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NOTES

OVERCOMING THE LEGAL AND HISTORICAL OBSTACLES TO PRIVATIZATION: THE TELECOMMUNICATIONS SECTOR IN THAILAND

Joseph C. Blasko

I. INTRODUCTION

HISTORICALLY, THE PERFORMANCE of most state-owned enterprises (SOEs) has been disappointing.1 As a result, governments around the world are privatizing their SOEs at a feverish pace.2 Between 1980 and 1991, more than 6,800 sales and liquidations of state-owned firms have taken place.3 By the early 1990s, over eighty countries were participating in "some significant form of privatization."4 Today, many governments are aggressively seeking to privatize virtually all of their SOEs, including

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1 B.A., Boston College, 1995; J.D. candidate, Case Western Reserve University School of Law, 1998. The author would like to thank Professor Robert Lawry for his advice with the drafting of this note.
3 For the purposes of this Note, "privatization" refers to the process of converting or transforming, through sale, liquidation, or any other means, state enterprises totally or partially into private organizations. See Amnuay Viravan, Privatization: Choices and Opportunities, 7 J. S.E. ASIA BUS. 1 (Fall 1991); see also KIKERI ET AL., supra note 1, at 14 ("Privatization can be defined as the transfer of ownership of state-owned enterprises to the private sector by the sale — full or partial — of ongoing concerns or by the sale of assets following liquidation").
4 See KIKERI ET AL., supra note 1, at 22. Other reports list the number of SOEs that have been privatized at more than 15,000. See Kikeri et al., Privatization: Lessons From Market Economies, 9 WORLD BANK RES. OBSERVER 241, 241 (1994) [hereinafter Kikeri et al., Lessons]. However, this figure generally includes a "very large number of completed 'small' privatizations of shops, microenterprises, and kiosks in the retail and service sectors." KIKERI ET AL., supra note 1, at 79 n.8. For example, it is estimated that more than 100,000 such firms have been privatized in Poland, Hungary, and in the former Czechoslovakia and German Democratic Republic. See id.
5 Helen Nankani, Techniques of State-Owned Enterprises, 1 WORLD BANK TECH. PAPER 89 (1988); see also KIKERI ET AL., supra note 1, at 1.
public utilities and enterprises historically classified as "strategic" industries. In the past, governments throughout the world have been reluctant to privatize these industries due to their close relation to national security and government control of their nationals. However, today privatization has become so widely accepted by most countries that it is no longer tied to the political arena. Instead, the developed world has specifically focused on the strategic issues involved, namely pricing, regulation, and timing of privatization.

Likewise, the developing world has been an active participant in the privatization process, albeit to a more limited extent. Slightly more than 2,000, or approximately thirty percent of the 6,800 privatizations have occurred in developing countries, and the size of the SOE sector in a number of developing countries has been substantially reduced. Between 1987 and 1992, foreign direct investment rose by nearly 29 billion dollars to a projected 38 billion dollars. Much of this rapid growth in foreign direct investment can be attributed to the expansion of privatization programs over this same period. The number of annual privatizations rose from twenty-six in 1988 to 416 in 1992, totalling approximately 870 privatizations. Moreover, over the same period of time, privatization revenues increased from 2.6 billion dollars to 23 billion dollars. Finally, while many of the SOEs privatized in developing countries were small or medium in size, recent years have witnessed an increase in the number of large SOEs being sold.

Consequently, although the SOE's pace of privatization lags behind that of the rest of the world, developing countries aggressively have begun to re-assess the potential of the private sector to take a more active role in financing and providing public services and physical infrastruc-

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5 See KIKERI ET AL., supra note 1, at 13. Particular sectors such as mining, petroleum, telecommunications, finance, transportation, and heavy industry are considered "strategic industries." See id. Each is central to a country's development because they provide crucial goods and services to all other industries. See FRANK SADER, PRIVATIZATION AND FOREIGN INVESTMENT IN THE DEVELOPING WORLD, 1988-1992 5 (1993).

6 See Viravan, supra note 2, at 3.

7 See id. at 3-4; see also KIKERI ET AL., supra note 1, at 6-10.

8 See KIKERI ET AL., supra note 1, at 1-2.

9 See id. at 23.

10 See SADER, supra note 5, at 3.

11 See id.

12 See id. at 4, 12.

13 See id. at 4.

14 See KIKERI ET AL., supra note 1, at 14.
ture. One particular sector of the infrastructure in which privatization has been pursued ardently is the area of telecommunications services.

Traditionally, telecommunications services have been provided exclusively by government-owned and operated entities under monopolistic market structures in the name of national security. However, like most SOEs, the telecommunications providers have had difficulty mobilizing significant amounts of capital for the telecommunications network. They also have a poor record of responding to the evolving and varying needs of businesses and households. Thus, policy-makers of developing countries, realizing that a modern telecommunications infrastructure is essential for attracting investment which will lead to economic development, have begun to privatize their telecommunications sector.

While the privatization of telecommunications services is a global phenomena, each country in the developing world has approached the process differently and has been driven by a combination of varied motives. In fact, use of the term "privatization" can be misleading because there are various methods in which a country can open its telecommunications market to competition. For example, in some Latin American countries such as Argentina and Mexico, the process has been characterized by efforts to privatize SOEs at an accelerated pace while limiting competitive entry into basic service sectors. In Mexico, the process has been relatively structured despite the pace in that it first "corporatized," then "decentralized," and finally "privatized" its state-owned telecom. Argentina and Mexico were motivated by the need to

15 See Rondinelli & Kasarda, supra note 1, at 134-35.
16 See The Death of Distance, ECONOMIST, Sept. 30, 1995, at 6 (providing a survey of telecommunications).
18 See Bishop & Mody, supra note 17.
19 See WILLIAM W. AMBROSE ET AL., PRIVATIZING TELECOMMUNICATIONS SYSTEMS: BUSINESS OPPORTUNITIES IN DEVELOPING COUNTRIES 5 (1990). Call-completion rates of less than 50% are common in developing countries. See id. Moreover, telecommunications SOEs “will have 50-100 employees for every 1000 lines of service, compared to 0.2 employees or fewer for the same number on lines among telephone companies in the United States.” See id. Finally, significant under-utilization of existing capacity is a common feature of many developing countries’ telecommunication sectors. See id.
20 See Casey & Wu, supra note 17, at 782.
21 See BJORN WELLENIUS & PETER STERN, IMPLEMENTING REFORMS IN THE TELECOMMUNICATIONS SECTOR 161, 177, 197 (1994).
22 See Bishop & Mody, supra note 17 (defining “corporatization” as converting the
accumulate significant amounts of foreign investment to combat daunting deficit problems.\textsuperscript{23}

In contrast to the Latin American experience, the “privatization” of the telecommunications sector in Asia has been a slower and much more diverse process.\textsuperscript{24} Nowhere is the mixed set of strategies and motives more evident than in the Southeast Asian country of Thailand.\textsuperscript{25} Despite a strong commitment to common regional issues embodied in such organizations as the Association of South East Asian Nations (ASEAN)\textsuperscript{26} and the Asia-Pacific Economic Cooperation group (APEC),\textsuperscript{27} Thailand has begun to open its telecommunications sector to competition in a much different manner than its neighbors and fellow ASEAN and APEC member states of Malaysia, Singapore, and Indonesia. Thus, Thailand provides a unique example of distinct approaches in privatizing a public utility such as telecommunications services. Whether the telecommunications master plan proposed by the Transportation and Communications Ministry of Thailand will meet its objectives is the subject of this Note.

In answering this question, this Note begins with a brief historical background of the Thai telecommunications sector. The following section highlights some of the problems experienced among SOEs, focusing specifically on the telecommunications sector in Thailand. While the volume and sophistication of telecommunications services in Thailand

\textsuperscript{23} See KIKERI ET AL., supra note 1, at 14. By the late 1980s, Argentina’s SOEs accounted for 50% of the total public sector deficit. See id. at 36.

\textsuperscript{24} See WELLHUS & STERN, supra note 21, at 197.

\textsuperscript{25} See Dennis A. Rondinelli, Business Participation in the Public Services Industry in Southeast Asia: Accelerating the Pace of Privatization, 7 J. S.E. ASIA BUS. 3, 3-6 (1991); see also WELLHUS & STERN, supra note 21, at 211-14.

\textsuperscript{26} The Association of South East Asian Nations (ASEAN) was created in August 1967 with the signing of the Bangkok Declaration by Indonesia, Malaysia, the Philippines, Singapore, and Thailand. See Michael R. Reading, The Bilateral Investment Treaty in ASEAN: A Comparative Analysis, 42 DUKE L.J. 679, 679 n.1 (1992). Brunei Darussalam became a member of ASEAN in January of 1984. See id. “The existing members have voted to admit Vietnam, but it has not yet formally become a member.” See Mary E. Hiscock, Changing Patterns of Regional Law Making in Southeast Asia, 39 ST. LOUIS L.J. 933, 935 n.7 (1995).

\textsuperscript{27} The Asia Pacific Economic Cooperation (APEC) group is comprised of 18 Member States, including among others the ASEAN members, Australia, Japan, and the United States. See Hiscock, supra note 26, at 938.
have increased rapidly in recent years, there are various impediments which may be extremely difficult for the telecommunications sector to overcome. Furthermore, although the concept of privatization is neither new nor unique to developing countries, the privatization of large state-owned public utilities is historically atypical. Therefore, to determine whether the particular objectives and methods applied by the Thai government will be potentially successful, it is imperative that these problems and issues be examined in detail.

The third part of this Note focuses on the specific objectives of privatization and the methods chosen to meet those objectives. Some of the methods of privatization have already been implemented in Thailand, while others are presently being considered by Parliament under the rubric of the telecommunications master plan. The first half of this section reviews the Build-Transfer-Operate (BTO) and Build-Operate-Transfer (BOT) concession contracts into which the two telecommunications SOEs have entered with the private sector to provide basic telephone and cellular services. While not strictly viewed as acts of privatization, these contracts are a significant departure from past practice, and have enabled the private sector to become involved in what has traditionally been a government-owned and operated industry in Thailand. The second half of this section examines the effect the Act Permitting the Private Sector to Participate in or Operate State Business (Joint Venture Act) will have on the privatization process, and concludes by discussing why a new national telecommunications master plan is needed in the sector.

Finally, this Note examines other methods of privatization involved in the new national telecommunications master plan and evaluates these methods of privatization in light of the BTO and BOT agreements. In so doing, this Note tries to determine just how successful the BTO and BOT agreements and the new master plan will be vis-à-vis this sector's historical background and the objectives sought by the Thai government. The Note then concludes by suggesting that while the "privatization" process undertaken in Thailand may have a positive impact in the short-run, the

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28 Once a government decides to privatize state-run enterprises, it is often difficult for the political leaders to define their objectives and outline the strategic process by which privatization will occur. As a result, many strategic decisions made by developing countries are limited and halfhearted. See generally Rondinelli & Kasarda, supra note 1, at 134-35. For example, the most frequently privatized enterprises are small, low-value firms in industry and services; not large public utilities. See KIKERI ET AL., supra note 1, at 24. Despite a strong correlation between the success of larger SOEs and the success of a country's economic development, privatization in many developing countries during the 1980s consisted of a few simple divestitures of money-losing state enterprises. See Rondinelli & Kasarda, supra note 1, at 135.
long-term effect may actually impede the growth of Thailand's telecommunications sector, and subsequently Thailand's national economy.

II. THE THAI TELECOMMUNICATIONS SECTOR: AN HISTORICAL PERSPECTIVE

The Royal Thai Government has provided telecommunications services for over a century on a monopoly basis through the Ministry of Transport and Communications (MOTC). Under the MOTC, the government has acted as planner, coordinator, investor, manager, operator, and regulator of all telecommunications services. The MOTC controls these services through three entities which fall under its guidance, namely the Post and Telegraph Department (PTD), the Telephone Organization of Thailand (TOT), and the Communications Authority of Thailand (CAT).

The Thai government has always paid particularly close attention to all telecommunications matters, and has amended laws where it believes it appropriate. It was with this goal in mind that the Royal Thai Government established the Telegraph and Telephone Act, B.E. 2477. Promulgated in 1934, the Act embodied the government's sentiment "to provide greater convenience to the people and to be even more appropriate to the times." The Act gave the PTD "monopolistic rights and authority" over all telegraph and telephone services.

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31 See id.

32 See, e.g., Telegraph and Telephone Act, B.E. 2477, opening decree (1934).

33 See id.; Thailand: Telecommunications Profile, supra note 30, ¶ 5.

34 See Telegraph and Telephone Act, B.E. 2477, opening decree.

35 Id. at ch. 2, §§ 5, 6. Sections 5 and 6 read as follows:

Section 5. The government reserves the monopolistic rights and authority to install, maintain and provide telegraph and telephone services with the Kingdom of Siam. This authority is assigned to the Post and Telegraph Department.

Section 6. Within the Kingdom of Siam, the Post and Telegraph Department shall be the sole person to have the right and duty to:

(1) install, make and maintain telegraph and telephone offices in any place which the Minister considers appropriate.

(2) install posts and hang up wires or place wires or cables underground or underwater or perform other activities in the interests of telegraph or telephone communication, and

(3) receive, collect, transmit and deliver messages, and do all types of other work connected with telegraph or telephone services in accordance with the regulations, rules,
In 1954 and 1976 respectively, the TOT and CAT were created from the PTD by the Ministry of Transport and Communications under charters issued by the Royal Thai Government at their genesis. "Despite separate charters, the web of relationships between the PTD, the TOT, and the CAT has been complex and difficult to unravel." While the PTD retained responsibility for the radio frequency spectrum allocation, licensing, and international postal coordination and cooperation, the TOT and the CAT were implicitly given the responsibility for domestic and international telephone services respectively. While in theory, this divi-

orders and by laws established by the government.

Id.

See WELLNIIUS & STERN, supra note 21, at 211. Compare Telephone Organization of Thailand Act, B.E. 2497 (1954) with Communications Authority of Thailand Act, B.E. 2519 (1976). There is no language in either act which specifies either body's responsibilities.


Section 11. Radio communication stations shall use the exact frequencies specified in the rules on radio communications according to the annex to the International Telecommunications Convention.

In order to insure conformity with the said rules, the Director General of the Post and Telegraph Department or his delegate shall have the power to control and specify the use of frequencies by radio communication stations.

Id.; but see id. § 29, which states that "the Minister of Communications shall be in charge of the execution of this Act . . . ."

Id. § 19. Section 19 reads as follows:

Section 19. In the case the licensee contravenes any of the provisions of this Act or any Ministerial Regulations issued pursuant hereto or conditions specified in his license, the licensing officer has the power to order the withdrawal or suspension of such person's license. The licensee may appeal to the Director General of the Post and Telegraph Department within thirty days from the date of withdrawal or suspension of his license. The decision of the Director General of the Post and Telegraph Department shall be final.

Id.; but see § 29, which states that "the Minister of Communications shall be in charge of the execution of this Act . . . ."

See Thailand: Telecommunications Profile, supra note 30, ¶ 5. However, many would agree that most of PTD functions have been assigned to the TOT and the CAT. See Denton Hall Burgin & Warrens Asian Communications Group, Asia: A Special Report, INT'L FIN. L. REV., Supp. Mar. 1992, at 7, 16 [hereinafter Burgin & Warrens].

See Thailand: Telecommunications Profile, supra note 30, ¶ 7; see also Telephone Organization of Thailand Act, B.E. 2497, ch. 1, § 6 (stating in part that the TOT is established "having the objectives of carrying out and promoting telephone activities for the benefit of the State and the public and carrying out the business in connection with telephone activities and other business incidental, pertaining or beneficial to telephone activities"); Communications Authority of Thailand Act, B.E. 2519, ch. 1, § 7 (listing CAT's objectives, but without specific language regarding the CAT's responsibility for
sion would seem to clearly delineate both bodies' responsibilities, a careful look at the charters for the TOT and the CAT suggest otherwise. The TOT's charter grants the organization the power to provide "all services in connection with telephone activities" and to fix rates of charges for "any services rendered in connection with telephone activities." However, there is nothing in either charter which indicates that the TOT is responsible for domestic telecommunications issues and that the CAT is responsible for international telecommunications. Nevertheless, the responsibilities of both the TOT and the CAT are well-known.

The TOT has long been considered the "backbone" of the country's telecommunications network. Once dominated by the Thai army, the TOT is responsible for the domestic local and long distance public telephone networks, domestic long-distance, telephone lines, leased circuit services, and value-added services. The TOT is also responsi-
ble for setting rates for telephone services and for establishing regulations concerning telephone equipment and services.\textsuperscript{51}

The CAT, on the other hand, is a relative newcomer. Like the TOT, the CAT is also responsible for all telecommunications activities in Thailand, except to the extent that responsibility is specifically conferred to other bodies, such as the TOT.\textsuperscript{52} While it is understood that the TOT specifically oversees the domestic telephone service and a few other related businesses, the CAT is viewed as having a monopoly over nearly all other forms of telecommunications activities.\textsuperscript{53} The CAT is responsible for the domestic postal services;\textsuperscript{54} the public international telephone services;\textsuperscript{55} domestic and international public telegraph and telex services;\textsuperscript{56} international leased circuits;\textsuperscript{57} cellular telephones;\textsuperscript{58} and international facsimile and data packet services.\textsuperscript{59}

However, there are features that both the TOT and the CAT do have in common. Both bodies were established as state enterprises rather than regular government entities.\textsuperscript{60} As state-owned enterprises, the TOT and

\begin{itemize}
  \item \textsuperscript{51} See Burgin & Warrens, supra note 39, at 16.
  \item \textsuperscript{52} See Communications Authority of Thailand Act, B.E. 2519, ch. 1, §§ 4, 7.
  \item \textsuperscript{53} See Section Four. The Post Office Act, B.E. 2477, the Telegraph and Telephone Act, B.E. 2477 and all rules and regulations issued pursuant thereto in so far as they are concerned with the postal and telecommunications service shall continue to be in force in so far as they are not contrary to and inconsistent with the provisions of this Act. Id. § 4. Section seven establishes the CAT to operate and improve the activities of the telecommunications sector, except for those activities “specifically prescribed by laws to be within the powers and duties of other juristic persons.” Id. § 7; see also Burgin & Warrens, supra note 39, at 16.
  \item \textsuperscript{54} See Burgin & Warrens, supra note 39, at 16.
  \item \textsuperscript{55} Communications Authority of Thailand Act, B.E. 2519, ch. 1, §§ 12, 16. Section 12 transfers “the entire postal fund under the Postal Fund Act, B.E. 2504” to the CAT except for the postal fund allocated for the Office of the Secretary, International Communications Division of the Post and Telegraph Department. Id. § 12.
  \item \textsuperscript{56} See id. ch. 1, § 13 (transferring all activities of the Post and Telegraph Department, other than those under the Office of the Secretary, International Communications Division, Planning Division, and the Office of Frequency Management to the CAT). The CAT is responsible for all public international calls except for those to countries which share a border with Thailand. See Thailand: Telecommunications and Equipment, supra note 29, ¶ 10.
  \item \textsuperscript{57} See Thailand: Telecommunications and Equipment, supra note 29, ¶ 10.
  \item \textsuperscript{58} See id.
  \item \textsuperscript{59} See id.
  \item \textsuperscript{60} See Telephone Organization of Thailand Act, B.E. 2497, ch. 1, § 10; Communi-
the CAT are extremely limited since their charters stipulate that they must operate under regular Royal Thai government budget constraints. Thus, both the TOT and the CAT are forced to compete not only with other governmental agencies, but also with more than sixty other SOEs for their share of the national budget and the annual public sector external borrowing limit.

III. THE PROBLEMS OF THE STATE-OWNED ENTERPRISE: THE TOT & THE CAT

There are certainly "as many reasons for privatization as there are countries that privatize." This holds true for developing countries such as Thailand. However, to determine why a particular country such as Thailand is interested in privatizing its telecommunications sector, it is important to set forth the general problems associated with state ownership of public utilities.

Although some SOEs have been productive and profitable, the governments of most developing countries have failed to provide reliable

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61 See Thailand: Telecommunications Profile, supra note 30, ¶ 6; Telephone Organization of Thailand Act, B.E. 2497, ch. 3, § 41. Section 41 states: The Telephone Organization shall make an annual budget classifying into investment budget and operation budget. The investment budget shall be submitted to the Council of Ministers for consideration and approval and the operation budget shall be submitted to the Council of Ministers for information.

Id. Cf Communications Authority of Thailand Act, B.E. 2519, ch. 3, § 40. The Communications Authority of Thailand shall prepare an annual budget which shall be divided into a capital account and account and [a] working account. The capital account shall be submitted to the Council of Ministers for consideration and approval while the working account shall be submitted to the Council of Ministers for information.

Id.

62 See Telecommunications and Power May Set Privatization Trend, E. ASIAN EXEC. REP., July 15, 1993, at 8, 8 [hereinafter Telecommunications and Power]. As of 1993, there were 62 SOEs in Thailand. See id. at 26. While there is only a finite amount of funds to be divided amongst the 62 enterprises, the SOEs are also constrained by a government imposed U.S. $2.5 billion annual ceiling on public sector foreign borrowing. See id. at 28.

63 Casey & Wu, supra note 17, at 782.

64 See, e.g., KIKERI ET AL., supra note 1, at 42-43. The authors point to the French national electricity company, the Korean national steel producer, the Ethiopian national airline, and an Indonesian fertilizer company as examples of well-run, profitable, and efficient SOEs. See id.
services on a national level. A large number of SOEs have been economically inefficient, incurred heavy financial losses, and absorbed disproportionate shares of domestic credit. Of particular concern has been the burden that loss-generating SOEs place on the hard-pressed public budgets of developing countries like Thailand.

Furthermore, in countries with a significant number of SOEs, the industrial infrastructure has remained underdeveloped, leading to an inability to attract domestic and foreign investment. The resulting lack of much needed capital ultimately inhibits the country’s economic development, and in turn prevents a country from developing its infrastructure. As one analyst has stated “[t]he poor quality of infrastructure in most emerging economies often leads to a vicious circle of inertia.”

Moreover, because of rapid technological changes in the industry, the capital needed to run an effective and efficient telecommunications system has diminished. Traditionally, large fixed capital requirements were needed for efficient operation of the telecommunications system. Fixed costs were so considerable that it was generally economically sound to have one firm — usually the State — provide that service as a monopoly. However, today technological advances are rapidly reducing the cost of producing, installing, and operating transmission and switching

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65 See Kokila Doshi, *The Rush to Privatize in the Asia-Pacific Region*, 19 Bus. F., Jan. 1994, at 42, 42 (stating that “external pressures such as the oil shock and worldwide recession in the mid-1970s, combined with internal factors such as price distortions, heavy subsidies, and public mismanagement, resulted in heavy financial losses by the SOEs and in rising foreign debts”).

66 See SADER, supra note 5, at 5-6. 

[T]he efficiency considerations, initially used as an explanation for the rapidly expanding economic activities of the public sector, were quickly replaced by short-term political goals, rendering SOEs primarily as large employers and suppliers of highly subsidized goods and services to the public. Instead of . . . fostering the development of private industry through the provision of essential services . . ., they typically turned out to be grossly inefficient, resulting in bottlenecks and generally inadequate and deteriorating infrastructural conditions.

Id.; see also Doshi, supra note 65, at 42 (discussing internal and external forces causing financial losses in many SOEs).

67 See generally SADER, supra note 5, at 6 (noting that many inefficient SOEs incurred substantial financial losses which led to a serious drain on the country’s budget).


69 See id. at 4.

70 Id.

71 See id.

72 See id. at 3. This is what is often referred to as a “natural monopoly.” See id.
Technology such as fiber optic lines have driven down the cost of producing, installing, and operating transmissions equipment, so the investment requirements have fallen as well. As a result, it is considerably easier for smaller companies to enter the market and increasing numbers of private telecommunications operators have entered the market, in most countries. Consequently, the traditional view that only one extremely large corporation (i.e. the government) is capable of funding a network which requires large capital expenditures has become a myth.

The problems encountered by most countries with state-owned enterprises have not eluded Thailand’s telecommunications sector. First, the government has not made a very good manager and operator. Due to bureaucratic red tape and a vacuum of technical expertise at the upper levels of management, the telecommunications sector has suffered considerably, and consistently has fallen behind in the goals established in its past five-year plans. Because of the ineffectiveness of the government’s management, Thailand’s telecommunications sector has been unable to support public demand.

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73 See id. at 5.
74 See id.
75 See id. For example, "a monopoly can be maintained in the actual physical infrastructure while new services are provided by attaching computer nodes that communicate with subscribers over existing circuits." Id.
76 See id.
77 See Telecommunications and Power, supra note 62.
78 See Thailand: Private Sector Offers Telecom Plan Alternative, BANGKOK POST, July 3, 1995, at 24 [hereinafter Plan Alternative]. Cf. Telecommunications and Power, supra note 62 ("The efficiency of state enterprises varies widely, but most have operated profitably . . . . Some of those that operate in the red are characterized by inefficient management, poor financial performance, and inadequate service and maintenance").
79 See Transport & Communications: Post and Telecommunications, Econ. Intelligence Unit Country Profile, Jan. 1, 1995, available in LEXIS, World Library, Allelu File ("The plans of the TOT included a significant expansion and modernization of the network under the fifth five-year plan (1982-86), but these were plagued by difficulties").
80 See Rondinelli & Kasarda, supra note 1, at 134.
Although the network is considered fairly modern, it is not very extensive, and the waiting list for a phone line is extremely long.

Furthermore, the poor infrastructure and the limited size of the consumer base has resulted in a smaller amount of revenue available for the TOT and the CAT. This revenue is vital for investment in the telecommunications infrastructure. The problem is cyclical, and as a result the Thai telecommunications network has become completely overwhelmed by public demand. To add insult to injury, the Thai govern-

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81 See AMBROSE ET AL., supra note 19, at 3. The concept of “universal service” in the context of the telecommunications sector is that the telecommunications services not be limited to urban areas or businesses, but instead be extended to all. See id. A number of industrialized countries have only considered privatization and liberalization of their telecommunications sectors “once universal service has been attained.” Id.

82 Close to 80% of the domestic telecommunications system is tied to digitally stored program control exchanges. See Thailand: Telecommunications Profile, supra note 30, ¶ 8. This digital exchange technology enables TOT to provide a number of technologically advanced telecommunications services. See id. ¶ 14. In addition, the government has also begun implementing several projects including an integrated services digital network (ISDN). See id. ¶ 19. “ISDN is a sophisticated telephone network that revolutionizes the traditional telephone line by carrying out not only voice of superior clarity, but also computer data, visual images.” See id. ¶ 20. ISDN also provides services such as video conferencing and telebanking. See id.

83 For example, it is estimated that there are only 600 ISDN lines in Bangkok and 1,100 lines throughout the rest of the country. See TOT 'Too Slow' With ISDN Line Expansion, BANGKOK POST, Oct. 24, 1995, at 28. Furthermore, the total number of fiber optic kilometers has been described as “nil” with a total of 8,530 kilometers of fiber optic cable to be installed by 1995. See Thailand: Fiber Optic Cable Market Profile, National Trade Data Bank Market Rep., Dec. 17, 1992, available in LEXIS, World Library, Mktrpt File. As for the number of telephone lines for basic telecommunications service, the figures range from 2.2 million or 3.1 lines for every 100 Thai nationals to 2.5 million or 4.0 for every 100 Thai nationals. See generally Phone Stocks Rise as Thais Get That Long-Distance Feeling, FIN. POST, Dec. 2, 1994, ¶ 1, at 15 [hereinafter Long-Distance Feeling]; Victor Mallet, Survey of Asia-Pacific Telecommunications, Fin. TIMES (London), Feb. 25, 1994, at 16. To put these figures in perspective, in 1992, Malaysia had 11.7 lines, Singapore had 41 lines, and South Korea had 35 lines per 100 individuals. See Thailand: Telecommunications Profile, supra note 30, ¶ 9.

84 There are approximately 1.56 million potential subscribers waiting for phone service. See Thailand: Cabinet May Debate Roles of Private Telecom Firms, BANGKOK POST, Mar. 28, 1995, at 21. By 1998, The Ministry of Transport and Communications estimates that the telephone demand will be 3.9 million subscribers. See id. Business users are generally given priority; therefore, most waiting are residential users. See id.

85 See Rondinelli and Kasarda, supra note 1, at 136-41.

86 See id.

87 See Long-Distance Feeling, supra note 83 (stating that one million people in
ment has routinely diverted a significant portion of the revenue generated by the telecommunications sector to other utilities in dire need of funding and other politically favored projects.

Yet, this does not mean that the TOT and the CAT are expected to obtain all of the funding for future infrastructure projects from the fiscal revenue that they generate in providing telecommunications services. As mentioned above, the CAT and the TOT receive a considerable amount of their funding directly from the government. However, this also constitutes a problem because, as state-owned enterprises, the TOT and CAT are forced to compete for funding with other SOEs and government ministries, and are consequently often under-funded. Furthermore, the Thai government has not been able to turn to telecommunications legislation for relief or guidance. Instead, most of the problems experienced by the telecommunications sector have been exacerbated by the language, or lack thereof, in the Acts and Charters of the PTD, TOT, and CAT. Although the three pieces of legislation clearly authorize each individual body to administer and regulate the telecommunications sector, they fail to establish the specific duties and responsibilities of each group. Furthermore, the charters which created the TOT in 1954 and the CAT in 1976 failed to set forth how the three entities were supposed to coordinate their operations.

The three acts also fail to assert any substantive objective for either the PTD, TOT, or CAT. The opening line of the Telegraph and Telephone Act defines the PTD’s mission as being “provid[ing] greater convenience to the people and to be even more appropriate to the times.” Likewise, the CAT’s charter simply states that the CAT has been established as a matter of “expediency.” The TOT’s charter is a bit more specific in that its objective is clearly related to “promoting telephone activities.” However, it is unclear from the ambiguous language governing the area which telecommunications activities the TOT is to provide vis-à-vis the objectives and duties of the PTD and the CAT. To make matters worse, the Acts and Charters are out of date and are not

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88 See generally Telecommunications and Power, supra note 62, at 8, 26-28.
89 See generally Telephone Organization of Thailand Act, B.E. 2497; Communications Authority of Thailand Act, B.E. 2519.
90 See generally Telephone Organization of Thailand Act, B.E. 2497; Communications Authority of Thailand Act, B.E. 2519.
91 Telegraph and Telephone Act, B.E. 2477, opening decree.
92 Communications Authority of Thailand Act, B.E. 2519, opening decree.
93 Telephone Organization of Thailand Act, B.E. 2497, ch. 1, § 6.
flexible enough to take into account fully the technological advances which have taken place since the 1930s, 1950s, or even the 1970s.\(^9\)

Finally, Thailand's political history has been extremely tumultuous.\(^9\) Punctuated by a succession of military coups, Thailand has been affected by political instability to a far greater extent than any other country in the region.\(^9\) Political instability has had a far reaching effect on all facets of the economy, and the telecommunications sector has been no exception.\(^9\) The sector has found it difficult to remain insulated entirely from the political situation.\(^9\) The successful implementation of any modernization initiative requires a high degree of political support.\(^9\) When this political support falters, the new project also falters.\(^10\) Thus, although the incentive for using new entities might be to bypass existing institutional structures, this can precipitate a political crisis.\(^10\) As a result, much needed change is often slow in coming.\(^10\)

\(^9\) For example, no elected government has survived the full four-year term in Thailand's history as a democratic state. See *Thailand*, Walden Reports, *supra* note 50.
\(^9\) See Wellenius & Stern, *supra* note 21, at 211; *Thailand*, Walden Reports, *supra* note 50 (stating that when Chuan Leekphai, leader of the Democratic Party, emerged as the head of the ruling coalition in September 1992, he became the first Thai prime minister in 16 years who had no military connections).
\(^9\) See Wellenius & Stern, *supra* note 21, at 211. For example, Foreign Minister Thaksin Shinawatra was forced to resign in February 1995. See William Barnes, *Thai Minister May Have to Go*, FIN. TIMES (London), Jan. 11, 1995, at 3. According to Thai constitutional amendments, cabinet members are banned from holding a direct or indirect interest in government business concessions. See id. Having built Thailand's biggest telecommunications company, Shinawatra Computer & Communications Company, which has won a number of government contracts, it was clear that there was a conflict of interest. See id.; *Thailand: Thai Telecoms Re-Think*, ELECTRONICS TIMES, Sept. 7, 1995, at 80.
\(^9\) See Prateepchaikul, *supra* note 97.
\(^10\) See Thailand: Phone Plan in the Hands of New Minister, BANGKOK POST, May 23, 1995, at 15 (discussing the effect that the dissolution of the House of Representatives would have on the implementation of telecommunications mega projects); see also Outlook: Infrastructure Plans May Be Hit by Politics, Econ. Intelligence Unit Country Reports, June 19, 1995, *available in* LEXIS, World Library, Alleu File (noting examples of the relationship of political support and success of new projects).
\(^10\) See Wellenius & Stern, *supra* note 21, at 213.
\(^10\) For example, the present telecommunications master plan has been in the works since 1992. See *Thailand: Telephone Company Privatizes*, NAT'L TRADE DATA BANK MARKET REP., Nov. 13, 1992, *available in* LEXIS, World Library, Mktrpt File.
Other domestic political forces have also opposed the transfer of ownership and control from the State to the private sector. For example, labor groups have been opposed to institutional changes since state workers are better paid and receive better benefits packages than regular staff-level workers in the private sector. Managers and even military leaders have been opposed to the institutional changes. Managers regard ownership transfer as career-threatening, while military officers traditionally retire to positions in SOEs. Thus, there have been a considerable number of obstacles such as political parties and lobbying groups which have allowed the inefficient status quo to remain in existence.

IV. THE METHODS OF PRIVATIZATION: BOT AND BTO AGREEMENTS

The Thai government has clearly committed itself to privatizing those SOEs associated with the country's infrastructure. The government has recognized the problems which have plagued the state-owned enterprises, and has turned to privatization as a "positive policy tool" for remedying those problems.

The telecommunications sector has been one of the first state-owned public utilities to be considered for privatization, and the government has made its objectives extremely clear. First, the government hopes to mobilize financial resources from the private sector. The present Seventh Five-Year National Development Plan calls for an estimated $50 billion for expansion of infrastructural facilities. No developing country has deep enough pockets to meet these daunting financial needs, and therefore the Thai government has literally been forced to look to the pri-

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104 See id.
105 See id.
106 See Durchslag et al., supra note 68, at 3. Infrastructure is defined by example as including such industrial sectors as transportation, power, and telecommunications. See id.
107 Doshi, supra note 65, at 42.
108 See TOT to be Restructured, PRIVATIZATION INT'L, Mar. 1, 1995, available in 1995 WL 8379661 (stating that "if the TOT privatization takes place, it would become only the second major state enterprise utility to be privatized following in the footsteps of the General Electricity Generating Authority of Thailand"); Viravan, supra note 2, at 6 (stating that as of 1991 there are more than 60 state-owned enterprises in existence in Thailand).
109 See Viravan, supra note 2, at 6.
110 See id.
vate sector. Second, and more importantly, this revenue must be employed effectively and efficiently. Therefore, the government has also turned to privatization as a means of attracting both technological and managerial expertise to remain competitive with the rest of the region and the world.

Despite these objectives, the privatization process is a relatively recent phenomena in Thailand. Feeling the pressure of an overwhelming public demand for basic and advanced services, and a desire to compete with Hong Kong, Malaysia, and Singapore as a major trade and telecommunications hub, the Thai government began to broaden its policy on telecommunications services. By inviting the private sector to invest in the expansion and operation of the national telephone network in a cooperative arrangement, the government began meeting its revenue and infrastructure needs.

Following the recommendation of the National Economic and Social Development Board’s (NESDB) Sixth Five-Year Plan, the government invited the private sector to invest in and operate part of the nation’s telecommunications services. This constituted a significant departure from past practice and was difficult to implement. Although the private sector has been involved in the telecommunications sector, the level of involvement has been extremely limited to a small number of insignificant projects. However, the traditionally limited involvement of the private

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111 See Doshi, supra note 65, at 44.
112 See generally id. at 42-46; Viravan, supra note 2, at 6 (explaining the privatization trend in the ASEAN region, and the feasibility, availability, and support for privatization in the region).
113 See Thailand: Telecommunications Master Plan Approved by Cabinet, BANGKOK POST, Mar. 29, 1995, at 17 (stating that one reason Thailand should increase its telecommunications capacity is to turn Thailand into a “telecommunications hub for Southeast Asia”); Paul M. Sherer, Vichit Readsies Telecom, ASIAN WALL ST. J., Feb. 9, 1995, at 1 (stating that according to Thailand’s Minister of Transport and Communications, Vichit Suraphongchai, “[t]he motivation is clearly how to build up the telecom industry in Thailand to be able to compete with other countries, and also to satisfy the demand, which is growing very fast”).
114 See Thailand: Telecommunications Profile, supra note 30, ¶¶ 1, 14, 15.
115 See id. ¶¶ 1, 14.
116 Thailand’s Sixth Five-Year Plan ran from 1987 to 1991. See generally Thailand: Telecommunications Profile, supra note 30, ¶ 35.
118 See id.
119 See Thailand: Telecommunications Profile, supra note 30, ¶ 14. The private sector’s involvement in telecommunications has been in such “piecemeal projects” as licensing for publication of telephone directories and turn-key switching contracts. See
sector aside, the more serious obstacle for the government was a statutory prohibition, precluding private sector ownership of telecommunications assets. Therefore, in many ways, it was extremely difficult for the government to look to the private sector for assistance in any large and expansive projects.

The Royal Thai government has constructively avoided this dilemma through the formation of concessionary BTO and BOT contracts. Under the TOT Act and the CAT Act, each authority is allowed only to collaborate or combine with other parties to carry on their respective activities. In 1989, the Royal Thai government began inviting the private sector to invest in the expansion and operation of the national telephone network in cooperative BTO and BOT arrangements. Under this scheme, local private firms with technical expertise provided by major partners from Europe, Japan, and the United States are able to invest in the telecommunications sector.

In a BTO arrangement, the private firm initially funds and installs the assets. The firm then immediately transfers all assets to the government. The government, in turn, leases the assets back to the private firm for a fee. The private firm then operates the systems and share profits with the government concession-grantor. In a BOT ar-

\[\text{id.}\]

120 See Telegraph and Telephone Act, B.E. 2477, ch. 2, § 5 (reserving for the government "the monopolistic rights and authority to install, maintain and provide telegraph and telephone services with the Kingdom of Siam").

121 See WELLENIUS & STERN, supra note 21, at 212 (stating the rigidities in the existing sectoral arrangements between the TOT and the CAT as the reason for the private sector not being heavily involved in the telecommunications arena).

122 See Telephone Organization of Thailand Act, B.E. 2497, ch. 1, § 9(6) (giving the TOT the power to collaborate or combine with other persons for the benefit of the work of the Telephone Organization, as well as the power to enter into partnership or hold shares in any partnership); Communications Authority of Thailand Act, B.E. 2519, ch. 1, § 10(6) (granting the CAT the power "to participate in a joint venture for the benefit of the activities of the Communications Authority of Thailand, as well as to become a partner or shareholder of a partnership").

123 See Thailand: Telecommunications Profile, supra note 30, ¶ 15.

124 See Rondinelli & Kasarda, supra note 1, at 145-48.

125 See Rondinelli, supra note 25, at 5; Thailand: Telecommunications Profile, supra note 30, ¶ 15.

126 See Thailand: Telecommunications in Thailand, BANGKOK POST, Sept. 18, 1995, at 4 (explaining the BTO arrangement TelecomAsia has with the TOT where TelecomAsia must transfer all of its assets to the TOT before the system starts operating) [hereinafter Telecommunications in Thailand].

127 See Rondinelli, supra note 25, at 5.

128 See Rondinelli & Kasarda, supra note 1, at 145-48; Rondinelli, supra note 25,
rangement, on the other hand, the private sector entity initially funds, installs, and then operates the relevant network or service for a period of years. At the end of this concessionary period, the firm transfers ownership of the particular assets to the government.

The Thai government is comfortable with this type of relationship, in part, because the TOT and CAT retain ownership of the assets once the system is built. The private firm is simply a licensee and operates the system for a fixed number of years. In this way, Thailand’s telecommunications infrastructure benefits from a more rapid pace of development than it did while being financed solely by the Thai government. In addition, the government retains ownership of the assets as required by law, and avoids the cumbersome process of repealing or amending the telecommunications acts.

An interesting feature of the BOT and BTO arrangements is that the private sector entity is actually made up of a consortia of various domestic Thai and international telecommunications firms. In many ways, the domestic partner is simply a figurehead, while the more experienced international partner is responsible for management of the construction project. Thus, it appears as though the government has constructed a loophole to open the door for the private sector to invest and participate in the development of the country’s telecommunications infrastructure. Furthermore, it appears as though the government has found a way to encourage foreign investment without immediately having to repeal or amend the TOT and CAT’s charters.

The TOT awarded its first concession contract to Charoen Pokphand (CP Group), now TelecomAsia, in September 1991. The contract took

at 5; Telecommunications in Thailand, supra note 126.
129 See Thailand, supra note 117, at 37; AMBROSE ET AL., supra note 19, at 27.
130 See Thailand, supra note 117, at 37.
131 Rondinelli & Kasarda, supra note 1, at 145-48.
132 See Thailand, supra note 117, at 37.
133 See Thailand: Telecommunications Profile, supra note 30, ¶ 15.
134 See id.
135 See AMBROSE ET AL., supra note 19, at 28. For example, in May 1990, a consortia of five foreign telecommunications corporations submitted bids for the manufacture of digital switching equipment. See id.
136 See generally WELLENIEUS & STERN, supra note 21, at 197.
139 See id. TelecomAsia is a subsidiary of the CP Group, which holds 60% of TelecomAsia. See TelecomAsia: Emerging Force in Asian Telecoms, INSTITUTIONAL
the form of a BOT and called for TelecomAsia to fund and install two million phone lines in the Bangkok metropolitan area between 1992 and 1996, and then operate them for twenty-five years. TelecomAsia identified New York-based NYNEX as its strategic partner, and Siemens, AT&T, and NEC as its suppliers. Under the negotiated agreement, TelecomAsia channels sixteen percent of its revenues to TOT. As of September 1992, TelecomAsia had begun the installation of lines in Bangkok, and by May 1993 had delivered 106,000 lines to the TOT, 40,000 more than required under the concession.

In July 1992, TOT awarded its second twenty-five year concession to Thai Telephone & Telecommunications Company (TT&T). The arrangement called for TT&T to install one million phone lines in the rural areas outside Bangkok. The Thai Telephone & Telecommunications Company chose Nippon Telephone and Telegraph as its strategic partner, and Ericsson and Alcatel as its suppliers. Under the agree-

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140 See How Thai Liberalization Plan Will Benefit TelecomAsia and TT&T, FINTECH TELECOM MARKETS, April 12, 1995, available in LEXIS, News Library, Allnews File; A Major New Force, supra note 139 (explaining that TelecomAsia will build, transfer, and operate two million telephone lines, and will run the concession for 25 years).

141 See WELLENIUS & STERN, supra note 21, at 212. TelecomAsia initially identified British Telecom as the foreign operator responsible for management of the construction project. See Thailand: Telecommunications Profile, supra note 30, ¶ 29. However, following the military coup in Spring 1991 and a long and contentious review process which saw TelecomAsia relinquish its bid for an additional one million lines outside of Bangkok, NYNEX replaced British Telecom as the outside contractor. See WELLENIUS & STERN, supra note 21, at 212. It is estimated that NYNEX will invest close to $100 million for a 10% share of TelecomAsia.

142 See Thailand: Telecommunications Market Profile, supra note 137, ¶ 2. NYNEX serves as project manager and holds a 15% equity share in TelecomAsia. See Thailand: Telecommunications Profile, supra note 30, ¶ 29.

143 See Thailand: Telecommunications Market Profile, supra note 137, ¶ 2. Siemens is subcontracted to supply 1 million lines, while AT&T and NEC are subcontracted out to supply 500,000 lines each. See Thailand: Telecommunications Profile, supra note 30, ¶ 16.

144 See A Major New Force, supra note 139.

145 See id. “By the end of 1993, [TelecomAsia] had installed a total of 301,500 lines.” Id. Furthermore, it is estimated that this project will cost between three and four billion dollars (U.S.). See WELLENIUS & STERN, supra note 21, at 212.

146 See WELLENIUS & STERN, supra note 21, at 212.

147 See Telecommunications: Millions of New Lines in Fresh Plan, E. ASIAN AFF.,
ment, TT&T provides TOT with 43.1% of its revenues in return for the ability to provide telecommunications services in rural areas expected to involve a significant percentage of profitable long-distance and international calls.148

With the emergence of private sector involvement in the telecommunications sector, the Royal Thai government enacted the Act on Permitting the Private Sector to Participate in or Operate State Business, B.E. 2535 (Joint Venture Act) in April 1992.149 The purpose of the Joint Venture Act was twofold. First, the Act was meant to encourage the private sector to invest more in its state-owned enterprises, effectively enhancing the infrastructure of the telecommunication sector.150 Second, the Act also served to legitimize the concession contracts that the TOT and CAT had entered into with TelecomAsia, as well as those it was about to enter into with TT&T. It was the government's position that these joint ventures would be monitored very closely by the Ministry of Transport and Communications (MOTC) "to ensure 'transparency and cleanliness.'"151 Under the Act, investment in the telecommunications sector by private consortia has increased considerably. From 1992 through 1995, the private sector invested $3.8 billion in Thailand's telecommunications infrastructure.152 In 1996, the private sector was expected to invest another $1.1 billion, constituting seventy-five percent of the total investment in the telecommunications infrastructure according to the figures presented by the NESDB in its Seventh Five-Year Development Master Plan.153

Yet, despite these modest gains, the Joint Venture Act has its limitations.154 First, the Joint Venture Act has failed to delineate clearly the scope of each individual venture.155 While it maps out the procedural guidelines for private sector participation,156 the Joint Venture Act

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145 See generally Thailand: Telecommunications Market Profile, supra note 137.
150 Id. opening decree (stating that "it is expedient to have a law on permitting the private sector to participate in or operate state business").
151 Telecommunications in Thailand, supra note 126.
152 See Thailand, supra note 117, at 38.
153 See id.
154 See WELLENIUS & STERN, supra note 21, at 213.
155 See generally Act on Permitting the Private Sector to Participate in or Operate State Business, B.E. 2535, ch. 2, §§ 6-11, ch. 3, §§ 12-21 (explaining bureaucratic problems of approving private sector participation in public projects).
156 Id. § 6 (stating that "[a] government agency developing the project that wishes to have the private sector participate in or operate any project, shall propose to the
fails to address the substantive issues such as how to integrate the new and established operators from an operational and technical standpoint. Instead, these decisions are made by an appointed committee on an ad hoc basis, leaving room for considerable discrepancy from project to project. For example, the contractual terms for TelecomAsia's three-million-line project in 1991 were drawn so loosely that they were useless as guidelines for the future, including TT&T's bid in 1992.

Second, and more importantly, the Joint Venture Act has failed to address the conflict of interest problems incurred by the Royal Thai government as it begins the process of sectoral restructuring and the eventual privatization of the TOT and the CAT. Both the TOT and the CAT still act as both a supervisor/regulator and service-provider/operator. There is considerable duplication of work by the two state enterprises, and it is clear that "this confusion of roles will ultimately make more difficult the task of third-party contractors like TelecomAsia and TT&T more difficult." Moreover, the resultant rivalry between the new service providers and existing government bodies

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157 See WELLENIUS & STERN, supra note 21, at 213 ("Other difficult issues not addressed under the Joint Venture Act include the role of the private contractor in providing operational capabilities, timing of transfer of new assets to existing entities, and methods of financing").

158 See id.; Suphaphan Plengmaneephan & Amornrat Mahithiruk, Thailand: TT&T Still Protected Under Silent Line Deal, BANGKOK POST, Sept. 22, 1995, at 19. For example, in an attempt to eliminate the protection periods of the two largest telecommunications concession holders under the Joint Venture Act, both TT&T and TelecomAsia were not to receive equal treatment. TT&T was permitted to retain its period of protection from other private telecommunications companies through September 1996. See id. Meanwhile, TelecomAsia agreed to immediately end its protection period for 1996. See Telecommunications in Thailand, supra note 126.

159 See Telecommunications in Thailand, supra note 126.

160 See WELLENIUS & STERN, supra note 21, at 213.


162 See id.

163 WELLENIUS & STERN, supra note 21, at 213.
has stifled growth as both groups attempt to work out potentially differing approaches to their respective business objectives.\textsuperscript{164} Furthermore, this relationship under the Joint Venture Act does not necessarily place TelecomAsia and TT&T in an enviable position.\textsuperscript{165} If the TOT and the CAT retain their status as SOEs, they would continue to have considerable leverage over TelecomAsia and TT&T, since they would both retain responsibility for setting tariffs.\textsuperscript{166} However, the Royal Thai government’s privatization of the TOT and the CAT, without amending or superseding the Joint Venture Act, would also work to further complicate matters.\textsuperscript{167} Eventually, the privatization of these two government entities “will inevitably ensure a more intensive review of the long-term relationship of the TOT and the CAT as well as their respective relationships with TelecomAsia and TT&T.”\textsuperscript{168} Without a complete delineation of sector relationships and policies, which the Joint Venture Act clearly does not provide, potential investors in the TOT, the CAT, and private entities like TelecomAsia and TT&T will refuse to make significant financial commitments to the Thai telecommunications sector.\textsuperscript{169} Consequently, it is not too surprising that the Royal Thai government has concluded that a new national telecommunications plan must be enacted for effective liberalization of the telecommunications sector to take place.\textsuperscript{170}

V. OTHER METHODS OF PRIVATIZATION: DIVESTMENT, DEMONOPOLIZATION, AND THE THAI TELECOMMUNICATIONS MASTER PLAN

Before ultimately examining the merits and flaws of the BOT and BTO agreements, it is important to question why the Royal Thai government chose this particular form of privatization to jump start its telecommunications sector instead of a number of other forms of privatization. There are numerous forms of privatization, each with countless

\textsuperscript{164} See Mallet, supra note 83. Likewise, the World Bank recognizes this same “conflict of interest” within the TOT itself. See \textit{Preaching Privatization to Thai Telecoms}, E. ASIAN AFF., Jan. 4, 1995, at 67, 67 (stating that “as an operator [the TOT] must maximize revenue while as a regulator it may seek faster network expansion”) [hereinafter \textit{Preaching Privatization}].

\textsuperscript{165} See \textit{Sorry, Wrong Number: Thai Telecoms: Only for the Long-Term Punter}, ASIAWEEK, Feb. 23, 1995, at 63 [hereinafter \textit{Sorry, Wrong Number}].

\textsuperscript{166} See \textit{WELLENIUS & STERN}, supra note 21, at 213.

\textsuperscript{167} See \textit{Thailand: Telephone Company Privatizes}, supra note 102.

\textsuperscript{168} \textit{WELLENIUS & STERN}, supra note 21, at 213.

\textsuperscript{169} See id.

\textsuperscript{170} See generally \textit{Telecommunications and Power Part II}, supra note 103.
variations, which have also been considered as alternatives to the expansion of government responsibility in the sector.\textsuperscript{171} As has been stated, "[a] broader concept of privatization encompasses a wide range of policies to encourage private-sector participation in public service provision and that eliminate or modify the monopoly status of public enterprise."\textsuperscript{172} Therefore, in answering this question, it is important to first examine the characteristics of other forms of privatization, two of which are the complete divestment of the SOE\textsuperscript{173} and the marketization and elimination of the SOE’s monopoly.\textsuperscript{174} Unlike the "privatization partnership" taking place in Thailand, a large number of governments have taken what some consider the "easy route" and simply sold off their state-owned assets,\textsuperscript{175} including their telecommunications network and services.\textsuperscript{176} Divestment of the state enterprise has been accomplished in a number of ways, including a public offering of shares;\textsuperscript{177} a private sale of shares to domestic or foreign investors,\textsuperscript{178} and management or employee buy-outs.\textsuperscript{179} Furthermore, in the telecommunications sector, the government has the option of either selling all or part of the SOE as a single entity, or dividing up the network and privatizing various components.\textsuperscript{180} In each case, there is likely to be a need for the SOE to restructure.\textsuperscript{181}

\textsuperscript{171} See Rondinelli & Kasarda, supra note 1, at 141-48.
\textsuperscript{172} Id. at 142.
\textsuperscript{173} For an overview of complete divestiture as a means of privatization, see generally KIKERI ET AL., supra note 1.
\textsuperscript{174} For an overview of "marketization" and "demonopolization" as a form of privatization, see generally Rondinelli & Kasarda, supra note 1; Bishop & Mody, supra note 17 (discussing the reasons for, and process of, demonopolization of a government-owned telecommunications monopoly).
\textsuperscript{175} See Rondinelli, supra note 25, at 3.
\textsuperscript{176} See AMBROSE ET AL., supra note 19, at 12.
\textsuperscript{177} See generally Durchslag et al., supra note 68, at 3. The transfer of ownership via public sale is most useful when the government is trying to develop the country’s capital markets or to use equity to gain support among the employees. See id.
\textsuperscript{178} See id. at 4. A private sale is advisable in sectors where operating experience and technology is crucial, as in the telecommunications sector. See id.
\textsuperscript{179} See Rondinelli & Kasarda, supra note 1, at 142. In the United Kingdom, employees who purchased British Telecom stock were considered the “main winners.” See generally Ingo Vogelsang, The United Kingdom, in Does Privatization Deliver? (Ahmed Galal & Mary Sirley eds., 1994).
\textsuperscript{180} See AMBROSE ET AL., supra note 19, at 13.
\textsuperscript{181} See id. at 39; Bishop & Mody, supra note 17 (discussing three steps necessary in enterprise restructuring of a government-owned telecommunications monopoly).
Likewise, the marketization and demonopolization of the SOE is another popular form of privatization that has been chosen by a number of countries. By restructuring their SOEs to make them more efficient and effective, countries have made them compete with or operate like private companies. This method of privatization has been accomplished in several ways. First, several countries have tried to eliminate the SOE's monopoly by eliminating subsidies, thereby forcing the SOE to recover costs or to make a profit. A second means of privatizing in this manner has been to create joint stock companies in which public and private investors hold shares and give direction to the enterprise. A third way has been to allow private firms to compete with SOEs in providing goods and services, which effectively eliminates the SOE's monopoly position. Finally, a few countries have chosen to break up their SOEs into divisions, some of which are divested while others are retained as public enterprises.

Although both are somewhat controversial, these two methods of privatization have proven successful in bringing substantial gains to the sector when they are implemented properly. For example, it is imperative that divestment of the assets of the SOE be combined with an appropriate regulatory environment. In addition, the barriers to entry must be low enough to permit competition. These gains can only be

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182 See Rondinelli & Kasarda, supra note 1, at 143-44.
183 See Casey & Wu, supra note 17, at 788-90 (discussing the restructuring of the telecommunications sector in the United Kingdom, New Zealand, Mexico, and Argentina).
184 See Rondinelli & Kasarda, supra note 1, at 144.
185 See Rondinelli, supra note 25, at 5-6.
186 See generally Bishop & Mody, supra note 17; Rondinelli & Kasarda, supra note 1, at 144.
187 See Rondinelli & Kasarda, supra note 1, at 144.
188 For an overview of how controversial complete divestiture can be, see generally DOES PRIVATIZATION DELIVER?, supra note 179.
189 See Ahmed Galal & Mary Shirley, Overview to DOES PRIVATIZATION DELIVER?, supra note 179, at 3, 4.
190 See Casey & Wu, supra note 17, at 786-88.
191 See AMBROSE ET AL., supra note 19, at 12. For example, following the introduction of the 1991 U.K. Government White Paper, the United Kingdom offered complete freedom for any organization, local or foreign, to compete in long distance and local services as well as the supply of voice, data, and value-added services. See Colin Long, United Kingdom, INT'L FIN. L. REV., Supp. Mar. 1992, at 73, 73. Consumers benefitted substantially from this type of divestiture. See KIKERI ET AL., supra note 1, at 28.
attained if privatization is accomplished with the introduction of competition wherever possible and without special concessions or privileges.192

Nevertheless, even when the privatization plan is properly implemented, many developing countries still find it difficult to attain the gains that one would expect.193 In a number of countries, the slow pace of the privatization may simply be the result of a government which has not been genuinely committed to capitalist policies in the past, and therefore lacks credibility with buyers and investors.194 A related issue in these countries is that there is no competitive private sector into which these enterprises can be privatized.195 Furthermore, establishing a competitive private sector takes a wealth of time and institutional development in the form of a legal framework, contractual enforcement, and a reasonable capital market.196

In Thailand, both complete divestiture and demonopolization of the TOT and the CAT have been considered by the Royal Thai government.197 In fact, the proposed national telecommunications master plan which was forwarded recently to the Cabinet considers these same means of privatization.198 The Royal Thai government began soliciting privatization consulting services for the TOT as early as October 1992.199 The government has been advised that the TOT should consider selling a

192 See Galal & Shirley, supra note 189, at 4.
193 See Lawrence H. Summers, A Changing Course Toward Privatization, in DOES PRIVATIZATION DELIVER?, supra note 179, at 11, 12-16.
194 See id. at 15-16. This has been referred to by some as the "privatization trap." Id. at 15. For a government which is caught in the privatization trap, it is difficult for it to receive a fair price for the sale of the SOE and behave properly too. See id. at 16. Because of the government's poor record in terms of capitalist policies, buyers will be wary and the SOE will not fetch a high price. If the government behaves properly and keeps interference at a minimum, the buyer will ultimately get a windfall; and if it does not behave properly, then the government will get more out of the deal, at least in the short-run, but the price will ultimately fall over time since the government's credibility will suffer. See id. This appears to have been the problem in Malaysia, Indonesia, and Taiwan where weak stock markets and low demand for shares slowed the process of selling SOEs in the early 1990s. See Rondinelli & Kasarda, supra note 1, at 151.
196 See id.
199 See TOT to be Restructured, supra note 108.
significant percentage of its equity to a potential strategic partner as the first step towards achieving privatization. The TOT-Restructuring and Privatization Study recommends that the TOT make an initial public offering of twenty-one percent of its equity and allocate five percent of this equity to its employees at less than IPO price, on top of a sale of twenty percent to a strategic partner. The SOE would automatically become a private organization following the reduction of its stake to forty-nine percent.

The Royal Thai government has been guided by the recommendation of institutions such as the World Bank in developing its National Telecommunications Master Plan. First, the government wants to separate the role of the operator from that of the regulatory watchdog body. In their place, the drafters of the master plan propose setting up the National Communications Board (NCB) to act as a politically neutral regulator of the sector. Ultimately, it is conceivable that the NCB could become responsible for frequency utilization and allocation.

Second, the Master Plan will ultimately permit the TOT and the CAT to openly compete with private companies. Drafts of the Master Plan...

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200 See id.
201 See id. The study was prepared by Coopers & Lybrand with assistance from consultants Thai Investment and Securities, Merrill Lynch, and Chula Unisearch as well as the law firm Skadden, Arps, Slate, Meagher & Flom, LLP. See id.
202 See id.; Loh Hui Yin, Thailand to Allow Competition in Growing Telecom Industry, BUS. TIMES, Mar. 30, 1995, at 3 (stating that "up to 49 percent of the two state enterprises would be sold to the private sector. Of the 49 percent, foreign investors could buy a maximum of 20 percent and the Crown Property Bureau, which manages the royal family's assets, 2 percent").
203 See Preaching Privatization, supra note 164.
204 See Plan Alternative, supra note 78, at 24.
205 See Sinfah Tunsarawuth, Thailand Completes Drafts for Telecoms Privatization, STRATS TIMES, Aug. 8, 1995, § 4, at 35. For the NCB to maintain its neutrality, the secretary-general of the Telecommunication Association of Thailand has suggested that the organization should have its own operating budget independent of the government. See Suphaphan Plengmaneeophan & Nondhanada Intarakomalyasut, Thailand: Kosol Doubtful NCB Can Stay Out of Politics, BANGKOK POST, Oct. 3, 1995, at 17. It is believed that the NCB should be able to generate enough income from licenses to private telecommunications operators. See id.
206 See Loh, supra note 202; Plengmaneeophan & Intarakomalyasut, supra note 205, at 17; Preaching Privatization, supra note 164 (explaining that "[t]he main jobs of the body would be to set tariffs in keeping with the rules of open competition" [and to] "guarantee the rule of nondiscrimination for users and ensure transparency with regard [to] costs").
207 See Plan Alternative, supra note 78, at 24.
Plan propose that the TOT and the CAT be combined and then split into two separate entities. One entity would be maintained as an SOE and would oversee the installation of the main networks and provide guidelines for future development. The remaining entity would become a public company to be listed on the stock market and provide actual telecommunications services.

Finally, to allow for as much competition as possible, the master plan also calls for the creation of a zoning system to completely liberalize the telecommunications sector. The country would be divided into five zones, and bids would be open in each zone to enable at least one private operator to compete with the government in providing the telecommunications network and services. The zoning system would encourage all private companies to compete on a level playing field because the networks would belong to the government under the SOE-portion of the TOT and the CAT. Also, each private operator whether new or old would have to pay the government to use the network. Furthermore, each zone would have to participate in revenue sharing to counter any advantage that one zone may have over another.

Yet, despite these overtures toward a more complete form of privatization, the process has moved slowly. As recently as March 1995, approval of the Master Plan appeared certain following the Cabinet's endorsement of the Transport and Communication minister's proposal. However, as is frequently the case in Thailand, political upheaval placed the reform measure on hold. Consequently, even though the Demo-
cratic Party cabinet was able to rush through its approval of the telecommunications plan, the new Chart Thai administration scrapped the proposal in favor of a revised plan, which just recently has been forwarded to the Cabinet for approval. The revised plan is similar to the earlier model, but the pace of change is accelerated dramatically to allow new entrants to come into the fixed line sector and bid for contracts to install approximately six million new lines. Nevertheless, due to the slow processing of the plan, it is doubtful that the initial January 1, 1997 deadline for privatization will be met. Thus, until the master plan is enacted, the Royal Thai government will be forced to continue to rely on BTO and BOT agreements to develop the infrastructure which the country needs.

VI. CONCLUSION: BOT AND BTO AGREEMENTS: FRIEND OR FOE?

Now, nearly six years after the government-controlled telecommunications sector entered into its first concessionary contract with TelecomAsia, the question remains whether the BTO and BOT agreements have been beneficial for the sector, or whether they will ultimately be more of a burden to the sector and the economy. In some ways this question is not fair since the Royal Thai government was left with very few options. Because of the enormous demand for telecommunications services and antiquated telecommunications laws which prohibited any form of privatization, the government had no choice but to enter into partnerships with TelecomAsia and TT&T. However, the government is not without blame. Instability, corruption, and indecisiveness have been
present in each administration during the 1990s. In fact, over the past six years Thailand has seen three prime ministers, one interim prime minister, and one military junta. Certainly, this is not an environment conducive to reform, liberalization, and investment.

Nevertheless, while hindsight is always twenty-twenty, it is still important to examine the results of the past to better predict the future, for both Thailand and other countries contemplating a BTO or BOT arrangement. Unfortunately, at least in the case of Thailand, it is clear that while these private-public partnerships are successful in the short-run, their benefits begin to diminish in the long-term. In fact, it may be argued that BTO and BOT agreements have actually discouraged or at least delayed privatization in Thailand. Furthermore, in light of the shortcomings reviewed below, the BTO and BOT agreements may also prove to be a hindrance once a more full and complete form of privatization is introduced to the telecommunications sector.

First, while the BTO and BOT agreements have helped enhance the telecommunications infrastructure and have improved telephone penetration in Thailand, control remains in the hands of the Royal Thai government. The TOT and the CAT still serve as both operators and regulators and the government retains responsibility for supervision and control of the network and fixing standards and service fees. This conflict of interest has most recently surfaced again as the TOT raised monthly telephone line rental charges by twenty percent. The increase, which is estimated to earn up to $768 million in revenue for the TOT, as well as connection problems have made it even more difficult for many people to afford maintaining a telephone in their home, resulting in lost customers and lost revenues for TelecomAsia and TT&T. In addition, restrictions on the type and amount of equipment which can be procured add further cost for private companies. Thus, with their earning capacity

225 See Thailand, Walden Reports, supra note 50.
227 See Technology Brief: TelecomAsia Corp., THE ASIAN WALL ST. J., Sept. 6, 1995, at 12 (discussing how the Thai Cabinet simply rescinded the five-year “protection period” it had granted TelecomAsia in return for TelecomAsia installing two million phone lines in Bangkok).
228 Thailand: Telecommunications in Thailand, supra note 126.
230 See id.
231 See Sorry, Wrong Number, supra note 165.
232 See AMBROSE ET AL., supra note 19, at 28. For example, procurement of a
adversely affected by these government policies, the BTO and BOT systems have actually served to discourage some in the private sector from playing a greater role in the provision of telecommunications services. 233

Moreover, full privatization of the telecommunications sector in Thailand has also been hindered by the “exclusivity” clauses in the BTO and BOT agreements. 234 Only two private companies, TelecomAsia and TT&T, have been permitted entry into the fixed-line telecommunications sector, and each was initially granted an exclusive right in a particular region for a fixed number of years. 235 Although these exclusivity clauses with TelecomAsia and TT&T have since been amended, 236 they were very costly to the government in terms of time, revenue, and power. The agreements with TelecomAsia and TT&T have actually served to delay expansion of the infrastructure in Bangkok and other regions since the government was unable to enter into a BTO or BOT agreement with any other private company. 237 In addition, renegotiation with both companies forced the government to expand the number of lines each could construct. 238 Finally, because of the government’s weak position, it has negotiated to increase the royalties of both TelecomAsia and TT&T. 239 It has also granted a tax rebate on the value-added tax collected on TelecomAsia’s and TT&T’s service fees. 240 This could amount to a loss of 200 million baht for the Royal Thai government. 241

Finally, these exclusivity clauses have also prevented the sector from opening up to competition, and have merely transferred monopolistic

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234 See Mallet, supra note 83.
236 See Thailand: TT&T Still Protected Under Silent Line Deal, supra note 158.
237 See id.
238 See id. For example, the TOT has awarded TT&T an additional 500,000-line project in its provinces for TT&T’s agreeing to limit its protection period from 1998 to September 1991. See id.
239 See Thailand: Phone Line Royalties Set to Go Before Cabinet, BANGKOK POST, Aug. 17, 1995, at 19 (stating that the government negotiated to increase TelecomAsia’s royalty from 16% to 21% and TT&T’s royalty from 43.1% to 44.5%).
241 See id. Twenty-five baht approximately equal one dollar. See Thailand, Walden Reports, supra note 50.
practices from the public to the private sector.\(^{242}\) This transfer has permitted big business to obtain greater economic and political influence which is difficult for public officials to control.\(^{243}\) Furthermore, these private monopolies also have very little incentive to operate efficiently.\(^{244}\) For example, in spite of an overall shortage of telephone lines in Thailand, TelecomAsia and TT&T have saturated traditional markets of high usage with new lines, creating a surplus that is going unused and therefore not generating revenue.\(^{245}\) Thus, the BTO and BOT agreements may actually delay a more complete form of privatization.

However, one last question remains as to the ultimate success of the new telecommunications Master Plan. Although any further form of liberalization and privatization in the telecommunications sector is welcome, the Master Plan will most likely enjoy only modest success for several reasons. First, the Master Plan is likely to see entrenched opposition from political leaders,\(^{246}\) the military,\(^{247}\) and the labor unions continue beyond the next Five-Year Plan.\(^{248}\) Historically, these groups have represented the status quo, and without any form of consensus amongst

\(^{242}\) See Rondinelli & Kasarda, supra note 1, at 154.

\(^{243}\) See id.

\(^{244}\) See Ted Bardacke, Thai Telecoms Soar Despite Operating Weakness, FIN. TIMES (London), Mar. 6, 1996, at 26 (stating that such monopolies reported net profits in 1995 despite an overall shortage of lines in the country).


\(^{246}\) See Suphaphan Plengmaneepun, Thailand: Rejected Venture 'Would Have Greatly Benefitted CAT,' BANGKOK POST, Oct. 13, 1995, at 28. For example, an opportunity by the CAT to invest 25 million baht in a recent joint venture project was opposed by Deputy Prime Minister Thaksin Shinawatra and rejected by the Cabinet. See id. The joint venture would have enhanced satellite uplink-downlink telecommunications services among television and foreign news agencies, rivaling Singapore as the region's telecommunications center. Id.; see also Suphaphan Plengmaneepun, Thailand: MOTC May Weaken to Set Up Uplink-Downlink Firm With CAT, Others, BANGKOK POST, Jan. 10, 1996, available in LEXIS, News Library, Allnws File. Thaksin Shinawatra is founder of what is considered the most successful Thai telecommunications company and his assets are valued at nearly $3.3 billion. See Sinfah Tunsarawuth, One of the World's Richest Ministers, STRAITS TIMES, Dec. 25, 1994, at 3; Suphaphan Plengmaneepun, Thailand: Thai Politics 'A Mess,' Says Telecom Company Executive, BANGKOK POST, Jan. 9, 1996, available in LEXIS, News Library, Bngpst File (discussing that the CEO of telecom conglomerate United Communication Industry has declared that he is "turning his back on politics because it is 'a mess'")

\(^{247}\) See Rondinelli & Kasarda, supra note 1, at 152.

\(^{248}\) See id. (stating that members of civil labor unions have been outspoken in their opposition to privatization, "fearing that transfer of services to the private sector will not only result in job losses but will also reduce their power in the service industry").
them, it is likely that the telecommunications sector will remain in havoc.\textsuperscript{249} It is extremely important then for the coalition leaders of the present administration to place their political differences aside and work to pass an effective Telecommunications Master Plan or Thailand may once again see a rise in public discontent.\textsuperscript{250}

Second, the government has frequently had difficulty trying to implement any reform proposal. Yet, it is imperative that the government implement the proper legal and regulatory framework to separate potentially competitive activities, clarify service goals, develop cost-minimization targets, and create an agency to supervise the process.\textsuperscript{251} Presently, a regulatory framework does not exist in Thailand that is free from any conflict of interest.\textsuperscript{252} Nor does the current legislation offer any assistance.

Whether the new Telecommunications Master Plan can resolve these problems is just a matter of time and political will. History has shown that it will be an uphill battle no matter which government administration is leading the fight. Yet, if Thailand is to compete with other countries in the region\textsuperscript{253} and remain in contention as one of Southeast Asia's business centers,\textsuperscript{254} and it is clear that the Royal Thai government needs to separate the telecommunications industry from government bureaucracy.\textsuperscript{255}

\textsuperscript{249} See id. at 158
\textsuperscript{250} See Teena Gill, Thailand Politics: Stormy Times Ahead for Coalition Government, Inter Press Service, Jan. 8, 1996, available in LEXIS, News Library, Allnw File; Rondinelli & Kasarda, supra note 1, at 151 (stating that "opposition remains strong ... impeding the implementation of privatization policies").
\textsuperscript{251} See Rondinelli & Kasarda, supra note 1, at 157-60; see generally KIKERI ET AL., supra note 1 (discussing divestment as a means of privatization and the government role in the process).
\textsuperscript{252} See Preaching Privatization, supra note 164 (stating that the World Bank sees a necessity in establishing an independent regulatory entity for the telecommunications sector).
\textsuperscript{253} See Sherer, supra note 113.
\textsuperscript{255} See Tunsarawuth, supra note 205 (quoting Mr. Sansern Wongchaum, deputy secretary-general of the National Economic and Social Development Board, the Royal Thai government's top planning agency as saying that the government "need[s] to pull the telecommunications industry out of [the] bureaucratic system").