

**PRIVATISATION OF TELECOMMUNICATIONS IN THE
DEVELOPING WORLD:
A LESSON LEARNT, OR A BURDEN IMPOSED?**

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Abstract

Privatisation has become an icon of economic and political reform in both developed and developing countries. It is hard to find a country without a privatisation program, and the telecommunications industry has become one of the leading candidates for privatisation. For developed countries, privatisation appears to be synonymous with the liberalisation of the sector. The establishment of WTO principles governing telecommunications services is clear evidence of their success in liberalising the sector. This paper discusses the privatisation of telecommunications from the point of view of developing countries with particular attention paid to telecommunications privatisation in Indonesia. The author argues, unlike developed countries who regard privatisation and liberalization as a necessity, for developing countries it is mostly an international commitment and international imposition. This is not a new issue but it has had serious consequences for developing countries such as Indonesia. This includes the problem of constitutional legality, lack of regulation, and a lack of consumer satisfaction.

1. Introduction

Privatisation of Telecommunications was a part of the massive privatisation phenomenon that swept the globe in 1980s. The selling of the British Telecom in 1984 is considered a "trailblazer" of telecommunications privatisation, facilitating the export of the idea to the world. The wave of telecommunications privatisation has been made a global phenomenon by the inclusion of the sector into the

framework of the WTO under the strong support from developed countries.¹

The WTO agreement on telecommunications services has convinced the developed countries to privatise their telecommunications sectors. This is understandable, as the basic idea of privatisation is more familiar to and in line with their economic and political systems. In other words, it might be said that privatisation for developed countries is a necessity.

¹ See Mathew, Bobjoseph (2003), *The WTO Agreements on Telecommunications*, Peter Lang, Bern, at p 44.

For developing countries which merely take part in this agenda, rather than actively promoting it, telecommunications privatisation essentially amounts to an international commitment or obligation. This is not a new issue but it has had serious consequences for developing countries such as Indonesia. This includes the problem of constitutional legality, lack of regulation, and a lack of consumer satisfaction.

2. Traditional Telecommunications Regime: Public and Private Monopoly

Telecommunications has been in state hands since the dawn of the electronics era in most developed countries, as well as in virtually all the developing nations.² It was generally combined with postal services and in most European countries has been provided by the national Post, Telegraph and Telephone Administration (PTT), which has traditionally been characterised by a high degree of government intervention.³ State

² Bortolotti, Bernardo; Souza, Juliet; Fantini, Marcella; Megginson, William L, (2001), "Sources of Performance Improvement in Privatised Firms: A Clinical Study of the Global Telecommunications Industry", Research Paper, at p 3. See also Melody, William H, (2001), "Introduction" in William H Melody (Ed.), *Telecom Reform: Principles, Policies and Regulatory Practices*, Den Private Ingeniorfond, Technical University of Denmark, Lyngby, at p 1. See also Straubhaar, Joseph D. (1995), "From PTT to Private: Liberalization and Privatization in Eastern Europe and the Third World" in Mody, Bella; Bauer, Johannes M; Straubhaar, Joseph D. (Eds.), *Telecommunications Politics: Ownership and Control of the Information Highway in Developing Countries*, LEA, New Jersey, at p 3-4.

³ See Klodt, Henning (1997), "Regulation of Privatized Networks: The Case of

institutions such as ministries of post and communications controlled the PTT that held monopolies over all mail and telecommunications services.⁴ Besides the concern about strategic industries important to national security and safety,⁵ two main reasons justified these telecommunications monopolies. First, a strong economic argument has been put forth which states that telecommunications is a form of typical natural monopoly. Secondly, telecommunications is a public utility.⁶

However, this was not the case in the United States (US), where the telegraph and telephone were invented in 1844 and 1876 respectively. Patents were obtained and capital was attracted to build businesses. Hence, telecommunications were considered services to be supplied by private business in normal markets.⁷ However, both Europe and the United States adopted the model of natural monopoly in different forms: public monopoly and private monopoly respectively.⁸

Telecommunications" in Herbert Giersch (Ed.), *Privatization at the End of the Century*, Springer, Heidelberg and New York, at p 297. See also Melody, William H, (2001), "Policy Objectives and Models of Regulation" in William H Melody (Ed.), *Telecom Reform: Principles, Policies and Regulatory Practices*, Den Private Ingeniorfond, Technical University of Denmark, Lyngby, at p 14.

⁴ Hulsink, Willem (1999), *Privatisation and Liberalisation in European Telecommunications: Comparing Britain, the Netherlands and France*, Routledge, London and New York, at p 6. See also Bobjoseph, op.cit., at p 1

⁵ See also Melody, op.cit., at p 11.

⁶ See Straubhaar, op.cit., at p 4. See also Klodt, loc.cit. See also Bobjoseph, op.cit., at p 1.

⁷ See Melody, loc.cit.

⁸ Hudson, Heathert E, (1997), *Global Connections: International Telecommunications Infrastructure and Policy*, Van Nostrand Reinhold, New York, at p 66.

More specifically, the traditional forms of governance used throughout the telecommunications domain included three modes; government department, public enterprise and regulated private monopoly.⁹ In most West European countries the operation of the telecommunications system was exclusively assigned to a government department or a public enterprise, generally known as the PTT model, with responsibility for the postal, telegraph and telephone monopolies, and sometimes also for the public money services.¹⁰

The second mode refers to the public enterprise regime such as in Japan. There was one public corporation, separated (more or less) from the public administration in charge of operating the telephone system. The third mode is the private regulated monopoly, in which private corporations were given an exclusive license to manage the network and provide the postal, telephone and telegraph services.¹¹ Canada and US were the best examples where private firms such as AT&T were given the exclusive license to function as telephone operators.¹²

In most developing countries the telecommunications system was usually derived from colonial regimes. Both public and private monopoly regime, therefore, was also applied in those countries. Public monopoly, or the PTT model, was mainly applied in the former European colonies such as Indonesia.¹³ This is because many new governments in such countries took over colonial

systems.¹⁴ Communist countries such as the former Soviet Union, China, and their satellites also chose to operate telecommunications through government ministries.¹⁵ Former United States colonies such as Philippines and most of Latin America followed the private regulated monopoly or the American model.¹⁶

In addition to being exclusively responsible for the provision and operation of the domestic network, the national PTTs operating under a bilateral governance mode¹⁷ were joint monopolists in the operation and management of international telecommunications services. This was strengthened by way of multilateral arrangements between public network operators within the International Telecommunications Union (ITU). In this exclusive regime, entry of new service providers was restricted at both the national and international level.¹⁸ Hulsink neatly identified this traditional governance regime of telecommunications as "national public monopoly and international cartel".¹⁹

⁹ Hulsink, *op.cit.*, at p 5

¹⁰ Hudson, *loc.cit.*

¹¹ See also Melody, *op.cit.*, at p 11.

¹² Hudson, *op.cit.*, at p 67. See also Hulsink, *Loc.cit.*

¹³ Hudson, *loc.cit.*

¹⁴ Straubhaar, *op.cit.*, at p 5

¹⁵ Hudson, *loc.cit.*

¹⁶ Wolf, Alendrina Benedicto; Sussman, Gerald (1995), "Privatisation of Telecommunications: Lesson from the Philippines" in Bella Mody *at.al*, *op.cit.*, at p 201.

¹⁷ A bilateral governance mode was based on the conception that international telecommunications is a jointly provided service. The provision of cross-border communications services was regarded as the result of a shared investment by the carriers of origin, transit (or through-traffic) and ultimate destination. See Hulsink, *op.cit.*, at p 9.

¹⁸ Hulsink, *ibid*, at p 10.

¹⁹ *Ibid*.

3. Telecommunications Reform

The present wave of telecommunications reforms now sweeping the globe began in the 1980s.²⁰ Developed countries took the first step, and many developing countries then joined this reform parade.²¹ Although the specific goals and process of reform differed among countries, its main objective was clear; to correct the drawbacks or failures of the traditional telecommunication based monopoly regimes both in the public and private sectors. More specifically, the aim was to dismantle the monopolistic nature of telecommunications to get consumers

more, better, new, and less costly services.²²

Telecommunications reforms both in developed and developing countries have mainly been spurred both by technological revolution and the failure of monopoly paradigm of the traditional telecommunications regime.²³ Rapid technological advances in telecommunications made the natural monopoly paradigm crumble fast. Due to new technologies, fixed cost declined and new firms entered the market. Furthermore, new types of transmitters such as optical fibre cables were introduced. They increased call carrying capacities exponentially and decreased marginal costs more rapidly than before. Although costs fell the monopoly operators were reluctant to cut down prices proportionately.²⁴

Technological changes also tended to blur industry boundaries, making competition possible between providers of traditionally different services. Such changes challenged the natural monopoly characteristic of the network and also introduced hybrid services that do not fall neatly into any traditional "industry," e.g., video conferencing, multimedia, and data transmission. Any attempts to preserve artificial industry definitions in order to maintain regulated traditional monopoly

²⁰ See Pisciotta, Aileen A., (2001), "Global Trends in Privatisation and Liberalisation" in Melody (Ed.), op.cit., at p 333. See also Wellenius, Bjorn (1997), "Telecommunications Reform: How to Succeed", Private Sector, No.130, at p 1. Yoshimatsu, Hidetaka (2001), "The Politics of Telecommunications Reform in Japan", Research Paper, The International Centre for the Study of East Asian Development, Kitakyushu, Japan, at p 2. See also Northfield, Dianne (1999), "Telecommunications Privatisation and Liberalisation Trends", *Telecommunications Journal of Australia*, Vol 49, No.3, at p 4. See also Volgelsang, Ingo (2002), "The German Telecommunications Reform – Where did it come from, Where is it, and Where is it Going", A Paper presented at Verein fur Sozialpolitik Annual Meetings Innsbruck, September 19, at p 1. See also Graham, Cosmo and Hossain, Moazzem (2004), "United Kingdom: Economic and regulatory issues of telecommunications reform" in Brown, Allan; Hossain, Moazzem and Nguyen, Duc-Tho (Eds.) *Telecommunications Reform in the Asia-Pacific Region*, Edward Elgar, Cheltenham, UK, at p 33.

²¹ Cho, Shin; Lee, Myeongho (1997), "Competition and deregulation: An APEC Perspective" in Hufbauer, Gary Clyde; Wada, Erika (Eds.), *Unfinished Business: Telecommunications after the Uruguay Round*, Institute for International Economics, Washington, D.C., at p 155.

²² Wellenius, loc.cit. Yoshimatsu, loc.cit.. See also GIPI (2002), "Best Practices for Telecommunications Reform", A Project of Internews and The centre for Democracy and Technology, Washington, D.C. at p1.

²³ Noll, Roger G. (1999), "Telecommunications Reform in Developing Countries", Working Paper, Department of Economics, Stanford University, at p 13. See also Rose, Michael and Wille, Gunnar (1999), "Telecommunications Sector Reform and Regulation in Developing Countries", CTI Working Paper No.47, Center for Tele-Information, at p 2.

²⁴ Bobjoseph, op.cit., at p 2

franchises then became arbitrary, futile, and counterproductive.²⁵

Simultaneously, there was worldwide dissatisfaction regarding the role of the government in general and the performance of government telecommunications monopolies in particular.²⁶ It is by now widely argued that government control of natural monopolies, through direct ownership (as in Europe) or through regulation of private firms (as in the United States), entails major inefficiencies. Incentives for cost reduction and for product innovation have suffered, and the administrative burden of regulation itself has been heavy. The burden consists of direct costs and, more importantly, of losses from rigidity and delay in changing prices and in making investments.²⁷

The combination of these two factors: inefficiencies in government intervention and technological changes both resulted in a new approach towards the telecommunications sector. It was believed that telecommunications services would be supplied in a better, more efficient manner if the markets were opened up to competition and State Owned Enterprises (SOEs) were privatised.²⁸

²⁵ See also Pool, I.de Sola (1990), *Technologies Without Boundaries. On Telecommunications in a Global Age*, Harvard University Press, Cambridge.

²⁶ Bobjoseph, loc.cit. See also Farajian, Patrick (2003), "Key Lessons in Telecommunications Reform", Paper presented at the Western Asia Preparatory Conference for the World Summit on the Information Society, Beirut (4-6 February) at p 1.

²⁷ Schwartz, Marius (1996), "Telecommunications Reform in the United States: Promises and Pitfalls; Research Paper, Council of Economic Advisers Executive Office of the President, Washington, D.C., at p 2.

²⁸ Ibid. See also GIPI, loc.cit.

In developing countries, a number of additional factors have further contributed to a need for, and possibility of, sector reform. One of the most important of these has been fiscal crisis and economic decline.²⁹ Governments in these countries generally adopted policy recommendations from international lending institutions and neo-liberal economists from developed countries, who argued that economic failure in developing countries was due to ill-conceived domestic economic policies. The remedy recommended for this illness was the deregulation of economic activities, the introduction of extensive competition in domestic markets, the increase of foreign investments, and finally—crucial to overcoming fiscal deficit—an extensive privatisation program.³⁰

The inclusion of telecommunications into the framework of the World Trade Organisation (WTO) also accelerated the sector reform. The main objective of the organisation is to deter all kinds of restrictions (whether tariffs or non-tariffs) against the equitable trade between its members, as well as in relation to granting equal treatment in trading conditions.³¹ In other words, the foundation of the Organisation reflects the need to liberalise international trade as well as eliminate the barriers on global trade and

²⁹ Petrazini Ben A. (1995), *The Political Economy of Telecommunications Reform in Developing Countries*, Praeger, London, at p 14.

³⁰ Ibid.

³¹ The Preamble of the WTO's Charter states: "The parties to this agreement ... Being desirous of contributing to thee objectives by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international trade relations".

investments. Telecommunications was traditionally subject to a monopoly and was not even seen as being tradeable. However, through the gradual evolution of the way such services are viewed, it became internationally accepted to include them into the regime for international trade.³²

One of the most successful aspects of this was the WTO Basic Telecommunications Agreement, which among other things was the adoption of pro-competitive regulatory principles (referred to as the "Reference Paper"). This was intended to formulate the core regulatory obligations that would bring significant changes to trade in telecommunications services.³³ The reference paper provides numerous safeguards aimed at preventing national telecommunications monopolies from exploiting their "dominant position to distort market forces and impede the ability of competitors to supply networks or services for which commitments would be made".³⁴

The adoption of the reference paper ensures that each country abides by this common set of pro-competitive regulatory principles. The regulatory principles are extremely important because when markets are initially

opened to competition, commitments to ensure fair and non-discriminatory treatment of new entrants are essential to prevent monopolists from abusing their market power.³⁵

4. Privatization as an Agenda of Reform

Since the main objective of telecommunications reform is de-monopolisation of the sector from either public or private monopoly, the agenda of reform typically takes the following main forms: privatisation, liberalisation, and competition in telecommunications.³⁶ In terms of their literal and technical meanings, these reform programs are different and subject to much academic debate.³⁷ They can be carried out separately; affect different aspects of the telecommunications sector, and often involve a variety of different actors.³⁸ However, they have the same objective: the abolition of various monopolistic characters of the sector.

Privatisation in a narrow sense, which refers to the transfer of ownership from public to private sectors³⁹, is not always the same as liberalisation in the sense of abolition or relaxation of the

³² Blouin, Chantal (2000), "The WTO Agreement on Basic Telecommunications: a re-evaluation", *Telecommunications Policy*, No.24, at p 135.

³³ Rosenthal, Rachel (2002), "United States v. Mexico: The First Telecommunications Challenge Confronting The World Trade Organization, *Common Law Conspectus*, No.10 at 323.

³⁴ *Ibid.* More specifically, the reference paper addresses the following six regulatory elements: (1) competitive safeguards, (2) carrier interconnection, (3) universal service, (4) public availability of licensing criteria, (5) the establishment of an independent regulator, and (6) the allocation and use of scarce resources such as spectrum

³⁵ Alissi, op.cit., at p 494.

³⁶ Cho note, op.cit., at p 157-159. See also GIPI, loc.cit. See also Petrazini. Op.cit., at p 16.

³⁷ See for example Joseph, Richard (1996), "Politics and Telecommunications Deregulation", *Telecommunications Journal of Australia*, Vol.46, No.1 at p 14. See also Garrison, William B (2004), "Telecom Privatization and Liberalization", The Kenan Institute of Private Enterprise, available at <http://www.gipiproject.org/telco/>

³⁸ Petrazinni, op.cit., at p 17.

³⁹ See Latipulhayat, Atip (2004), "The Nature of Privatisation: A Comparative Approach", *Unpad Journal of International Law*, Vol.3 N0.2, at 122-123.

monopolistic powers of the SOEs. It is also not necessarily synonymous with competition, in the sense of opening for a multi-operator system in the provision of telecommunications services. Put simply, privatisation may or may not be accompanied by liberalisation. Privatisation per se does nothing to liberalise the market, since a private monopoly could exist in a country simply by transferring the ownership of a telecommunications entity from public to private hands.

However, privatisation in the broader sense of a transfer of ownership or activities from public to private sectors will encompass liberalisation.⁴⁰ In this context, both privatisation and liberalisation are acts of demonopolisation, which opens the door for competition. Some have argued, therefore, that both the terms, particularly for the purpose of telecommunications reform, have no absolute differences.⁴¹ Johnson, therefore, states that privatization or liberalization of telecommunications refers to a process of transferring existing state-run monopoly enterprises that provide voice, data, and video delivery services to a competitive private sector.⁴²

Based upon the above theoretical and practical reasons, the author is of the opinion that both privatisation and liberalisation are often linked and can be used interchangeably in the discourse of telecommunications reform. Much literature uses the terms simultaneously, as many states undertake liberalisation

followed by privatisation of their telecommunications industries such as in the United Kingdom (UK)⁴³. In that country the privatisation of telecommunications is part of a policy that is intended to tackle the problem of British SOEs through the selling of the state's ownership in the British public sector, and re-regulating them in the sense of opening the sector up for competition and liberalisation.⁴⁴

At the practical level, therefore, telecommunications reform can involve various combinations. First, privatisation with full-competition as carried out by New Zealand and Chile. Secondly, privatisation with phased-in competition as took place in the United Kingdom, Japan, and Argentina. The third option is liberalisation without privatisation. An example of this model is Telecom Finland, which remains 100 percent state owned. However, all services, including local, long distance, international cellular value added and private line services are competitive. The final combination is private sector participation without privatisation or liberalisation, of which the Peoples Republic of China and Saudi Arabia are examples.⁴⁵

⁴⁰ Ibid,

⁴¹ See for example, Pisciotta note 61.

⁴² Johnson, Andrea L. (2002), "Privatisation of Telecommunications in Five Emerging Markets: Germany, Egypt, South Korea, Argentina and Mexico", *Albany Law Journal of Science & Technology*, Vol 12, at p 314.

⁴³ See for examples Hulsink, op.ci., at p 6.

⁴⁴ See Al-Shurman, Emad (2001), "The Transformation of a Public Monopoly into a Public Limited Company Through the Privatisation Process, A Critical Legal Study of the British and World-wide Experience: The Case Study of Privatising Telecommunications Industry", Phd Thesis, University of Aberdeen, at p 144.

⁴⁵ Pisciotta op.cit., at p 341.

5. Privatisation of Telecommunications in Developing Countries.

5.1. Pragmatic privatisation

Unlike developed countries, privatisation program in developing countries is more pragmatic in nature rather than the product of any ideological consideration.⁴⁶ For most developed countries, privatisation can not be separated from an ideological belief that the long-term well-being of the society can only be achieved by leaving economic decisions mostly to the marketplace. This idea reveals a belief that state intervention produces inefficiency and waste, because it leads to decisions that are mostly based on political considerations and ignore, or override, factors which markets would recognise. It should, therefore, be minimised.⁴⁷ For most developing countries, however, privatisation is merely a pragmatic solution to specific administrative, financial, and economic problems faced by the country.⁴⁸ This may help explain why the objectives, techniques and results of these privatisation programs sometimes differ.⁴⁹

For example, the original objectives of the UK's privatisation program were to reduce the size and scope of government, to increase the efficiency of privatized firms, and to distribute equity more widely among the population, diffusing ownership and giving people a direct stake in the

success of British industry.⁵⁰ By contrast, the privatization in developing countries was primarily to reduce the unsustainable levels of domestic and external debt required to prop-up their ailing SOEs.⁵¹ In those countries, therefore, SOEs are primarily sold to one or more private sector firms because local capital markets have a very limited absorptive capacity. By comparison, in developed countries such as the UK, most privatisation are achieved through the sale of shares directly to the public.⁵²

Like most developing countries, Indonesia carried out the privatisation program mainly to reduce government debt and overcome deficit of the state budget. Tanri Abeng, the Indonesian former Minister of State-Owned Enterprises stated that privatisation was necessary to overcome the country's budgetary problems.⁵³ In other words, for Indonesia, privatisation is more a pragmatic solution to the financial crisis faced by the government. Consequently, budgetary matters and short-terms revenue maximisation tend to be high on

⁵⁰ Ibid.

⁵¹ Ibid at p 6. See also Lee, Cassey (2005), "Malaysia: Telecommunications reform and beyond" in Brown, Allan; Hossain, Moazzim and Nguyen, Duc-Tho (Eds.), *Telecommunications Reform in the Asia-Pacific Region*, Edward Elgar, UK, at p 120. Lee observes that like most developing countries, the privatisation of Malaysia's telecommunications sector was driven by pragmatic and economic considerations. The experience of twin deficits and mounting external debt during the early 1980s convinced the Malaysian government to embark on a strategy of promoting private-sector-led growth and development. The government considered privatisation to be a way to relieve their administrative and financial burdens and at the same time improve the efficiency of service delivery.

⁵² Miler, op.cit., at p 7.

⁵³ Abeng, Tanri (2001), *Indonesia, Inc.*, Time Academy Press, Singapore, at p 127.

⁴⁶ See Miller, Alan N (1997), "Ideological Motivations of Privatisation in Great Britain versus Developing Countries", *Journal of International Affairs*, Vol.50, Issue 2, at p 1.

⁴⁷ Latipulhayat, op.cit., at p 133.

⁴⁸ Ibid.

⁴⁹ Miller, op.cit., at p 2.

the list of governmental priorities.⁵⁴ In this context, privatisation has emerged as a major revenue earner. This has generally happened in countries characterised by mounting foreign debt and budget deficit such as Argentina, Mexico, Brazil, and Indonesia. In other words, privatisation that is carried out in those countries just to raise money – not one based on a broad vision of how the economy should work – is a mere “bandaid solution”.⁵⁵

Given such a pragmatic motive, Indonesia’s privatisation of telecommunications has mainly taken the form of selling its SOTEs to strategic investors, particularly foreign investors due to the limited capacity of domestic private sector. In Indonesia, therefore, particularly in the telecommunications sector, people see the privatisation program as no more than a “foreignization”.

The divestment of PT.INDOSAT⁵⁶ in 1994 by selling 35% of the government’s share was the first privatisation of the Indonesian State Owned Telecommunications Enterprise (SOTE). It obtained about US\$1,077 billion in cash, nearly 80% of which was used for the payment of foreign debt.⁵⁷ The next divestment was carried out in 2002 by selling 41.94% of the government’s share to STT (Singapore Technologies Telemidia). This transaction left the government with only 15% of the shares of common stock

of PT.INDOSAT, as well as the series A special share (golden share). This transaction obtained about US\$627,353,886. Like the first divestment, it was mainly aimed at resolving the problem of the state budget and reducing foreign debt.⁵⁸

PT.TELKOM, another the Indonesian SOTE also was divested in 1995 by selling 46.02% of the government’s share through a global initial public offering on the Jakarta Stock Exchange, the Surabaya Stock Exchange, the New York Stock Exchange and the London Stock Exchange. This transaction, however, retained the government as the major shareholder of the company.

5.2. An international commitment and international pressure.

From a historical and ideological perspective, privatisation is a term that is closer to developed countries, or what Lissitzyn refers to as “western business civilizations”.⁵⁹ With regard to the telecommunications sector, they successfully imported the idea into the framework of the WTO. The main mission of this organisation is liberalising international trade as well as eliminating the barriers on global trade and investments.⁶⁰ In this regard, the developed countries see the WTO as a suitable venue for negotiations on telecommunications.

At least there are two main reasons behind the movement. First, many developed countries felt that the

⁵⁴ Latipulhayat, op.cit., at p 138.

⁵⁵ Ibid. at p 139.

⁵⁶ PT.INDOSAT was the State-Owned Telecommunications Enterprise and the sole provider of international telecommunications services.

⁵⁷ See Barisan Penyelamat Aset Bangsa (2003), *Kejahatan Terhadap Negara: Kasus Divestasi Indosat, BPAB, Jakarta*, at 9. Koesmarihati in Brown, op.cit., at p 99.

⁵⁸ Barisan Penyelamat Aset Bangsa, op.cit., at p 10 and 157.

⁵⁹ Cited from Nugraha, safri (2004), *Privatisation of State Enterprises in the 20th Century: A Step Forwards or Backwards?*, University of Indonesia, Jakarta, at p 74.

⁶⁰ Bobjoseph, op.cit., at p 46.

International Telecommunications Union (ITU) was not an appropriate forum to discuss liberalisation initiatives. The governments represented their national telecommunications operators, focussing on technical issues and neglecting both the introduction of competition and the integration of private suppliers of telecommunications services.⁶¹ Secondly, the developed countries perceived the developing countries as too dominant in the ITU. The new international economic order in the 1970s and the North-South conflict made it clear to developed countries that they could not expect deregulation and liberalization to become a high priority for the ITU.⁶²

In this context, privatisation of telecommunications can be said to amount to an internationalisation of the domestic programs of developed countries to create new markets in developing countries. For developing countries, therefore, it could be considered an international obligation, which must be fulfilled in order to attract investors, particularly foreign investors, due to the limited capacity of their domestic capital markets. To this end, developing countries including Indonesia that undertook a commitment under the framework of the WTO have an obligation to liberalise their telecommunications market.

The extent of change to Indonesia's telecommunications regime is clear. It was indicated by, among other things, the enactment of the Telecommunications Act of 1999, which came into effect on September 8, 2000. This Act specifically prohibits monopolistic practices and unfair

competition among telecommunications operators.⁶³

Aside from being a part of international commitment, Indonesia's privatisation program is also a condition imposed by international lending institutions such as the International Monetary Fund (IMF) and the World Bank to overcome the financial crisis at the end of 1997. Whenever developing countries request loans of financial assistance, the World Bank and the IMF frequently demand that privatisation plans be implemented as a prerequisite to receiving funds.⁶⁴

The second round of the divestment of PT.INDOSAT in 2002 was part of Indonesia's commitment with the IMF for its further economic recovery. The Indonesian government states: "among the larger enterprises, the two publicly listed telecommunications enterprises, PT.TELKOM and PT.INDOSAT, are strong candidates for further rapid privatization".⁶⁵ It even goes further by stating:

"Toward this end, as well as to promote private investment in the sector, we will (i) adopt a new tariff policy (by March 2000) and adopt new network interconnection rules; (ii) finalize the implementing regulations for the new Telecommunications Law (by June 2000); (iii) finalize modern, new licenses for major operators, and (iv) establish an agency to

⁶¹ Ibid.

⁶² Ibid.

⁶³ See Article 10 of the Indonesian Telecommunications Law of 1999.

⁶⁴ Nugraha, *op.cit.*, at p 142.

⁶⁵ See Letter of Intent of the government of Indonesia with the IMF, January 20, 2000, at p 16-17.

provide transparent and predictable regulations. By the end –2000, the government will also strive to reduce PT.TELKOM's and INDOSAT's extensive cross-ownership in the sector, and to secure a mutually acceptable resolution of the issues concerning the revenue-sharing contracts between PT TELKOM and its private partners (KSOs). This resolution will be consistent with the new Telecommunications Law, and promote competition by enabling both TELKOM and INDOSAT to evolve into competing full service providers".⁶⁶

5. Some Consequences

It is true that telecommunications privatisation in developing countries mostly constitutes an international obligation and is not a new phenomenon. However, it has certain consequences that may decrease an appeal of further privatisation programs in such countries.

The Indonesian privatisation program appears to be more in line with the government's interest than the interests of consumers or the goal of increasing the performance of SOEs. Some have observed that those who profit the most from privatisation are the new owners, at the expense of the government, customers and employees.⁶⁷

⁶⁶ Ibid.

⁶⁷ Bastian, Indra (1998), "An Accounting Appraisal of the Privatisation Decision: A Case Study of Indonesia's Telecommunications

This can be seen for instance by the fact that the privatisation of PT.TELKOM and PT.INDOSAT was not followed by cheaper services. In the context of comparing consumer satisfaction following the privatisation of SOEs between developed and developing countries, Safri Nugraha compares the service price paid by customers in the Netherlands charged by KPN and its competitors in the Netherlands, and the tariffs charged by PT.INDOSAT of Indonesia for international calls in 1999.

We shall take the current exchange rates: one Dutch guilder (EUR 0.45) is equal to 3000 Indonesian Rupiah (Rp). For a one-minute call from the Netherlands to Indonesia, KPN customers pay NLG 2.70 (EUR 1.22) during peak hours and NLG 2.40 (EUR 1.09) during off-peak hours and at the weekend. Indonesian customers, on the other hand, pay Rp.10,700 (=NLG3.57/EUR 1.62) during peak hours and Rp.8,025 (=NLG 2.67/EUR 1.21) in the evenings, at the weekend and on national holidays. By comparing these tariffs, it is possible to conclude that customers in some developing countries, or more specifically in Indonesia, pay more for the same services that customers in some developed countries, in this case the Netherlands.⁶⁸

In addition, as of 2004 the Indonesian fixed line phone density is about 4% and mobile is 8.5%, while the total telephone density in developed countries is more than 100% and in developing countries is less than 50%.⁶⁹

Industry", PhD Thesis, The University of Hull, at p 387.

⁶⁸ Safri at p 149.

⁶⁹ See Koesmarihati (2004), "Indonesian Telecommunications regulatory Body", Paper presented at the APT-Asean Regional Meeting, Denpasar, 1-2 March 2004, at p 1

The telecommunications density in Indonesia is one of lowest in the Asia-Pacific region.⁷⁰

The pragmatic approach adopted by most developing countries led to the program being implemented straight away in these countries. In fact, for privatisation to work effectively, several things have to happen, and among other things it should be followed by regulatory reform to regulate new telecommunications market. In the case of Indonesia, this condition seems to have been regarded merely as a formal obligation imposed by an international institution rather than a substantial requirement for the success of the privatisation program. An example of this is the establishment of an independent regulatory body.

The establishment of an independent regulatory body is very important for ensuring that governments act independently and treat all telecommunications operators equally. This regulatory body has already been established in Indonesia, i.e. BRTI (Indonesian Telecommunications Regulatory Body). However, this regulatory body is still far from an ideal as its establishment appears to be mere a formal response than a genuine attempt to ensure fair competition in the telecommunications industry.

This regulatory body is afflicted by at least four weaknesses:⁷¹ (I) the existing BRTI does not have strong legal basis as it was established by ministerial decree not an Act; (ii) BRTI is funded

from State Budget which is part of Directorate General Post and Telecommunications (DGPT)'s budget, which adds to the bureaucracy and decreases independence; (iii), the chairman of BRTI is the Director General of Post and Telecommunications, and BRTI consists of DGPT and Committees. This causes confusion as to when he is acting in his capacity as regulator (BRTI) or as part of the Ministry; and (iv) often its decisions are dependent upon signature from the Minister. This renders the BRTI incapable of regulating telecommunications sector fairly and independently. For instance, the BRTI did not have a clear position on the interconnection dispute between PT.TELKOM and PT.INDOSAT despite the fact that the Indonesian Commission for Unfair Competition ruled that PT.TELKOM engaged in unfair competition.

Last, but not least, the pragmatic approach also raises the constitutional legality of the privatisation program. In this case, privatisation of telecommunications can be interpreted as the selling or leaving of the strategic and vital sector of the state to private industry, thus potentially reducing the level of control of the state. This is mainly because, constitutionally, telecommunications is a sector of production, which is important for the country and affects the lives of the people and must therefore be controlled by the state.

The government decision to privatise PT.INDOSAT in 2002 by selling 41.94% of PT.INDOSAT's share to STT (Singapore Technologies Telemedia) which left the government with only 15% of the shares of common stock of PT.INDOSAT sparked strong

⁷⁰ Ibid . See also World Telecommunication Development Report 2002, ITU, Geneva, at p 56. According to the report, Indonesia's total teledensity world ranking is 134. This is slightly better than India (145) and some of African countries such as Senegal (136), Congo (146), Ghana,(156) and Uganda (169).

⁷¹ Koesmarihati, op.cit., at p 8.

opposition. One of this pertains to the constitutional interpretation of the term “state control”. They read the term as state ownership. According to their interpretation, the divestment of PT.INDOSAT is constitutionally unacceptable as this transaction leads the government holding only a minority share, leaving the government with insufficient power to control this sector. On the other hand, the government read the term as “the state regulatory function”. This means that, their minority shareholding does not necessarily mean that government has insufficient power to control the sector, as this power is the built-in function of the state and this does not have any connection with the level of government ownership.⁷²

The conflicting interpretations of the term “state control” has been resolved by the Indonesian Constitutional Court which states that this term is neither means state ownership nor state regulatory function, but it is a concept of public law that that derives from the principle of sovereignty of people. The term state control should be read as a constitutional mandate to the state to create economic policies with the main purpose of utilising the nation’s natural resources and strategic economic sectors for the greatest benefit of the people.⁷³

An important note here is that the pragmatic privatisation is prone to raise legal problems, such as the government arbitrarily interpreting the constitution or other legislation, only because of the

perceived need for an instant solution to their economic problems.

6. Concluding remarks

The preceding discussion reveals that the privatisation program in developing countries, particularly in the telecommunications sector, is mostly based on the pragmatic considerations as a response to economic and financial problems faced by the governments. This privatisation is generally in the interests of government and the new owners, at the expense of the consumers and other public interests.

This pragmatic approach of privatisation will lead it to be viewed as no more than one aspect of a set of conditions imposed by the international lending institutions for the economic recovery programs of developing countries. Although this is not a new issue, it has had serious consequences for developing countries such as Indonesia. This includes the problems of constitutional legality, lack of regulation, and a lack of consumer satisfaction.

⁷² For further discuss see Latipulhayat, Atip (2005), “The Meaning of State Control: An Investigation based Upon Indonesian Constitutional, Statutory and Judicial Interpretation”, Paper (unpublished), Monash University.

⁷³ Ibid.