1988 arrangements somewhat.

⁹ Upheld by the US Federal Court of Appeals in Cable & Wireless plc v. Federal Communications Commission and United States of America, 344 U.S. App. D.C. 261; 166 F. 3d. 1224.

Government of Jamaica in 1999, providing for the implementation of a new regulatory framework.

Table 2: Cable & Wireless (Jamaica) Ltd profit by service, 1999

Service	Profit Share
Inbound International Calls	110%
Outbound International Calls	10%
Access Lines	-45%
Intra-Parish Calls	-10%
Inter-Parish Calls	10%
Other Services	30%
Total	100%

Source: Myers 2001, from data collected from C&W by the OUR

The agreement contained detailed drafting instructions for new telecommunications legislation, and for phased liberalisation over three years, starting with cellular and value-added services, and concluding with the introduction of competition in the profitable international market (Cable & Wireless, 1999). The Telecommunications Act 2000, as it became, finally established the legal status of the OUR as the independent regulator of telecommunications, though certain functions were retained by the Minister, including the power to issue licenses, and to issue general guidance (both arrangements are common in jurisdictions which follow the ‘British’ Of-type model of regulatory institutions). As provided in the agreement, C&W was issued with new licenses under the Telecommunications Act 2000, which also shored up for a limited period C&W’s rights of exclusivity¹⁰, the existing legal basis of which, as we argued earlier, was legally questionable.

Liberalisation under the Act proceeded smoothly at first, with the successful issue of licenses for two new cellular license operators in 2000, which eventually went to Mossel (trading as ‘Digicel’) and Centennial, the latter operating under a license initially issued to Cellular One (Caribbean) Ltd. In 2002 a further cellular license was

¹⁰ See for example, R. v. Office of Utilities Regulation ex p. World Telnet International Ltd, Suit M. 81/2000 in which the Supreme Court upheld the decision of the OUR to allow the disconnection by C&W of the applicant company, who was engaged in bypass operations, in contravention of S. 51 of the Telecommunications Act 2000.

issued to AT&T, though this was not to take effect until three years after the entry into force of the Telecommunications Act 2000. In early 2003, however, a decision of the Jamaican Court of Appeal quashed those provisions of the Act which provided for the phased transition to liberalisation on the grounds of constitutional protection of free speech, after a challenge by Infochannel, a communications provider which prior to the Telecommunications Act 2000 had provided ‘voice over Internet’ communications services.¹¹

(f) The Overall Development of Jamaica’s Telecommunications Sector 1987-2002

To place the preceding account of Jamaica’s regulatory regime change in comparative perspective and to highlight broader developments in the telecommunications market, this section illustrates the growth in telecommunication service in Jamaica in comparison with its Caribbean neighbours Barbados and Trinidad & Tobago (data was taken from the ITU’s telecommunications database) (for comparative analysis of regulatory change in telecommunications across the three countries, see Lodge and Stirton 2002b). It also offers material for the subsequent discussion of how to interpret Jamaica’s change in telecommunications regulation in the light of Levy and Spiller’s argument. Any conclusions from these comparisons are limited, given their limited time scale – the most recent data is often from 2001. To some extent, the data supports Levy and Spiller’s argument about the success of Jamaica’s regulatory regime. Yet in other respects, the data highlights the incongruence between the Levy and Spiller approach and subsequent developments. We return to this argument in the next section.

Figure 1 points to the relative overall growth in telecommunication lines in Jamaica since the early 1990s. The number of main lines has continued to grow even following the ‘unravelling’ of the terms of the 1988 licenses, discussed earlier.

¹¹ Infochannel v. Minister of Industry, Commerce and Technology, Office of Utilities Regulation and Cable and Wireless Jamaica Ltd. M. 135/2001. This decision followed the seminal Dominican case of Cable & Wireless (Dominica) v. Marpin Telecoms and Broadcasting Ltd [2001] WLR 1123, in which the Privy Council ruled that, because of the common financial interest of the government and Cable & Wireless in establishing a monopoly, the courts should apply a heightened level of scrutiny in determining whether such a monopoly infringed the constitutional right of free speech. In other words, the ‘hard look’ doctrine applies (.e that courts will not be deferential to the judgments of policymakers but will seek to investigate in detail whether the basis of their judgment was correct).

Figure 1: Growth in telecommunication lines per hundred inhabitants

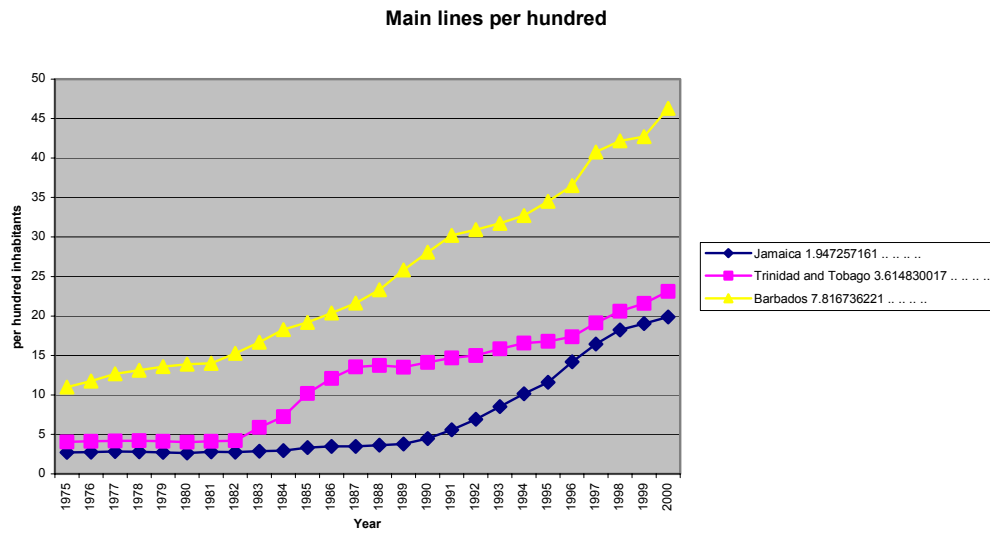


Figure 2 highlights the continued level of total investment into telecommunications in Jamaica which outperforms the two comparator countries. While this could arguably be attributed to the Jamaica’s comparatively larger size in territory and population, it nevertheless does not suggest a sudden fall in private investment interest given the challenges to the initial licensing regime throughout the 1990s which a narrow reading of the Levy and Spiller framework would predict.

Figure 2: Total investment into telecommunications

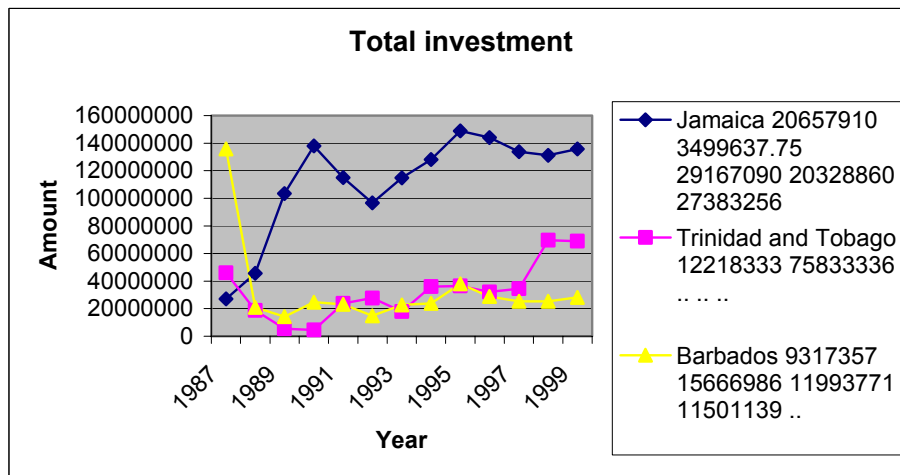
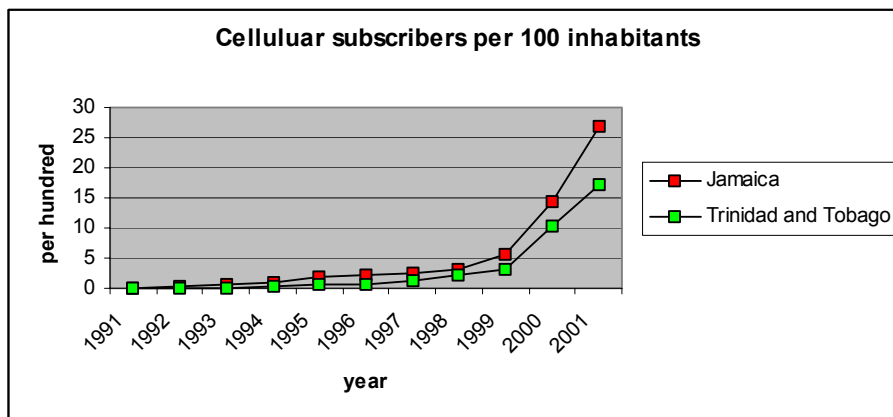


Figure 3 offers a further indication for the growth in telecommunications in Jamaica – in comparative perspective to Trinidad.

Figure 3: Cellphone subscribers per 100 inhabitants.



Assessing the Puzzles: three possible interpretations

The development of Jamaica's telecommunications sector presents a number of challenges for Levy and Spiller's institutional endowment hypothesis. At first sight, the pattern of expanding services seems to confirm their argument about the appropriateness of an extensively 'hardwired' regime based on simple rules written into a legally binding license contract for a country such as Jamaica, diagnosed to have alternating parties in government, a weak bureaucracy dominated by the country's political directorate, and weak informal constraints on arbitrary behaviour. At a deeper level, however, developments since the establishment of the regime in 1988 suggest that the regulatory commitment engendered by the licenses have been much weaker than Levy and Spiller's analysis suggests, potentially falsifying their prediction about the effects of commitment on investment behaviour (given their diagnosed absence of other institutional safeguards). Furthermore, if establishing regulatory commitment was so important (and eliminating regulatory discretion through an extremely 'hardwired' license contract the most appropriate means of doing so) why did both parties, the Jamaican Government and C&W agree to renegotiate the regulatory bargain? In particular, why did they agree to settle on a regime that conferred extensive regulatory discretion, and which provided for protection against administrative expropriation primarily through legislation and through delegation across tiers of government (mechanisms which the Levy and Spiller framework suggests would be ineffective in a country such as Jamaica)?

We suggest and compare three possible interpretations of the apparent mismatch between the predictions (and foundations) of Levy and Spiller's analysis and the evolution of Jamaica's regulatory regime. The first interpretation suggests that subsequent facts are directly contrary to the expectations of their model, providing the basis for discarding it. A second, contrasting interpretation suggests that Levy and Spiller were right all along; on this interpretation the Telecommunications Act 2000 and associated reforms should be regarded as an ill-advised mismatch between institutional endowment and regulatory incentives, the outcome, perhaps of 'miscalculation' on the part of C&W and the Government of Jamaica and which would be predicted to lead to a decline in investment.

A third interpretation seeks to build on the claim that Jamaica's institutional endowment has been strengthened over time; therefore, regulatory change is interpreted as a bargain for the mutual benefit of both incumbent operator and government. Given a different institutional endowment, a move towards a more complex set of rules, safeguarded by a broader range of commitment mechanisms is not inconsistent with Levy and Spiller's overall approach, and is perhaps even necessitated by it. The remainder of this section seeks to develop each of these three interpretations in more detail.

Interpretation I: Facts in Revolt Against the Theory

As Keynes pointed out, when the facts change, the sensible course is usually to change one's mind. Accordingly, it could be argued that subsequent developments provide the basis for discarding the institutional endowment hypothesis.

Fundamentally, Levy and Spiller seem to have over-estimated the extent to which the 1988 licenses were the outcome of a rational institutional choice, rather than an incremental and ad hoc process, which took place over five years, under two separate administrations and latterly at least, in response to short-term fiscal pressure. (Wint 1996, 55-6; Spiller and Sampson 1996, 73-4).¹² Consequently, they overstate the extent to which the licenses were intended as a sole instrument for protecting C&W against administrative expropriation. Counter-factually, had the Government of

¹² An internal government document of 1991 highlighted the central role of the Office of the Prime Minister in privatisation policies, an authority it had assumed in 1990. The paper represented the first

Jamaica not been under pressure to sell its remaining 40 per cent stake in 1989 and 1990, the additional commitment engendered by the Government having an ‘encompassing interest’ in the financial performance of ToJ might plausibly have been sufficient to discourage the government from its actions to undermine C&W’s exclusivity. Casual comparison with developments in Trinidad and Tobago, where similar initial arrangements have not been subject to the same degree of challenge, and where the Government retained a 51 per cent stake in TSTT, seem to support this view (for details see Lodge and Stirton 2002a: 674-678).

A related point is that the extent to which the use of detailed license provisions, ostensibly conferring the most comprehensive monopoly, constituted a legally binding license contract is unclear. Firstly, as Spiller and Sampson (1996: 72) put it, ‘Legal arguments are that the monopoly does not extend to domestic wireless and value added services such as digital transmission of computer data’. No attempt was made at the time to revise the main instrument of legislation, the Telephone Act 1893, which defined the Government’s regulatory function in terms of wire-based voice communication, and moreover, that the Radio and Telegraph Control Act 1973 was concerned with the ownership and operation of equipment, rather than with the provision of services, and could consequently not be the basis for granting an enforceable right of exclusivity.¹³ When the Government sought to revise the legislative framework in 1993, this proved to be politically unacceptable.

Furthermore, it is a simplification to regard the licenses purely as private law instruments: over time, developments in competition law and policy and in human rights law eroded the extent to which Jamaica’s judicial institutions protected C&W’s investment. In terms of the former, action by the FTC and C&W’s competitors using the Fair Competition Act 1993 forced C&W to allow users to connect rivals’ terminal equipment, and one year later to allow interconnection to the public switched telephone network (PSTN) to competitor ISPs. The adoption of an institutional design that minimised administrative discretion, and thereby also the potential for the

attempt to develop a ‘national’ policy towards privatisation (‘Privatization Policy and Procedures’, OPM, ministry paper, 1991 (no exact date given).

¹³ It should also be noted that the intent behind the granting of the wireless license was for the provision of ‘wireless in the local loop’ rather than for the provision of cellular services, although C&W were able to introduce their cellular service using the authority of the original license.

expropriation of quasi-rents, created the cost of substantial litigation as the principal means to resolve disputes; these also proved unsuccessful for C&W (as the ‘Infochannel’ cases demonstrated).

Developments in human rights law more directly impacted on the level of commitment engendered by the 1988 licenses, following the decision in the Marpin case (see footnote 11) in which the Privy Council overturned the earlier of the Supreme Court of Dominica which had upheld C&W’s exclusivity. This case was cited by the Solicitor-General in the (discontinued) action between the government and C&W, who argued on the basis of the Marpin precedent that the Government had acted unconstitutionally in issuing the 1988 licenses. Had the Solicitor-General’s argument prevailed (as many at the time predicted it would, had the matter gone to judgement) this would have struck at the heart of the constitutional protection C&W’s monopoly. It was at this point that C&W agreed a negotiated comprehensive reform of telecommunications regulation in Jamaica.

With the advantage of roughly ten additional years of data on regulatory reform in Jamaica, it seems that the impressive development of the telecommunication sector since 1988 seems not to have occurred because of a clearly specified and legally binding license contract based on simple rules, but in spite of the absence of unambiguously settled private law rights. Such protection as may have been said to have existed in 1988 increasingly unravelled over time. Whatever the basis of investor confidence, it was not based on the legal safeguards on property that allowed private utilities to become ‘aggressive investors’. At best, there may have been a ‘myth’ of regulatory commitment among all parties which may have been sufficient in inducing substantial investment into telecommunications. Given however the substantial and numerous struggles on the status of these licenses such an account seems not very persuasive. Thus, according to this interpretation, Levy & Spiller’s case is shown to be flawed, the development of Jamaica’s telecommunications domain requires an alternative explanation.

Interpretation II: Levy and Spiller as prophets of doom of the Jamaican basket-case

A different interpretation of the developments in Jamaican telecommunications regulation would be to suggest that they confirm the worst fears of Levy, Spiller and

Sampson, namely that over time even the most contractually ‘hardwired’ of all agreements was unable to withstand sustained attempts at administrative expropriation (Levy and Spiller 1996: 2-3). Furthermore, in adopting a more discretionary, pro-competitive regulatory regime following the Telecommunications Act 2000, the Jamaican government may be said, if Levy and Spiller’s argument about the required non-discretionary safeguards is correct, to have represented the establishment of a misaligned regulatory regime, one which would not engender adequate regulatory commitment. Such a ‘prophecy of doom’ has high degree of plausibility, for a range of reasons.¹⁴

In terms of shirking behaviour, legal ambiguity was strategically employed by the government when it started issuing VSAT licenses in order to challenge C&W. The explicit nature in which VSAT operation opportunities were temporarily prohibited in the 2000 Telecommunications Act suggests that the main value to the government of these new competitors was strategic, to put pressure on C&W to renegotiate the terms of the regulatory bargain. Similarly, the continuous referral to the judicial system to challenge the exclusivity arrangements and the arguably self-interested agenda-selection by the FTC can be interpreted as ways in which the initial regulatory contract was to be undermined. Such an interpretation would also be supported by the government’s failure (in 1993 and after) to use the legislative process to provide C&W with a clear legal basis for its various licenses, thereby failing to guarantee the company exclusivity. Though this can plausibly be ascribed to the Government’s inability to gain legislative support for such a measure, it might also to some extent be seen as ‘shirking’. The use by the government of international arenas, notably the WTO to commit to a liberalisation agenda could also be interpreted as shirking from the initial regulatory bargain, though C&W ultimately supported the government’s accession to the WTO agreement on basic telecommunications services.

There are two levels on which the Telecommunications Act 2000 might be seen, from the perspective of the Levy and Spiller framework as an inadequate commitment mechanism. On the level of the nature of the provisions of the Act, a comprehensive

¹⁴ An alternative, but compatible interpretation would be that Levy and Spiller’s prophecy did not include technological and international regulatory change. In the face of changes in these domains, even the ‘best’ hardwired contract would be undermined, therefore dooming future development.

licensing power is conferred on the Minister, remedying the ambiguities caused by the fact that the 1988 licenses were based on obsolete legislation; yet following a transition period (which was invalidated by the Supreme Court in the Infochannel v. Minister of Industry, Commerce and Technology case, discussed above) the Minister was empowered to license new entrants at his discretion. In addition to an enhanced discretionary role in policing competition, with authority divided between the OUR and the FTC, the Office was given substantial discretion in price regulation.¹⁵ As Spiller and Sampson (1996: 76) point out, such discretion could also be used to expropriate investors' assets. The central prediction of Levy and Spiller is that in countries in which elected officials dominate a weak bureaucracy, delegation across tiers of government to independent regulatory agencies will not prevent 'politicisation'.¹⁶ Furthermore, all rules promulgated by the OUR are subject to affirmative resolution of Parliament, suggesting a further avenue for the politicisation (though the OUR retains, importantly, the power of agenda-setting).

At another level, from the Levy and Spiller perspective, it is problematic, given Jamaica's unified system of parliamentary government, that the new arrangements place relatively greater importance on legislation to safeguard investors against expropriation. Such safeguards include, for example: procedural requirements of consultation including the giving of reasons; statutory appeal against the decision of the OUR to an administrative Appeal Tribunal; criminalising undertakings engaging in bypass operations to circumvent the services offered by licensed carriers. The point is that all these 'public law' instruments could be repealed by an administration set upon expropriation, limiting their potential to establish credible commitment.

In sum, applying the Levy and Spiller framework to subsequent developments, most notably the introduction of the new liberalised regulatory regime following the Telecommunications Act 2000 suggests, if anything, increased potential for expropriation. Though detailed, prescriptive licenses are still central to the operation of the regime, they increasingly play a role in preventing administrative expropriation alongside delegation (albeit in somewhat circumscribed form) to an independent

¹⁵ It is perhaps significant that the Act is relatively prescriptive in terms of the OUR's powers; for example, in contrast to the UK, the use of price-cap methodology is specified in the legislation.

agency, the OUR, as well as the use of legislation as an additional means of ‘hardwiring’. Furthermore, the way in which the Jamaican government succeeded in shirking on the initial licensing regime, suggests that even a maximum non-discretionary regime could not withstand the self-interested motivation of governments to shirk and therefore indulge in administrative expropriation. While persuasive, such an account would require some evidence of shrinking private investment into the Jamaican telecommunications market. As we noted above, such a decline has been, also in comparative perspective, not noticeable. The third interpretation, set out below, suggests an alternative (and more optimistic) set of reasons for this particular institutional choice.

Interpretation III: Explaining Regulatory Change Under Evolving Institutions

One obvious problem with our second interpretation (although it is no doubt too soon to make more than a tentative judgement) is that there is no obvious evidence of the predicted effects of a decline in the degree of commitment and a shift towards greater flexibility, namely a decline in investment. The not insubstantial sums raised by the 2000 cellular license auctions, together with the observation that C&W was willing to assent to the new regulatory regime suggest that investor confidence has not significantly diminished under the new regime.¹⁷ If there is any truth at all in the institutional endowment hypothesis, how could this be explained?

One plausible explanation of this is that over a decade or so, the institutional endowment of Jamaica has altered, which in turn affected the character of the optimal trade-off between flexibility and commitment. Such a focus develops Levy and Spiller’s argument by allowing us to model the effects of changes in institutional endowment, while maintaining a focus on the question of match/mismatch between regulatory institutions and regulatory incentives.

¹⁶ The post-1966 experience with the Public Utilities Commission appears to bear out this assessment of Jamaican bureaucracy.

¹⁷ License auctions held early in 2000 for the two new cellular carriers, Mossel Jamaica Ltd (trading as Digicel) and Cellular One (Caribbean) Ltd raised US\$ 47.5m and \$US45m respectively, albeit at the height of the ‘dotcom’ bubble. However, C&W’s confidence in the new regime should perhaps be compared with the legal uncertainty existing immediately prior to the Act, and not with the view of Levy and Spiller dating from the early 1990s.

The argument for this interpretation involves, firstly, making an assessment of the way the events, as set out in the second section have themselves impacted on Jamaica's institutional endowment, and secondly, how these changes in institutional endowment impact on regulatory incentives. Such an account looks beyond the problems that governments face in establishing credible commitment, and analyses, in more detail than Levy and Spiller's original account, the trade-off between the costs of commitment and other transaction costs with which developing country governments face (drawing in particular on Horn 1995). Seen in this light, the trajectory of Jamaican regulatory reform is in fact predicted by the Levy and Spiller framework, rather than coming as a surprise to it.

A number of factors suggest that the traditional difficulty facing the Government of Jamaica in achieving credible commitment diminished between 1988 and 2000. The first major factor affecting commitment costs was Jamaica's evolving electoral politics which might arguably be said to have lowered the degree of regulatory risk facing the incumbent. While in the 1970s and early 1980s, there was a fairly regular eight year electoral cycle between the 'pro-business' Labour party and the 'democratic socialist' PNP, by 2000 Jamaican politics was far more 'Downsian' with both parties putting forward broadly similar policies; moreover, by the 1990s a period of PNP hegemony seemed to have emerged, with Prime Minister Patterson securing a fourth successive election victory in 2002. Additionally, the presence since 1997 of a single Minister, Phillip Paulwell, who was seen by C&W as credible¹⁸, can be said to have had signalled greater continuity at a time when the major disagreements over the course of regulatory reform were intra-party rather than between the parties.

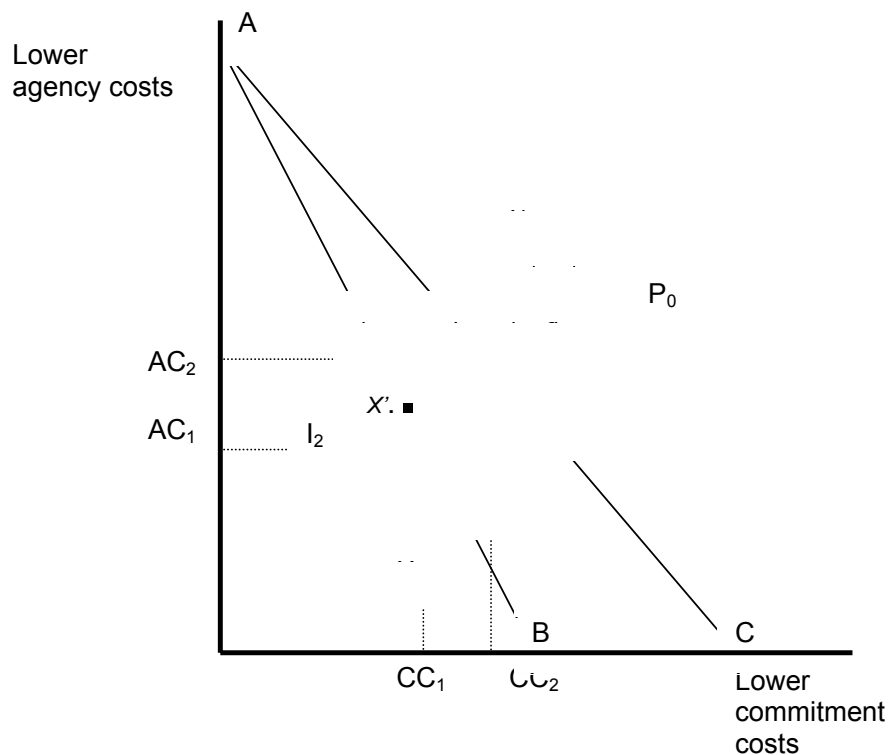
Second, Jamaica's accession to the WTO agreement on basic telecommunications services provided an additional mechanism through which the government could signal. As noted above, this was used strategically by the government to commit itself to liberalisation, though it also reinforced commitment to respecting C&W's right of exclusivity in fixed-line telephony until 2013.

¹⁸ One interviewee, a London-based senior executive at C&W described Paulwell as the best minister he had ever had to deal with.

A third (and arguably most persuasive) change focuses on specifically administrative factors. Levy and Spiller characterise Jamaica as having a weak bureaucracy. By 2000, this broad characterisation is questionable. Jamaica has been subject to successive World Bank administrative reform programmes since 1983, and despite legislative anomalies (which were rectified by the Telecommunications Act 2000) the Office of Utilities Regulation increasingly exhibited a degree of independence, under the credible leadership of Winston Hay, a former World Bank energy consultant. We have argued in favour of this assessment in detail elsewhere (Lodge and Stirton 2002b). A number of factors contributing to this increasing ‘regulatory autonomy’ can be recounted here. Most importantly, the decision (in contravention of World Bank advice) to create a cross-sectoral agency, responsible for telecommunications, electricity, water and metropolitan public transport concentrated regulatory expertise within a single agency. Such concentration of expertise was enhanced by the presence of external advice furnished first by the UK development agency DfID (under its now defunct ‘Institution Building’ programme) and later by CIDA, the Canadian development agency. Furthermore, as Posner (1986, 571) has argued, agencies with broader jurisdictions exhibit greater independence because legislative (as well as regulatee) oversight is more difficult. The fact that the OUR was financed by a levy on regulated industries also enhanced independence by reducing dependence on the appropriations process, although C&W may have undermined this by declining to contribute (which they were able to do, due to the failure to designate TOJ as an ‘approved organisation’).

Although none of these factors could be said to have generated a ‘cast iron’ protection against administrative expropriation (most of these changes were ultimately reversible, though some only with difficulty), given a relative increase in the capacity of the Jamaican government for credible commitment, could, within Levy and Spiller’s framework, lead to a preference for an absolute increase in the level of discretionary authority. On this view, policymakers considering the design of regulatory incentives face a straight-forward trade-off between minimising agency costs and minimising commitment costs, subject to a minimum ‘participation constraint’, which, if not met, will fail to attract private investment. When capacity building efforts make it feasible to lower commitment costs, the utility may be prepared to concede greater discretion, as set out in Figure 4, below.

Figure 4: How Increasing Commitment Leads Policy-Makers To Prefer Greater Flexibility in Regulatory Design



Line A-B represents the feasibility frontier of possible trade-offs between lower agency costs and lower commitment costs in regulatory design, as it existed in 1988. Curve P_0 represents the private sector participation constraint—the least favourable level of risk-adjusted profit which is acceptable, and therefore the minimal trade-off between credibility and flexibility for which the private sector will be willing to invest. Given the Government’s limited commitment it is to be expected that greater emphasis would be placed on solving the ‘commitment problem’: the government would be compelled to concede high agency losses for the sake of securing private sector participation giving CC_1AC_1 (represented at point x). In particular, allowing the private sector telecommunications provider to retain a substantial producer surplus, though limited price-setting discretion (and a generous rate of return) and minimal competition might be seen as a ‘regulatory risk premium’ necessary for securing private sector participation. Now, the Government would have faced the familiar

‘time-inconsistency’ problem (Green and Waddams-Price, 1995): prior to privatisation, it would have been interested in establishing sufficient commitment to ensure private sector participation. However, once investment is achieved, it will prefer to trade lower commitment costs for lower agency costs, and hence had an incentive for ‘chiselling’ at the bargain, attempting to shift the balance in favour of lower agency costs (in the direction of, though not necessarily reaching x').

Due to increasing commitment capacity, by 2000 the feasibility frontier is represented by Line A-C. Because the possibility of delegation downwards (to independent agencies) and upwards (through international agreements) now offer additional and (somewhat) credible means of establishing credibility, this offers the possibility for a new possibly more enduring bargain between C&W and the Government, in which C&W is prepared to concede greater discretionary regulatory authority in return for even greater commitment. This is given in figure 1 at point y giving AC_2CC_2 .

On this view, the fact that the regime established by the Telecommunications Act 2000 is less credible than it might have been, insofar as it confers a degree of discretion on government (and thus a degree of regulatory risk on the incumbent), this looks less like a design ‘flaw’ but rather more as an appropriate response in the light of changing background institutions. With increased capacity for commitment, it is possible for the government to enjoy both greater commitment, as well as the flexibility necessary for both more powerful incentive regulation and for the introduction of competition. The regime lowered agency costs and provided C&W with more high-powered efficiency incentives, in the form of both RPI-X price regulation and the introduction over three years of competition, both of which would have reduced the degree of surplus retained by C&W. Under such circumstances, C&W is no worse off than it was in 1988 (and a good deal better off than it would have been, had the government simply continued to ‘chisel’ at the regulatory bargain as it existed in 1988) since, in return for acceding to these high-powered incentives, a higher degree of commitment was offered. Furthermore, the greater reliance on delegation (downwards) and on protections embedded in legislation as key commitment mechanisms alongside license provisions is exactly what Levy and Spiller would predict, given a stronger bureaucracy and the changing electoral politics discussed earlier.

Conclusion

Applied to the Jamaican regime in 1988, Levy and Spiller's analysis resembles the old adage that when your only tool is a hammer, every problem resembles a nail. With a legal-political system in which parties alternated in power and in which the executive dominated the legislature, with a weak bureaucracy and few 'informal' constraints on arbitrary behaviour, their framework prescribes (and, assuming rational design, predicts) an exclusive reliance on simple rules written into private law instruments. Our analysis of subsequent developments has shown some of the well-known weaknesses of the "private law' model of 'public law'" ascendant in the Westminster-Whitehall system of government (Harlow and Rawlings 1997, 42). Ultimately even the precision of the 1988 licenses were unable to withstand the developments of the 1990s, including the new competition law regime, and the technological changes in the communications sector. We have highlighted the weakness of the 'hardwiring' and 'commitment' as metaphor and as prescription. According to the first interpretation, the analysed basis for 'commitment' was seen to be fundamentally flawed; according to the second interpretation, even a 'maximum commitment regime' (empirically unparalleled) was seen to have fallen victim of internal chiselling and external environmental changes to the telecommunications regime; and, finally, according to the third interpretation, the initial 'hardwiring' provoked certain endogenous processes that enhanced Jamaica's overall institutional endowment and therefore allowed for the mutually agreeable move towards a more discretionary regulatory regime. On this interpretation, the Telecommunications Act 2000 and associated reforms can be seen as the outcome of a decade of institutional strengthening, the effects of which Levy and Spiller could have, in principle, predicted, once we accept augment the concept their analysis with an analysis of (variable) regulatory capacity.

One potentially upbeat lesson of this is that regimes with weak institutions are not forever condemned to crude regulatory regimes which must cede high agency losses to service providers in order to attract investment. At the same time, however, our analysis confirms some of the lessons on the sequencing of administrative reform (for example, Schick 1998). To the extent that the Jamaica reforms can be seen as a success, this has been at least partly because it first adopted a rigid license-based

regulatory regime for more than a decade prior to moving towards a more discretionary approach. During this time, it enhanced its regulatory governance in a manner which provided reassurance to the incumbent that it was no longer the 'basket-case' of the 1960s and 1970s, which may be the main reason that 'prophecy of doom' interpretation has not come to pass.

In conclusion, Levy and Spiller's analysis of institutional endowment continues to offer important lessons for regulatory reform in developing countries. We have suggested here, that to yield developmental outcomes, their approach has to be supplemented by a greater focus on the way in which institutional capacity can be strengthened by institution-building mechanisms. When re-interpreted in this manner, the approach constitutes the best existing advice available to policy makers and regulators in developing countries.

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