

MASTER OF ARTS MAJOR RESEARCH PAPER

**POLITICAL EXPEDIENCY VRS POLICY DIRECTIVE:
A CASE STUDY OF TELECOMMUNICATIONS IN JAMAICA AND THE
MOVE TOWARDS AN INTEGRATED REGULATOR**

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SECTION 1: INTRODUCTION

1.1 PROJECT DESCRIPTION

With multiple goals spanning from the dissemination of public information, to being a tool for political propaganda, to perceptions of national identity - it is not difficult to understand why communications industries are frequently interwoven into the fabric of state and society. In fact, with a long-held understanding of communications as a mechanism for 'national security, identity and culture' (Bhuiyan, 2008), the communications industries in many developing economies in particular are often the industry most guarded by the state.

As such, the design, structure, and function of regulatory institutions for telecommunications frequently exhibit a complexity that is not often found in other industries. For example, regulation can be used to establish the conditions for the sector's operations, the rules for entry in the case of foreign ownership, the extent of competition/diversity and quality of service, general surveillance, universal accessibility, pricing of monopoly services, development of independent production, content distribution, legal procedures for conflict resolution, and balancing nation-building with investment opportunities.

Often these multiple objectives converge via separate platforms and lines of business¹, with broadcasting often being aligned to accomplishing nation-building goals, and telecommunication often being aligned to accomplishing investment goals. A media industry that displays

¹ Often the objectives of the government vary according to the "line of business," notably between broadcasting and telecommunications. The regulation of broadcasting has focused on the social and cultural impact of the sector, while in telecommunications the concern has been the transition from monopoly to competition.

convergence can offer both linear and non-linear services², and in many cases these services are offered by the same corporations, but with the services being regulated by different institutions. As the media industries continue to converge, these alignments blur, and questions arise as to whether or not regulation should be based on the technology platform, or on the content type, or on the line of business. The widespread perception of telecommunications as a high growth industry with the potential for spill-over in many sectors (Mohammed and Strobl, 2011) generates a high level of attraction for both private and public stakeholders. Therefore, telecommunication regulation can never be too far from sight for a modern state - especially as broadcasting, ICT and telecommunications services and platforms become more integrated.

Telecommunication regulation can be regarded as having both short term and long term objectives. In the short term, regulation can be used to stimulate competitive conditions, to promote efficiency, and to provide universal access or promote welfare. In the long term, regulation can increase industry robustness, ease barriers to entry, and encourage direct investment. Goals can be designed to impact consumer interest through price setting and competitive options, public interest through universal access to information and the maintenance of social and cultural goals, and the industry interest through entry to market and investment in infrastructure.

Regulatory institutions can additionally be designed to govern a single sector or multiple sectors. Single sector institutions generally have a narrow remit, with an objective to encourage competition and protect both consumer and public interest, but tend to be less economically and

² Linear services are generally defined as traditional print, TV or radio broadcasts. Non-linear services include 'on demand' services including those on the Internet. Non-linear services tend to be subject to a lower degree of regulation.

administratively viable due to the narrow specialization. The multi-sector regulator is understood to be more cost-efficient and with less risk of partiality than a single sector regulator, but are often conflicted by the need to stimulate industries for low-cost but high-quality utilities that may be uneconomical³. (Lodge and Stirton, 2002)

This paper considers regulatory reform in Jamaica's telecommunication industry. Currently, Jamaican telecommunication operates under a multi-sector regulator, the Office of Utility Regulation (OUR), which has oversight of all public utilities including telecommunications, water, gas, and electricity. The reform under consideration in Jamaica is the transition towards a single-sector independent regulator, referred to throughout this research as the integrated regulator, with monitoring responsibility for converged media services, including broadcasting and Information Communication Technology (ICT).

This research will argue that the current multi-sector structure is outdated and has become unsuccessful in governing the regulatory challenges of telecommunication in a modern society. Through examining how a recent anti-trust situation was allowed to proceed, resulting in an uncompetitive market for consumers and a setback for the public interest, this research highlights the need for transition from a multi-sector regulator to a single sector regulator and considers some of the dimensions such a regulator might take.

1.2 RESEARCH OBJECTIVES

Since the 1970s, Jamaica - like most developing economies - has experienced waves of reform in telecommunications regulation. Previous

³ For Lodge and Stirton (2002) the transition to an integrated regulator implies a greater technical expertise and confidence in public policy

rounds of regulatory reform in Jamaica were designed within the ambit of international organizations like the World Bank (WB) and the International Monetary Fund (IMF) in compliance with Structural Adjustment Programs (SAPs). When regulation made its way into the mainstream of international telecommunication reform after the Latin American debt crisis in the late 1970s and early 1980s, it was under the circumstance of introducing competition and protecting foreign investors in emerging markets (Hills, 1998). The goals of the international organizations for privatization, liberalization, and market competition were attached to conditions of aid and demands for ‘independent’⁴ regulation. These factors directly impacted market vehicles such as price setting and competition laws but had less impact on the process of designing regulatory institutions, and virtually no impact on the public interest goals which are generally accelerated through the cultural mandates of the broadcasting line of business.

The Small Island Developing State (SIDS) of Jamaica presents an interesting national case study for telecommunications for several reasons. First, the geographic proximity to North America results in direct economic and cultural influence by the consumerist behemoth of the United States. As an English-speaking nation, Jamaica cannot protect its associated markets through language barriers. The impact of this factor on the telecommunication industry relates to the ability to promote national cultural identity and protect and develop an indigenous content creation industry. Second, political and legal institutions in

⁴ ‘Independence’ for the International Telecommunications Union (ITU) refers to the regulator being impartial, accountable, transparent, objective and non-partisan, predictable, and must also be separate from the supplier of services, and separate from the statutory authority of government. For Mohammed and Strobl (2011) independence refers to the ability to implement policy without undue interference from politicians or lobbyists. Additionally, statutory independence refers to the operational separation from government. By functional independence, they refer to the range of regulatory functions empowered by the institution.

Jamaica still suffer the legacy of post-colonial rule, low administrative capacities, and the vestiges of conditional borrowing. These factors have resulted in the continued infiltration in Jamaican markets by international reform programs, and continued foreign impact in national decision-making (Lodge and Stirton, 2002). As a case study this is important because of the global nature of the telecommunication industry, as it relates to foreign ownership laws, allocation of spectrum, and the monetization of substituted advertising. Third, the study of telecommunications regulatory reform in Jamaica is important because it is this industry that in particular has the potential to influence cultural commerce and generate political and legal modernization through technology. The general newness of the industry in Jamaica also gives a competitive advantage to avoid pitfalls experienced by more mature industries (Nordicity, 2010). Media policy being reviewed currently can benefit from best practices developed with the current age of information in mind.

Given the movement currently underway towards an integrated regulator, this project will explore the following research question: **What is the importance of the current transition to an integrated telecommunication regulator in Jamaica, and what are some of the issues to be considered during this regime transition?** Using a recent anti-trust case study the objectives of this research are to:

- Identify challenges experienced in the Jamaican telecommunication industry due to gaps in the current outdated regulatory regime
- Present the merits of the implementation of the integrated regulator for converged media services, and
- Explore possible issues and recommendations for consideration for the implementation of an integrated regulator in Jamaica

1.3 METHODOLOGY AND PROJECT OUTLINE

Mixed methods have been employed for this research, and the project includes technical industry reports, national and international policy documents, scholarly works and published news articles. Sources include Jamaican, Caribbean and International scholars who have explored the design and implementation of regulation in telecommunications, policy documents that outline national development priorities; and industry reports on the global telecommunications industry.

Although regulatory reform (both institutional design and implementation of regulatory vehicles) in the telecommunications industry is a widely researched field for industrialized economies, research on this process in developing economies is a sparsely populated area of study. In a 2012 EBSCO search for peer reviewed publications with keyword parameters of 'telecommunications', 'regulation' and 'Jamaica' spanning the period 1993-2012 – only 19 articles of the 108 entries that resulted were actually relevant to the search. The most frequently cited foundational research on the development of telecommunication regulatory policy in non-industrial states were Levy and Spiller (1996), Stern and Holder (1999), and Wallsten (2001). This research is an attempt to build on this literature.

Of the 19 sources, only 8 were of Caribbean authorship (defined either by self-identified cultural background in author biographies or by affiliation to a Caribbean academic institution), and only 4 of these 8 were dedicated to research on telecommunication regulation in Jamaica. Of the 11 non-Caribbean authors in the total 19 entries available on this topic, only 3 focused on telecommunications regulation in Jamaica. Essentially, in the past 20 years, there seems to be only 7 scholarly

articles on telecommunications regulation in Jamaica. I have found it important to differentiate between Caribbean authorship and non-Caribbean authorship because there seems to be contradiction in the analysis of historical data. The Caribbean authors tended to collectively regard the process of regulatory reform in the Caribbean as a failed example for other developing states. As a Caribbean author myself, I additionally feel the need to disclose an experiential and ethnographic proximity to the work. This project acknowledges that accurate data may not be fully available, respects the limitations that the variables can be difficult to measure, and treads gingerly on the contradictions between historical observation, experiential and ethnographic impacts, and empirical research.

The project will first provide an in-depth contextualization of the academic literature surrounding telecommunication regulation in the Caribbean, and will then recount the regulatory history in Jamaica leading up to the current considerations for the integrated regulator. I will explain some of the regulatory challenges which enabled the anti-trust case study, assess the nature of the current wave of regulatory reform, and advocate for the integrated regulator as the vehicle through which some of these challenges can be reconciled. Finally I will present some possible implementation strategies for the integrated regulator, based on international best practices and keeping country-specific adaptations at the forefront.

SECTION 2: LITERATURE REVIEW ON TELECOMMUNICATIONS REGULATION IN JAMAICA

This section will contextualize the academic and political climate in which this research is situated. Proceeding with a chronological review of limited academic source material, the literature review will also present analysis of some of the perspectives and contradictions that continue to be prevalent throughout this current wave of reform. The goal of this section is to set the stage for understanding the current state of affairs in telecommunication regulation in Jamaica.

2.1 "Telecommunications Privatization Issues: The Jamaican Experience" 1993

In "Telecommunications Privatization Issues: The Jamaican Experience" (1993), McCormick opens by explaining how and why the natural monopoly of telecommunication industries shifts with the advent of new technologies. Lower barriers to entry and emerging competitive environments generally result in an altered balance between public and private sector interests. The public sector is interested in the public good and mass communication services. The private sector, on the other hand, is interested in economies of scale and shareholder benefits.

Although privatization may initially seem advisable for operational efficiencies and activating foreign investment, McCormick acknowledges the need for regulation to preserve a balance. Market forces will not result in certain public goals, such as universal access, so where public interest is required, regulation must be firm and inflexible. McCormick argues that since a government cannot truly require a private company to perform uneconomic activities for the public interest, then it is necessary that regulation balances this.

McCormick, a Caribbean scholar, proceeds to outline the situation under which Jamaican telecommunication was coerced into privatization with conditionality attached to the World Bank's structural adjustment programs of 1982-87. McCormick argues that on the eve of the first wave of telecommunications regulatory reform, the public interest was ignored in favour for the goals of transnational service providers liberalizing the market. Through a detailed account of the process of divestment of shares and the biased political nature of the deal, she regards the history of telecommunications regulation in Jamaica to be a failed example of balancing public and private interests.

2.2 "The Institutional Foundations of Regulatory Commitment: A Comparative Analysis of Telecommunications Regulation" (1994)

Levy and Spiller, in "The Institutional Foundations of Regulatory Commitment: A Comparative Analysis of Telecommunications Regulation" (1994), use a case study format to examine the performance of privatized utilities. Combining econometrics with socio-political analysis, they review telecommunications regulation in Argentina, Chile, Jamaica, the Philippines and the United Kingdom. Through exploring how political institutions and regulatory conditions affect economic performance in telecommunications, they find that 1) satisfactory economic performance can be achieved if administrative decisions follow precedent and predictability, 2) regulation may need to be inflexible in some socio-economic environments in order to generate regulatory credibility, and that 3) regulatory credibility can result in long-term investment. For the purposes of this case study, it would seem that an inflexible regime may be suitable if Jamaica intends to prioritize and satisfy investment goals.

2.3 "Caribbean Telecommunications Policy: Fashioned by Debt, Dependency, and Underdevelopment" (1995)

From a socio-political perspective, Dunn argues in "Caribbean Telecommunications Policy: Fashioned by Debt, Dependency, and Underdevelopment" (1995) that the industry is unfortunately characterized by the continued dependence on technology, capital, and management from foreign constituents. A Caribbean academic, Dunn maintains that external forces tend to promote reforms that benefit themselves, rather than benefiting the developing economy that is undertaking the reforms.

With continued economic dependence resulting in the coerced compliance with the World Bank's structural adjustment programs, for example, it is not difficult to see how external influence results in what is referred to as the national representatives of a transnational capitalist class. This manifestation within the domestic elite is quite prominent in Jamaica, and it succeeds in reinforcing existing power relations.

Persisting to present day, Jamaica remains a very hierarchical society with socio-economic class structures populating the political sphere. The domestic elite are the decision-making class, and an ethnographic perspective may reflect that more often than not, decisions on issues of national interest are pursued with the benefit of this hierarchy in mind. Dunn also builds on McCormick's analysis, arguing that the influence of the domestic elite, coupled with technical inadequacy and external pressure from international institutions, resulted in a regulatory framework which did not promote the best interests for the development of the industry.

2.4 "Liberalization, Regulation and Development: Telecommunications" (1998)

In "Liberalization, Regulation and Development: Telecommunications" (1998), Hills remarks on the extent to which research on regulation has been absent from economic or development studies, and further, that research on the telecommunications industry as a tool for development has also been limited. She theorises that although regulation can be used to create a healthy market and to meet national objectives in a less developed economy, and despite continued research showing the positive relationship of telecommunications to industrialization - research in development studies have tended to exclude telecommunications processes⁵.

For Hills, it was not until the late 1990's and into the 2000's that developing economies were able to enjoy the leeway of aligning market regulation with political stability and national development. Although telecommunications has generally remained an area of technical expertise, Hills outlines how the study became a mainstreamed issue with lending institutions after the Latin American Debt Crisis. She is very specific about the need for regulation to incorporate country-specific cultural significance, and argues that within the case studies that she reviewed, successful results were not usually experienced where there was no adjustment for country-specific factors. Although the World Bank and WTO have, in theory, recognized the need to attend to country-specific adjustments, Hills argues that in practice these institutions still exhibit a 'one-size fits all' method. Additionally, she advocates for the

⁵ Hills attributes this dearth of inclusive research to the initial World Bank concept of 'development' as a historical process, an attribute, and an ideology of modernization theory. The first phase focused on the modernization of infrastructure, then the modernization of the individual, and finally the modernization of the state as the mechanism to trigger national development.

inclusion of country-specific analysis when implementing regulatory reform.

2.5 "Regulatory Reform in Small Developing States: Globalisation, Regulatory Autonomy and Jamaican Telecommunications" (2002)

Lodge and Stirton's 2002 article "Regulatory Reform in Small Developing States: Globalisation, Regulatory Autonomy and Jamaican Telecommunications" reviews regulatory reform in Jamaica through the 1980's to the 2000 Telecommunication Act. The authors argue that the previous wave of reform was not indicative of a shift in ideology, but was instead indicative a level of economic dependence. They agree with McCormick that the privatization process occurred in tandem with financial instability of the government and the need to demonstrate regulatory credibility to access reform support from international organizations. The authors also identify four global factors which can both positively and negatively impact regulatory autonomy. These are 1) transnational capital, 2) International organizations, 3) knowledge transfer⁶, and 4) domestic elites⁷.

For example, transnational capital can induce growth, but also has the potential to exploit the policy making process in dependent economies. International organizations can provide structure and best practice, but also tend to promote reforms that benefit their mandate⁸. Knowledge transfer has been evident through the evolving relationship between

⁶ Knowledge transfer occurs through internationalization of the regulatory community or knowledge importation, eg: International Telecommunication Union toolkits online, or Nordicity commissioned report in 2010.

⁷ For more on how states and domestic elites remain central in shaping policy, despite reforms which attempt to challenge existing power relations and the national representatives of a transnational capitalist class, see Dunn

⁸ The first phase of telecommunication reform was driven by the World Bank and the World Trade Organization, whose mandate promoted market liberalization, as opposed to current phases driven by the International Telecommunication Union, whose mandate included more focus on social development.

Jamaica and North America (rather than British influences) through Canadian International Development Agency (CIDA) and other Canadian influences. Unfortunately the region has witnessed the failure of the Caribbean Telecommunications Union, resulting in greater dependency on a North American direct relationship, rather than a regional collective knowledge sharing. Finally, these three factors impact the fourth factor - reinforcing domestic hierarchies rather than challenging them, as we have seen also stated by Dunn. The anti-trust case study in section 3C will present an example of how regulatory autonomy can be subverted by domestic hierarchies.

2.6 "Embedding Regulatory Autonomy in Caribbean Telecommunications" (2002b)

Lodge and Stirton's adjunct research, "Embedding Regulatory Autonomy in Caribbean Telecommunications" (2002b), presents a comparative review of the pursuit of telecommunication regulatory autonomy in Jamaica, Trinidad and Barbados. The authors begin by highlighting the distinct challenge of telecommunication regulation as straddling national controls with international demands and technological change. An institution that enjoys regulatory autonomy must 1) have the capacity to handle technical complexity, 2) prevent arbitrary administrative decisions, and 3) embed social responsibility in its mandate. These conditions are constantly interdependent and trade off with each other.

The analysis presents the experience of Jamaica as a successful example of a balance between these three conditions in pursuing regulatory autonomy, compared to similar reforms in similar economies. It seems however that 'success' in this instance is likely being measured by the success in creating a competitive investment environment, rather than success in accomplishing national mandates.

2.7 "Learning to Swim with Sharks: Caribbean and African Telecommunications Regulatory Experience Under Monopoly Conditions" (2004)

In "Learning to Swim with Sharks: Caribbean and African Telecommunications Regulatory Experience Under Monopoly Conditions" (2004), Smith-Hillman and Brathwaite contrast the regulatory experiences in telecommunications in Nigeria and Jamaica. The article discusses the importance of institutional design and the utilization of research, especially as emerging technologies continue to evolve into services not yet predicted. They outline how the original regulatory license agreements did not include internet services, and review the court cases between the Jamaican government and the incumbent transnational service provider over market liberalization for the inaugural internet service providers.

The article also references the widely acknowledged benefits for the developing economy of having a strong communications industry, and discusses the pro's and con's of the single sector and the multi sector regulator. The authors view the transition to a single-sector regulator as an indication of greater technical expertise and public confidence. Hillman and Brathwaite conclude that the implementation of regulation in Jamaica has also exhibited efficiencies in terms of stimulating competition and improving consumer access.

2.8 "First a Glimmer, Now a ...? The Prospect of a Caribbean Competition Policy" (2006)

In a further 2006 article "First a Glimmer, Now a ...? The Prospect of a Caribbean Competition Policy", Smith-Hillman aims to assess the extent to which the CARICOM Single Market and Economy (CSME) facilitates the formulation of a common competition policy. Regional blocs arguably provide the best means for instituting a competition policy as the

occurrence of similar social, political, and economic backgrounds tends to stimulate consensus. However the reconciliation of collective competition policies with social objectives and growth plans for individual small economies often coincides with compromised efficiencies. The author suggests that the formulation of a regional CSME competition policy requires careful consideration.

2.9 "Withering in the Heat? In Search of the Regulatory State in the Commonwealth Caribbean" (2006)

In "Withering in the Heat? In Search of the Regulatory State in the Commonwealth Caribbean" (2006), Lodge and Stirton question whether the characteristics of the regulatory state are triggered by efficiency or political complexity in Jamaica and Trinidad and Tobago. They outline Majone's regulatory state hypothesis⁹, and then explores if this may be useful for predicting institutional activity in these particular case studies.

With the Jamaican case study, Stirton and Lodge use the type and amount of World Bank investment as an indication of the need for efficiency. They revisit their 2002 argument that telecommunications regulatory reform in Jamaica was not indicative of a shift in ideology, but rather financial instability of the government and the need to demonstrate regulatory credibility.

2.10 'International Communication: Shifting Paradigms' (2007)

For Bornman and Madikiza, the political economy approach to international telecommunication continues to be an area in which critical analysis is required, with "important themes for analysis [being] the role

⁹ Majone's 1994 theory of the 'Rise of the Regulatory State' describes a shift in policy emphasis away from macroeconomic stabilization and redistributive welfare policies. There is a greater concern with competitiveness, economic efficiency, and a favouring of legal authority over alternative policy instruments such as public ownership, planning, or centralized administration.

of transnational media and telecommunication corporations, as well as international organisations such as the WTO and the ITU in the increasingly market-driven international environment.” Their 2007 research ‘International Communication: Shifting Paradigms’ provides a historical survey of international communications and some of the theories and paradigms which have influenced its regulation, as well as outlining research questions for further study.

2.11 ‘Development Telecommunications State of Research’ (2009)

Ogan’s ‘Development Telecommunications State of Research’ in 2009¹⁰ presented findings on 211 peer-reviewed articles on development, telecommunication and globalization published between 1997 and 2007. One of the interesting findings of this study is that although ICT’s formed a large primary focus of the studies reviewed, the presentation was largely not through the paradigm of globalization. Similarly to Hills, the authors expressed the need to see scholars directly engage globalization with development in their telecommunication research.

2.12 “Jamaican Electronic Media Consultation” (2010)

The “Jamaican Electronic Media Consultation” submitted by the Nordicity Group to the Broadcasting Commission of Jamaica (BCJ) in 2010 presented multiple policy recommendations to bring the regulatory regime transition in line with global best practices. It acknowledged several limitations of the current structure and reporting practices, and identified recommendations that that could be implemented in phases

¹⁰ Ogan’s study of the scholarship published focusing on development telecommunications and ICTs from 1997 to 2007 sought to answer several questions related to the trends in this field in an era of globalization. Is the focus on telecommunication and development declining in the academic literature? How is the newer focus on ICTs in development situated vis-a-vis traditional media? How is the discourse on globalization related to the discourse of development in the telecommunication literature? What paradigms and theories are being adopted to understand telecommunication and development in the 21st century?

and components to greater align the industrial strategy with an indigenous content strategy.

These recommendations included 1) defining the scope of the industry based on the 'like' services provided¹¹, rather than on content or distribution format, 2) regulating all entities with a corporate or commercial presence¹², and 3) facilitating the financial stability of all entities of producers, broadcasters and distributors. These recommendations will however require greater compliance with financial and business reporting, and in Jamaica is not an easily-implemented recommendation at this time.

Other layers for consideration included 1) that foreign ownership structures¹³ may be subject to both Jamaican and regional¹⁴ trade regulations, 2) diversity of ownership¹⁵ may need to be incorporated into industrial priorities, 3) that emergency and disaster response are incorporated to all broadcast standards, and 4) that the digital transition process follow standard switchover dates, milestones and incentives.

The report acknowledges the digital strategy committees that are currently in place and recommends greater stringency for licensing and competitive activity (including mergers and acquisitions). Finally, they recommend that the regulator be acknowledged as the sole authority for

¹¹ Internet Service Providers and telecommunication companies may need to be incorporated because of their role in the distribution chain.

¹² Nordicity recommends that entities be levied for both a one-time cost of licensing and an annual scaled fee based on market share.

¹³ Although foreign ownership is currently regulated for traditional broadcasting and subscriber entities, both the analysis and the ensuing case study present the need for review for ownership structures.

¹⁴ CARICOM single market

¹⁵ In a nation with such a strong unified cultural identity, diversity of ownership may not need to be as prioritized as nations with greater population demographic diversity.

dispute resolution and the awarding and revoking of licenses¹⁶ and that the institution be empowered through sanctions to implement nuanced regulation frameworks and an appeal process for arbitration.

2.13 "Good Governance and Growth in Developing Countries: A Case Study of Regulatory Reforms in the Telecommunications Industry" (2011)

Most recently, in "Good Governance and Growth in Developing Countries: A Case Study of Regulatory Reforms in the Telecommunications Industry" (2011), Mohammed and Strobl identify that in most developing countries, the objective of regulatory reform has been to make way for privatization, establish an independent regulator, and introduce competition. They build on Hills by investigating the intersection of telecommunication and development, choosing telecommunications for its significance as a high growth industry with potential spill-over effects to other sectors. They argue that institutional design can be crucial for the development of the telecommunication industry in developing economies¹⁷.

Much of their data reflects that the telecommunication sectors in developing countries only experience greater teledensity and connection capacity where there is an independent regulator not controlled by a ministry, and where the industry operates under privatization practices¹⁸. For the authors, where the regulator is not only physically

¹⁶ It is important to note that at the time of research for the Nordicity report, the nation was not as far along on its process of developing the integrated regulator, and therefore some of the recommendations relate solely to the BCJ, without the incorporation of other regulatory bodies.

¹⁷ This report focused on the impact of regulation on the development of the telecommunication industry itself, and was therefore somewhat inconclusive on the impact of telecommunication regulation on national development, citing limited data and immeasurable external factors.

¹⁸ Although Mohammed and Strobl acknowledge the lack of accurate data quantifying this area of research, their findings suggest that the nature of the regulatory institution itself can be crucial for the development of the industry, which can potentially play a role in economic growth. Their results indicate that if the regulator is given certain functions with which to carry out

separate but also operationally separate (with its own roles, policies, and empowered through the public record) from government, this can improve efficiency and productivity, and create an environment which will attract private investment.

Overall, there are several issues raised in the body of the academic literature which we will also see reflected in the regulatory history and to an extent, in the current state of affairs. These issues are:

- The need to assess what regime priorities may be more suitable at this stage of reform. In the design of the integrated regulator, Jamaica will need to balance prioritizing investment goals with protecting consumer and public interest. Is the government pushing for integration to enhance market competitiveness and consumer protection? Or are other forces at work?
- The incorporation of country-specific analysis will need to examine the role of the domestic elite as an institution in itself. Given the outcome of the anti-trust case to be examined, Jamaica will need to ensure adherence to administrative precedent. Are the domestic class and power structures being challenged or reinforced?
- The impact of the international landscape. Originally the WTO instigated the market liberalization process, and was able to enforce this ideology because of the government's need to access international aid. Is the transition to the single sector regulator simply being expedited to streamline with other international best practices? Are global best practice recommendations even feasible given the current state of institutional capacity?
- An independent regulatory institution must have the capacity to handle technical complexities, safe guard against administrative

telecommunications policy, this can enhance growth for the industry, but that there is no similar evidence in terms of operational separation of the regulator from the government.

indiscretions, and embed social responsibility. Are these qualities enjoyed by the regulator now? Is this transition truly an indication of greater technical capacity? Or because the current structure was unsuccessful in managing a modern-day monopoly?

SECTION 3: TELECOMMUNICATIONS REGULATION IN JAMAICA

This section will contextualise regulatory reform in the telecommunications industry in Jamaica. Beginning with the historical context since the 1980's and leading into a main focus on the decade since the amendment to the Telecommunications Act of 2000, this section will additionally examine recent developments up until 2012. I will present a recent anti-trust case study and identify some of the issues that have arisen and continue to be experienced for the telecommunications industry. Finally I will outline some of the current expectations for this wave of reform towards the integrated regulator.

3.1 HISTORY OF TELECOMMUNICATION REGULATION

Like most post-colonial nations, Jamaica privatised its telecommunications industry in the late 1980's under the aegis of market liberalisation goals in the attempt to modernize industry and access international development aid. Privatization in 1987 was not welcomed by the Government of Jamaica¹⁹ (GoJ), but was enveloped in the World Bank's (WB) structural adjustment program (SAP) – which required a drastic reduction of public expenditure and foreign indebtedness. Privatization occurred due to financial instability of the government and the need to demonstrate regulatory credibility to access support from international organizations.

The international landscape also presented an added layer of complexity - the World Trade Organization (WTO) was considered to be slanted towards market liberalization, whereas the International Telecommunications Union (ITU) tended to be more focused on development. Although both institutions impacted international

¹⁹ Neither the Jamaica Labour Party (JLP) nor the People's National Party (PNP) administration had a policy to include utilities in their privatisation programme at this time.

telecommunication regulations, reform instigated by the WTO was considered to be inevitable, as it was this organization that, at the time, managed the standardization of international rate setting for long distance calling.

With international conditions paving the way for privatization, the Telecommunications Company of Jamaica (TOJ) was formed in 1987 (later renamed Cable & Wireless Jamaica), representing at that time, a 51% share held by the GoJ, and the rest in the holdings of UK corporation, Cable & Wireless. Three distinct phases of regulation followed: monopoly control by C&W and ministerial regulation in 1987-1996, the introduction of competition 1996-2000²⁰, and the current phase of liberalization and the operation of an independent regulator since the Telecommunications Act of 2000.

The Telecommunications Act 2000 gave rise to another phased process of market liberalization, which rolled out with competition in domestic mobile and data services in 2000-2001; competitive licenses for domestic wired voice services and internet services over subscription television in 2001-2003; and from 2003 to the present full market competition in all services. The independent regulatory bodies currently servicing this industry are the Office of Utility Regulation (OUR) for voice and data, the Broadcasting Commission of Jamaica (BCJ) for audiovisual and content services, and the Spectrum Management Authority (SMA) for telecommunication spectrum. Currently, the OUR operates as a multi-sector regulator, with oversight additionally for electricity, water, gas and other public service utilities.

²⁰ The Telecommunications Act 2000 is the most recent incarnation of regulatory phase

Since 2004, the GoJ has encouraged and maintained a competitive business environment for telecommunications services, particularly mobile telephony. The main players in the telecommunications landscape in Jamaica currently for mobile telephony are Digicel, Cable and Wireless (rebranded LIME Jamaica in 2010) and Claro (acquired in 2011 by Digicel); LIME JA and Flow Jamaica for internet service provision; Flow Jamaica for digital cable television service, and number of smaller satellite cable subscription services that provide retail cable services. With a fiercely competitive landscape, all the major players have provided individual capital and infrastructural investment, with Flow Jamaica in particular investing in the laying of over 26,000km of undersea fibre optic cable networks throughout the region²¹. The Digicel-Claro acquisition is the case study to be deconstructed, ironically so since the regulatory objective of market liberalization was broader competition, rather than the resulting duopoly.

Several other developments have conditioned the landscape in which telecommunications operates in Jamaica. In 2004, infoDev, in cooperation with the International Telecommunication Union (ITU), began the development of an Information Communication Technology (ICT) Regulation Toolkit, a hands-on, web-based update and expansion of infoDev's successful Telecommunications Regulation Handbook of 2000. Published online in 2008²², the Toolkit aimed to assist regulators with the design of effective and enabling regulatory frameworks to harness the latest technological and market advances. Its most prevalent themes are the impact of changing technology, the role of competition, and the regulatory implications of the transition from traditional telephony to next generation networks (NGNs).

²¹ <http://www.columbuscommunications.com/home.html> Website accessed Aug 1, 2011

²² <http://www.ictregulationtoolkit.org/en/Index.html> Website accessed Aug 1, 2011

In 2010, the Nordicity Group²³ was commissioned by the Broadcasting Commission of Jamaica (BCJ) to produce the Jamaican Electronic Media Regulatory and Policy Framework Consultation, which recommended “multiple policy approaches that will bring Jamaica’s broadcasting legislation in line with those of leading global jurisdictions. It will help prepare the Jamaican broadcasting and media industry to thrive and adapt to new technologies.” (Nordicity, 2010) The areas for review included redefinitions for the industry given the onset of convergent media, financial reporting and conditions of license, support for indigenous production, foreign ownership, concentration of ownership, and content and transmission standards, among others. The nation however suffers from multiple conditions of under-development which may challenge the implementation of the recommended media policy approach²⁴.

In March 2011, The GoJ ICT Policy was released which built on the Nordicity Report, referencing several other developments in the National Development Plan (commonly known as Vision 2030)²⁵ and presented the decision for the creation of a single regulatory institution for converged media services which would address the overlap and the silos experienced through the current non-converged organizational structure. This step in regulatory reform in Jamaica has been referenced in several government documents including the Telecommunications Act (2000), National Development Plan (2009)²⁶, the National Media Policy

²³ Nordicity is a leading international consulting firm specializing in economic and financial analysis; business strategy solutions; and, public policy and regulatory affairs. <http://www.nordicity.com/hp.html> Website accessed Aug 1, 2011

²⁴ As regulatory structures are intensely complex and sensitive to the cultural and historical factors of each society in which it operates, Hills notes that it is highly unadvisable for these structures to be an outright replication of the regulatory structures of industrialized nations.

²⁵ Vision 2030 Jamaica is the country’s first long-term National Development Plan which aims to put Jamaica in a position to achieve developed country status by 2030. It is based on a comprehensive vision: “Jamaica, the place of choice to live, work, raise families, and do business”. <http://www.vision2030.gov.jm> accessed July 31, 2011

²⁶ Document also referred to as “Vision 2030”

Consultation (2010), the National ICT Policy (2011), and in July 2011 through public announcement by the then Prime Minister of Jamaica, the Honourable Bruce Golding. These policies, reports and plans are cross-referenced, and attempt to create procedural intersections with common goals.

Since the most recent change of government administration in January 2012, plans for the deployment of single converged institution have not been represented with public transparency, Digicel has fully acquired Claro, resulting in a duopoly in the market and (at the time of writing) is contesting the OUR's requirements to follow interconnection regulations with its now sole competitor, LIME²⁷.

3.2 CURRENT STATE OF AFFAIRS

Demographically, Jamaica is a middle income island nation with a Gross Domestic Product (GDP) per capita²⁸ of approximately \$9199 (International Monetary Fund, 2012) and a population of 2,709,300 people (Statistical Institute of Jamaica, 2011). The nation is estimated to be growing at approximately 1.5% per annum (Planning Institute of Jamaica, 2011).

Major trading partners include the United States of America, Canada, the European Union, Trinidad and Tobago and other Member States of Caribbean Community (CARICOM). The island is a signatory to many international Agreements including the Agreements establishing the World Trading Organization (WTO) and the CARIFORUM1-EC Economic

²⁷ According to ITU comparative data, countries are addressing these interconnection dilemmas by introducing a series of regulatory measures. For example, Denmark and Argentina have adopted symmetrical interconnection regimes, in which any operator, regardless of the type of network it has, is obliged to interconnect with any other operator.

²⁸ Based on Purchasing Power Parity

Partnership Agreement. Jamaica is also a member of the International Telecommunications Union (ITU), Universal Postal Union (UPU), Caribbean Postal Union (CPU), Commonwealth Telecommunications Organisation (CTO), Caribbean Telecommunications Union (CTU), Inter-American Telecommunication Commission (CITEL), and International Telecommunications Satellite Organization (ITSO).

The telecommunication regulatory landscape is populated by multiple institutions, which share responsibility for the various layers of regulation of media services. Despite scholarship that presents the Jamaican case as a successful example of regulatory development, a major challenge with the current structure, which has not been reflected in the academic literature, is the overlapping jurisdictions within the industry.

3.2.a Office of Utilities Regulation (OUR)

The OUR was established by an Act of Parliament in 1995 to regulate the operations of utility companies. Operations began in January 1997. The Director General, as the Head of the OUR, is appointed by the Governor General, while the Deputy Directors General are appointed by the Prime Minister. Together they have a responsibility to develop and set tariffs, and carry out a range of technical functions. The Senior Director, Regulation and Policy, leads four functional areas - Telecommunications Markets, Electricity Regulation, Water and Transport Regulation and Numbering Administration/Technical Support. It is staffed by critical professionals comprising economists, financial analysts and engineers.

3.2.b Fair Trade Commission (FTC)

The FTC is an agency of the Ministry of Industry, Investment and Commerce, and the administrative body responsible for implementing the Fair Competition Act (FCA). The FCA was promulgated in 1993 to ensure

that the benefits of the competition process in Jamaica are unhindered by anti-competitive activity. The FTC has the power to carry out investigations in relation to the conduct of business in Jamaica to determine if any enterprise is engaging in practices that are in contravention of the Act. The FTC can also take to court any business or individual who has been found guilty of anti-competitive practice and has failed to take corrective measures, after being instructed by the Commissioners, who are appointed by the Minister of Industry, Investment & Commerce.

3.2.c Broadcasting Commission of Jamaica (BCJ)

The BCJ monitors and regulates the audiovisual content industries, balancing the interests of consumers, the industries and the creative community in implementing public policy and law. Advising the Minister²⁹ but reporting the parliament, the BCJ recommends 1) which applicants should receive licences for radio, television and subscriber television (STV) services, and 2) the terms and conditions under which those licences should be granted and renewed. Applicants for licences are expected to meet certain programming, technical, operational and financial standards and be able to provide a satisfactory level of service. The Commission is also required to oversee that the operations and programming of the licensees it regulates meet the standards set out in law.

3.2.d Spectrum Management Authority (SMA)

The SMA is the national regulator for the radio frequency spectrum and reports directly to the Minister of Energy, Mining, and Telecommunications. The Authority is self-funded through a cost-

²⁹ The responsible ministry changes when portfolios are reassigned after changes of government administration. Currently the BCJ reports to the Information Division of the Office of the Prime Minister

recovery mechanism which requires that spectrum licensees pay spectrum licence fees and regulatory fees for use of the radio frequency spectrum. Spectrum licence fees are collected on behalf of the GOJ and paid into the Consolidated Fund. The Authority is governed by a Board of Directors who are appointed (and therefore can also be dismissed) by the Minister, with daily operations overseen by its Managing Director.

3.2.e Central Information Technology Office (CITO)

CITO is a publicly owned company established by the GOJ in 2001. It is intended to be an enabler for national development through its charge to formulate, update, coordinate and monitor implementation of the National Information and Communications Technology (ICT) Strategy. The organization is governed by a Board of Directors on which its Chief Executive Officer sits, reporting directly to the Minister of Energy, Mining, and Telecommunications. The organization was created with an intended staff of 12 yet currently operates with 2.

The table below outlines the main service providers in the telecommunications industry in Jamaica, as well as an overview of the areas of service provision which are governed by overlapping jurisdictions.

Table 1: The Service Providers in the Jamaica Market

Corporation	Services Offered	Overlapping Jurisdiction
Digicel	Mobile phones Broadband Internet Business GSM mobile Business cloud services Network access	Interconnection with other service providers

	ICT management	
Flow (Columbus Communications)	Digital cable tv Digital fixed landline Broadband internet	Provides distribution for local online content production
LIME (Cable and Wireless)	Landline Digital landline (voip) Broadband internet Dial up internet Mobile services Digital mobile tv Digital cable tv	
TVJ / CVM	Local free-to-air stations	Regulated by BCJ
PBCJ	Public broadcaster	Regulated by BCJ
Cable Operators	Subscription television cable and satellite	Regulated by BCJ, OUR, and Fair Trading Commission
Internet Service Providers (ISPs)	Dial-up internet Broadband internet	Regulated by BCJ, OUR, and FTC

3.3 CASE STUDY: THE DIGICEL-CLARO ACQUISITION

As we have seen, the government currently approves final issue of licenses for new entrants and manages competition policy, while the utility regulator manages interconnection and universal access, and the content regulator is becoming involved in spectrum, cyber crimes and data privacy. Major challenges with this structure include the entrenchment of the existing institutions and domestic elite, the overlapping nature of jurisdictional responsibilities, and the limitations to legal parameters in place for ownership structures. These challenges

are starkly apparent in the following examination of the Digicel-Claro acquisition case.

In March 2011, America Móvil (AMX) announced it would sell its local Claro operations to rival Digicel and in return, would acquire 100% of Digicel's operations in Honduras and El Salvador. Digicel is 100% owned by Irish entrepreneur Denis O'Brien, and the company up to 2010 had a market share of over 65% in Jamaica. The deal was approved in August 2011 by former Prime Minister of Jamaica, Bruce Golding, in his capacity as the minister with responsibility for telecommunications, with the provision that Digicel would continue to operate Claro as a separate network. This deal would allow Digicel to further solidify its market domination in excess of two million subscribers among the Jamaican population of 2.8 million. It has been reported in the national newspapers³⁰ that the Digicel-Claro merger (which brought Digicel's market share up to 80%) was actually inked through a private deal between Denis OBrien and one of Forbes richest, Carlos Slim (Claro Owner and CEO)³¹ without any consultation with the OUR or the FTC.

Telecom incumbent service provider LIME launched a failed suit at the Supreme Court to have the Prime Minister's approval of the merger overturned. LIME had contended that the Prime Minister's decision to approve the merger "is unlawful/and or was affected by an improper exercise of his power". Additionally, the then opposition People's National Party had expressed concern that the deal would put Jamaica in danger of reverting to the highly undesirable situation of a monopoly provider of voice telecommunications services. However, in a ruling against LIME,

³⁰ <http://jamaica-gleaner.com/gleaner/20120129/letters/letters3.html>

³¹ Slim was described in the article above as "*a formidable competitor, superpower entrepreneur and owner of Claro, ranked number one on the Forbes rich list with a net worth of US\$74 billion*"

Justice Bryan Sykes, said that Golding's approval was done "in accordance with the respective regulation".³²

Golding resigned in September 2011 amidst a wave of corruption indictments regarding the extradition of local drug and gang don, Alexander 'Dudus' Coke – making way for then Education Minister Andrew Holness to step up as interim Prime Minister until the hotly anticipated January 2012 elections. In his short stint as interim Prime Minister, Holness negotiated with Digicel for the removal of the lien to operate separate networks. In December 2012, the Fair Trade Commission also joined the battle against this unprecedented antitrust situation. In the January 2012 elections, the PNP defeated the ruling JLP at the polls – unseating Andrew Holness, and delivering this evolving situation into the hands of the new Minister of Energy, Telecommunications and Mining, Phillip Paulwell.

Currently within the Telecommunications Act, there is a 51% indigenous ownership requirement for traditional broadcasters and subscriber television, but there are no foreign ownership requirements for telecommunications, and no provisions that monitor the impact to industry competition in the event of a transfer of license between existing operators of telecommunication services. Additionally, the Fair Competition Act does not require that a merger review process is undertaken (likely due to outdated clauses that existed before the competitive landscape), but only that parties to an agreement may seek review from the FTC if there is concern about the potential to adversely affect competition. In the reports that follow, we will learn how the acquisition of Claro by Digicel, which resulted in an 80% market share by a company with 100% foreign ownership, was allowed to happen

³² http://www.jamaicaobserver.com/news/FTC-opposes-Digicel-Claro-merger_10462227

because of outdated laws, overlapping jurisdictions and a regime that does not protect the development of a burgeoning domestic industry.

Published in the Jamaica Gleaner³³ on December 28, 2011 by staff writer Paul Henry:

The Fair Trading Commission (FTC) has become the second entity to take legal action in the Supreme Court in an effort to prevent the approved merger of telecoms providers Digicel and Claro ...
... According to the suit, over the period April 2007 (when Claro entered the market) to March 2011 (when the intended merger was announced) "it is estimated that customers' benefits from competition" among the Digicel, Claro and LIME "exceeded \$16 billion". The FTC is contending that this monetary benefit to customers would be lessened should the merger go through...

The following excerpt is from Radio Jamaica News³⁴, published on Jan 14, 2012:

Former Prime Minister, Andrew Holness, is defending his decision to allow Digicel to merge with Claro despite a previous arrangement for the two companies to operate as separate entities on the completion of Digicel's takeover of Claro. Mr Holness said he made the decision after consulting various stakeholders, including the then Opposition, after Digicel appealed the previous stipulation that it maintain two separate networks, because it would not be economical.

"We examined the issue as well of competitiveness and the emerging

³³ http://www.jamaicaobserver.com/news/FTC-opposes-Digicel-Claro-merger_10462227

³⁴ <http://rjrnewsonline.com/business/former-pm-defends-decision-concerning-digicelclaro-merger>

trend towards a dominant service provider. Digicel is the dominant service provider and we were very careful in changing the decision that it does not make them even more dominate in the market.”

Mr Holness said the real issue was that of competition and interconnection rates. He said the regulator, the Office of Utilities Regulation, must now be strident in defending consumer rights, because the market now has a dominant telecom provider. He maintains [the decision] was made in the best interest of the consumers.

In a presentation³⁵ on January 17, 2012, David Miller, the Executive Director of the Fair Trading Commission identified that this was an interesting case because of the overlapping jurisdictions, and argued that the impact on consumers would be detrimental. Digicel subscribers pay \$4.00 per minute to call other Digicel subscribers while the rate to call LIME's subscribers was only reduced in 2011 from \$17.70 to \$13.80 per minute. The merger would also result in the elimination of the reciprocal calling rate of \$5 per minute between Claro and LIME thereby increasing the price that LIME's subscribers will have to pay to make calls to former Claro subscribers who are now on the Digicel network. Miller's speech transcript states:

While the Telecoms Act expressly recognizes the jurisdiction of the competition authority in a general way, it seems that there is at least one inconsistency in its application, which became apparent with the agreement between Digicel and Claro. That is, where the holder of a telecommunications license wishes to transfer its license and

35

http://www.jftc.com/Libraries/Speeches_and_Presentations/The_Merger_of_Digicel_Claro_is_like_ly_to_hurt_Mobile_Phone_Customers_-_Mr_David_Miller.sflb.ashx

operation to an existing operator. The Telecoms Act does not require consideration of the competitive effect of the transfer. It should be noted that while the FCA does not contain provisions which stipulate that a merger review process must be undertaken ... there is a law in place that serves to protect the competitive environment and we have chosen to use it. If the declaration is granted, it would deem the agreement to be unenforceable, which could mean that Digicel would have no authority to assume Claro's operations in the manner in which it did.

Paul Golding, Dean of the College of Business and Management, University of Technology, presented Digicel's strategy simply as a means to an end. The company's goal of developing additional infrastructure for the nation was being hampered by the conditionality of the merger, which would make their investment less economical. The following is an excerpt³⁶ from Golding's article in the Jamaica Gleaner published Sunday, January 29, 2012:

Claro's departure gives Digicel the necessary scale to maintain profitability and to invest in next-generation 4G mobile infrastructure. Digicel has already announced that it will roll out the 4G next-generation High Speed Packet Access (HSPA) later this year. Digicel executives are shrewd business people ... and they may have exerted pressure or made a compelling case, legal, commercial or otherwise, to convince the then Prime Minister to scratch the offending clause.... The regulatory agencies, particularly the Office of Utilities Regulation (OUR), the national agency responsible for advising the Government on, inter alia, telecommunications issues, was never consulted, nor was aware until Claro customers started

³⁶ <http://jamaica-gleaner.com/gleaner/20120129/letters/letters3.html>

to complain of inadequate service. This deal within a deal was a Machiavellian move at best.

In March 2012, the hearing had not yet concluded and Digicel was proceeding with business as usual - now challenging the authority of the regulator to even bring action, noting that the Telecommunications Act has no jurisdiction over mergers and acquisitions. Published March 1, 2012 in the Jamaica Observer³⁷:

Digicel [has] filed suit challenging the FTC's legal standing to bring the legal action, noting that the Telecommunications Act does not regulate mergers and agreements. The FTC's legal team argued in chambers before Justice Almarie Sinclair-Haynes that even though the Act does not regulate mergers and agreements, the regulatory body had a duty to investigate because a complaint was made. The arguments were being made even as Digicel began a shutdown of the Claro network yesterday. If the Digicel application is successful, the FTC's opposition to the merger would be thrown out. However, if the FTC emerges victorious it will be allowed to proceed with its challenge of the merger.

In May 2012, the Fair Trading Commission (FTC) was cleared by the Supreme Court to challenge the merger³⁸ and proceed to trial. Pending any appeal from Digicel, the injunction has been scheduled for May 2013. For all purposes, however, the merger is already technically complete - Digicel has closed Claro operations and has required previous Claro subscribers to purchase new SIM cards and port their numbers to the Digicel network. With the court case to block the merger scheduled

³⁷ http://www.jamaicaobserver.com/news/FTC-argues-case-against-Digicel-Claro-merger_10940881

³⁸ http://www.jamaicaobserver.com/news/Way-cleared-for-FTC-to-challenge-Digicel-Claro-merger_11481876

for 2013, it seems highly unlikely that any change to the operational status quo will be affected in the coming months.

This case study reflects more than just a monopolistic situation. There are clear concerns about the currency, efficiency and effectiveness of the regulatory institution, not only in its handling of technical complexity, but also in checks and balances against administrative interference. For example, the outdated Fair Competition Act facilitates, but does not require, the meeting of consumer standards and protection against anti-competitive activity. The Telecommunications Act did not account for competitive impact in the event of the transfer of licenses between existing operators. Neither the FCA nor the TA required approval from either regulator for this acquisition, and the deal was solidified between two private parties and directly with the Prime Ministers of the country. This case study is a true indication of the urgency of the transition towards an integrated regulator.

It is the National ICT Policy (developed in 2010 by the Information and Telecommunications Dept of the Office of the Prime Minister)³⁹ that elaborates on the implementation of the integrated regulator, stating that:

³⁹ Aspects of the sector are additionally regulated by the Office of Utility Regulation (OUR), the Spectrum Management Authority (SMA), the Consumer Affairs Commission (CAC), the Broadcasting Commission (BCJ) and the Fair Trading Commission (FTC). Additionally, the telecommunications sector is governed by several pieces of legislation - Post Office Act (1941), Broadcasting and Radio Re-Diffusion Act (1949), Radio and Telegraph Control Act (1973), Fair Competition Act (1993), Office of Utilities Regulations Act (1995), Telecommunications Act (2000), Consumer Protection Act (2005), and the Electronic Transactions Act (2006).

“...The Government of Jamaica (GOJ) aims to facilitate investment, strengthen all productive sectors and create a knowledge-based society. In furtherance of the above, considerable treatment is given to the creation of a converged regulatory structure for the ICT sector, owing to the shortcomings of a variegated approach and the concentrated focus required to provide flexible, responsive and specialist regulation to meet the demands of the fast growing ICT Sector.”

The telecommunication section of this policy document acknowledges that the overlapping jurisdiction impedes efficient regulation and recognizes that content and competition issues require specialized treatment. Additionally, the objective is presented in the policy document to establish a converged regulator to ensure a single point of entry into the sector, and enable a regulatory environment that facilitates investment and competition. Initiatives to implement this include establishing cross-agency protocols for the standalone regulator, a separately designated content regulator, and an inter-regulators forum to include the competition regulator. This process would require the amalgamation of several existing regulatory bodies with the Broadcasting Commission continuing as the content regulator, and the OUR presumably continuing to regulate water and consumer utilities. The government's intention at the writing of this policy document is to encourage self-regulation, devise new legislation, and establish an appropriate governance structure for the new integrated regulator.

The policy advisors who developed and circulated this policy document in 2010 had adequate insight to the shortcomings of the current regime in order to produce this very sensible and comprehensive strategy. When Prime Minister Golding approved the acquisition it was under the advisory that the deal would result in the benefits of greater economic

activity for the nation, rather than with the consideration for protection of consumer interest or the ideology of market competitiveness. When interim Prime Minister Holness expedited the acquisition, it was under the advisory that the deal would facilitate the opportunity to use economies of scale to develop a 4G network and additional infrastructure which would overall benefit public access to technology and information. What could have possibly spurred two Prime Ministers less than one year later in 2011 to disregard the insights of the policy advisors in order to approve and expedite an acquisition that resulted in the exact opposite of the objectives of a circulated national policy? Would an integrated regulator with updated regulation that is more relevant to modern competition have been able to catch the overlapping jurisdictions and mutual finger-pointing that resulted in the creation of a foreign-owned duopoly telecommunication landscape?

SECTION 4: ADVOCACY FOR AND POTENTIAL IMPACT OF THE INTEGRATED REGULATOR

This section will begin with the potential advantages that may be anticipated around the transition to an integrated regulator. I will then outline some issues for consideration as Jamaica moves towards the integrated regulator.

4.1 ADVANTAGES OF THE INTEGRATED REGULATOR

An integrated regulator generally governs multiple areas of telecommunication regulation, including market entry authorization, competition, interconnection and price setting, consumer satisfaction, broadcasting carriage, spectrum management, and content. Several countries have now moved towards the integrated regulator, including Malaysia in 1998, India and South Africa in 2000, the UK in 2003.

For many of the reformed institutions, the need for an integrated regulatory authority stemmed from the impact of technological convergence and the rise of new technology of digital content delivery, including internet protocol services such as VoIP/MoIP, IPTV and mobile TV. Stirton and Lodge (2002b) outline other domestic and international changes which have additionally encouraged the lead up towards the consideration of implementing an integrated regulator. These changes include:

- international shifts from national monopolies towards market competition or complex international agreements
- compliance with WTO market liberalization and structural reform programs, and

- shifts in business strategy from residential telephony services to data rich services, or the purposes of attracting new entrants or private investment

The following excerpt⁴⁰ represents the key advantages of an integrated regulator:

- consumers may be better served by a single regulatory authority to avoid confusion as to which institution regulates certain activities
- increase in regulatory clarity and effectiveness provides security for investors, multiple regulators may lead to inconsistent policy decisions
- reduces wasteful duplications of resources and activities between regulators where there are overlapping jurisdictional scope between telecommunications and broadcasting, potential cost saving by creating synergies in terms of staffing, resources
- could appease some of the conflicting objectives between telecommunications and broadcasting, leading to better internal cooperation
- could integrate more seamlessly the public interest and economic efficiency aspects of regulation within one single framework
- results in economies of scale and scope as a single regulator charged with both carriage and content could effectively counteract, in terms of powers and resources, the large entities which it is called to regulate
- integration of transmission and carriage is better placed to address issues of market power and vertical integration
- could result in modification of existing networks and infrastructures to offer new services

⁴⁰ excerpted from the consultation paper issued by The Authority For Info-Communications Technology Industry - Developing a Converged Telecommunications and Media Regulatory Framework for Brunei Darussalam Implementation of a New Licensing Structure - 18 April 2012

- shift towards an equal or technology-neutral regulatory treatment of different information and communications infrastructure

Using the case study presented, it would seem that Jamaica exhibits some, but not all, of the characteristics and push factors that lead reform towards an integrated institution.

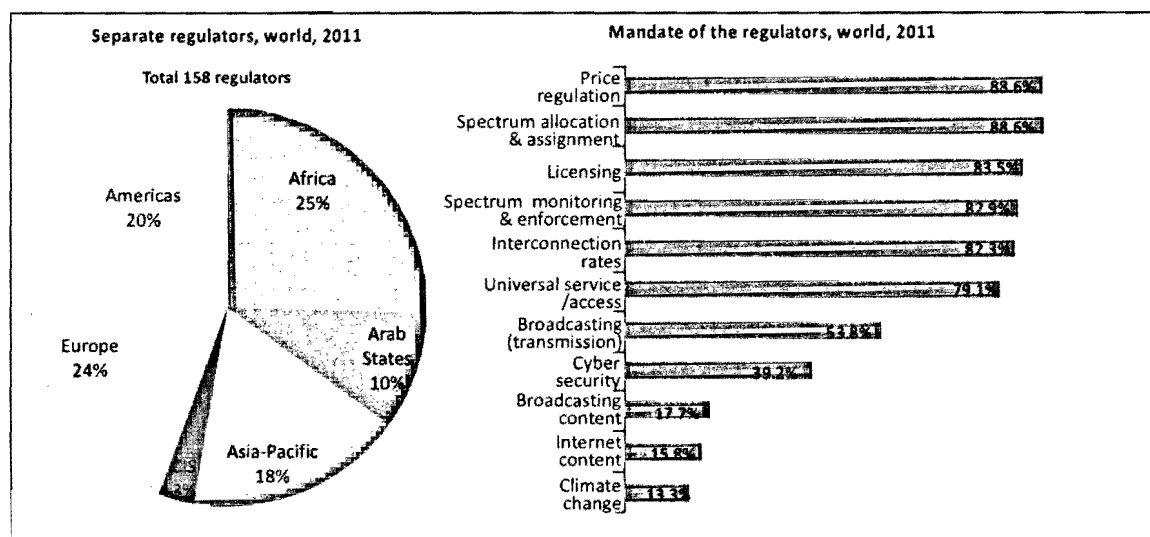
4.2 ISSUES TO CONSIDER BEFORE IMPLEMENTATION

Regulatory transition for the telecommunication industry in Jamaica must serve multiple objectives and goals. A modern regulator has the power to alter the competitive landscape, and it must take care to maintain that its objectives encourage consumer-friendly competitive characteristics with socially responsible goals that safe guard against administrative indiscretions. The reformed institution must also have the capacity to handle technical complexities.

The 2012 *Trends in Telecommunication Reform* published by the Telecommunication Development Bureau (BDT) of the International Telecommunication Union (ITU) explores various legal and regulatory issues that are emerging for integrated regulators. They report that over the past five years, a growing number of telecom regulators have seen their mandate expand to incorporate information communication technology and broadcasting. More recently, electronic content, cybersecurity, data protection, privacy and environmental issues have also entered into the purview of regulators. The increased use of online applications and services to communicate and do business (such as social media, cloud services, e-payment and other m-banking services) bring a host of new regulatory issues to the fore.

The diagram below shows the ITU's representation of the mandates that are concerning regulators worldwide. Clearly these are still areas for growth for the Jamaican regulator, so the transition to the integrated regulator may not truly be an indication of greater technical capacity, as was suggested in the literature. The likelihood exists that this transition is being expedited because of the clear mismanagement of the Digicel-Claro acquisition, yet it should be acknowledged that the integrated regulator will likely be better able to handle the technical complexity predicted by the ITU.

Figure 1: Mandate of Regulators, worldwide, 2011



Source: ITU World Telecommunication/ICT Regulatory Database.

In designing regulatory reform, the International Telecommunications Union regulatory toolkit recommends a combination of legislative, regulatory and self-regulatory approaches. The legislative approach refers to the amendment of laws and frameworks, for example. The regulatory approach relates to the amendment of regulatory policies within an existing framework. The self-regulatory approach refers to a less formal consultation or committee approach, as well as the trend towards total

de-regulation. While the self-regulatory or de-regulated approach may be useful in attracting capital investment and the provision of competitive services, this approach may not necessarily be the most suitable one for Jamaica. The GoJ National ICT Policy recommends a self-regulatory approach specifically for ICT, but is not clear on the level of regulatory intervention applicable for broadcasting and telecommunication that will also fall under the jurisdiction of the integrated regulator. Given the jurisdiction overlaps that resulted in uneven market share, a less flexible regime with both social and industrial goals may be the route required at this stage.

The ITU decision tree below can be useful in identifying which questions the GoJ will need to ask itself as it continues the process of regulatory reform.

Table 2: Best Practice Observations

DECISION LEVEL	DEVELOPED COUNTRIES <i>Important considerations</i>	DEVELOPING COUNTRIES <i>Important considerations</i>
6. Industry Structure	Open Inter-platform competition Open service competition	Limited Inter-platform comp. Open SP competition
5. Infrastructure Investment	Public – private partnerships	Public – private partnerships More government non- financial aid in-kind
4. Regulatory Support	Extend beyond primary reliance on	Greater reliance on radio technologies.

Mechanisms	fibre-optics. Use of UAS. Spectrum, rights of way.	Forbearance. Broader use of UAS. Spectrum, rights of way.
3.Institutional Form of Regulation	Independent, converged and/or integrated	Independent, converged and/or probably more integrated
2.Goals and Targets	More sophisticated goals and targets	More sophisticated goals and targets
1.Foundation	Infrastructure planning inclusive of all stakeholders	Infrastructure planning inclusive of all stakeholders, plus augmented by capacity building

Source: B. Horton

Although this research does not delve into the amendments that may be useful from a legislative or regulatory approach, eg: how license classifications will need to be amended based on technology-neutral service offerings, I acknowledge that this is an area for further expansion. This research can provide a start to analysing the areas of overlap between the current institutions and a possible wire-frame model of an integrated organizational capacity, and will proceed by outlining the public and consumer interest concerns and the regulatory structure concerns that will need to be incorporated to the current phase of reform.

4.2.a Public and Consumer Interest

The GoJ's National ICT policy with jurisdiction over telecommunication regulation specifies the desire to create a knowledge-based society. This

implies a public interest goal and its implementation should reflect a vision of innovation and inclusiveness. The development of a knowledge-society can also be characterised as one in which citizens have universal access to technology and broadband within fair market price. Within the case study we can see the tension between a public interest goal that may have led to improved broadband infrastructure via an investment strategy which may have only been possible through economies of scale, and a second option which would have led to consumers being worse off with high interconnection fees and less competitive choice in a duopoly market structure. With the original telecommunication liberalization reform intending to open a more competitive market, one can't help but imagine that this reversion to a duopoly is simply a step backwards, and an ironic one at that since Digicel was only allowed to enter the market as a means of providing competition for the incumbent monopoly under Cable and Wireless/LIME. In a nation like Jamaica where smart phones are more prominent than fixed-post access, this reversion to limited competition may very well negatively impact the public interest goal of developing a knowledge society since the monopolist currently controls full access to mobile telephony and broadband. There is no easy solution to this dilemma, however the difficulty with this situation remains the messy way in which it was handled.

Although the scope of this work focuses mainly on the telecommunication competition aspect, a true integrated regulator will certainly need to address broadcast issues such as content and programming. The Nordicty report (2010) also recommends the integration of public interest goals and a national industrial strategy through the development of indigenous production. The support of indigenous content creation can also be seen as a goal of regulation that aims towards nation-building, and best practices worldwide include

financial and educational support as well as exhibition and carriage requirements. They recommended:

- developing a priority programming fund from new industry revenue;
- creating a tax credit to support indigenous production;
- developing training programs to increase production crew levels; and,
- mandating carriage of all terrestrial broadcasters by programming services distributors, and
- encouraging carriage, including fair carriage negotiations, of national and local specialty, or cable-based, programming services.

Regulation of content (including advertising, protection of minors, media literacy and cyber crime awareness) vrs regulation of access to the network will also need to be balanced in this model. Local content formats that can be streamlined towards local distribution include feature film and short film (including documentary genre), episodics for traditional TV programming, webseries for smart phone consumption, the creation of smart phone applications and more. Several reputable media production training facilities exist in Jamaica, and can be the beneficiaries of this support without resorting to the creation of funding bureaucracies to administer grants to independent content creators. By aligning content creation to institutional accreditation, Jamaica has the potential to develop a uniquely certified cultural media product – a benefit to Brand Jamaica.

Additionally, public interest concerns will need to address country-specific analysis rather than a one-size fits all model, especially if we examine the role of the domestic elite as an institution in itself. With the regime transition, are the domestic class and power structures being

challenged, or reinforced? How was it possible that two foreign multi-millionaires inked a private deal -that would change a nation's competitive landscape and affect an entire population- which was approved by two Prime Ministers without consulting with any regulatory institution, and were then able to disrupt the judicial system of a Supreme Court over the course of two years? In what modern society could a Prime Minister disregard an established policy document advising of the shortcomings of a current structure in handling a complex and probable issue of national importance, in order to implement an arbitrary administrative decision with a representative of transnational forces? On what grounds did the original LIME suit indicting the Prime Minister of 'unlawful exercise of power' get thrown out by a Supreme Court judge, only to be re-admitted as valid cause for injunction after the public, the media, and an external regulator joined the process of scrutinizing the merger? Hopefully an empowered integrated structure would leave less leeway for the exigencies of the domestic elite which resulted in the kind of market share subversion characterized by the Digicel-Claro acquisition case.

Within the first wave of regulatory reform in Jamaica, the tension between the public interest and industrial goals was also significant. International organizations were able to force an ideology of market liberalization onto the Jamaican government by attaching it to conditions of aid. In order to access much-needed international financial support, Jamaica was required to comply with structural adjustment programs in the telecommunications industry. These programs measured regulatory credibility as a means of attracting foreign investment and the privatization of a previous state-owned utility. Examining the Digicel-Claro acquisition case, the need to monitor the competitive landscape and protect consumer and public interest were clouded by the drive to develop technology infrastructure and generate economic activity, and

facilitated by an outdated regulatory regime, the disregard of existing policy advice, and administration discretion of a domestic elite. The Jamaican government will need to identify if it will be public, consumer, or industrial goals which will guide policy design, and it will also need to abide by agreed-upon policies without administrative interference.

4.2.b Regulatory Structure Considerations

The more that goals are intended to promote industry efficiency, then the more likely it will be that institutions exhibit a separation of policymaking from service provision, and delegation to arms-length structures. If industry efficiency is in fact the goal, we can hope to see an empowered integrated institution emerge with ability to enforce its mandate. The experience of the Digicel-Claro acquisition is a clear indication that efficiency policies surrounding conditions of license, transfer of license, market competition, authorization, and jurisdiction to appeal – are in dire need of revision.

Even prior to the duopoly economy, the main corporate entities have moved towards converged lines of business, creating content for the web, mobile and IPTV initiatives. This means that multiple verticals are operated by a handful of corporations. The Nordicity report (2010) recommends that the scope of the industry should be more accurately defined by 'like' services and that any entity with a corporate or commercial presence should be subject to regulation. They recognize that all entities in the industry must be financially viable in order for this to be feasible. This recommendation can be organized along a sliding scale such that larger players (based on market share) will have larger costs of entry and greater conditions of license – similar to tax bracket models. This revised and inclusive structure will require cooperative relationships with the FTC, BCJ, SMA and the OUR to work out both the convergence of the assignment of Acts and the engineering needs. With the market-

saturation that is currently experienced this is likely the best way to proceed.

A technology-neutral structure will be required, and this has been outlined in the GoJ policy objectives. It would not be recommended that different divisions operate for broadcasting, telecommunication, information and spectrum, but rather than the departmental division gets broken down based on function, with technical experts from each platform available for all departments. Possible departmental structures could be content, licensing, engineering, revenue management, government relations, consumer advocacy, research, etc. A staffing balance including legacy staff and new staff could be based on legal experts, economic experts, technical experts, policymakers, sociology/cultural analysts, and executive or administrative management. Cultural expertise is currently not included in the regulatory model, this will be an important country-specific recommendation for the Jamaican model, as the digital economy is so intricately entwined with the national cultural mandate in the GoJ Vision2030 policy document.

Adequate and stable funding is also crucial, not only for the operation of the regulator, but also for the assurance of regulatory autonomy. Currently, license fees collected for spectrum management, broadcasters and telecommunication companies can be allocated directly to operation, as well as to pay into a fund as incentive for local multi-platform content production. The total fees collected for Spectrum Licences by the GOJ from 2000 to March 2009 was J\$5.15 billion. Further, funds under management at the Universal Access Fund Company Limited (UAFCL) are approximately J\$6 billion (these represent total receipts from the Universal Service Levy on international calls terminating in Jamaica.

Additionally, the sale of the first island-wide wired STV license netted the Broadcasting Commission J\$32 million. The Government has projected that General Consumption Tax (GCT) returns from the levy on the telephone and communications sector netted approximately \$4.8 billion in FY 2007 and \$6.4 billion in FY 2008 (applicable GCT rate for the sector is 25%). Notably, all of the agencies currently mandated to regulate the ICT industry are self-financing and do not receive subvention support from the Consolidated Fund. Sources of funding through licenses obviously differ based on the service provided and the particular sector – for example the license fees⁴¹ to operate paid by direct foreign investment in telecommunication are collected by the ministry, rather than the regulator. For broadcasting, the administration is facilitated through the regulator.

A revenue management department might be useful in this new model, which is not currently available in the multi-regulator system. Scaled licensing will need to be implemented based on market-share, however as we have seen previously, the effective implementation of this strategy is dependent on updating reporting and compliance mechanisms. A challenge is the inconsistency of reporting mechanisms for all entities, and limited compliance with rights agreements for content distribution. Although licensees are required to submit audited financial statements and abide by distribution agreements, compliance with these obligations vary and is not penalized to an extent to ensure compliance.⁴²

⁴¹ The only mention of license fees on the OUR website are for the JA\$25,000 application fee for submitting an application for license. This is approx CAD\$250 for a foreign company to apply for a license to operate

⁴² The Nordicity Report 2010 recommended two changes at the industry level which are prerequisites for the successful implementation of new broadcasting legislation and ultimately the ability of the industry to fully realize its potential: All commercial entities in the system (television and radio broadcasters and distributors) report full financial information to the regulator on a regular basis and the reporting is consistent with accepted accounting practices; AND All programming distributed within the regulated Jamaican broadcasting industry must be acquired through appropriate rights agreements, be they regional or full national rights, and first, second or subsequent window rights.

Unfortunately, at this stage, global recommendations for financial compliance are not truly feasible given the current state of institutional capacity.

Other alternative recommendations for ensuring financial independence could be a percentage levied on the sale of SIM cards by telecom service providers. With smart phone telephony becoming more ubiquitous than fixed post internet access from physical computers, this is a vehicle through which the investment benefits of telecommunications can be used to bolster the development of the regulatory regime. The BCJ has also began exploring the possibility of selling spectrum leftover from analogue transmission to cell phone usage, although with an integrated regulator this would be like selling your own surplus back to yourself....

The incorporation of substituted advertising in traditional transmission can also be a way of ensuring that ad revenues remain local even if foreign content is being transmitted. Reviewed rights agreements will be necessary before this can be implemented. Under an integrated regulator, entities that offer multiple services may have the opportunity to diffuse their advertising strategy. Branded content can also be an area of growth which will provide production opportunities for local content creators, as well as their use for advertising spots in mobile or internet transmission.

These perspectives indicate important factors to be considered for Jamaica on the cusp of regulatory reform - on the one hand, the intersection of public, consumer and industry interests; ; and on the other hand, design of the regulatory institution with agility, capacity, and structure.

SECTION 5: CONCLUSION

“The larger truth is that the current media market's nature is set by explicit government policies, regulations and subsidies. For the cable TV industry or the commercial broadcasting industry this linkage between policies and market structure and logic are transparent. The government creates these markets and sets the terms for the firms to operate; only after policies are set does market logic become inexorable. But this same relationship defines all media industries: behind every media system is a government policy or set of policies and behind every policy is a policy-making process.” – Robert McChesney, 2004

McChesney's message is indirectly a hopeful one: it elucidates that the evolution of media and technology and their role in society is not ad hoc. It is guided by a policy making process, which designs and implements parameters for growth by incorporating a balance between public, consumer, and industry interests. The principles of privatization, competition, and liberalization have been of central importance over the past two decades in the telecommunication sector. Ongoing regulatory reform in this sector must be tailored to each country's unique characteristics and historical precedents.

This research project has focused on regulatory reform in the telecommunications industry in Jamaica, in light of the current transition to an integrated regulator as outlined in the GoJ's National ICT Policy. In examining the push factors and conditions which have facilitated an integrated regulator in other international best practice scenarios, this research has identified considerations to be incorporated, and advocates for the implementation of an integrated regulator in Jamaica. The project has reviewed

- academic literature surrounding the nature and challenges for reform in a small island developing state,
- historical context of reform in Jamaica, and
- the case study reflecting the inadequacies of the current regime

The literature review identified several issues that were also reflected in the regulatory history and the current transition. These issues included the need for a less flexible structure, the examination of the role of the domestic elite, the removal of the arbitrary from administrative decisions, the redress of overlapping jurisdictions, and the capacity to handle technical complexities and embed public interest.

The regulatory history showed us that previous reforms were designed in order to access international financial support, and not necessarily with the protection of the consumer or the creation of a competitive landscape in mind. The overlapping jurisdictions, outdated policies, and the embeddedness of the domestic elite that grew out of the regulatory history, very much resulted in the clear mismanagement of the unprecedented Digicel-Claro acquisition case.

The importance of the current transition to an integrated regulator is to redefine the landscape to allow Jamaica to better handle the regulatory challenges of a modern knowledge society. An integrated regulator may have been able to catch the shortcomings of the overlapping jurisdictions in handling this unprecedented case. In fact, in the Jamaica scenario, policy advisors pre-empted this regulatory challenge and advised for the expediting of a revised institution. With the current duopoly scenario, and the complicated regulatory issues that are envisioned by the ITU's best practices, the integrated regulator at this stage is even more crucial. Not only will the integrated regulator be required to enforce the balance

between public, consumer and industry interest in terms of price setting, interconnection and universal access to information, but the integrated regulator will soon be required to tackle complex issues such as spectrum, cyber-security and emergency communications over IP.

This regime transition is of the utmost importance for the development for telecommunications in Jamaica. The nation has a long way to go in refining this process, and there is much work ahead, but the transition towards an integrated regulator may provide the opportunity to streamline political, economic, and social efficiencies for the converged media industries in Jamaica.

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