REGULATORY MULTIPLICITIES IN TELECOMMUNICATIONS REFORMS IN INDONESIA AND CHINA[*]

ANGUS YOUNG,[**] SANDI RAHAJU[***] AND GRACE LI[****]

I INTRODUCTION

Telecommunications is a key component in any country's economic infrastructure,[1] requiring a vast amount of capital injection and ongoing technical innovation. For developing countries where capital availability and technical capability are limited, this handicap could retard the pace of industrialisation.[2] Therefore attracting both capital investments and technical expertise by attuning their economic policies and legal environment to meet investors' expectations is a priority. Even though privatisation had been triumph by international institutions like the World Bank as the linchpin for developing economies to industrialise, from a regulatory perspective this process is far from straightforward. Implementing economic policies requires a number of regulations and regulatory instruments to be in place. Apart from the need for an independent regulator, regulatory outcomes are often dependent on the willingness of various stakeholders' to comply with course of actions undertaken by authorities.

Both Indonesia and China are large developing countries with a sizable population characterised by their embedded historical and cultural orientations. The lure of industrial country's living standards and impelled by postcolonial realities Indonesia embarked on economic modernisation in the late 1960s.[3] By the early 1980s the government pursued a massive privatisation program in keeping with

* The authors would like to thank Professor Sam Blay, Professor Michael Adams, Professor David Barker, and Professor Philip Griffith for their encouragement and advice.

** Tutor in Economics, Law, Management, and Politics, UTS and Macquarie University, Research Associate at ICAN Research Centre, Faculty of Business, Administrator/Researcher, Centre for Legal Education, and PhD Candidate, Faculty of Law, UTS.

*** Tutor in Business Law, SJD Candidate, Faculty of Law, UTS.

**** Lecturer in Law, UTS.

1 Robert Saunders, Jeremy Warford and Bjorn Wellenius, *Telecommunications and Economic Development* (1994) 3.

2 Ibid 5-18.

3 Hal Hill, *The Indonesian Economy Since 1966: Southeast Asia's Emerging Giant* (1996) 11-29.

worldwide trends.[4] This was remarkably complicated in part, because the number of infrastructure projects competing for resources.[5] On top, enmity amongst stakeholders along with the country's flatulent democracy obscured and delayed many key policy decisions.[6]

In comparison, China's 'Open Door Policy' since the late 1970s,[7] establishing a unique economic framework steered by a Communist-led 'quasi-market economy' had produced remarkable economic outcomes.[8] The reforms have thus far produced far-reaching institutional and legal changes.[9] However, the Chinese government have a difficult task of controlling the pace and depth of change as there is some inherent political risks associated with rapid socio-economic transformation. Competing business and institutional interests striving for domination has strained both state/enterprise relations and state/social relations. More importantly, the reforms have exerted further demands to modernize the country's inept legal system.[10]

It is against these national attributes that this article examines the factors steering the process and changes in the telecommunications reforms. Whilst we contend that the political and socio-economic factors are too complex to analyse with sufficient depth in one article, this paper intends to highlight certain turnkey elements, as well

---

4 David Clutterbuck, *Going Private: Privatisations Around the World* (1991) 71.

5 In its 6th national five-year planning period, Repelita VI (1994-2000), for example telecommunications sector represented 11% of the country's infrastructure spending (US$7.9 billion). Power sector attained highest allocation of 40% of the total US75 billion quota, followed by land transport (24%), ports (6%), water supplies (5%), airports (4%) and others (10%). See M D Piché, B Mark and Roger Carlson, 'Nynex's Experiences in Thailand with Telecomasia: An Example of Foreign Cooperation in the Opening Up and Expansion of the Telecommunication Sector in Asia' in Daniel J Ryan (ed), *Privatization and Competition in Telecommunications: International Development* (1997) 59, 62.

6 Radius Prawiro, *Indonesia's Struggle for Economic Development: Pragmatism in Action* (1998) 213-54; I Ketut Mardjana, 'Public Enterprises under the New Order' and M Djadijono, 'Economic Growth and Performance of Political Growth' in Richard Baker *et al* (eds), *Indonesia: the Challenge of Change* (1999) 41-58 and 115-36.

7 The socialist market economy system was introduced in China by Deng Xiaoping in late 1978 and had since evolved into what some economists, outside of China, would argue as modern Chinese capitalism. With its status as a Socialist country, Chinese government used to choose a very restricted attitude towards its economic plan. Trading with foreigners was under central control and a belief of 'self -sufficiency' governed all the sectors in the country. During the period of 1949, when the Communist Party took over the country, to the end of 1970s, the Chinese participation in the international trade was rare. The Open Door Policy is the current stated policy of the PRC government starting in 1978 with the Chinese Economic Reform policies under Deng Xiaoping. See Jiaqing Lu, *Inequality and Industrial Change in China and Financial Crisis* (Doctoral Dissertation, the University of Texas, 1999) 25.

8 World Bank, 'Country Economic Review: People's Republic of China' PRC 2000–09 (Washington DC: World Bank, 2000), adjusted for recent statistics.

9 Alice Tay, 'Introduction: Law and Legal Culture in China' in Alice Tay and Gunther Doeker-Mach (eds), *Asia-Pacific Handbook – Volume 1: People's Republic of China* (1998) 39-53. See also Barry Naughton, *Growing Out of the Plan: Chinese Economic Reform, 1979-1993* (1995).

10 You Ji, *China's Enterprise Reform: Changing State/Society Relations after Mao* (1998) 163-91.

as identifying the multiplicities involve in regulating privatisation in both Indonesia and China against a 'model' proposed by the World Bank.

II CONVENTIONAL WISDOM IN REFORMING TELECOMMUNICATIONS SECTOR

Many economists champion privatisation as the 'answer' to advance developing countries' economic needs.[11] Even if the arguments in favour of privatisation are diametrically opposite to the case against, it remains on many country's economic reform agendas.[12] In essence, this reform presumes to boost foreign investors' confidence,[13] stimulate economic growth flowing from greater efficiency and competitive environment.[14] Furthermore privatisation is assumed to remove unwarranted political intervention.[15] Yet some post-privatised enterprises in the developed world have turned into private monopolies, riddled by inefficiencies and anti-competitive behaviours prompting re-regulation and selective political intervention.[16]

The 'know how' and 'model' of privatisation is often developed and recommended by international economic institutions like the World Bank staffed by technocrats and experts. It is not implausible to assert that these benchmarks are at times more influential than nationally developed models simply because it advances the international financial community's interests. As such developing economies are obliged to integrate these international models or benchmarks into domestic policies and regulations so as to attract foreign direct investments and technology transfers.[17]

---

11 Bjorn Wellenius, 'Telecommunications: World Bank Experience and Strategy' (Discussion Paper No 192, The World Bank, 1993) 7-8. Privatisation is not new, it has become a central feature of economic reform agendas for both developed and developing countries. See Keith Hartley and David Parker, 'Privatization: A Conceptual Framework' in Attiat Ott and Keith Hartley (eds), *Privatization and Economic Efficiency: A Comparative Analysis of Developed and Developing Countries* (1991) 11.

12 Arguments for privatisation are among others: (1) more efficient use of resources; (2) benefit consumers from the introduction of market forces; (3) reduce the size of the public sector and hence public sector borrowing; and (4) wider share ownership. See Hartley and Parker, above n 11, 11-6. The case against are: (1) lessen of competition with the introduction of a private monopoly; (2) damages industrial relations by undermining job security; (3) contrary to the promotion of social interests; (4) overpricing services; and (5) abandoning public responsibilities. Arguments in favour of privatisation are drawn largely from neo-classical economic theory which suggests that capital accumulation and technological progress is fundamental to achieving economic growth. See Clutterbuck, above n 4, 7-10, and Michael Todara, *Economic Development* (7th ed, 2000) 115-20.

13 Bruce Rowe, *Digital Satellite Telephony: The Right Solution in Developing Indonesia* (1997) 41-45.

14 Todara, above n 12, 102-3.

15 Hugh Emy and Owen Huges, *Australian Politics: Realities in Conflict* (2nd ed, 1991) 446-7.

16 Ibid 447-52.

17 Ronald Wolf, *Trade, Aid, and Arbitrate: The Globalization of Western Law* (2004) 113-22, 135-42.

In 1992 the World Bank (WB) produced a discussion paper on telecommunications reform framework as a 'template' for the WB to advice national governments on the economic benefits, as well as to develop regulatory strategies about privatisation.[18] The paper notes while the nationalisation of telecommunications sector in developing economies in the 1960s had contributed to their development, by the 1980s this policy produced bottlenecks in investments and caused inefficiencies.[19] The course of action to remedy the above includes:

1. separating operations from government activities;
2. restructure the operations as an independent state enterprise charged with being financially self-sufficient;
3. reorganise as a joint stock company;
4. managed the entity as a business;
5. controlling interest should devolved with employee stock ownership, trenching of stock sales, and residual state ownership; and
6. carrying out of sale to the private sector.[20]

As well notes,

> Successful privatization of a state telecommunications enterprise depends on a number of factors falling into place. Privatization must be inserted in the political process. ... Privatization also requires creating a market structure and regulatory environment that provide the new owners incentives and obligations to invest and perform, and institutional arrangement free the operators from unwarranted controls yet safeguard users and reconcile commercial interests with broader development objectives. ... International market considerations are also increasingly important. ... Proper design and implementation of the complex process of privatization and related sector reforms requires strong and visible high-level political commitment, clear allocation of authority and resources to mange the process, and the expert assistance (including foreign) on policy, regulatory, legal and financial matters.[21]

In terms of developing regulations the Bank comments,

> The single most troubling issue in recent reforms is slow progress in developing regulatory capabilities. All major reforms have been based on the expectations that effective public regulation of privatised monopolies, especially with respect to prices, service obligations, interconnection, competitive behavior, and access to the public domain (including use of radio spectrum), can be developed fairly quickly. ... The search for better regulatory solutions merits high priority in the design of sector

18 Wellenius, above n 11, 1-20.
19 Ibid 1-4.
20 Ibid 8.
21 Ibid 8-9.

> reform. ... An important issue is that of location and independence of the regulatory function. Regulation involves technical matters as well as rent distribution. An effective regulator must mediate among competing interests seeking to appropriate rents and understand how this affects sector performance.[22]

Grasping the contents of this report appears to be straightforward, almost to the extent that governments 'just need to follow the step-by-step instructions' and the anticipated benefits would ensue. But upon closer scrutiny many recommendations are driven by economic theoretical assumptions or anecdotal evidence of certain countries' positive experiences.[23] The entire process seemed to be reduced into a two-dimensional exercise with little tolerance for deviation or national attributes, despite the mild language in its text. The report also suggests a lack of political will or benevolent regulator as a failure. This blinked approach assumed that all national characteristics and problems are identical.[24]

For the sake of argument, even if the consequences of developing countries defying or disregarding WB recommendations are not necessarily catastrophe, often they are not in the position to ignore the significance of these recommendations. Research conducted by Li and Xu found that the impact of privatisation around the world revealed only fully privatised entities showed improvement in competition and positive returns in capital investments, whereas partial privatisation did not deliver much gains.[25] Hence in light of this evidence, developing countries would be more compelled to adopt WB recommendations. A World Bank study found that telecommunications sector in Asia generally requires substantial capital and technical investments to sustain the region's continued economic development.[26] Governments in Asia would thus have to pursue policies that promote competition, increase private sector participation, and regulatory reforms expediting privatisation so as to stimulate economic growth.[27] Be that as it may, regulation is not a clear-cut affair simply be enacting necessary legislations to meet privatisation objectives.

Regulation is often thought to be a government imposition that restricts and prevents certain undesirable behaviour. Rather it can also be understood as enabling and facilitative tool.[28] From an economic perspective, government's involvement in regulating business arises when there is perceived to be some form of market

---

22 Ibid 10.

23 Ibid 7-42.

24 For more on the shortcomings and social cost of privatising experience – see New Zealand's experiences in Tim Hazledine, *Taking New Zealand Seriously: the Economics of Decency* (1998) and Jane Kelsey, *The New Zealand Experiment: A World Model for Structural Adjustment?* (1995).

25 Wei Li and Lixin Colin Xu, 'The Impact of Privatization and Competition in the Telecommunications Sector Around the World' (2004) XLVII (2) *Journal of Law and Economics* 395.

26 Peter Smith and Gregory Staple, 'Telecommunication Reforms in Asia: Toward a New Pragmatism' (Discussion Paper No 232, The World Bank, 1994) 24.

27 Ibid 23-79.

28 Robert Baldwin and Martine Cave, *Understanding Regulation: Theory, Strategy and Practice* (1999) 2.

failure.[29] Loss making, inefficient and uncompetitive state owned monopolies clearly falls into this category.[30] A commonsensical solution would be to rid the government of this responsibility to allow these entities to market forces.[31] Laws, regulations and polices would thus serve to enable and facilitate this transition by encouraging private ownership and investments, introduce corporate styled management, enact pro-competition laws, attune regulators and regulatory institutions to allow the market take its course devoid of governmental intervention, except to secure private property rights and uphold the privity of private transactions.[32] But economic regulations are not always consistent or manageable by the courts or authorities. Often authorities and the courts find enforcing economics type regulation difficult, as economic activities are not always easy to define within legal doctrines.[33]

Regulating privatisation does not stop at allowing private sector to participate, separation of state's ownership functions with operation matters, implementing competition policies and removing legal barriers for new entrants, and establishing an independent regulator.[34] According to the OECD Guidelines on the Corporate Governance of State-Owned Enterprises (SOE) released on 28 April 2005, the challenge facing SOEs including the telecommunications sector is that these entities have conflicting corporate objectives, unclear board responsibilities, opaque board appointments, and a lack of equitable treatment towards shareholders.[35] All of which would require 'self-regulation', where the regulator encourages internal regulation of the SOE through its own procedures.[36] This is where the corporate governance, especially at the board level becomes crucial.[37] An effective board would have a clear mandate and objectives responsible for the entities performance. Members should be appointed on the basis of merit and not favour.[38] In short, the governance of a privatised entity should operate on competitive market expectations. However the trade-off matrix would most likely be socio-political agendas.

Telecommunications reforms in Indonesia have so far demonstrated a clear commitment towards a competitive market structure, at least in theory.[39] With the country experiencing genuine democracy for the first time in its history, and the

---

29 Chris Terry, Ross Jones and Richard Braddock (eds), *Australian Microeconomic Policies* (3rd ed, 1988) 44-5.

30 Robert Baldwin, Colin Scott and Christopher Hood (eds), *A Reader on Regulation* (1998) 5.

31 Owen Hughes, 'Public Management or Public Administration?' (1992) 51(3) *Australian Journal of Public Administration* 286-96.

32 Christine Parker, *et al* (eds), *Regulating Law* (2004) 13-32, 168-206.

33 Imelda Maher, 'Regulating Competition' in Christine Parker, *et al* (eds), above n 32, 192-205.

34 Smith and Staple, above n 26, 23-88.

35 OECD, *OECD Guidelines on the Corporate Governance of State-Owned Enterprises*, 28 April 2005, 4-34.

36 Julia Black, *Rules and Regulators* (1997) 219.

37 Christine Parker, *The Open Corporation: Effective Self-Regulation and Democracy* (2002) 62-111.

38 OECD, above n 35, 31-4.

39 Smith and Staple, above 26, 2-4.

aftermath of 1997 financial crisis which created greater economic inequalities pose a considerable challenge for the newly elected government to govern. The combination of international pressure, domestic economic needs, and political concerns add to the complexities in the formulation of policies.[40] As a result, international investors have become more cautious. The newly elected democratic government not only has to rejuvenate the economy, but also reassure international investors its ability to provide greater political stability. At this stage, it is relatively uncertain as to the extent this government could govern without further domestic unrest. Plainly appeasing the vested interests of various politically and economically influential stakeholders are crucial. According to Mardjana, 'The future evolution and configuration of Indonesia's public sector enterprises thus remain uncertain, subject both to economic trends and to the outcome of continuing policy debates within the government'.[41] In view of this, it would be doubtful that Indonesia could implement WB's recommendations beyond weak regulations.

China is a different 'kettle of fish', in terms of economic development and domestic political affairs. Since China has been left relatively unscathed by the Asian financial crisis, in conjunction with recent smooth political leadership transition, market liberalisation has continued to gain momentum.[42] Even though China's accession to WTO obliged the government to meet its obligations under the treaty, the country's privatisation still bears distinct Chinese characteristics.[43] Moreover recent intensity in domestic competition has driven business rivals to resort to aggressive tactics causing some concerns to the central Beijing government. The government has to work on two fronts; first, showing the international community they are committed to further liberalisation, and second endeavour to retain some levels of control between competing interests of various governmental institutions and anxious entrepreneurs.[44] Thus it appears that the economic reforms would continue with Chinese characteristics dominated by domestic interests, at the same time, authorities would continue to appease its international obligations.

III Telecommunications Sector Reforms in Indonesia

A *The Beginnings: Ample Room, Too Few Players*

In keeping with practices in most countries, the Government of the Republic of Indonesia (GOI) kept telecommunications under the control the government as it

---

40 Manuel Montes and Muhammad Abdusalamov, 'Indonesia: Reaping the Market' in K S Jomo (ed), *Tigers in Trouble: Financial Governance, Liberalisation and Crises in East Asia* (1998) 179.

41 Mardjana, above n 6, 56.

42 S LingLing, 'The Brief Development of the Chinese Communications' (2000) 90 *WuHan University Press* 34.

43 See examples Peter Lovelock and John Ure 'The China Circle: Regional Consequences of Evolving Relations among the PRC, Taiwan, and Hong Kong-Macao' (Paper presented at the IGCC Conference, Hong Kong, 8-10 December 1994).

44 Fang Wang, 'Who's Hand is Telecommunication Tomorrow In?' (2003) 150 *Beijing Postal and Telecommunication* 23.

was considered to be strategically vital to national security for many decades.[45] As early as 1961, Indonesia's first telecommunications SOE PN Postel had had the privilege of being the only SOE providing domestic and international telecommunications services immune from market competition. After two decades, GOI nationalised a previously foreign investment company to establish a new SOE, PT Indonesian Satellite Corporation (Indosat). Right from its induction, Indosat had been granted exclusive rights to provide international telecommunications services, while PN Postel was restructured to become *Perusahaan Umum Telekomuniasi* (Perumtel), granted monopoly rights to provide local and long distance domestic services.[46] Subsidies and protection had however undermined efficiency and profitability. Perumtel and Indosat also followed similar faith due in part to a lack of efficiency. This led to the endorsement of Presidential Instruction No 5 in 1988 and the Ministry of Finance decrees No 740 and 741 in 1989, which was expected to turn things around.[47]

The GOI also introduced Law No 3/1989 specifically designed to increase productivity in the telecommunications sector.[48] Concurrent arrangements were in place to change Perumtel's status to a limited liability company, as well as law regulating the involvement of private companies under specific cooperative schemes. [49] Perumtel was transformed to a state owned limited liability company *PT Telekomunikasi Indonesia* (Telkom) in 1991 with Government Regulation No 25/1991. Further 'quasi-competition' was introduced with the establishment of SOE-private party cooperation schemes.[50] The cooperation schemes endeavoured to overcome the GOI budgetary financial restrains by allowing private sector

---

45 Lilia Pérez Chavolla and Rohan Samarajiva, 'Privatization, Market Liberalization and Regulatory Reform in the Mexican Telecommunication System' in Daniel J Ryan (ed), *Privatization and Competition in Telecommunication* (1997) 59, 150.

46 Ibid.

47 Safri Nugraha, *Privatization of State Enterprises in the 20th Century: A Step Forwards or Backwards?* (2004) 110-111. There are several avenues, as elaborated therein the Decree by the Ministry of Finance No 740/1989, which can be pursued to transform the poorly performed SOEs into those of better performances. These include the change of status, operation management or management contract with another party, consolidation or merger, stock split, the use of capital market arrangements, direct placement or by establishing joint venture companies.

48 The Law regulates, among other things, the transfer of telecommunications operational duties from the Government to the operator, ie, Telkom. Following the WTO classification, telecommunications services are categorized as basic and non basic (value added). Basic telecommunications services include telephone, telex and telegrams while any others are those of non-basic category. Legal entities other than the operator may join the operator providing basic telecommunications services. Those legal entities are however able to independently provide non-basic telecommunications services. See Republic of Indonesia, Ministry of State Owned Enterprises *Masterplan for the Reform of State-Owned Enterprises* (1998) II.2.1; *Services Sectoral Classification List*, WTO Doc MTN.GNS/W/120 (10 July 1991).

49 Being a limited liability company means that Indonesian basic Company Law No 1/1995 applies to it.

50 Republic of Indonesia, Ministry of Communications *Blueprint on Government Telecommunication Policies* (1999) II.5.

including foreign capital investments in this sector.[51] Early steps of Indonesian telecommunications sector restructuring had then enhanced further by privatising Indosat and Telkom in 1994 and 1995 respectively through Initial Public Offerings (IPOs) on both domestic and international exchanges.[52] Yet Indonesian telecommunications service market was still dominated by duopoly of Telkom and Indosat. Moreover both providers were able to maintain their dominant position by entering into joint ownership arrangements with most subsidiaries.[53] An overview of the Indonesian telecommunications industry following the introduction of Law No 3/1989 is in Table 1.1.

By the end of 1992, Indonesia which was then constituted the world's fifth most populous country with its about 190 million people was served by just 1.5 million connected telephone lines, representing teledensity (the number of main telephone lines per 100 inhabitants) of only 0.8.[54] With such a low teledensity, it was not surprising that Indonesia's teledensity was among the lowest in the Asian region. Access divide was apparent with around 45 percent of the lines were concentrated in Jakarta, where less than 8 percent of the total population lived.[55]

---

51 For example, since 1995 Telkom has made private arrangements with investors to enter into partnership schemes through two specific alternatives of agreement. These are revenue sharing agreements (PBH) or joint operation agreements (KSO). PBH generally allows investors to finance and construct a given project and leaves its operation including all operating costs to Telkom while revenues are shared between Telkom and the investor. In this scheme of co-operation, legal ownership of the constructed remains with the investor until expiration of the PBH agreement whereupon transferred to Telkom. With KSO agreements however, the private investor acts only as the operator of any specified Division, ie, regional service allocation, on behalf of Telkom. The KSO Agreements provided those private sector consortia, each of which involved one or more prominent international telecommunications operators, to manage and operate regional divisions for a fixed term, undertake the construction of fixed lines and at the end of the term, transfer existing and new telecommunications facilities to Telkom for agreed amount of compensation in addition to share revenue generated during the term of agreement. There were seven regional divisions and one network division, which five of them were used to be served by the KSO agreements. See PT Telekomunikasi Indonesia, Tbk (Telkom) *2003 Annual Report – Form 20F* (2004) 4A.

52 Telkom's IPO was completed on November 14, 1995. Since then, its shares have been listed on the Jakarta Stock Exchange (JSX), Surabaya Stock Exchange (SSX) and London Stock Exchange (LSX). Apart from the listing arrangements, Telkom's shares were also offered on the Tokyo Stock Exchange as public offering without listing (POWL). Similarly, Indosat was listed on the Jakarta, Surabaya and New York Stock Exchanges in October 1994. See Telkom, *2003 Annual Report* (2004) 2;Indosat, *2004 Annual Report* (2005).

53 Telkom, above n 52.

54 John Ure, *Telecommunication in Asia* (1995) 50.

55 Ibid.

Table 1.1 Structure of the Indonesian Telecommunications industry ex-ante the 1999 reform

Telecommunications services	Telecommunications operations
Basic Telecommunications	
Fixed wireline local services	Exclusive rights 1996-2010 (Telkom)
Fixed wireless local services	Limited competition (Satelindo)
Fixed domestic long-distance service	Exclusive right 1996-2005 (Telkom)
Fixed international service	Duopoly 1995-2004 (Indosat, Satelindo)
Mobile cellular service	Competition based on frequency availability
Non-basic Telecommunications	Competition exists
Customer Premise Equipments (CPE)	Competition exists

Source: Department of Transport and Communications (1999)

B *Recent Developments: Too Many Regulations, Too Little Impact*

A major contributor to market liberalization and competition is this sector was Indonesia's commitments under GATT/WTO.[56] The financial crisis in 1997 had negatively impacted on the country's telecommunications industry.[57] The unprecedented depreciation of the currency left many telephone users unable to pay their telephone bills.[58] The situation had also caused operators and their private partners (KSO) to experience difficulties in fulfilling their obligations, some of which led to protracted legal disputes. In order to reduce the severity of the impacts, the GOI approached the International Monetary Fund (IMF) for assistance.[59]

Some steps toward further market liberalization in the telecommunications industry had been acted upon. These include restructuring some regulations which probably hampered competition, further regulating the interconnection, competition watch,

---

56 For example, Indonesia had submitted supplementary schedules of commitments which include among other things deletion of economic needs test for new entrants in domestic mobile cellular telephone services, personal mobile cellular communication services and regional and national paging services. Schedules for termination of extended exclusive rights have also been forwarded. Thus exclusivity for Telkom in providing domestic long-distance fixed line services is set to expire in 2005, in 2010 for Telkom's local service and in 2004 for Indosat and Satelindo's international service. Subject to the use of networks of Indosat and Satelindo for international traffic, Indonesia is also committed to competitive supply mechanism for packed switched public data network services, telex, telegraph and internet access services. See *Trade Policy Review-Indonesia*, WTO Doc WT/TPR/S/117 (2003) 92.

57 There has been extensive analysis on the causes and consequences of Indonesia's financial crisis. See eg, Ross H McLeod 'Indonesia: Macroeconomic Fundamentals in the Lead-up to the Crisis' in R H McLeod and R Garnaut (eds), *East Asia in Crisis: From being a Miracle to Needing one?* (2000) 31, 31-48; Hal Hill, *The Indonesian Economy in Crisis* (1999).

58 Republic of Indonesia, above n 50, IV.4. A sudden depreciation of Indonesian Rupiah (Rp) towards US$ from 2,430 to 3,600 marked Indonesia's early phase of financial crisis. Subsequently Rp was further depreciated into Rp 6,000 per US$ and reached its lowest ebb of Rp17,000 within six months after the crisis first broke out. It has currently been relatively steady at the range of Rp 7,500/US$.

59 The GOI entered into an agreement with the IMF in late October 1997. The first financial assistance package provided by the IMF brought about US$10 billion from IMF and US$8 billion from the World Bank and Asian Development Bank (ADB) combined. See McLeod, above n 57, 40-42.

establishing telecommunications independent regulatory body and a clearing house for traffic and interconnection, further stipulating tariff rebalancing, fixed wireless access, granting 3G (third generation) licenses and launching universal service obligation (USO) program.[60]

Since 1997 Telecommunications Law No 36/1999 and the 1999 Blueprint became the government's primary telecommunications platform.[61] The Telecommunications Law provides key guidelines for industry reforms including industry liberalization and the facilitation of new entrants.[62] The Blueprint on the other hand depicts the profiles of future Indonesia telecommunications sector and ensuring that sound competition, effective regulatory regime, accessible telecommunications services and quality services are in place.[63] In addition, new categorization of telecommunications operators (service and network providers),[64] elimination of restrictions towards private players,[65] commercial assessments in the formation of cooperation schemes,[66] greater foreign share ownership, cost-oriented Telecommunications service tariff, and terrestrial-satellite infrastructure for multimedia communication had also been introduced.[67]

Pursuant to the new Telecommunications Law, the GOI, Telkom and Indosat entered into an agreement on 28 July 2000 to expedite early termination of both operators' exclusive rights. Instead of retaining exclusive rights on local Telecommunications fixed network and service operator up to year 2010, Telkom's exclusive rights were terminated on 1 August 2002. Rights to provide long distance services until 2005 were also terminated sooner starting from 1 August 2003; likewise, Indosat agreed to release its exclusive rights as monopolistic international direct dial (IDD) service provider on 1 August 2003.[68] At the same time, cross

60 East ASEAN Growth Area (EAGA), *Indonesia: Telecommunications Information* (2005) EAGA <http://www.eaga.or.id/indonesia/telecommunications.htm> 6 March 2005.

61 The European Union's Asia IT&C Programme for Indonesia, *Promoting Internet Policy and Regulatory Reform in Indonesia*, Assessment Report (February 2003) 7. The Telecommunications Law was passed on by the then President of the Republic of Indonesia, B J Habibie on 8 September 1999 and in accordance to its article 64, became effective one year later.

62 Telkom, above n 51, 4A.

63 The European Union's Asia IT&C Programme for Indonesia, above n 61, 7-8.

64 In the past, categorization has been based upon basic and non-basic telecommunication service providers. See Republic of Indonesia, above n 50, III.2. See also above n 48.

65 Prior to 1999, private parties were required to enter into cooperation agreements with a Service Operator, ie, Telkom or Indosat in providing basic telecommunication services: Republic of Indonesia, above n 50, III.2.

66 Government Regulation No 8/1993 and Decree of the Communications Minister No 39/1993 as the implementing regulations of Law No 3/1989 on Telecommunication allow only joint ventures, joint operations and management contracts as alternatives for cooperation with private entities (Other Entities). Government Regulation No 52 and 53/2003 however allow greater flexibility in such cooperation schemes: ibid.

67 Ibid.

68 As part of the exclusive rights early termination schemes of both Telkom and Indosat, GOI through its Ministry of Communications issued on 30 March 2004 an announcement No PM.2/2004, concerning the implementation of telecommunication restructuring. With its issuance, the GOI among other things has agreed to pay Telkom including its KSO partners an

ownership between the two operators was removed as of August 2001, Telkom and Indosat were engaged in competition essentially creating a duopolistic market structure in the fixed line market segment and leave other segments particularly mobile phone towards greater competition.

At the implementation level, the Law No 36/1999 itself opens up room for extensive regulations.[69] In an attempt to completely finish the reform agenda, the GOI announced various implementing regulations since the Law's enforcement in 2000,[70] famously known as the March 2004 Telecommunications package. Consisting of eight decrees by the Ministry of Communications, the package has two distinctive categories. One category is to regulate certain contentious affairs that so far have been left unregulated,[71] while the other is amending existing regulations and aims to fully implement the Telecommunications Law and the Blueprint.[72]

There are other legal and regulatory forces playing apart in ongoing legal and regulatory reforms, such as the basic Company Law No 1/1995, Antimonopoly Law

---

amount of Rp 478 billion after tax and Indosat to pay the Government an amount of Rp 178 billion after tax. The payment of compensation to Telkom is to be made from the 'on top' (above allocated ceiling) fund of the State Budget for the Ministry of Communications after approval by the Parliament. In addition to this early termination arrangement, the announcement also sets down other matters such as the need to release supporting regulations in order to settle interconnection problems and to amend current regulations, which turned out hampering full competition between Telkom and Indosat. The announcement also touches issues with regard to the newly established Indonesian Telecommunication Regulatory Body (BRTI) and the Telecommunications Traffic Clearance System (SKTT), tariff rebalancing, universal service obligations, fixed wireless and license synchronization for Telkom and Indosat. See Telkom, 'The Implementation of the Telecommunication Sector Restructuring' (Press Release No Tel 157/PR000/UHI/2004, 31 March 2004). See also *Bringing competition into regulated sectors: Indonesian experience in preparing framework for competition in the telecommunication sector*, OECD Doc DAF/COMP/GF/WD(2005)5 (2005) (Contribution from Indonesia 12 Jan 2005).

69 The Law, for example has called for at least 19 government regulations in its text although it is worth noted that one government regulation may cover one or more issues at the same time which would eventually reduce the number of implementing government regulations.

70 See eg Government Regulation No 52/2000 concerning service provisions, which stipulates the categorization of telecommunication operators as network, service and specific-purposes telecommunication operator, and Government Regulation No 53/2000 which stipulates the use of radio frequency spectrums and satellite orbits. Further down the implementing regulations lie many Ministerial Decrees including a Decree by the Ministry of Communications No KM 21/2000 on Telecommunication Service Operations, listing all other valid Ministerial Decrees.

71 Including in this category are regulations on interconnection tariff (No 32/2004), enforcing competition on the operations of fixed network and basic telephony services (No 33/2004), universal service obligations (No 34/2004) and the operations of fixed local wireless (No 35/2004).

72 Falling under this category are provisions of national telecommunication fundamental technical plan (No 28/2004, amending Ministerial Decree No 4/2001), of telecommunication network operations (No 34/2004, amending Ministerial Decree No 20/2001), of telecommunication service operations (No 30/2004), amending Ministerial Decree No 21/2000) and of public telephony internet service operations (No 31/2004, amending Ministerial Decree No 23/2002).

No 5/1999, the Consumer Protection Law No 8/1999, and SOEs Law No 19/2003. In addition, Indonesia has been promoting decentralization since 2000, under Law No 22/1999 which the government to delegate certain authorities to regional or district councils, overtime would influence overall regulatory distribution of power. Compounding to this, Law No 7/1984, an accession to the World Trade Organization (WTO) also shapes any strategic policy decisions.[73]

C *Current Structure: The Divide Remains*

As of June 2004, Indonesia has seen an increasing number of both teledensity and telecommunications carriers.[74] Telkom however still constitutes dominant operator with more than 98 percent of market share in the fixed-line service. For mobile telephone market, three major national operators dominated 98 percent of market share.[75] In the long-distance market, Telkom serves as major player with Indosat just entering the market. There are currently seven licenses for Voice over IP (VOIP) operators and 20 for operators of broadband wireless access using 2.5G, 3.3G, 5.6G, 5.7G, and 10.5G bands. As for fixed line, the duopoly of Telkom and Indosat remains.[76]

The liberalization has so far provided equal access to the privileges, those who live in the capital city or other big cities which are to less than half of Indonesian 66,778 villages.[77] As of June 2004, 43,022 villages have no access to telephony and it is for this reason that USO regulatory instruments were introduced.[78] In addition, USO

---

73 With reference to telecommunications, Indonesia's commitments cover among other things, exclusive rights on telecommunication service providers, percentage on foreign participation and other things as set out therein the WTO Reference Paper, which include provisions related to transparency, competition, interconnections and an independent regulatory body. See Giri Suseno, 'Siaran Pers Mastel' (Press Release, 7 July 2003).

74 In 2003, there were 8.5 million fixed lines in service with teledensity of 3.54%. As of 2004, there were a total of 8.7 million fixed lines and 22.7 million cellular subscribers, increasing the teledensity to -15%. As of March 2002, there are 12 telecommunications carriers in Indonesian. See State Ministry for National Development Planning/National Development Planning Agency, 'Infrastructure Road Map' (paper presented at the Infrastructure Summit 2005, Jakarta, 17-18 January 2005) 49; 'ICT market penetration still low', *The Jakarta Post* (Jakarta), 21 March 2005, 3; Asian Info-Communications Council, *Country Status Report: Indonesia* (2003) <http://www.aic.or.jp> at 21 March 2005.

75 In the mobile market segment Telkom through its subsidiary Telkomsel (Telkom cellular) nonetheless catches the biggest portion (58%). The other two carriers are Indosat-Satelindo and Excelcomindo which compete for the remaining major share. See Asmiati Rasyid 'Duopoli Perlu Diterminasi Secepatnya' *Kompas* (Jakarta) 16 September 2004; Indonesian Chamber of Commerce and Industry (KADIN), *The Indonesian telecom industry at a crossroad* (2000) <http://www.indotradezone.com/Informasi/Telecom.html> at 2 March 2005.

76 The data are based on the GOI submission into the 30th meeting APEC Telecommunication and Information Working Group, 19-24 September 2004. See APEC, *Telwg30/PLEN/21: Indonesia's Regulatory Update* (2004) <http://wwwapectelwg.org> at 6 March 2005.

77 As of June 2004, the capital city of Jakarta for example has teledensity of 25 while other big cities are ranging from 11 to 20. On the contrary, rural areas have teledensity as low as 0.2: ibid. See also State Ministry for National Development Planning/National Development Planning Agency, above n 74, 49.

78 Article 16 of Law No. 36/1999 on Telecommunications.

program aims to enhance telephony access to information access, develop information access as a fundamental for information society, and being local economy catalyst.[79] Thus in short term, the main USO goal is to provide telephony access for those >43,000 rural villages, while endeavours to attain the medium and long-term goals of better quality access and service provisions to all and community access to information.[80]

An overview of the Indonesian telecommunications structure following the introduction of the 1999 Law is provided in the following Table 1.2.

Table 1.2 Structure of the Indonesian Telecommunications industry ex-post the 1999 reform

SEGMENT						STRUCTURE	OPERATIONAL Until 2004	Until 2005	Until 2010	After 2011
TELECOMMUNICATIONS	PUBLIC NETWORK	SERVICE	MULTIMEDIA	INTERACTIVE MULTIMEDIA		COMPETITION	TELKOM + INDOSAT + Other Operators (as per June 2004: 7 VoIP Licenses for single 9 with access code 010x and double stage operations)			
				INTERNET		Competition	TELKOM + INDOSAT + Other Operators (as per June 2004: 190 ISP Licenses, 112 active)			
			FIXED	FIXED INTERNATIONAL TELECOM SERVICE		Competition (Exclusivity)	INDOSAT (major player) SATELINDO	+ TELKOM + Other Operators		
				FIXED LONG DISTANCE TELECOM SERVICE		Competition (Exclusivity)	TELKOM (major player)		INDOSAT + OTHER OPERATORS	
				Fixed Local Connection Tel Service	Cable	Competition (Exclusivity)	TELKOM + KSO + BBT (98%)			+ Other Operators (3)
					Radio	Competition	TELKOM + Other Operators			+ Other Operators
		SERVICE		Value Added Services		Competition	OPEN			
			MOBILE	GMPCS		Competition	TELKOM + INDOSAT + Other Operators			
				Cellular		Competition	TELKOM + INDOSAT + Other Operators (3 major national players (98%))			
				Trunking		Competition	OPEN			
				Public Pager		Competition				
			Leased Circuit: Satellite Transponder & Resell			Competition	OPEN			
			BROADCASTING			Competition	OPEN			
	SPECIAL TELECOMMUNICATIONS NETWORK					No Competition	Indonesian Radio (RRI) + Indonesian TV (TVRI)			
			Close Usage		SRR, PtP	Unregulated, except frequency usage				
					Other	No Competition	Private			
			Government			No Competition	Government			
			Ministry of Defence & Security			No Competition	Military Purposes			
EQUIPMENT			Non-Customer Premise Equipments (CPE)			Competition	OPEN			
			CPE							

Source: modified from the Department of Transport and Communications (1999)

---

79 APEC, above n 75.

80 Ibid.

D *The Regulator: Business as Usual*

Prior to the establishment of Indonesian Telecommunications Regulatory Body (BRTI) on 11 July 2003, Indonesian telecommunications industry was governed by the Directorate General of Post and Telecommunications (DGPT), which was operating under the auspices of the Department of Communications. Since BRTI's induction the structure of Indonesian regulatory authority has been changed. Altered to become an independent regulatory body under the Minister of Communications decree No 31/2003,[81] the BRTI comprise of the DGPT and the Telecommunications Regulatory Committee (the Committee).[82] The establishment of this body was driven in part by Indonesia's obligations under GATT and later WTO.[83]

One of the BRTI's main functions is to ensure transparent, independent, and competitive Telecommunications market. In order to ensure transparency, a system for handling all interconnection matters named Telecommunications Traffic Clearing System (SKTT) has been established.[84] Consequently the regulatory, supervisory, and controlling functions were transferred from the Minister to the BRTI, consisting of five members with the director general of the post and telecommunications acting as the chairman of the Committee.[85] The members were installed on 19 December 2003 and have commenced their duties since January 2004. The existence of Indonesian BRTI appears to conform to global practices and is yet riddled with controversies.[86] On the one hand, BRTI represents Indonesia's global commitments to progressively liberalise its trade in services.[87] On the other

81 The decree serves as an implementing regulation towards the main Telecommunications Law No 36/1999. Specifically, the establishment of BRTI was a conditional requirement set by the House of Representative Commission IV in allowing the GOI to raise telephone rates. See Eva C Komandjaja, 'Mastel Suggests Restructuring of BRTI' *The Jakarta Post* (Jakarta) 4 December 2003.

82 Telkom, above n 51, 3.

83 For details see WTO/GATS special session on telecommunications services of 25 June 1999. Also the current draft of schedule has detailed Indonesia's up-to-date specific commitments of telecommunications services with regards to limitations on market access and on national treatment including its additional commitments within the 4 modes of supply: cross-border supply, consumption abroad, commercial presence and presence of natural person. *Indonesia: Draft Consolidated Schedule of Specific Commitments*, WTO Doc S/DCS/W/IDN (24 January 2003) accessible online through http://docsonline.wto.org.

84 Through this system, the regulatory body expects to obtain accurate data on the profile of interconnection traffics among operators which can then be used to calculate traffic congestion so as to ensure transparency in charging fees: ibid.

85 Appointment and disposal of committee members remain an exclusive right of the Minister. Members are having a two-year service period with a possibility of re-appointment for a maximum one service period. The Committee is to report to the incumbent Minister each quarterly or in such other times as deem necessary and any BRTI's decision represents and takes the form of a director general decree. See articles 8-9, 11-12 of the Ministerial Decree No 31/2003.

86 ITU *Trends in Telecommunications Reform 2002: Effective Regulation* (4th ed, 2002).

87 Article 5 of the WTO Reference Paper has recommended the establishment of a regulatory body which is separate from, and not accountable to any suppliers of basic telecommunications services and of which decisions of and the procedures used are impartial with respect to all market participants.

hand, the operations of BRTI had showed inconsistencies and deviations from international practices.

The problem lies with its independency although the Ministerial Decree No 31/2003 has made it clear that independency is one of its three main characteristics, along with transparency and fairness. Issues of independency are apparent by the presence of the director general of post and telecommunications as chairman of the Committee and the absence of telecommunications association representatives in its membership.[88] Given a position as the chairman, the director general could influence decision making in the BRTI because even though the Committee has the authorities to make decisions either through consensus or voting, final decisions require approval from the director general.[89] Things get more complicated in the case of Telkom where GOI is the majority shareholder. In this particular circumstance, the structure of BRTI indicates that the GOI has failed to draw a line separating its functions as the regulator and as an industry player. Considering administrative position that the director general holds, it is very unlikely that BRTI would be able to make independent judgments free from the government's interference as logically assessments will benefit Telkom in which the GOI is the majority shareholder. The protracted conundrums on long distance code access might well illustrate this point. Enabled with end-to-end national network coverage, the incumbent Telkom has been largely benefited by being able to supply international direct dialing service since 7 June 2004. Yet Indosat's ability to do so in the domestic long distance segment has to be imperceptibly deferred for as long as another five years. The is due to the unprecedented judicial review suit filing to the Constitutional Court just few days prior to Indosat's long-distance access scheduled to activate on 1 April 2005.[90] This strategy has been considered as anti-competitive and breaches policies stipulated in the article (1) O of the Ministerial Decree No 28/2004.[91]

E *Post Privatisation Syndrome: Two Steps Forward, One Step Back?*

The emergence of the first wave of Indonesian SOE privatisation program came about as early as 1988.[92] Privatisation was initiated along with the deregulation in the banking sector.[93] By the end of 1993, privatisation initiatives across different sectors intensified and reached their breaking point in 1994 when Indosat 'went

---

88 See article 11 of Ministerial Decree No. KM31/2003. See also article 5 of Law No. 36/1999.

89 Komandjaja, above n 81.

90 The Ministerial Decrees being filed for judicial reviews are those of No. 28/2004, 29/2004 and of No 30/2004. These three Decrees provide a basis for long distance code access transfiguration as stipulated by the Ministerial Decree No 4/2004 of 13 May 2004.

91 J B Basuki, 'Kebijakan SLI PT Telkom: Normally and Illegally Closed' *Kompas* (Jakarta) 2 August 2004. Telkom's anti-competition conducts have been largely indicated, such as obstructions toward Indosat's 001 and 008 code access in several occasions which led to investigation by the Indonesian Competition Watch (KPPU).

92 Muhamad Suhud, 'Privatization: A Review on the Power Sector Restructuring in Indonesia' (2002) INFID <http://www.infid.or.id> 16 March 2005.

93 Ibid.

international' by listing its shares overseas and domestically, followed by Telkom a year later.[94]

The exercise served more than just 'ownership transfer from government to private'.[95] There was an expectation of improving efficiency, providing positive contribution to the national budget and job opportunities while at the same time lessen the burden of public administration.[96] In the aftermath of the financial crisis however, the main objective of the second privatisation wave has been alleviation of the government's budgetary deficit.[97] More importantly, it served as a key structural adjustment strategy recommended by the IMF and supported by the World Bank and ADB.[98] It functioned as 'conditionality' to obtain support, mostly foreign loans from these institutions and other donor groups. Until the end of the term of the agreement with IMF in 2003, the effectiveness of the assisted privatisation programs has been questioned.[99]

Under tremendous pressure from the IMF, Indonesia had to act quickly to privatise its SOEs. Thus target to privatise 150 SOEs within the timeframe of 1998-2008, bypassing many processes, in many cases the privatisation took place before internal restructuring carried out, setting of performance criteria, or had in place many supporting legal infrastructure.[100]

---

94 Ure and Vivorakij maintained that development in the case of telecommunications has double meanings: efforts to bring telecommunication within reasonable access to people and attempts to modernize the economy through information technology. See J Ure and A Vivorakij in D J Ryan *Privatization and Competition in Telecommunication* (1997) 7-11.

95 See eg Ure and Vivorakij, ibid. See Nugraha, above n 47, 14-15. Ure and Vivorakij warned however that a more exacting definition would require such a transfer to give sufficiently the private operators substantive independent power. The ambiguity of the term was well illustrated by Nugraha when he exemplified many and often contradictory meanings of privatization from political-philosophical, ideology, economic and legal points of view.

96 Suhud above n 92.

97 Ibid.

98 Ibid. The agreement between GOI and the IMF was manifested in the Letter of Intent (LoI) and Structural Adjustment Program. The IMF-led Indonesian reform programs are based on the presumption that the economic difficulties stem largely from structural distortions. Thus any reform program will not be effective in restoring macroeconomic stability unless these distortions are addressed sufficiently. See David C L Nellor 'The Role of the International Monetary Fund' in R H McLeod and R Garnaut (eds), above n 57, 245, 258-259.

99 In Indonesia, the opposition towards IMF policies is articulated by a group of 35 leading economists under 'Indonesia Bangkit' who campaigned strongly to end Indonesia's assistance programs with the IMF. See M Chatib Basri, 'Economic Update 2003: After Five Years of Reformasi Ekonomi, What Next?' in M C Basri and Pierre van der Eng (eds), *Business in Indonesia* (2004) 39, 50. For others, see eg, McLeod above n 57, 45-47, Hill, above n 57, 78-80.

100 There is an imminent danger in pursuing a reform agenda where privatization is placed before separate, independent regulatory authorities are put in place. In his study involving 200 countries in 1985-1999, Wallsten found that having privatization programs done before the establishment of sound and effective regulatory authorities impair telecommunications investment and telephone penetration. Moreover, he also found that investors require a risk premium to invest in countries where regulatory authorities remain unclear. Scott Wallsten *World Bank Policy Research Working Paper No 2817* (April 2002) 1-15.

In doing so Indonesia preferred public offerings and private sales to other methods of privatisation such as management buy-out and concessions.[101] The set targets and limited time frameworks had also left the GOI with little flexibility in exercising other alternatives of SOE restructuring programs. There was also a lack of preparatory studies carried out.[102] Another issue is the existence of golden share arrangements.

Nationalism is endemic to Indonesia's territorial integrity.[103] In order to safeguard the national interests, a 'protection mechanism' was introduced by the GOI, known as the 'golden share arrangements'.[104] Based on legal requirements of share ownership and corporate control, golden share arrangements find its justification on Article 46(4) of Indonesian basic company law No 1/1995, which classifies golden shares as a priority shares and allow corporate control to remain in government hands.[105] With the GOI holding an aggregate interest of approximately 51.19 percent of the issued and outstanding shares of Telkom, the dominant position of

---

101 With management buy-out, the management is given the opportunity to control the company's assets. Concession arrangements on the other hand include joint operations wherein the private sector is given a work contract to take over an SOE in stages. See Suhud above n 92.

102 The Union Network International (UNI) Telecoms has indicated that the continual stream of privatization initiatives have not been to the advantage of workers and consumers. The absence of studies on Indonesian telecommunications privatization programs has therefore urgently poses the need to conduct further research whether or not social benefits have been increased by recent privatization programs of telecommunications SOEs. See UNI Telecoms 'Regulation and Sustainable Telecommunication Industry' (2004) United Network International <http://www.union-network.org> 15 March 2005.

103 Nugraha, above n 47, 226.

104 Golden share clauses can be found in almost articles of association of the privatized SOEs, including those of Telkom and Indosat (telecommunication), Bank BNI, Semen Gresik (cement manufacturer), Timah and Aneka Tambang (mining companies). See Nugraha, above n 47, 224. The adoption of golden share mechanism has also been popular and implemented in for example Portugal (Law No 11/1990), France (Decree No. 93-1298 of 13 December 1993 concerning *Société Nationale Elf-Aquitaine*), Belgium (Belgian Royal Decree of 19 June 1994 concerning *Société de distribution du gaz SA*), Spain (Law No 5/1995 and implementing decrees creating special powers in respect of Repsol SA, Telefónica de España SA, Tabacalera SA and Endesa), Italy (special Italian Government's powers retained in ENI SpA and Telecom Italia SpA), United Kingdom (golden share arrangements in British Airport Authority, BAE Systems, National Grid Transco, British Energy, Scottish Power, Southern Energy and Rolls Royce) and Germany (the Federal Act 21 July 1960 under which the *Volkswagen Aktiengesellschaft, Wolfburg* was privatized in 1960). See Johannes Adolff, 'Turn of Tide?: The 'Golden Share' Judgments of the European Court of Justice and the Liberalization of the European Capital Markets' (2002) 3(8) *German Law Journal* 1; Jeremy Grant and Thomas Kirchmaier, 'Corporate Control in Europe' (Winter 2005) 2(2) *Corporate Ownership and Control* 65; BBC, '*BAA 'golden share' ruled illegal*' (13 May 2003) *BBC News* <http://news.bbc.co.uk/1/hi/business/3022809.stm> 26 February 2005.

105 Article 46 of Law No 1/1995 basically allows a company, specified by its article of association to have one or more classes of shares (Art 46 (1)) which entitle holders of a particular class of shares equal rights (Art 46 (2)). In cases where a company has more than one classification of shares, one of such classifications should be of ordinary shares (Art 46 (3)). Article 46 (4) specifies other classes of shares which might (i) give the shareholders special voting rights, (ii) be in the forms of revocable and/or convertible shares, (iii) give the holders cumulative or non-cumulative dividends, and which (iv) give the holders preferential rights to dividends and company's assets in the event of dissolution.

the GOI in Telkom is reinforced by its holding the non-transferable *Dwiwarna* share which has special voting and veto rights over elections and removals of executive directors and commissioners and over amendments to the Articles of Association, including matters such as company merger and dissolution, increase and decrease of authorized capital and decrease of subscribed capital.[106]

There is however several problems associated with the adoption of golden share mechanism by the GOI. From internal legal points of view, the existence of golden share clauses in Telkom's Articles of Association conflicts with and ruins essential pillars of current Indonesian basic company Law No. 1/1995. At first, such clauses are in serious breach of powers and authorities of the Shareholders' Meeting to nominate and appoint directors.[107] It is obvious that the powers retained therein the golden share are used to nominate and appoint directors who can protect the interests of majority shareholder, ie, the GOI. Consequently from an economic perspective, golden share arrangements have become unattractive private investors because of the bias towards government control. This becomes very harmful as international rating agencies generally value the GOI (political) governance as 'unfavourable'. Golden share arrangements also infringe main principles of GCG, namely accountability, independency, transparency, responsibility and fairness. One such indication is the nomination and appointment of members of the board of commissioners by *Series A-Dwiwarna* shareholder. Under such a system, it is unlikely that the board of commissioners is able to perform its function as the company's internal control mechanism. It is also anticipated that golden share clauses precipitate several other articles of the basic company law No 1/1995 to malfunction.[108] Global practices suggest that the use of golden share mechanism to protect the newly privatised SOEs is likely to become increasingly scarce. Several current rulings by the European Court of Justice illustrate this tendency and might become important precedents worldwide.[109]

It is clear that current Indonesian restructuring programs aim mostly at solving short-term problems. Although the problems leading to the financial crisis are

---

106 Nugraha, above n 47, 224. Compare for example with golden share clauses therein Indosat's Articles of Association. Currently owning a 15% equity stake and one 'Series A' special share (golden share), the GOI retains its special voting and veto rights over certain strategic matters by entering into a Shareholdes' Agreement with ICL, a subsidiary company of Singapore Telecom and Telemedia (STT) which is owned by Singapore based Tamasek Holdings (Private) Limited. With 'golden' powers similar to those in Telkom, GOI's ability in Indosat is limited to elect and remove the Board of Commissioners and Directors by appointing two nominees for each governing body. Should GOI reduce its ownership below a certain number of shares while remain as the holder of the golden share, its power is reduced to nominating one Commissioner and one Director. See Indosat above n 52.

107 Article 80 (1) of Law No 1/1995.

108 This includes for example Article 54(2) of Law No 1/1995 which stipulates protection mechanisms for minority shareholders who can sue the company in cases where decisions of the AGSM, Directors or Commissioners are detrimental to their interests. In consequence to the operations of the golden share clauses, a minority shareholder might not be able to sue where a 'golden veto' has prevented amendments to the Company's constitution to take place.

109 Christine O'Grady Putek, 'Limited but not Lost: A Comment on the ECJ's Golden Share Decision' (2004) *Fordham Law Review* 2219, 2219-2283.

related to poor governance, the international financial institutions, led by the IMF and ADB have focused on market liberalisation through privatisation. However, for market forces to function properly, good governance is crucial.[110]

As discussed earlier, Indonesia has quite an extensive coverage of supporting legal and regulatory framework to enable telecommunications sector reform to function properly. This however is not supported by strong enforcement mechanisms, and most basically legal culture.[111] Even though legal and regulatory reform has been backed up with some improvements in the legal system such as the establishment of a commercial court, appointment of ad hoc judges and appointment of new judges to the Supreme Court, judicial corruption represents a significant impediment for successful reform. Indonesia would continue to suffer from woefully poor legal enforcement, mostly related to corruption, collusion and nepotism (KKN). Thus unless a culture which outlaws KKN exists, whatsoever good reform plans will gain little benefits.

Good corporate governance (GCG) is vital for ensuring corporate sustainability and accountability. Major telecommunications operators as part of the requirements have put this into practice.[112] In addition, since 1997 Indonesia has also put in place corporate governance-related reforms by establishing a National Code of Corporate Governance in the form of a Decree of the Minister of SOE.[113] Telkom's annual reports does, to a certain extent, illustrate its attempts to comply with these relatively new standards of GCG. Whilst questions over 'form versus substance' are lingering, Telkom got the apparatus of GCG in place.[114]

Establishment of the nomination and remuneration committee is however superfluous as any decision it makes with regards to nomination and remuneration of the company's executives is subject to approval and rectification by the shareholder of *Series A Dwiwarna*. In addition, key personnel in the company's GCG institutions are generally those in the inner circle of politically powerful. Telkom's 2003-2004 President Commissioner, for example is the ex state minister

---

110 For a discussion on the trilogy of governance, the elements and their supporting pillars, see F A Alijoyo, 'Trilogy of Governance' (2004) *Republika* (Jakarta). Similar approach has also been taken by Inada who uses the concept of governance to complement the limitations of neo-classical economics which neglecting non-economic factors in its developmental studies. Thus in his study about Indonesia, the concept of governance is used to explain important non-economic factors such as institution, public sector management, political process and the role of civil society. See Juichi Inada 'Governance Factors in Indonesian Economic Development' in Yasutami Shimomura (ed), *The Role of Governence in Asia* (2003) 137, 137-138.

111 The absence of supportive legal culture has been indicated as the culprit of Indonesian governance system. For further details see Benny Tabalujan, 'Why Indonesia Corporate Governance Failed' (2002) 15(2) *Columbia Journal of Asian Law* 141, 162.

112 Jakarta Stock Exchange (JSX) Regulation No I-A. In addition, the JSX has also been instituting the 'annual report award' program to support better corporate governance practices.

113 Decree No 117/2002 of the Minister for SOEs.

114 For establishment, objectives, duties, responsibilities and authorities of each committee, see Telkom's 2002 and 2003 Annual Reports.

for SOEs which again leaves independency of the board of commissioners with a big question mark.[115]

The establishment of Indonesian information and communications society (MASTEL) is however a good start for civil society empowerment. Other telecommunications industry associations also open up sufficient room for public contribution towards the industry's overall improvements. And together, these groups represent opportunities for self regulating the industry through soft-law arrangements to complement the government's relatively weak legal and regulatory enforcements due to excessive red-tape bureaucracy and rooted problems of corruption, collusion and nepotism. At this stage, privatisation of telecommunications has been partial and there is no certainty that full privatisation is on the government's agenda.[116]

IV TELECOMMUNICATIONS SECTOR REFORMS IN CHINA

A *Initial Stage of Modernisation: Unmaking a Legal Monopoly*

Telecommunications industry in China commenced in 1870 with the construction of the first submarine cable by a British company and in 1879 when the Chinese army laid the first landline. Since then, services in telegraphs, telephones and wireless communications were gradually introduced into China and much of the controls were held in Foreign Service providers.[117] After Communist party took over power in 1949, the party has kept a tight control on the construction and operation of the telecommunications in China.[118] The sector was consolidated under a single authority and two operators – the PRC Ministry of Post and Telecom (MPT) and Provincial Posts & Telecoms Bureaus (PPT).[119] Apart from certain telecommunications infrastructures operations delegated to the Ministry of Electronics Industry (MEI) and the Chinese People's Liberation Army (PLA), MPT

115 During the period of March 1998 – October 1999.

116 Indonesia's reform paths have been similar to its Asian counterparts perceiving that privatisation of state-owned telecommunications sector would further economic development objectives. See Carsten Fink, Aaditya Matoo and Randeep Rathindran 'Does Sequencing Matter? Regulation and Privatization in Telecommunication Reform' (Working Paper No. 2909, World Bank, October 2002) 1-18. In their paper, Fink, Matoo and Rathindran analyzed the impact of policy reform in basic telecommunication on performance. Using a sample of 86 developing countries across Africa, Asia, the Middle East and Latin America over fourteen years period of time (1985-1999), they found that comprehensive reform programs (privatisation, competition and independent regulatory authorities) lead to much better performance in terms of higher mainline percentage and productivity compared to partial or no reform arrangements.

117 Zhou He, 'A History of Telecommunication in China: Development and Policy Implications' (1997) *Telecommunication and Development in China* 56.

118 E Sautedé, 'Telecoms in China: Towards a Post-WTO Shock Therapy?' (2002) *China Perspectives* 9.

119 Ken Zita, 'Modernising China's Telecommunication, London' (1987) *The Economist* 23.

and PPTs enjoyed exclusive powers to plan, construct, operate and regulate the country's public networks.[120]

With near absolute control the temptation to be complacent and gradually sluggish is conceivable. MPT's substandard performance has undermined the industry for many years. During 1970s and 1980s, MPT was able to vast a considerable amount of subsidies and protections from the central Beijing government. In addition, was given a free reign to retain high proportion of profits generated, which led to diverging outcomes. On one hand, the telecommunications infrastructure enjoyed a substantial progress to amass the latest technologies in the world. On the other hand, the subscribers to the services were charged by outrageously high prices and yet receiving poor quality services.[121]

Similar to Indonesia, China has low teledensity in its initial stages of development. In the early days after the establishment of the People's Republic of China, the total capacity of the switching system was just over 310 thousand lines with 208,750 telephone subscribers. The telephone density was only 0.05 percent.[122] From 1949 to 1977, telecommunications developed gradually because telecommunications was not a priority in the overall developing process. By the end of 1977, the telephone density was only 0.36 percent, increasing less than 0.02 percent every year.[123]

Since 1978 the Chinese government has been performing an interesting balancing act. On the one hand, embracing economic development by acquiring information technology and attracting foreign investment to improve efficiency and stimulate economic growth. On the other hand, wanting to retain the traditional levers of control over national industrial policy and maintaining a monopoly structure in many key sectors including telecommunications. It reflects Chinese government's fear that a complete liberalisation will erode their powers.[124] Even with the '4 modernization process'[125] in place, they took a 'wait and watch' approach that explains many lengthy bureaucratic processes in their decision making.

120 Yanrui Wu, 'China: Growth and Reform in Telecommunication' (2004) *Telecommunication Reform in the Asia-pacific Region* 220-221.

121 By using fix line phone as an example, in 1992, to install a fix telephone line into a normal household, it could take about 4 months waiting period and cost about RMB2571 yuan (or AUD$500), which was almost 6-month salary for an average income worker.

122 Liang Xiongjian, 'Development and Regulatory System Reform of Telecommunications Industry in China' (paper presented at the College of Management & Humanities Annul Conference, Beijing University of Posts & Telecommunication, 2002).

123 Statistics database, PRC Ministry of Information Industry, <http://www.mii.gov.cn/mii/hyzw/tjxx.html> 28 May 2003.

124 He above n 117, 29.

125 '4 modernization processes' was the slogan used in China at the beginning of overall domestic reforms. The 4 modernization processes cover agricultural, industrial, technological, and national defence modernizations.

Nevertheless, the process of re/de regulation in Telecommunications came about in 1990s pressured by international trends as well as domestic factors.[126]

B *Recent Developments: A Very Chinese Affair*

In a single party regime, policy-making has always been a sensitive issue amongst various stakeholders in China. Any minor change to the existing practices would take months or years to actualise. Moreover, no problems in telecommunications can be dealt with in isolation by considering the nature of this industry, which therefore drags the policy making process even longer.[127] The State Council after years of hesitation and behind the scenes negotiation acknowledge the importance of the information age and the needs for efficient flow of information to exist for economic reforms to succeed.[128]

Another motivation for telecommunications reforms was the realisation of this as a lucrative business. This is the same reason that makes reforms difficult as various stakeholders would literally 'wage war' amongst themselves for a share of the profit stream.[129] Thus, lengthy bargaining plagues the development of the regulatory regime in Chinese telecommunications. The negotiated outcome resulted in the introduction of limited competition dominated by a small number of players.[130] Observers haled this process as 'turf warfare'.[131]

As part of the socialist market economy plan, the Directorate-General of Telecommunications (DGT) was separated from the postal operations of the MPT's business and corporatised to become a self-financing operator – China Telecom in 1995. The aim was to establish MPT as an independent regulator. However, the new management in China Telecom had strong personal connections with MPT management,[132] which enables China Telecom to hang on to its dominance and

---

126 Liangchun Yu, Sanford Berg and Qing Guo, 'Market Performance of Chinese Telecommunication: New Regulatory Policies' (2004) 28(9-10) *Telecommunication Policy* 715-732.

127 Ibid.

128 John Ure, 'Telecommunication in China — More than was Bargained For?' (1997) 2 *New Technology Quarterly* 34.

129 See example in Xu Yan, Niall Levine and Douglas Pitt, 'Competition Without Privatization: The Chinese Path' in Stuart Macdonald and Garry Madden (eds), *Telecommunication and Socio-Economic Development* (1998) 375–392. See also example in 'Beijing Telecom: China's Role Model' (2000) 34(11) *Telecommunication.*

130 Ure, above n 128.

131 See, for example, Peter Lovelock and John Ure, 'Telecommunication Policy-Making in China: A Two-Tier Bargaining Model' (Hong Kong Centre of Asian Studies, University of Hong Kong, 1998). See also Ure, above n 128.

132 Management level in China Telecom was mainly from the former MPT officials. In fact, some of the senior managers of directors in China Telecom came from MPT. See example in Becky P Y Loo, 'Telecommunication Reforms in China: Towards an Analytical Framework' (2004) 28(9-10) *Telecommunication Policy* 697-714.

enjoyed certain policy privileges. In particular, China Telecom seemed immune from public dissatisfaction.[133]

However this domination attracted many potential challenges. Other ministries started to look for their ways to get a 'slice of the cake'. Finally in 1993, China Teleom's legal monopoly was curtailed and the State Council approved another market entry, the JiTong Communications Company (JiTong), to roll out its own data communications network in competition with China Telecom.[134] The Ministry of Electronics Industry (MEI) was the principal patron of the new venture.[135] The relationship between JiTong and MEI was similar to the relationship between China Telecom and MPT. In the meantime, the MPT remained the agency responsible for the development and enforcement of regulatory policy.

A second carrier rivalling MPT was launched after intense political bargaining, China Unicom opened in 19 July 1994.[136] Again MEI and the Ministries of Railways and Energy were the sponsors of China Unicom. Another interesting twist is that JiTong was one of the original shareholders in China Unicom.[137] Their involvement was politically determined, and their level of participation operational issues was often minimal. In addition, each stakeholder was driven by his or her own agendas.[138] To complicate matters, other ministries were getting involved, such as the People's Liberation Army (PLA), who is equally an important player in this political arrangement. In a move to divert the threat from new competitors, the MPT entered into a joint venture with the PLA to build and operate CDMA cellular networks.[139]

Since MPT embraced both regulatory and operational responsibility, Unicom as an entity outside the MPT seem to encounter many problems with China Telecom. In fact, Unicom faced the same problems all new entrants face against China Telecom. There were no agreed terms for revenue-share or universal service obligation. Unicom lacked vital resources to develop and was therefore more inclined to look for overseas technical partners and finance, reason enough for the MPT to oppose foreign participation on any terms that might rival their position.[140]

---

133 Yanrui Wu, 'Growing through Deregulation: a Study of China's Telecommunication Industry' (Paper presented at the Workshop on 'Telecommunication Reforms in the Asia-Pacific: Can Developing Countries Benefit from the Experience of Developed Countries', Jakarta, November 2000).

134 Alex Tan, Zixiang, 'Product Cycle Theory and Telecommunication Industry – Foreign Direct Investment, Government Policy, and Indigenous Manufacturing in China' (2002) 26(1-2) *Telecommunication Policy* 18.

135 Ibid.

136 Overview of the company, China Unicom Website, <http://www.chinaunicom.com.cn/chinaunicom/about/about.html> 1st July 2004.

137 Zixiang, above n 134.

138 Ure, above n 128, 90.

139 Ibid 97.

140 John Ure, 'The Chinese Telecommunication Market' (Paper delivered to the Business and Technology Exchange Forum on Telecommunication, Hong Kong Industrial Technology Centre Corporation Tech Centre, Kowloon, 14th-15th September 1995).

C *The 1998 Shakeup: MII and the New Market Topography*

Political lobbies led by MEI, MOR, MEP, China International Trade and Investment Corporation (CITIC) and other interests groups had brought the most significant reform to the telecommunications sector in 1998.

In March 1998, whilst reforming the Chinese bureaucracy, MEI and MPT were merged with State Radio Regulation Commission to form a new ministry – Ministry of Information Industry (MII). MII was to be the principal regulator of the Telecommunications and information industry.[141] This reform was designed to set up an independent regulator. Its mandate was to introduce more competition,[142] and is responsible for policy recommendations, regulation of fixed, mobile, satellite and electronic telecom networks and manufacturing; overall planning including radio and TV broadcasting and cable TV networks.[143] The leadership of the MII included Wu Jichuan, the minister,[144] five vice ministers; two of which are former MPT vice ministers and three were former MEI vice ministers. Wu Jichuan's appointment along with two other vice ministers was significant as this suggests that the former MPT's influence would continue in this sector.

Yet after 1998 restructure, the battle for domination in the telecommunications sector persisted. During 1999-2000, the newly established MII led the market through a complicated restructuring program to accommodate competing interests groups. As a compromise, ministries' negotiation brought about new telecommunications topography with a total of seven SOEs in 2000, breaking up China Telecom's four divisions of services into separate entities. Consequently, four independent companies were formed. They are responsible for the fixed line, mobile, paging and satellite communication services, respectively. The fixed line services maintained the name China Telecom. The new China Telecom was officially incorporated on 17 May 2000.[145] The mobile service department of the old China Telecom became China Mobile,[146] which was established on 16 May 2000. A new company, China Satellite,[147] which would provide satellite telecommunications services, was also approved by the State Council. The paging arm of the old China Telecom had then merged with Unicom. In particular, after the restructuring, the

141 The new MII was established with the previous powers from MPT, MEI, MRFT plus satellite networks and orbital slots of Aviation Industries of China, China National Aerospace Industry Corp + SRRC, Golden Projects Office, Leading group on the Informatization of the Economy. As the regulator in telecom industry, the role of MII also assumed the telecommunication and information responsibilities of the Ministry of Radio, Film & Television (MRFT), the China Aerospace Industry Corporation, and the China Aviation Industry Corporation.

142 Hong Kong, 'Telecom Reforms to Enhance Competition – Minister Says', *China Daily*, 8 January 2002.

143 See functions of MII,< http://www.mii.gov.cn/mii/bmjs.htm> 22 October, 2000.

144 He was former minister of the MPT.

145 Meihua Li, 'Breaking up the Big Brother', Overseas Edition, *People's Daily*, 18 May 2000.

146 China Mobile Communications Group.

147 China Satellite Communications Group.

new China Telecom, China Mobile and Unicom were compatible with each other in size and hence more equal rivalries were established.[148]

The diagram below provides a clear description of this 1998 game both from the players' perspective and functions' perspective.

1998 Reform – new arrangement for services[149]

Fixed line	China Telecom, Unicom and some local cable TV networks
Mobile	China Mobile, Unicom, Great Wall and potential entrants (China Satellite China Telecom)
IP telephony	Unicom, China Telecom, Netcom, Jitong and China Mobile
Paging	Unicom and many other providers
Data	China Telecom, Unicom, Netcom, Jitong, China Mobile and potential entrants (e.g. the cable TV networks)

1998 Reform – new arrangement for players[150]

Old China Telecom	China Telecom - still holds an absolute majority market share in fixed-line phone market
	China Mobile - operate in mobile phone market, with an initial market share of 50% in mobile market.
	China Satellite - operate satellite business, which was originally owned by China Telecom
	China Netcom - build and operate a broadband data transmission network and to provide Internet services.
China Unicom	Was strengthened by obtaining mobile's paging business and permitted to maintain its 25% market share in mobile telephony as well as roll out new CDMA mobile technologies
Ji Tong	Unchanged
China Railcom	The second-largest fixed network provider by transferring to it a telephony network established by the Chinese Ministry of Railways along China's rail networks.

148 Wu, above n 120, 22

149 Source: information obtained from <http://www.chinatelecom.com.cn/cn>, <http://www.chinamobile.com/Chinese/Chinese.htm>, <http://www.chinaunicom.com.cn>, and <http://www.cnc.net.cn/english/indexe1024.html> 14 June 2002.

150 Ibid.

D *The 2002 Reform: Privatisation or Capital Rising Exercise?*

Despite the 1998 restructuring, the battle for domination in the telecommunications sector persisted. After 2 years reallocating market share between the various providers the changes was still far from completing. In May 2002, to increase competition, the Chinese State Council created six multi-functional state-owned enterprises with a high degree of functional overlap.[151] The market topography was reorganised again to reflect the socialist market economy policies. It was not surprising that a lengthy bargaining process once again constituted the new outcome. The diagram below details the new arrangements.

2002 Reform – mix up the functions of the players[152]

China Teleco	China telecom, Northern (part of China Netcom) - permitted to operate a mobile telephony and fixed line, operates with China Netcom
	China telecom, Southern – new China Telecom: permitted to operate a mobile telephony and fixed line
China Mobile	Unchanged as China's largest operator in the mobile services market.
China Satellite	Expanding services into other markets
China Netcom	China Telecom North + China Net com + Jitong
China Unicom	Unchanged and can provide a full range of telecommunicationss services with a focus on mobile telephony
China Railcom	Unchanged and can provide a full range of telecommunicationss services with a focus on fixed-line telephony

In addition, the State Council is likely to partially or fully privatise some of these state-owned enterprises to raise funds for further infrastructure investment.[153]

To date, a number of Hong Kong subsidiaries of these enterprises have already been privatised to raise capital for infrastructure investment.[154] Interestingly, China Unicom managed to launch IPOs at New York Stock Exchange and Hong Kong Stock Exchange back in June 2000 to raise foreign capital; whereas for domestic capital, the plans were implemented two years later in October 2002 to list at the

151 China Moves Ahead with Monopoly Phone Split', 2001; Total Telecom Asia, <http://www.totaltele.com> 1 November, 2002.

152 Jingmin Wang, 'China Telecom: Growing to Join the World-Class Telecom Carriers', <http://www.cnii.com.cn/20030915/ca199571.htm> 15 June 2005.

153 Bing Zhang, 'Assessing the WTO agreements on China's telecommunication regulatory reform and industrial liberalization' (2001) 25(7) *Telecommunication Policy* 461-483.

154 Zixiang, above n 134.

Shanghai Stock Exchange.[155] Comparatively, the privatisation of the incumbent – China Telecom happened much later. After completion of its corporate restructuring in 2002, China Telecom finally issued its shares globally by listing its H shares on the Hong Kong Stock Exchange in November 2002 while the ADS were listed on the New York Stock Exchange in November 2002.[156]

Since 2002 reform, the Chinese telecommunications services have seven providers including Internet and other value-added service businesses and thus competition in this sector has emerged.

Moreover, another decision was made in 2002 to mix up the respective functions of those seven existing market players. The purpose of this decision was to promote more effective market given a wider range of competitive overlap.[157] While Indonesia was still struggling to establish a competitive market for network and service providers in 2002, by this time Chinese competitive domestic market had been developing.

E *The Invisible Hand: The Inter-Ministries Tug-of-Market Share*

As argued, the regulatory development in Chinese Telecommunications industry has gone through several different stages coupled with various reforms. Chinese policy making is driven by a number of different, and at times, contradictory concerns. Policy considerations include Chinese national security, coordinated regional development, and the promotion of competitive domestic industry. More importantly, inter-ministries negotiation is critical to policy making. Different objectives of each government ministries and interest groups have resulted in the creation of multiple state-owned enterprises. The increase in number does not necessarily lead to a better competitive market.

Allegations have historically been made against the certain Chinese Ministries favouring a particular state-owned enterprise under their control to dominate this sector. For example, in pre-MII period, both JiTong and China Unicom complained that MPT was unfairly promoting the interests of China Telecom, particularly in relation to Telecommunications interconnection disputes. Complaints against MII from unwarranted interference and continued favourable protection of a particular SOE still plague news headlines from time to time.[158]

---

155 See < http://www.chinaunicom.com.cn/chinaunicom/about/about.html > 2 May 2001.

156 See < www.chinatelecom_h.com.cn> 2 May 2001.

157 Jingqiao Chen, 'China: The History of Telecom Reform and the Future of the Telecom Regulation' (Paper Delivered to the Asia Pacific Forum, The 3RD Telecommunications Policy and Regulation, Kuala Lumpur, Malaysia, 16-18 May 2002).

158 Yan Xu, Douglas Pitt and Niall Levine, 'Interconnection: A Bottleneck to Future Chinese Telecommunication Deregulation?' in Philip Enslow, Pete Desrochers and Irene Bonifacio, *21st Century Communications Networks* (1997) 106–114. See also eg, G P He, 'Various Technical Problems in the Interconnection between China Unicom GSM Network and P&T PSTN Network' (July 1998) *China Communications* 32–35. See also S V Lawrence, 'Telecoms Brawl' (1999) 162(39) *Far Eastern Economic Review* 69.

F *Legal Framework: A Lack of Regulation or Regulatory Will?*

Ambiguous legal environment have contributed to the above outcomes. Foremost is that there has never been an overarching and coherent telecommunications law enacted to regulate the industry. Various administrative decisions from the State Council shape the changes on an *ad hoc* basis in conjunction with a handful of confusing regulations such as Telecommunications Regulations 2000, which in nature, is still a set of administrative regulations issued by the State Council.[159] However, the pitfalls had become apparent over the past several years. For example, there are clear failures to address the problems concerning interconnection charges and convergence issues.

In reality China began formulating a broad ranging of Telecommunications law for the last 24 years.[160] Part of the reasons contributing to the lengthy process is due to the fastest-growing nature of this sector, but also the multifaceted and hard-to-balance powerful competing interests.[161] For instance, MII and the SARFT have been at odds over who should have jurisdiction to regulate the telecommunications and broadcasting cable operators.[162] This resulted in a significant over-regulation of broadband cable sector and uneconomical infrastructure duplication.[163]

According to the previously agreed timetable in 1995, the State Council promised to introduce a Telecommunications Law to guide the future development of the industry,[164] but reasons for 'shelfing' such legislation has never been evident.[165] According to Chinese media reports, a draft Telecommunications Law of the People's Republic of China (Telecoms Law) has been completed. Recent attempts by MII to sought feedback from relevant government departments, organisations, enterprises and experts in this sector is encouraging and is apparently now ready to submit the draft to the Legal Affairs Office of the State Council. It is expected that the draft Telecoms Law could be ready for implementation after it passes the National People's Congress sometime next year. Even after promulgation, it is uncertain when the new legislation will become fully effective. [166]

As the market continues to grow and following the country's WTO accession in 2001, China is now facing a number of crucial challenges with its telecom industry. The pressures are from both domestic and outside.

---

159 The Telecommunications Ordinance of the People's Republic of China was promulgated by the State Council on September 20, 2000, and came into force on the same day.

160 China's Long-expected Telecoms Law in Consolidation Stage', *China Daily*, 3 September 2004.

161 Ibid.

162 Jeanette Chan, Moreia Ellis and Anthony Zhao, 'Cable TV – What Do the New Procedures Offer' (2000) 2 *China Law and Practice* 45.

163 China Netcom was created from a policy proposal to build a high-bandwidth Internet network. After approval by the Chinese Government, the company was formed by the China Academy of Sciences, SARFT, the Ministry of Railways and the Government of Shanghai·

164 US-China Bilateral WTO agreement·

165 'China's Telecom Act is on the way', *China Daily*, 7 March 2005, Xinhua net, Beijing.

166 Ibid.

As part of culture, doing things in China depends on connections or personal networks at a great deal. This is more definite in running a lucrative business like Telecommunications. Given the close relations between the MII and the state-owned Chinese telecom companies, the MII is far from being a truly independent telecom regulator. This presents an important challenge of a regulator to address matters including inter-connection, allocation of resources, controlling transparency, fairness and regulating unfair competition.[167]

Chinese authorities believe in 'win-win scenarios' while western world believes in 'zero-sum game'. David Lampton pointed out with respect to China:

> A bargaining perspective does not mean that China is on the road to free enterprise – indeed, bargaining can be one means by which established hierarchies endeavor to prevent the further erosion of their power, a way to avoid the increased use of market forces. Moreover, bargaining does not mean that established hierarchies are being dismantled; on the contrary, bargaining is one reflection of the fact that there are large, competitive bureaucracies and territorial administrations that are absolutely central to the functioning of both society and the polity. Bargaining does not necessarily result in more coherent policies or more efficient governance. Bargaining is more akin to protracted guerrilla warfare within and between large scale organisations.[168]

Thus, the entry of an increasing number of players into telecoms market certainly intensified and extended competition. But increasing competition only means a more competitive market but also means a more matters concerning formulating regulation and the relationships between regulator and regulatee becomes more complicated.

Decentralisation of management – horizontally or vertically – does not necessarily lead to deregulation, nor does it necessarily mean a waning of national leadership. Indeed, decentralisation appears to have made the administration more effective at achieving its objectives, not less. Opening up for competition in network equipment supplies, mobile communications and value-added services does not of itself indicate a change in the long held political and ideological notion that Telecommunications perform a critical role. Thus it would be a mistake to assume that the leadership's decision to reform this sector would lead down to the path of liberalisation, deregulation and full privatisation.

G *WTO Membership: Privileges or Interference?*

China's entry into WTO in late 2001 adds to further contradictions to the Socialist economic ideology. The entry to WTO means a new regulatory regime has to be

---

167 Wen Wang, 'Note on the so-called Chinese Separation of Powers' (1996) *Zhonghua Publishing Bureau* 56.

168 David Lampton, 'A Plum for a Peach: Bargaining, Interest and Bureaucratic Politics in China' in Kenneth Lieberthal and David Lampton (eds), *Bureaucracy, Politics and Decision Making in Post-Mao China* (1992) 37.

established and foreign operators must be gradually allowed access into Chinese market.[169] Against this background, a paradox of 'being Chinese' and participating in the global economy created certain tensions between expectations and reality, especially when China made many commitments in telecommunications sector to meet WTO requirements.[170] Thus China is obliged to continue its reform under this Treaty to split the regulatory and operating functions of MII and adopt pro-competitive regulatory principles, which are necessary for foreign-investors to compete with local players.

Four Sino-foreign joint ventures were approved in 2003, all of which provide Internet access services.[171] And in accordance with China's WTO commitments, since 11 December 2004, foreign-funded enterprises have been allowed to establish joint-venture telecom companies and a maximum 25 percent shareholding in domestic and international fundamental telecom services. This entry of foreign capital into Chinese telecom market will bring both diversity and practical service to its domestic users. It is fair to say that, to certain extend, the problem that foreign telecommunications service providers have faced in accessing China's market has improved in the post-WTO period. However, some major challenges still remain unsolved, which include more market access, a better legal and regulatory environment with higher international standards and greater transparency. Moreover, tariff and non-tariff barriers to trade must be removed; foreign exchange control must be relaxed; issues of intellectual property rights, subsidies and product safeguards must be adequately addressed; and current Chinese demand on foreign companies to export products and provide technology transfer in return for market access must be eliminated.

Even if the WTO might offer China a 'grace period' for the protection of the country's fledgling industries, several economic sectors are bound to suffer from fierce international competition. Like all other countries, China is concerned about the potential loss of sovereignty and the prospects of economic damage, such as

---

169 Ching Cheong and Ching Hung-Yee, 'Handbook on China's WTO Accession and Its Impacts' (2003) *China Legal Publishing* 15.

170 For the domestic and international wired services, foreign services suppliers will be permitted to establish joint ventures with 25 percent foreign equity share within three years after accession, subject to certain geographic restrictions. The permitted foreign equity share will increase to 35 percent within five years after accession and 49 percent within six years after accession. All geographic restrictions will be eliminated within six years after accession. In the area of mobile voice and data services, foreign services suppliers will be permitted to establish joint ventures with 25 percent foreign equity share upon accession, subject to certain geographic restrictions. The permitted foreign equity share will increase to 35 percent within one year after accession and 49 percent within three years after accession. All geographic restrictions will be eliminated within five years after accession. In the area of value-added services, such as electronic mail, voice mail and on-line information and database retrieval, and in the area of paging services, foreign services suppliers will be permitted to establish joint ventures with 30 percent foreign equity share upon accession, subject to certain geographic restrictions. The permitted foreign equity share will increase to 49 percent within one year after accession and 50 percent within two years after accession. All geographic restrictions will be eliminated within two years after accession.

171 'New Faces in the Market' (2003) 2 *New Technology Quarterly* 34.

weakened government control of China's key industries, large-scale structural unemployment, and social dislocation that may result from foreign competition. Therefore, 'How will China introduce and implement WTO rules?' Answer to this question is a cause for speculation as it is most likely that introduction and implementation will be done in 'Chinese way'.[172]

V CONCLUSIONS

This article is not about comparing the experiences of Indonesia and China or hypothesizing an Asia-Pacific model of privatisation per se. Much of the expected benefits of privatisation assume that by transferring and restructuring SOEs from government ownership and administration into private ownership and corporate management, subjected to market forces would rid these entities of inefficiencies and financial losses. And anecdotal evidence from many fully privatised SOEs around the world seems to support these economic propositions delivering greater efficiency and profitability.

International institutions like the World Bank has produced guidelines and offered many recommendations as to how developing countries should go about privatising SOEs. On the same breath, advocates selective re-regulation to promote and maintain competition and introduce self-governing corporate mechanisms. For developing nations where capital and technological expertise are scare, conforming and adhering to these guidelines is a vital link to tap into international markets and capital.

This is not to say that guidelines are necessarily draconian or dictatorial. These documents assist developing countries at two levels. On one level, it provides a template or guide for these countries to action upon, otherwise trial-and-error could be economical and politically cost as failures tend to generate devastating knock on affects on progress. On another level, in keeping with those guidelines, international investments would be more inclined to flow into these countries. However regulating privatisation is not as clear-cut or uncomplicated as the guidelines had anticipated. Economic regulations are not always consistent or manageable by authorities.

Apart from encouraging private sector to participate, separation of state's ownership functions with operation matters, implementing competition policies and removing legal barriers for new entrants, and establishing an independent regulator. Stakeholders have to be willing to comply with any necessary directives including bearing some financial cost in the course of restructuring and loss of market share. Furthermore, in the post privatisation climate, the notion of effective corporate governance and board has to be instituted. Governments would ideally no longer be partaking in operational decisions.

---

[172] 'Competition Shakeup: China vs New Zealand' (2005) 3.4 *Australian Legal Business* 29.

Common to both Indonesia and China is that they are both developing economies seeking international investments to flow in. The level of international investments channelling into their economies would invariably be hinged upon the adoption of reform agendas and practices proposed by international institutions like the World Bank. But both countries face considerable domestic pressured from local businesses, institutional and political players. These stakeholders might share both common and competing interests, where both governments would unavoidably have to play a mediating role. Unless some level of acquiesces could be achieved amongst various local stakeholders including shareholders (private or public), instigating laws and regulations might serve nothing more a 'paper chase' because of its unenforceability.

Whilst both governments appear to be committed (in various degrees) to complying with international guidelines and standards, each has adapted those recommendations to suit domestic realities and political agendas. Indonesia has undergone economic liberalisation for some decades; aside from accusations of corruption appear to have the necessary regulation for privatisation of the Telecommunications sector in place. The government's determination in leaching onto the 'golden shares' could quash any realistic expectation complete privatisation and implementing a robust corporate governance regime. Nevertheless greater competition in mobile, overseas calling services, and broadband have been actualised.

China too, has underwent economic liberalisation, though much later compared to Indonesia, until date has yet to put in place the necessary measures and comprehensive regulations. Rather the telecommunications sector had been 'carved up' into several pieces according to different product categorisation as competing government institutions support by various business interests have dominated this market. The reluctance or deference of the central Beijing authorities to fully privatise is perhaps due to consensus making and collective decision making nature of Chinese political leadership, thus privatisation could only be realised with distinct Chinese characteristics.

If there are lessons to be drawn from these two case studies in regulating the process of privatising the telecommunications sector is that each developing country has a host of domestic considerations to be taken into account. There needs to be greater flexibility and diversity. More important the interests of key domestic economic and political stakeholders would have to be taken into account. A more pragmatic model adapted from international guidelines would be formulated. A series of negotiated outcomes with key domestic stakeholders focusing on practicable time frame would be preferable. Lastly post privatisation issues like corporate governance also needs to be addressed. This issue is a vital aspect of the entire Telecommunications reform package to deliver the desirable outcomes, which needs to be tackled in future research.