

**AT A CROSSROAD: THE GATS TELECOM
FRAMEWORK AND NEO-PATRIMONIAL STATES:
THE POLITICS OF TELECOM REFORM IN KENYA**

by

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**Thesis submitted in accordance with the requirements for the degree of
Doctor of Philosophy in the School of Social Science and Policy,
University of New South Wales**

March 2006

CERTIFICATE OF ORIGINALITY

I hereby declare that this submission is my own work and, to the best of my knowledge, it contains no material previously published or written by another person, nor material which to a substantial extent has been accepted for the award of any other degree or diploma at UNSW or any other educational institution, except where due acknowledgment is made in the thesis. Any contribution made to the research by others, with whom I have worked at UNSW or elsewhere, is explicitly acknowledged in the thesis.

I also declare that the intellectual content of this thesis is the product of my own work, except to the extent that assistance from others in the study's design and conception or in style, presentation and linguistic expression is acknowledged.

Signed:

Monica Kerretts

ACKNOWLEDGEMENTS

*To him who is able to do exceedingly, abundantly above all else
(Ephesians 3:20)*

I have been very fortunate to have Dr Susan Keen as my supervisor in the development, research and writing of my thesis. Susan provided steadfast support, always pushing me forward to explore my project deeper and finding the essence of what this study was about. She was also always there to acknowledge the ‘ups and downs’ of in my endeavour to do so. Special mention and thank you, also goes to Prof. Marc Williams of the School of International Relations and Politics for providing insight into the structure of the thesis and for the final read and insightful comments in spite of his busy schedule.

I also wish to thank other colleagues in the School of Social Science. To my co-supervisor; Associate Professor Michael Johnson (Development Studies) for the final edits and comments and Dr Ingrid Tufvesson, the later with whom I had the pleasure of sharing an office. Special mention also goes to: Jenny Wilson, Dr Kulinda Davis, Dr Cathie Jensen Lee, Dr Sue Starfield, Dr Ian Collinson, Dr Dominic Fitzsimmons and the entire staff at the Learning Centre whom I had the pleasure of working with. Much appreciation is given to my financial supporters. Most importantly ‘JC’ who is responsible for my funding and, my family, for believing I could do it. This thesis would not have been completed without the financial support from the Vice Chancellor to him and his team I say - thank you.

The central work in this thesis could not have taken place without the cooperation and willingness of the various telecom actors and institutions in Kenya. I wish to thank especially the staff at the Communications Commission of Kenya, Telkom Kenya and the National Communications Secretariat who gave me access to numerous documents and made time for the interviews and facilitated the networks to other players in the industry.

Finally and most importantly, I wish to thank my husband and best friend - Mark Makau, whose support emotionally and financially I will always remember. Thank you for all the love, encouragement and belief in me. For the sacrifice of your time over the years, words cannot adequately say thank you enough. This thesis is as much yours as it is mine.

ABSTRACT

The liberalisation of domestic telecommunication (telecom) markets has become a worldwide trend. As a result, the General Agreement on Trade in Services (GATS), evolving from deliberations within the World Trade Organisation (WTO), has been heralded as the mechanism with which to effect telecom liberalisation domestically. For countries in Africa, the GATS instruments have been translated as a means to establish the principles required for an effective telecom industry supported by key institutions in policy, regulation and implementation. However, the analysis of relevant literature on telecom in Africa has tended to focus on technological developments based on current observable outcomes. This methodology is inadequate because it fails to account for the context-specific nature of the policy arena and framework shaping telecom outcomes.

I argue that we must consider telecom outcomes by understanding the nature of political institutions domestically and their interaction with the international arena. To explicate this intersection of ideas, I draw on two seemingly independent theories, Neopatrimonialism and New Institutional Economics (NIE) with reference to the works of van de Walle (2001) and North (1990) respectively, to shed light on the nature of the Kenyan political context and the value of the GATS as an instrument that facilitates credibility and reduces opportunistic ex-post behaviour. It is contended in this study, that for the Kenyan Government, the value of the GATS accession lies in the legitimising role that it facilitates in accessing funds from the international community. This study thus highlights the inevitable tension that arises when domestic policy-reform goals are juxtaposed with international trade obligations undertaken through treaty accession and informed by a liberalisation agenda.

A qualitative approach was used to collect the data and involved interviews and documentary analysis. The findings suggest that Kenya is partially in compliance with its GATS telecom commitments. However, this partial reform results from patrimonial

tendencies in Kenya and is exacerbated by the need to attract hard currency through aid packages that dictate the nature of the policy process and the relationship between Kenya and the international community.

In conclusion, even with policy reforms, state agents always find ways to maintain or create clientelist practises. Unless such reform is accompanied by political changes that provide checks and balances on institutions and state agents, reform policies on their own will not create an effective telecom sector. To truly evaluate telecom reform therefore, we must appreciate the context-specific nature of policy making.

PREVIOUS PUBLICATIONS

Some of the analyses in this thesis have previously been published. A paper describing the issues of the licensing option in the Kenyan telecom policy process was published in the internationally peer reviewed Southern African Journal of Information and Communication, titled: “ICT Policy and Regulation at Crossroads: A case study of the licensing process in Kenya” (Kerretts, 2004). In addition, a paper, titled: “WTO Reference Paper on Telecommunications, Implications for Kenya” (Kerretts, 2005) was submitted to the Kenyan WTO Organising Committee and later presented at the Kenyan ICT policy Network. The Paper also received an award in January 2006 through the Eastern and Southern ICT policy Network competition organised through Catalysing Access to ICT in Africa which was modified with specific reference to African countries.

ABBREVIATIONS

ADB	African Development Bank
Africa	Refers to Sub-Saharan Africa
AG	Attorney General
APC	Association of Progressive Communications
APEC	Asia Pacific Economic Corporation
AT&T ¹	American Telephone & Telegraph Company
ATPS	African Technology Policy Studies Network
CATIA	Catalysing Access to ICT in Africa
CBK	Central Bank of Kenya
CCK	Communications Commission of Kenya
CMA	Capital Markets Authority
COMESA	Common Market for Eastern and Southern Africa
CSOs	Civil Society Organisations
CTS	Council for Trade in Services
DAC	Development Co-operation Directorate
DDA	Doha Development Agenda
DFID	Department for International Development of the United Kingdom
DGIPE	Department of Government Investment and Public Enterprise Reform
DP	Democratic Party
DSB	Dispute Settlement Body
EAC	East African Community
EC	European Commission
ECA	East African Community
EDI	Electronic Data Interchange
ESAF	Enhanced Structural Adjustment Facility
ETACS	Extended Total Access Communication System
EU	European Union
FCC	Federal Communications Commission
G2B	Government to Business Services
G2C	Government to Consumer Services
G2G	Government to Government Services
GATS	General Agreement on Trade Services
GATT	General Agreement on Tariffs and Trade
GDP	Gross Domestic Product
GEMA	Gikuyu, Embu, Meru Alliance
GITS	Government Information Technology Services

¹ Originally standing for American Telephone and Telegraph Company.

GMPCS	Global Mobile Personal Communication by Satellite
GMPCS-MOU	Global Mobile Personal Communication by Satellite Memorandum of Understanding
GoK	Government of Kenya
GPE	Global Political Economy
GSM	Global System for Mobile Communications
HDI	Human Development Index
HDR	Human Development Report
ICANN	Internet Corporation for Assigned Names and Numbers
ICT	Information Communication Technology
IDA	International Development Agenda
IF	Integrated Framework for Trade-Related Technical Assistance to least-developed
IFI/s	International Financial Institution/s
IMF	International Monetary Fund
IPO	Initial Public Offer
IPRSP	Interim Poverty Reduction Strategy Paper
ISP	Internet Service Providers
ITU	International Telecommunications Union
IXP	Internet Exchange Point
JITAP	Joint Integrated Technical Assistance Program
KACA	Kenya Anti Corruption Authority
KANU	Kenya African National Union
KCA	Kenya Communications Act
KICTANet	Kenya ICT Action Network
KIXP	Kenya Internet Exchange Point
KP&TC	Kenya Posts and Telecommunications Corporation
Ksh	Kenyan Shilling (currency)
KTN	Kenya Television Network
LDC	Least Developed Country
MD	Managing Director
MDGs	Millennium Development Goals
MFN	Most Favoured Nation
MP	Member of Parliament
MTNL	Mahangatar Telephone Nigam Limited
NARC	National Rainbow Coalition
NCS	National Communications Secretariat
NCWTO	National Committee on World Trade Organisation
NDP	National Development Party
NEPAD	New Partnership for Africa's Development
NGO	Non-Governmental Organisations
NIE	New Institutional Economics
OECD	Organisation for Economic Co-operation and Development
PC	Personal Computers

PERP	Public Enterprise Reform Program
PMG	Post Master General
POSTA	Postal Corporation of Kenya
POTS	Plain Old Telephone Service
PRGF	Poverty Reduction and Growth Facility
PRSP	Poverty Reduction Strategy Paper
PSTN	Public Switched Telephone Network
PTO	Public Telephone Operator
PTT	Post Telephone and Telegraph
RoK	Republic of Kenya
RP	Regulatory Reference Paper
RTO	Regional Telecommunications Operators
SAP	Structural Adjustment Programmes
SNO	Second Network Operator
SSG	Stakeholders Support Group
TCE	Transaction Cost Economics
TCNZ	Telecommunication Corporation of New Zealand (TCNZ)
Telecom	Telecommunications
Telkom	Telkom Kenya Limited
TESPOK	Telecommunications Service Providers of Kenya
TRIPS	Trade Related Aspects of Intellectual Property Rights
UK	United Kingdom
USA	United States of America
UN	United Nations
UNDP	United Nations Development Program
UNECA	United Nations Economic Commission of Africa
UNSW	University of New South Wales
US\$	United States Dollars
USO	Universal Service Obligations
VANS	Value Added Network Services
VHF	Very High Frequency
VoIP	Voice over Internet Protocol
VSAT	Very Small Aperture Terminal
UHF	Ultra High Frequency
WSIS	World Summit on the Information Society
WTDC	World Telecommunications Development Conference
WTO	World Trade Organisation

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A TIMELINE OF KENYA'S TELECOM SECTOR

1800-1962	Kenya under the East African British Protectorate
1951	East African Posts & Telecommunications Act
1963	Independent Kenya under Kenyatta regime
1977	Collapse of the East African Community Kenya Posts and Telecommunications Act KP&TC formed
1978	Moi regime
1982	First ITU Plenipotentiary conference held in Sub-Saharan Africa
1992	First multiparty elections
1995	Kenya Joins the WTO
1998	Second multiparty elections
1998	Kenya Communications Act Separated KP&TC to CCK, Telkom & Postal Services Created NCS Kenya signs the GATS agreements (telecom) Telkom given monopoly exclusivity in sector ISPs licensed
2000	Mobile companies: Safaricom and Celtel licensed
2002	Third Multiparty elections: Kibaki regime
2003	RTO licensing process begins Third mobile licensing process begins
2004	Telkom exclusivity ends SNO licensing process begins VoIP approved
2005	

**PART ONE: THEORY,
CONTEXT AND MOTIVATION**

THE STUDY OF TELECOM POLICY IN KENYA

A world order is a stool on three legs: the political, the normative, and the institutional
Samuel K. Murumba
(1993 p.867)

It is not claimed here that globalisation has touched every person, location and sphere of activity on the planet, or each to the same extent; nor that globalisation is a linear and irreversible process, even if has often appeared to have a juggernaut quality; nor, in reductionist fashion, that globalisation constitutes the sole and primary significance; nor that state and geopolitical boundaries have ceased to be important; nor that everyone enjoys equal access to, and equal voice in, and equal benefits from the supraterritorial realm; nor that globalisation entails homogenisation and an erasure of cultural differences; nor that it heralds the birth of a world community with perpetual peace. Indeed, in respect of each of these points the contrary has frequently been the case.

Jan Aart Scholte
(1996, p.47)

Introduction

The growing interdependence of countries as a result of globalisation is undeniable. What is more problematic is the implications of this increasing interdependence in terms of the ability of national governments to govern. This thesis examines aspects of the interface between national and international policy making in the telecommunications (telecom)² sector in Africa. Drawing on a case study approach, the primary focus of inquiry in the examination of Kenya's implementation of its telecom reform process viewed as an assessment of Kenya's telecom commitments to its international trade commitments undertaken through accession to the World Trade Organisation's (WTO's) General

² The terms telecommunication, telecommunications, telecom and telecoms and in some cases ICT tend to be used indiscriminately and interchangeably in the literature. For the purposes of this study, I will use the term 'telecom' referring to both the plural and singular form unless circumstances require another version eg., International Telecommunications Union. The linkages between telecom and ICT as a general term shall be discussed in the limitations section of this chapter.

Agreement on Trade and Services (GATS)³ framework. This chapter seeks to ground the research terrain by identifying the scope and the nature of the study. In particular, it examines further the rationale and justification of the thesis. This is achieved by providing an overview of the problem, the research framework, the originality of the study and a précis of the methodology. The chapter concludes by providing a preview of the development of the study's argument as advanced in each chapter.

1.1 Situating the problem

Kenya is at a crossroad. Though wealthier and more stable than most African⁴ countries, it suffers from the same problems of incessant hunger, illiteracy, and lack of economic opportunity. At the time of independence in 1963, the Government identified illiteracy, disease, ignorance and poverty as the main areas to address post-independence (Republic of Kenya, 1965). Thirty years on, the poor still constitute slightly more than half the population. Agriculture is the primary economic activity and tourism and the flower industry earn Kenya its largest foreign exchange, accounting for more than 40 percent of Gross Domestic Product (GDP) (Omosa, 2002). Performance in all sectors of the country is severely restrained by structural factors such as poor institutions, corruption, insecurity, dilapidated public utilities, inefficient parastatal⁵ sectors, inappropriate regulatory frameworks and other market distortions (Holmquist et al., 1994). Its overall problems are derived from *the degree of political decay, the Government's control of large portions of the country's economy and the use of that power to dispense favours to allies and cronies as well as to punish opponents* (Kiai, 1998 p. 189). Over the years, regime efforts have been geared towards improving the standing of some business people and creating elites based on

³ WTO, *General Agreement on Trade Services*, contained in Annex 1B to the Agreement Establishing the World Trade Organisation, 15th April 1994, Final Act Embodying the Results of the Uruguay Round in Multilateral Trade Negotiations, *Legal Instruments-Results of the Uruguay Round*, 33 I.L.M. 1143, 1168 {GATS}. The GATS is available online from the WTO website at: http://www.wto.org/english/docs_e/legal_e/26-gats_01_e.htm

⁴ Africa in this study refers to the countries south of the Saharan desert, generally known as Sub-Saharan Africa. I however note that there are several political, economic and social differences.

⁵ A parastatal is a company or agency owned or controlled wholly or partly by the government.

patrimonial relationships (Ndegwa, 1998). For a long time, individuals, particularly those in the public sector, could not risk their businesses or positions by criticising Government as opportunities could be foreclosed or sanctions applied in the form of state banks calling in loans and legal difficulties emerging without warning (Holmquist & Michael, 1998 p.241). The unpredictable landscape has inflicted severe deleterious effects on the country's social and economic environment. For example in Kenya, most user services until 1997 for the telecom sector were provided through the Post, Telegraph and Telephone (PTT) ministry - Kenya Posts and Telecommunications Corporation (KP&TC)⁶ which was solely run by the Kenyan Government. Like other sectors in the Kenyan economy, Kenya's PTT organisation was overstaffed, inefficient, debt-ridden and had poor connectivity therefore offering telecom services at high costs. These inefficiencies were seen as a growing impediment to economic development to Kenya and many other African countries.

In the early 1980s, in an effort to change these conditions, African governments were encouraged by the donor community, mainly the International Monetary Fund (IMF) and the World Bank to liberalise a range of sectors including telecom. This, it was thought, would minimise national government interference in these sectors. In the telecom sector, African governments such as Kenya's were encouraged to pursue regulatory reforms that had been utilised by Western countries. However, by the mid 1990s reforms undertaken had been less than appropriate. The international financial community in an effort to improve the reform process institutionalised a range of conditionality procedures into its lending procedures. The idea was that loans would only be disbursed when particular conditions of the reform process were met. In Kenya this conditionality procedure began in the 1990s under the privatisation programme which also included the telecom sector (IMF, 1996).

⁶ The details of operation of KP&TC are discussed in chapters 5 and 6.

1.2 Locating the problem: the telecom sector

In the telecom sector, the reform process was further sparked by technological changes taking place globally leading to a change in the conceptualisation of the traditional boundaries of telecom management. To summarise these changes here, the market for international service was no longer limited to the national customer base in the country in which the license was based. Pricing arbitrage could make that carrier's service attractive anywhere in the world. These developments challenged the way telecom institutions operated at a national and international level. In the developed and developing world, telecom reforms were therefore implemented to improve efficiency and remove monopoly from the ministries/agencies that controlled the growing telecom sector (Melody, 1997b). These reforms entailed liberalising and privatising the telecom sector in order to open up new markets for the development of telecom. Leading this process were the United States of America (USA), United Kingdom (UK), and France with other countries with implementation of varying levels of telecom reform. The growth⁷ of the internet and the use of mobile services and value added services⁸ such as messaging and more recently Voice Over Internet telephony (VoIP) is therefore closely tied to the quality and availability of telecom competition based policies.

The expansion and convergence of technologies however, mean that initial agreements made between nations were considered cumbersome and inefficient.⁹ This led to the advent of the General Agreement in Trade Services (GATS),¹⁰ notably the Basic

⁷ The ITU estimates an annual growth rate of 1.3 billion subscribers in mobile services and 1.2 billion in fixed-line. See ITU, *World Telecommunications Indicators Database*, 2004

⁸ Value added services refer to the new technologies that rely on the telecommunications infrastructure such as the mobile phone and the internet. For example: checking emails on your mobile,

⁹ Privy to the WTO, the International Telecommunications Union (ITU) was the main international telecom regime, its aim being to "promote, at the international level, the adoption of a broader approach to telecommunications issues in the global information economy and society" (ITU. Strategic Plan for the Union, 1995-1999, Annex 1 (Oct.14 1994) in FINAL ACTS OF THE PLENIPTENTIARY CONFERENCE (1994).

¹⁰ WTO, General Agreement on Trade in Services, contained in Annex 1B to the Agreement Establishing the World Trade Organisation, 15th April 1994, Final Act embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Legal Instruments – Results of the Uruguay Round, 33 I.L.M. 1143, 1168 {GATS}.

Telecommunications Pact or Fourth Protocol¹¹ initiated by the World Trade Organisation (WTO)¹² to signify the introduction of telecom services competition in domestic and international markets. By the late 1990s most countries recognised that if telecom sectors were to be in a position to seize new technological and service opportunities, entrepreneurship, good management, frontier technical knowledge and an understanding of customer demand and regulation were deemed essential. In the absence of tried and tested regulatory models, various countries adopted a ‘try and see’ approach with privatisation as the main form of reform. Yet, in spite of this, the idea of telecom sector reform was pushed in African nations through the GATS framework. Specifically, the reform process was introduced as a means in which developing country governments could meet their Universal Service Obligations (USO).¹³ In addition, of the growing global convergence of telecommunications, the WTO reforms under the GATS emerged as a more viable option than its precursor, the ITU, (which negotiated bilateral agreements between nations) and was adopted by many countries. Nonetheless, because governments are equally attracted by the potential to raise capital from privatisations and to garner the benefits of foreign expertise and management, this privatisation process inevitably creates a tension manifest in how best to manage telecom reforms while the state retains often substantial or majority ownership in a partially privatised operator (usually the sole incumbent, at least in fixed-line services).

¹¹ *Fourth Protocol to the Basic Agreement on Trade Services*, 30th April 1996, WTO Doc. S/L/20. The literature refers to this protocol varying: namely, the Fourth Protocol; the Basic Telecommunications Agreement (BTA), or the Telecommunications Pact. Throughout this thesis, preference is given to the term ‘Fourth Protocol’ as the BTA assumes a higher level of substantive consensus through the policy-making process than was/is arguably the case. Discussion in reference to the term consensus shall be discussed in chapters 2 and 4.

¹² As used throughout the study, ‘WTO and WTO Agreements’ refers to the Marrakesh Agreement Establishing the World Trade Organisation {hereinafter WTO} and the substantive multilateral agreements attached thereto, April 15, 1994, in WORLD TRADE ORGANISATION, *THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS* 3 (1999) {hereinafter the WTO}, 33 ILM 1143 (1994).

¹³ USO is generally defined as the provision of services (public utilities) to all citizens at affordable rates and has mainly been attributed to the provision of basic voice telephony also known as Plain Old Telephone Service (POTS). For a detailed discussion on USO see *Telecommunications Policy* Vol. 28 which covers articles on Universal Service. Further discussion is provided in chapter 2.

Coupled with the telecom reform process is the issue of establishing (at least in developing countries) and maintaining effective regulation. As shall be discussed in chapter 2, telecom reform models are adjunct with regulatory process that involves the decreasing involvement of government in the sector. Primarily driven by the GATS telecom instruments, regulation has been elevated from a purely domestic matter to one contemplated, if not fully realised, at a global level. Any telecom regulatory reform undertaken since the mid 1990s has therefore usually occurred and continues to do so with reference to the principles enshrined in the GATS Regulatory Principles (RP)¹⁴, illustrating a type of ‘codification’ of telecom policy, or at least some of its essential principles practiced in many parts of the world. Thus, while in 1990 there were only 13 regulatory agencies around the world, at the beginning of 2005 there were no less than 123 countries with regulatory agencies, with 140 expected by the end of 2005 (Wu et al., 2004). Debates continue regarding the appropriate regulatory structure and institutional design and the question about whether public interest goals are best served by single or multi-sector utility regulators in a converging telecom environment (Henten et al., 2003). While these debates are unlikely to lend themselves to a prompt or universal solution, their existence is reflective of the fact that regulatory reform remains an enduring and dynamic process.

In seeking to implement telecom reforms, Kenya acceded to the WTO in 1995. This process was to begin a broader telecom reform programme in Kenya and led to the enactment of the Kenya Communications Act (KCA)¹⁵ in 1998. This was set to change the telecom landscape of the country. However, eight years (2005) after the enactment of the KCA, telecom development country wide had not progressed as quickly as anticipated and Kenya had not fully met its liberalisation conditions as specified through its accedence

¹⁴ Reference Paper on Regulatory Principles Used for Consideration as Additional Comments in Offers on Basic Telecommunications, WTO Negotiating Group on Basic Telecommunications (24 April 1996), Online: WTO http://www.wto.org/wto/english/tratop_e/telecom_e/tel23_e.htm {Reference Paper or RP}.

¹⁵ See Kenya Communications Act (1998). The KCA is the legal framework under which the GATS telecom reform process was implemented in Kenya and is discussed in the context of this study in chapters 5 and 6.

to the WTO. Kenya's PTT organisation - Telkom Kenya Limited¹⁶ (Telkom),¹⁷ remains under Government control in spite of various stated intentions by the Government to privatise it. As shall be examined in the analysis chapters, telecom growth as indicated by telephone lines, Internet Service Providers (ISPs) and personal computers (PCs) is still low. Appendix A provides a comparison of Kenya's telecom indicators with South Africa and the rest of Africa. In addition, the costs associated with telephone and internet use continue to be very high compared to the country's average per capita earning. While the mobile telephone industry has grown exponentially, this growth has only been evidenced within the urban areas of Kenya.

The solution (in this case reforming the telecom sector) has thus been conceived much too narrowly. Privatisation approaches tend, often indiscriminately, to ascribe assumptions about developed markets to developing ones. Such assumptions include, that the state has an unequivocal interest in privatising the PTO; that all countries will be attracted to foreign investment; that competition will serve the state's interest; that the notion of public interest through the provision of USO will be best served through market restructuring in the telecom sector and that the notion of telecom reform will always produce a 'positive-sum game' in which all stakeholders gain (Hahn, 2000). This tendency to assume a 'one dress fits all' for telecom reforms is somewhat myopic, but is nonetheless prevalent because abiding by the WTO principles lends credibility to a country wanting investment to fund its telecom sector. Nonetheless, it could be argued that grafting assumptions about developed countries onto emerging markets is yet another manifestation of neo-colonialism, within the trade regime, or what Hahn (2000, p77) terms the *internalisation of regulatory reform*. It is therefore more appropriate pedagogically to

¹⁶ As shall be discussed in chapter 5 and expounded on in chapter 6, part of the reform process under the GATS and as enshrined in the KCA required that the telecom sector be split into a regulatory body, and that telecom and postal services be separated. This separation created Telkom Kenya Limited (Telkom).

¹⁷ It is noted that the terms telecom and Telkom are similar. However, preference was given to the term 'Telkom' as the standard reference over Telkom Kenya Limited or TKL for consistency given that majority of those in the telecom sector in Kenya referred to Telkom Kenya Limited as Telkom. It is noted nonetheless that several other countries use the term Telkom. Where this is the case and where such companies have been referred to in this study, this will be mentioned.

suggest that the explanation of telecom reform outcomes, at least in part arise from a lack of rigorous academic literature on the experiences of developing countries due to the very recent time within which such far-reaching changes are taking place (Kerretts, 2004).

For example, Kenya, like other African countries, does not have a complete telecom network. The telecom infrastructure country wide is vastly under-developed with a majority of those in rural areas not having access to land-lines (CCK, 2005). In addition, Kenya has never had sufficient capital to construct a full international network and suffers from a shortage of technical skills. Attracting foreign capital, while necessary, underscores the fact that Kenya must be in a strong position to control and manage foreign resources in the best interests of the Kenyan domestic economy and society. Thus, telecom reforms in African countries open up three new dimensions of the issue that have not been explored to any significant degree in the literature.

First, the literature and policy debates have paid insufficient attention to the domestic implications of telecom development in African countries based on models adopted from 'information rich' countries. This is not to say, however, that telecom reform in African countries has not been dealt with in the literature. New and emerging literature in the last five years on the subject of telecom regulation and its implications for developing countries spearheaded by the Learning Information Networking and Knowledge (LINK) centre in South Africa and its network of partners.¹⁸ While relatively new, this is a very important aspect of the process and provides a window through which to address the issues associated with telecom reform. This study therefore contributes to this new field that seeks to analyse the experiences of African countries in telecom reform. Nonetheless, the majority of the literature outside this collaboration, deal mainly with models of

¹⁸ The LINK Centre defines itself as "the leading information and knowledge hub providing training, research and consultancy in the Information and Communications Technology (ICT) arena in order to develop public, private, NGO and community-based capacity within the Southern African region" (<http://link.wits.or.za>). Its partners include LIRNE.NET: Learning Initiatives on Reforms for Network Economies, a Strategic Collaboration between Centre for Tele-Information (CTI), Technical University of Denmark, and Economics of Infrastructures, Delft University of Technology, Netherlands and WDR: The World Dialogue on Regulation for Network Economies, which generates and disseminates new knowledge on regulation and governance for network economies.

regulation, the function each model has in different economic conditions and the technological developments that have taken place. While this literature is important, given that it provides a base from which to start any analysis of the telecom sector, it should be noted that little attention has been given to the actual elements of the policy process to which these models are applied. Questions must therefore be raised about how Kenyan actors interact with these international models and the role that these actors play in influencing the eventual outcome of the telecom reform process. This means evaluating the way in which political and economic structures within the domestic environment influence telecom outcomes. And while very little is known about the underlying forces shaping telecom policy, this is not because it has not been covered. Rather, policy and politics have always been in the domain of politics and international relations. As a result, much of what has been said about telecom has tended to emanate from practitioners devoted to the technical aspects that have made telecom analysis an 'experts' domain. Thus, instead of a holistic assessment of telecom in the social fabric of society, many have been scared off by the use of technological terms resulting from the lack of an academic discipline in telecom studies.

Second, studies which consider the realm of the state and the international arena as separate contexts fail to explain the role that both play in influencing the policy-making process. For example, since the establishment of the WTO and the GATS telecom instruments in 1995, a pragmatic approach to liberalise or privatise remains the dominant norm and is expanding as countries continue to accede to the WTO treaties and domestic regulatory design becomes a discourse within multilateral negotiations. Coupled with this shift, is a movement towards more general and procedural systems of rules in the face of a clear trend towards the globalisation of service provision in telecom (Noam 2003), which suggest that as telecom reforms grow internationally, it also transforms the international and national system of telecom, leading to the end of the traditional notion of telecom as a national and territorial sector. Without necessarily desiring to establish itself as a supra-national regulator, the effect of the WTO telecom instruments in general and the RP in particular, sets a 'vaguely precise' blueprint for the future of both domestic and

international policy making in the sector. By early 2004, more than 100 countries had taken up commitments to basic telecom reforms (WTO, 2005), and despite the ‘crash of silicon valley’ that followed the post-dotcom boom, telecom reforms have continued unabated. Thus, while a large body of the public policy literature argues that states are increasingly constrained and shaped by global forces (Ohmae, 1995; Falk, 1997), for the most part public policy literature has tended to focus on domestic state activities and to treat the international arena as an external condition to which policy actors respond rather than an integral part of the policy process.

Third and particularly evident in what is now known as the field of Information Communication Technology (ICT)¹⁹, is the fact that ICT which includes telecom is seen by many commentators as underpinning the social and economic progression of nation-states throughout the first stages of the 21st century. Likewise, researchers have presented convincing arguments over the past two decades as to how ICT will transform countries into ‘knowledge economies’ and ‘network societies’ (Castells, 2000). This often evangelical zeal has been taken up with equal determination by governments of (over)developed countries around the world. The ability to use ICT has thus been heralded as the indispensable language and a fundamental aspect of citizenship in what is seen as the prevailing information age (Norris, 2001; Katz & Aspen, 2001). Equally involved, though usually less hyperbolic, are academics who have also welcomed the use of ICT as the key to transforming social divisions and inequalities (Van Ryckeghem, 1995). This is not to say that ICT cannot be used as a tool for development, however, as argued by Wilson (2004), for the most part, a ‘techno-determinist’ framework (framework based on technological developments) runs throughout much of the ICT and development literature. Techno-determinism however fails to recognise routine practises as repositories of power and tend to erase history and time as relevant factors in producing scenarios of the future (Jasanoff,

2002). Failure to take these elements into account has led to a classification of people as ‘information rich’ and ‘information poor’, depending on the availability of ICT (Nulens & Van Audenhove, 1999; Selwyn, 2004). This binary division (‘information poor’ and ‘information rich’) that underlies many of the projects in ‘information-poor’ countries has however been shown to be too simplistic an understanding of both countries/societies themselves and of what development and change means (see for example: Wilson, 2004; Mansell & Wehn, 1998; Mansell et al., 2002). Further, such assumptions render passive those who are to be made ‘information rich’ and therefore limit the potential for ICT to challenge the social structures of poverty.

Correspondingly, the study of telecom policy has privileged the role of economics and efficiency at the cost of other ways of conceptualising policy making options. The focus on telecom reform has therefore been depicted as the ‘best’ means in which telecom development would occur. A related emphasis has also been on the prioritisation of modernisation and neo-liberal perspectives in the analysis of the information and communication sector. As well as privileging strategic models for policy implementation, the actors associated with these interests have also received greater prominence without any critical analysis in their role in the policy process. The centrality of the telecom sector to the ‘information revolution’ or ‘knowledge economy’ internationally has therefore also elevated the interests and issues at a local level.

Indeed, the opportunities presented to the ‘information poor’ countries like Kenya are not in question. Research into these opportunities has conclusively shown that benefits do accrue as a result of adopting telecom technologies (Gillwald, 2005). But such research should not be considered conclusive if the policy process and frameworks which shape the adoption and use of telecom are not analysed. The ‘techno-deterministic’ discourse in

¹⁹ Information Communication Technologies or Information Communication Technology (ICT) refers to the convergence of technologies which includes telecommunications. Where used in this study in relation to policy, it denotes specific reference to policies that have attempted to incorporate the entire ambit of ICT within the policy framework. In the case of Kenya, this is included under the proposed Draft ICT policy. Further discussion is done in the limitations section of this chapter.

the field of telecom and the wider field of ICT has therefore rendered telecom analysis less open to critical scrutiny as the international agenda of information and communication adoption becomes entrenched into everyday discourse. The blame for this should therefore solely rest on telecom practitioners and academics in the field. If policy making is critical in understanding the use of telecom, then all ‘techno-deterministic’ agendas of telecom studies should follow on with telecom policy research that seeks to understand how governments construct the process of adoption and implementation of these policies. Clearly, the implications for the above methodological inadequacies lie in its contribution to Africa and the international development sector’s failure to redress the issues that continue to sustain the gap between ‘information rich’ and ‘information poor’ countries.

Presupposing the desire to redress this gap and given the tendency to assume the lack of involvement of domestic and international actors in influencing policy outcomes, this research seeks to improve the understanding of the relationship between international institutions and domestic policy making through an analysis of the GATS application in Kenya. This study explains the current state of Kenya’s telecom reform process by offering a political explanation for the persistence of the slow development in the reform process in Kenya. As argued, within the narrow analytical universe of studying telecom development, certain issues and actors have been privileged in the form of an accepted *problematic*. The term *problematic* defined here as *a social theoretical position which is linked either explicitly or implicitly, to a broadly based philosophical view point* (Bocock, 1982 p.40). The problematic within the telecom and development literature has thus been to bias three main issues as reviewed above. First, a techno-deterministic paradigm in which the role of technology prevails over the role of actors. Second, a tendency to assume that domestic and international realms are separate arenas in the telecom process and third to ignore the historical context in which telecom development is located in African nations such as Kenya.

Seeking to transcend this orthodoxy and hierarchy of issues and interests, this research will treat the analysis of telecom reform in Kenya as historically specific to its domestic context. In doing so, this study takes as its starting point the premise that domestic institutions and patterns of politics *will continue to function as highly critical filters of global forces* (Pempel, 1998 p.219) and therefore places historical development at the centre of its explanatory framework recognising history as the framework within which meaning is located.

1.3 Argument and theoretical framework

The need for an expanded analytical framework for understanding telecom reform outcomes in Kenya as implied in the previous section is more fully supported by locating the study within a Global Political Economic (GPE) framework that address the empirical ('what is') nature of policy making in a given historical context. This is not to suggest that normative theories ('what out to be') are not valid, but rather, as argued earlier, recognising that policy making takes place in both domestic and international contexts allows the study to address the underlying issues of development often accepted as normative. Thus, the research inquiry is predicated on the assumption that, the tension proposed between the two contexts, namely domestic and international contexts do not require a resolution as neither the domestic nor the international policy framework individually provide a holistic framework for understanding policy reform undertaken through international commitments in African contexts.

Since the onset of Africa's economic crisis over twenty years ago, political scientists have sought to explain the inability or unwillingness of governments in the region to undertake policy reform. Three main types of reasoning are found in the literature. First, one set of literature argues that the lack of societal power as asserted through organised interest groups is in part to blame for Africa's lack of reform. Nonetheless, this literature disagrees on the extent to which these actors can act to achieve real policy change (see Shaw, 2000; Bratton, 1989; Collier, 1982). Second, much of the literature focusing on the African

political economy also views African governments as prisoners of their societies through their reliance on clientelist practices to ensure political stability (see van de Walle, 1997). Finally, most analysts of why Africa has not been able to renew with economic growth in the last twenty years place the blame squarely on the inability of African governments to overcome society opposition to the policy reform imposed on them by International Financial Institutions (IFIs) (see Mkandawire & Soludo, 2003). All of these three main themes in the literature on Africa contain valuable insights, but they underestimate the autonomy of African governments from societal forces, a feature not common in Western societies. Most states in Africa combine weak capacities and discipline with a fair amount of autonomy to make economic policy decisions, largely because of the lack of strong organised pressure groups that would hold the state more accountable. Thus, partial and uneven implementation of reform, as is argued in this study, is less of a paradox if it is understood that African state elites have sought to adapt to the changing global arena without losing hold of the state and state resources.

I argue therefore that the main obstacles to telecom reform are to be found within the state itself and the political institutions that link state and society. My starting point is that patterns of telecom reform outcome in Kenya can be explained with reference to the nature of political institutions there first, and second to their interaction with IFIs within the wider ambit of the global trading system. Specifically I argue that the GATS framework²⁰ provides the Kenyan Government with credibility to access funds from IFIs and yet at the same, legitimises its policy actions domestically.

Seeking to understand the political and policy context of Kenya, I draw on the theoretical concepts of neo-patrimonialism and the broad principles of New Institutional Economics (NIE) as a framework. African governments have received several billions of dollars from IFIs since the early 1980s for economic development. Yet, the dependency and neo-

²⁰ These include the GATS framework Agreement applicable to all services (1994); the GATS Annex on Telecommunication (Annex) applicable to essential infrastructure (1994); the Fourth Protocol to the GATS, applicable to liberalisation of basic telecom services and Regulatory Reference Paper (RP) that attaches to the Protocol (1997).

Marxist literature have always viewed donor resources as complementary to private capital. They have argued that aid is designed to better integrate Africa into the global trading and financial networks, dominated by Western capital. More mainstream observers have viewed aid as a force for positive change in the region, which would help African countries adapt to changing global markets. On the contrary, it is argued in this study that both the international trading system and the political system of clientelism have over the years created a co-dependency between Kenya and IFIs. This combined effect of dependency and clientelism is termed as neo-patrimonial²¹. The term captures the thesis that most African states are hybrid regimes in which patrimonial practices coexist with modern bureaucracy.

Understanding the context of Kenya as neo-patrimonial draws the question as to why a country would want to consider making commitments in international institutions that could be viewed as an unnecessary external constraint on the pursuit of domestic goals in neo-patrimonial states. The field of NIE seems to provide this answer. Recent developments in the world of IFIs indicate that NIE continues to be a strong theoretical framework framing the critique of international institutions today. This field of literature includes work by Sachs (2003), Easterly (2001) and Jutting (2003). For example Jutting (2003) from the OECD critically evaluates the role of the international institutions in development work using NIE, while Rodrick et al (2002) from the IMF analyse the role of institutions in integration and economic development. While these studies do not deal with the GATS, their findings indicate the NIE provides a window in which to directly focus on the role played by institutions in the new global economy. While the definition of institutions differs, this study follows North's (1990) definition as constraints that human beings impose on themselves. Following this definition, institutions prohibit, permit or require a specific type of action, ie political, economic or social, which is important for reducing the degree of uncertainty, for improving information flows or

²¹ The term is drawn from the Weberian notion of neo-patrimonialism. For Max Weber's theory of political authority, see Weber, M (1968). *Economy and Society*. New York: Bedminster Press.

defining and enforcing property rights. This action is thus called a transaction cost. Thus, Kenya's accession to the GATS it is argued, must lie in the perceived legitimisation of the GATS as part of the WTO's broader bargaining structure which facilitates trade deals (Bronckers, 1999) namely: that concessions made in one area will assist in obtaining trade concessions in other areas²². In this study, the GATS is viewed as a transaction cost that offers Kenya the opportunity to signal to the international community its growing commitments to trade and liberalisation and the terms upon which that commitment is based.²³ Yet it is argued, that in doing so, it also provides credibility for the Kenyan Government to access funds from International Financial Institutions (IFIs) and at the same time legitimise its actions in the telecom sector domestically.

I am not attempting to marry a critical GPE - neo-patrimonialism to a post-positivist rational choice approach - NIE. Rather, I accept that the world of telecom reform is not neatly divided into sectors that accord neatly with academe's disciplinary boundaries and departments. Telecom practice crosses these boundaries at random and with no respect for the reductionist methods of social science disciplines and is shaped by the interaction between the state and the contemporary international trading regime. Central to this study is therefore is the notion of strategic action. This work follows Giddens (1984) in conceptualising actors as drawing upon the historically produced *structural properties of the constitution of social relations* (p.288) in their strategic conduct. Such structural properties involve complex and interacting issues of politics, ethnicity and class which often define the axis of struggle in patrimonial states. Members of ruling cliques, many of whom share locations within this network of hierarchies, are contrary to many telecom analyses, not floating above the economic and social conditions of their societies but are deeply rooted in them. This study therefore provides a modest explanation of telecom policy outcomes

²² The legitimisation process can be seen through the WTO overriding purpose which is stated as: "to help trade flow as freely as possible-so long as there are no undesirable side-effects" (see www.wto.org: 'Understanding the WTO').

²³ GATS, Part III encompassing Articles XVII-XVII inclusive discussed in chapters 3 and 4.

by offering a political explanation of the intricate linkage of the Kenyan policy process with the international arena.

1.4 Significance of the research

While the entire significance of the study is evidenced through the development of the argument within the chapters, three key contributions require further elaboration. First, this study is the first of its kind that seeks to provide a political explanation of telecom outcomes in Kenya. The inattention to politics by telecom analysts is a particularly glaring omission because telecom is hinged on the wider development of the economy. Perhaps as researchers in Africa, 'we' have had to first document 'our' progress to date technologically by collecting statistics on the state of the sector. Yet, on the other hand, perhaps this focus has left other areas unattended. This study attempts to move forward the discourse of telecom reform in Africa noting that political contexts contribute to policy processes which in turn influence policy adoption and implementation.

Second, this study provides a distinctive framework in analysing the telecom sector in Kenya. Indeed, as noted earlier, both neo-patrimonialism and NIE tend to reside in opposite frames where academic discipline and argument is concerned. Nonetheless, the roots of political science are rooted in institutions (Peters, 1999) and institutions are located within specific contexts. In this study, neo-patrimonial literature provides a framework for understanding clientelist needs of neo-patrimonial states and its interaction with the larger international community while a broad NIE approach provides a basis for understanding international institutions and the value of the rules they create. For the most part, the literature on international institutions has taken a realist approach in which organisations such as the WTO are understood as mere arenas in which states convene to pursue their national interests, rather than viable institutions capable of acting in their own right to influence domestic outcomes. In addition, state centred approaches have tended to focus on the state as an autonomous actor rather than as part of the international order. Given these tendencies, van de Walle (2001, p.15) argues that *political science should shed light*

on Africa's failures in novel and distinctive ways. This study attempts to do just that, noting that both the international and domestic arenas are intricately linked where policy, politics and telecom development are concerned.

Third, this study is the first detailed empirical study drawing the WTO GATS framework application in Kenya. Previous comprehensive literature on the topic is scant and those in existence (Muruiki, 2002, 2004, Kane, 2002; Etta & Elder, 2005) evaluate the growth of the sector in relation to the KCA making no mention or link to how international policy in the form of the GATS framework has shaped and influenced the framing of the KCA. While it would be wrong to dismiss these studies on the basis of approach, it would be equally misleading to claim that telecom development is best explained without taking into consideration its political and economic context. Thus, at doctrinal level, this study is the first of its kind to document the first stage of the implementation of Kenya's telecom liberalisation process (1997-2005), applying a qualitative approach in which interviews and documentary analysis were used. This adds to the current knowledge of telecom reform in Kenya as it provides an explanation to current telecom indicators in the sector.

There are a number of implicit assumptions that underpin the central argument of this study and are borne out of the theoretical framework discussed in chapter 2, but one critical distinction must first be highlighted here. The central argument put forth in this study is tested within the paradigm of engagement of African states with the WTO. While the institution and broader trend in globalisation that it is seen to reflect has multiple problems and critics, this study does not seek to engage in that broader discussion or challenge the existence or legitimacy of the WTO. But, it does not also dismiss the concerns pertaining to the merits and demerits of the GATS telecom instruments and more specifically the GATS Reference Paper.

That said, I note that while misgivings remain about the WTO's liberalisation agenda, the realities of the world dictate an acknowledgment that African governments will continue to engage in international policies such as those of the WTO. This is arguably an

irreversible trajectory of modern times. The challenge for the future of countries such as Kenya therefore is to address the consequences of neo-patrimonial systems of governance that also play out in participation in policy processes. As a result, one area of concern in this study is the constraints that developing countries such as Kenya face in participating in international policy making. Drawing on interviews, the study discusses how the neo-patrimonial system of clientelism and favouritism not only inhibits effective participation internationally but also inhibits effective policy making domestically. It is suggested that addressing these constraints might facilitate effective policy-making processes for Kenya.

1.5 Motivations and interdisciplinary frameworks

Commentators on telecom and the increasingly exciting new technologies that are emerging often divide into ‘optimistic’ and ‘pessimistic’ when it comes to considering future trends in telecom access. I confess that I belong to both camps. I am optimistic that technology will continue to bring about increased benefits and convenience to the citizens of wealthy nations, both in support of entertainment and escape and in mobilising information as a future resource. I am also optimistic that technology will also provide better living standards for those with access to funds to afford the application and use of technologies in Africa. However, as an African, I am pessimistic when considering the future information resources that will be available to the majority of peoples in Africa, more specifically, those in rural areas. I cannot see how ‘we’ can ever catch-up. I cannot see a will among wealthy nations to share their bounty unreservedly in order to give poorer people the liberating effects of information at little or no cost. And neither can I see African governments taking a more holistic and pragmatic approach to the development of telecom without being forced to.

My pessimism emanates from what I have witnessed living in Kenya and as a professional in the telecom field in Africa. Working as manager for a large international consulting firm, I noted that for the most part, telecom development was used as a political rhetoric rather than the sincere need to improve development. It was during this time, having

registered as a voluntary member to several ICT civil society organisations, that I began see how our ability as Kenyans to make policy was not just limited to the national level, but was also present within the international level. I felt somewhat foolish attending both national and international meetings on technology adoption, such as those organised by the United Nations. While this provided an opportunity to travel internationally, I felt that most of my Government representatives were indifferent to the events taking place in the telecom sector internationally and I became driven by a desire to understand how international policies affected policy making domestically. I left the firm driven by my own frustrations about the proffered strategies on how policy was made and the conflict between my new found inquiries. I hoped that the academic study would provide answers that eluded me in the professional domain.

It is therefore important to acknowledge and be driven (to some extent) by my personal experiences and to acknowledge that they played a crucial role in shaping the research inquiry. As a consequence, this research relies on the freedom granted to an interdisciplinary approach in the School of Social Science & Policy. The choice of the neo-patrimonialism and NIE as a framework for this study relates to the suitability of the GPE framework that seeks to address the unique characteristics that have evolved in countries such as Kenya. Its scope is brought about by my preparedness to be reflexive and interdisciplinary therefore allowing the research to develop an understanding of the relationship between domestic political institutions and international regimes such as the WTO. Nevertheless, there are many other influences in this thesis including: critical social theory, economic theory political theory and information revolution theories. This thesis is therefore reflective of its time. At the beginning of the 21st century we reside in an increasingly interdisciplinary age. Ironically, like ICT, it an age less bounded by the dominance of modernism and its desire for order through the categorisation of thought and is heavily influenced by the uncertainty of what is understood by some as the post-modern era, the globalisation era (Jameson, 1998; Nash 2000). Supported by a critical perspective on technology and the changes taking place in the global world, it was important to locate my research within a body of critical political theory that allows for

the recognition of 'power' as it exists within states and their institutional governance systems in Africa. International regimes are confronting shifts in power relations in the context of ICT and are, in turn, influencing the form and structure of the institutions of their respective member states. This analysis therefore offers insights into these changes that are rapidly altering and re-defining neo-patrimonial regimes such as Kenya.

1.6 Methodology

This study lends particular weighting to a qualitative framework as it seeks to understand the role of actors in the policy process. The study employed a triangulated approach in which interviews and documentary analysis were used. Since I could not anticipate the exact number of interview participants, meetings and observations that I would be allowed to attend, my initial attempts to gain access were broad, with letters sent to every institution and key individuals partaking in the telecom policy process (as depicted from the policy document itself, readings from the press and contacts with colleagues in Kenya). In Kenya I was interested in locating myself within the regulatory body – the Communications Commission of Kenya (CCK) and the Government's telecom policy advisory body – the National Communications Secretariat (NCS)²⁴. My two letters to both organisations, however, were in vain as I received no replies while in Australia. On landing in Kenya I went to see the then Managing Director (MD)²⁵ Mr Chepkonga. After a brief on my research and helped by the fact that I had previously dealt with CCK through consulting work with the African Telecommunications Union (ATU) as well as the fact that my parents were his acquaintances, a letter was issued to all management in CCK letting them know that I would be conducting research in CCK and would be approaching several departments and individuals for interviews and data. This was the start of an interesting journey into the corridors of Government. In hindsight, my stay at CCK (where I had an office) also allowed me to attend several Government meetings.

²⁴ Both the CCK and NCS are discussed in chapters 5 and 6 and the remainder of the study.

²⁵ In the CCK, the Managing Director is known as the Director General. However as the titles are symbolic and unique to each organisations, MD is the preferred term used in this study in reference to the head of the organisations.

And it was here that I was able to piece together the personalities who took part in the formulation of the telecom reform process that led to the enactment of the KCA. What seemed surprising at the time and now trite given the data I collected (as shall be observed in later chapters), was that many of the personalities involved in the policy process were now working for CCK and Telkom. I was later to learn that a large number of CCK employees had been employed by the former PTT organisation, KP&TC. This greatly facilitated obtaining data and as well the provision of information.

Through contacts in CCK, I was also linked to the Kenyan National Committee on World Trade Organisation (NCWTO)²⁶ where I was able to talk to the members of the committee and appreciate the issues they faced. The interviews with the NCWTO members were also instrumental in piecing together the rationale for joining the GATS and the current thoughts at the time of Kenya's accession to the GATS. The members of the NCWTO were initially less than thrilled by my investigations given the political angle to my questioning. I thus approached the members individually as they were all Government and private employees working in different ministries and organisations. I would say this was one of the more difficult tasks of my fieldwork as most of the individuals would book meetings but cancel them abruptly with no notice. Many times I had to sit and wait for more than two hours to talk to the more senior Government staff. However, once I had developed a rapport with the individuals, the process seemed easier and many were always more than willing to contact their colleagues and speak to them on my behalf.

A further daunting task was in understanding the GATS framework. Having no prior legal background but a general awareness of law and rules, I immersed myself in the reading of the GATS and the KCA and was helped by the legal team of CCK, who provided legal interpretation for some of the more complex and unclear regulations. In addition, the private sector - through the Kenya Leadership Institute which had three legal experts in

²⁶ Details of NCWTO are discussed in chapters 6 and 7.

telecom issues also provided key interpretations of the various rulings and arguments that I had been unable to access while at CCK. My attempts to interview staff of the NCS, however, proved difficult and many of the CCK staff felt that there was no need to do so. I later learnt that tensions existed over the roles of CCK and NCS. My wait to see the Communications Secretary, was the longest at three hours! Various officials kept walking in and out of his office and at one time, even the Minister stepped in to his office. It seemed I was always the lesser of importance. Finally, after my persistence, which he acknowledged, I had my first chat with him on October 4th 2003. A key factor that facilitated this was that he had also done his PhD and was keen to explain what he did (Engineering). While I spent the first half hour listening to how 'young people are nowadays lucky to have technology and the ability to travel', my patience eventually paid off. Through the NCS I was linked to the corridors of Government and invited to several meetings which enabled me to appreciate the various conflicts within the different Government institutions.

Finally, one last mention is required here, the local newspapers had begun to take an interest in the events of telecom and they proved an immense source of data particularly in recording statements made by the various leaders in the press. I was able to speak to the various telecom reporters of both the *Nation* and *Standard* newspapers (the two widely circulated dailies in the country) and was able to get backdated information through their archives. This facilitated a wonderful paper trail of events that I had been unable to capture on interview or through documents provided by the interviewees and various institutions.

The advantages of this study design therefore comes from the ability to discuss the intricate and salient aspects of policy making that are often the product of the political process and the nature of how decision making takes place locally and internationally. It is within this framework that the study is able to correlate, compare and analyse the influences of international and domestic decision making on local policy making. In the

face of the complicated landscape of policy making then, the Bridges Organisation's²⁷ paper '*Spanning the Digital Divide*' (Bridges.org, 2005) comment below is acknowledged.

Detailed case studies provide the most valuable tool to critically analyse what policies should be reformed. More importantly perhaps, a good case study details the needs of stakeholders and clients that governments seek to balance as they plot their course.

Further details of my process of learning and acquiring the data are provided in chapter 3 which forms the methodology chapter.

1.7 The development of the argument

For the purposes of explanation and understanding, and in keeping within the parameters of the PhD decorum, the research is divided into distinct chapters. The three fields of the thesis: telecom reform, international institutions and neo-patrimonial regimes are treated in the theoretical framework in chapter 2 and hence forward discussed through chapters 3 to 8. The merits for this are advantageous as this provides the study the opportunity to remain within the decorum of the PhD format and yet still conclusively develop the argument through the chapters.

Chapter 2 provides the framework. Policy outcomes are shown as resulting from the interaction of neo-patrimonial states with the international donor community. The chapter is divided into two parts. Part I argues that political institutions established following decolonisation were weak and endowed with little legitimacy. As a result, state elites came to quickly rely on patronage and the distribution of economic rents in order to ensure political stability. African political systems thus became neo-patrimonial, combining a façade of western bureaucratic logic with internal patrimonial logic. Drawing

²⁷ Bridges.org is a non-profit corporation, with origins in Washington DC and bases in Uganda and South Africa. According to its website its mission is to "to promote the effective use of information and communications technology (ICT) in the developing world for meaningful purposes, such as better healthcare, education and self-sustaining economic development" (<http://www.bridges.org/about>)

on NIE, part II of the chapter provides a contextual understanding of the role of the IFIs. This is done so as to establish the link between IFIs and the WTO in later chapters. The chapter then proceeds to understand the value of the GATS as a policy instrument which structures complex exchange as well as its role as a credibility enhancing mechanism with which to lower the transaction costs and address, to some extent, the risks associated with policy implementation common in telecom. This provides a background against which to examine how this has manifested itself in the Kenyan telecom sector.

Chapter 3 describes and discusses the case study design of the research within a qualitative paradigm. As the thesis espouses various political understandings and experiences of policy actors, the chosen methodological framework is aimed to reflect this. The methodological aspects that shape this study, my journey towards obtaining, interpreting and presenting the data on the telecom reform process in Kenya form the main themes of the chapter.

Chapter 4 in its entirety is largely descriptive but certainly important in conveying what precisely is at stake and draws on the framing of the GATS as a transaction cost developed in chapter 2. The chapter examines the main tenets of the GATS framework and its related telecom instruments, the Annex on Telecommunication (Annex),²⁸ the Fourth Protocol and the Regulatory Reference Paper (RP).²⁹ It describes the rules, norms and disciplines imposed by the GATS in this regard, sufficient to provide the basis for a thorough subsequent investigation of Kenya's compliance with its GATS commitments.

Chapter 5 draws on the framework of neo-patrimonial states developed in chapter 2, locating, describing and analysing Kenya's political and economic development within its neo-patrimonial context. It shows how the dynamics of the international and domestic context have conditioned the states response to reforms since the 1970s. Specifically, the

²⁸ Unless otherwise stated, Annex refers to the Annex on Telecommunications, discussed in chapter 4.

²⁹ Discussed in chapter 4.

chapter posits the ‘development priority’ underpinning the reform and how this was conceptualised within the GATS framework and adopted through the KCA.

Chapter 6 continues the account of Kenya’s telecom reform process from 1997-2005 by critically evaluating developments within the framework of Kenya’s implementation of its GATS commitments under the Fourth Protocol and the Schedule of Specific Commitments, including the additional obligations undertaken by the adoption of the RP. A comprehensive analysis of these undertakings is provided in regard to the current status of each within Kenya.

Chapter 7 draws the chapter together by analysing the application of the GATS framework in Kenya within the framework of the study developed in chapter 2. This is an important chapter as it draws on the findings from chapters 4 to 6 and discusses the tensions exhibited between domestic and international preferences as displayed through Kenya’s telecom process. In doing so, it also comments on Kenya’s options in participation in international governance mechanisms.

Chapter 8 concludes the study by summarising the findings of the study and discussing the implications of these findings for the telecom sector and as well for policy making in Kenya and other neo-patrimonial states.

1.8 Limitations of the study

This study aims *inter alia*, to document the first phase of Kenya’s liberalisation programme and advance an innovative theoretical approach to understanding its success and failures in light of undertakings made by the country through GATS accessions. All studies of this kind, ambitious in scope and depth, have a number of inherent limitations that should be noted at the outset.

1.8.1 Logistical constraints

The first such limitation is temporal. Telecom by its nature is a dynamic industry and its regulation is constantly evolving (and in some cases delayed). With most studies of this kind, and relating to telecom in particular, the challenge is to reach completion without argument and analysis becoming outdated before publication. While the thesis attempts to document a period of time (1997-2005), it is inevitable that this will not reflect the entire picture. This is reflected through the nature of what policy is, incremental in process (Lindblom & Woodhouse, 1993). A number of facts and issues therefore risk redundancy through the natural course and pace of development in the sector.

First, while it had initially been hoped to discuss the logistics of telecom reform within the proposed ICT Policy that was to come into effect in 2003 and therefore replace the KCA, the ICT policy remains in draft form. As shall be discussed, political interests can be attributed for its delay. In addition, the KCA requires that Telkom be privatised and a new Second National Operator (SNO) introduced to compete with the incumbent. However, this too has been delayed due as the thesis suggests to political interests. The Minister of Communications at the time the last chapter of this thesis was being written mentioned that the ICT policy was ready to be tabled in Parliament and that Telkom would eventually be privatised early in 2006. As a result of the setbacks experienced in this process and other practical reasons, 31st December 2005 was chosen as the cut off date for monitoring and including developments in the sector, subject to further relevant detail being discussed in the concluding remarks. Setting such a date is unavoidable, but should be borne in mind for future studies drawing from this thesis.

Second, while the study draws on the commitments made by Kenya specifically in 1999 in the WTO, other rounds of service negotiations are ongoing. This means that further country offers will emerge and by 31st December 2005 Kenya had not formally lodged a formal offer in respect to the new rounds. This situation may thus translate as an opportunity for further academic work in this area.

1.8.2 Definitions and borders

The research recognises that in choosing to focus on the telecom policy process and how agents interact within a political, economic and social process in a given context, it cannot offer insights into how people actually experience technologies. It cannot uncover their hopes, values, fears and capacities for action. This is, however, an important aspect of analysis and is emerging as a challenging site of study. Key researchers involved in this field include Kling (2003), Mansell (2002), Millar (2002). Knowledge Management studies also seek to integrate the relationship between people and the technologies they use (see: Kerretts 1999; Holsapple, 2004; Cader, 2004; Mansell & Wehn 1998, Mansell et al., 2002). Furthermore, the study does not analyse demand patterns of information technologies in Kenya such as gender and income. Recent work by Curry (2002) and Walker (2001) evaluate the various ways in which demand is influenced by these factors. It is noted however that this field of critical theory is contributing to the understanding of telecom application.

The choice of focusing on the policy-making process in the telecom sector also implies that the study does not delve into how and why people adopt technology. There is a growing field of study in this area including work by Mansell and Wehn (1998) as well as work done by various international agencies such as the United Nation's (UN) Human Development Reports (HDR) which began a telecom analysis under the title 'ICT indicators' in 2001. This also means that the focus of this research is not dependent on the technological advances in the wider ICT sector. Instead this investigation is on the underlying telecom policy frameworks and policy process that underpin the introduction of these technologies into a given society. By focusing on the telecom policy process, I intentionally align the study within policy and not technology. Instead, I recognise that technology is a tool that does not act on its own.

In addition, this study accepts the view that a distinction between trade in goods and services is no longer relevant and that the historic reasons for different approaches to

goods and services no longer exist.³⁰ However, the thesis also asserts a narrower contention that trade in telecom services, because of the central link to telecom infrastructure and development is distinguishable from other trade services such as transport or financial services. The importance of this has been underscored and will be discussed in chapter 2.

Finally, it is important to note that there is little if any consensus in the field as to what the term ICT actually denotes. This in itself provides inherent difficulties for policy making and policy makers. In this study, the use of telecom instead of telecommunications is preferred in the discussion though the literature uses it interchangeably. The meaning of telecom is derived from the 3 definitions used in the KCA which frames both the telecom industry in Kenya and the analysis of this study. Namely:

...a service offered to subscribers which provides such subscribers with a telephone connection to, and a unique local telephone number address on a licensed local access provider and which enables such subscribers to place calls to or receive calls from, other telecommunications stations on those systems and shall include residence and business line services. ...a service provided to the public which allows end users to transmit and receive real time voice communications, including voice telephony service, public pay telephone service, operator assisted services, local, domestic and international long distance telephone service whether by wire or wireless means as well as basic, non-packet switched data communications, such as facsimile but does not include advanced or enhanced services or dedicated data communications services such as paging services... a fixed line or mobile communications service in which a two-way connection are established without any deliberate removal or addition to the information content transmitted over that connection or any additional service having been provided thereof (KCA, 1998 Part I).

The study therefore does not deal with organisations that make the actual technologies themselves such as the development of content services, broadcasting and other forms of

³⁰ See Trebilcock, M. & Howse, R. (2000). *The Regulation of International Trade*, 2nd ed., London: Routledge.

entertainment with vertical ICT applications (such as e-commerce, e-learning, e-government), with intellectual property rights, or with issues such as privacy, security or gender in relation to ICT. Where the term ICT is used therefore there is an implied knowledge that it includes other services such as e-commerce and technologies that have converged with broadcasting making up the term ICT. ICT therefore denotes this convergence.³¹ This research therefore excludes media and broadcasting. The reasons for this are first, practical as a thesis would not permit such a discourse and second, the GATS framework focuses on telecom policy reforms. In addition, in most cases telecom policies around the world have left media and broadcasting as separate entities, though even this is being contested with the convergence of technologies.

1.8.3 Practicalities and resources

The remaining limitations are practical in nature. First, while I have endeavoured to cover all aspects of the research terrain as documented through the methodology chapter (chapter 4), it is impossible to monitor every relevant process and regulatory hearing on matters pertaining to this thesis. In addition, websites of Kenyan Government institutions have been slow in updating information. Resources in this regard have been limited but have not meant that the thesis has suffered. As a result, the reliance on relevant statistics has meant using international bodies such as the ITU, WTO, UN and others as opposed to local Government data. Nonetheless, where websites were used, in order to verify consistency and content, all websites remain valid as checked by the author on December 10th 2005.

In addition, this study would have been quantitatively strengthened if reliable statistics on the participants in policy meetings were recorded over the years. Moreover, using multi-method analysis within a case study involves other complications like financial and time costs. It also affects the depth at which one is able to examine each case. I believe my

³¹ For further in-depth discussion, see Nicol (eds) (2003) *ICT Policy, A Beginners Handbook*, Association of Progressive Communications, www.apc.org

work would have benefited from a stay in the field for longer than the 12 months I undertook. This would have facilitated a longer analysis of the meetings and observations. In addition, a long period of stay would have provided me with opportunities to revisit issues for further clarification. Nonetheless, I have been fortunate to live within a ‘technological world’ that has allowed me to maintain contacts with respondents by email and telephone and further listen to Kenyan news online.³²

Finally, any historical interpretation of political events and process has inescapable elements of subjectivity as discussed in the methodology chapter. While I have endeavoured to keep the work within the theoretical confines of the study, my thoughts and ideas have evolved over the period of this thesis and have been shaped and moulded by discussion with colleagues both abroad and at home in Kenya. This is my version, any factual errors or subjective distortions in interpretation remain my own.

The remainder of the study is devoted to the development of the argument. I begin chapter 2 with the framework of the study namely: neo-patrimonialism and NIE. As stated earlier, this framework provides the basis upon which the analysis of Kenya’s application of the GATS is done.

³² It is acknowledged that this would have proved difficult where I in Africa, as the costs of phone calls are much more expensive and the possibility of a steady online stream remains unavailable. In a sense, the writing of this study is driven by such inequalities.

THEORETICAL FRAMEWORK

It is an irony of history that the very losers of globalisation will in future have to pay for everything from the welfare state to a functioning democracy – while the winners of globalisation post dream profits and steal away from their responsibility for future democracy
(Beck, 2000 p.6)

Introduction:

The aim of this chapter is to present the underlying theoretical considerations of the thesis. This is an important chapter as it explores the political complexity of Kenya within a domestic and international context and strives to make sense of, - a context that is the starting point for an analysis of telecom reform in Kenya.

The research inquiry presented in chapter 1 can be posed through the question ‘why is Kenya’s telecom reform lagging behind in spite of its adoption of the GATS framework?’ This question may be simple, but devising a reasonable empirical strategy for answering it is far from straightforward. This is not because we do not have good empirical studies. As noted in chapter 1, in the field of telecom, outcomes have mainly been explained through technological quantitative data. While these studies provide an indication of the status of a country’s technological development, they nonetheless do not explain why they happened. On the other hand, in the voluminous literature on economics and political sciences, three strands of thought stand out explaining outcomes in general. First, there is a long and distinguished line of theorising that places geography at the centre of the story. In summary, this field argues that geography is a key determinant of the endowment of natural resources and climate, therefore explaining outcomes. Writings by Jared Diamond (1997) and Jeffery Sachs (2001) are the most notable. A second strand argues that international markets and trade and the role they play in structuring the economy of rich

and poor countries provides an explanation for outcomes. Notable research in this field includes works by Frankel & Romer (1999) and Rodrick et al., (2002) and Jutting (2003). Allied to this strand is the work focusing on African economies and the structure of their political and economic context. Notable works here include van de Walle (2001). The final strand centres on institutions and in particular the rule of law and property rights. In this view, what matters is the rules of the game in a society and their conduciveness to desirable behaviour. This view is associated most strongly with Douglas North (1993).

The reason for telecom outcomes can thus be explained by all three strands. For example, the geographical strand can account for telecom outcomes using the physical infrastructure within a context. The international markets framework can explain telecom outcomes as a result of the networks a country may have with other telecom industries and alliances therefore lowering the costs of telecom access and the institutional strand can measure both domestic and international institutions and the extent to which they structure outcomes. The difficulty therefore is not with the lack of solutions but rather, how to sort out this complex web of causality that entangles the above factors. Attempting to provide a holistic framework that accounts for the domestic and international context and therefore this complex web of causality, this study applies neo-patrimonial and NIE literature as a framework to help analyse telecom outcomes in Kenya.

The chapter is presented in two sections. Part I provides an explanation as to why African economic crisis has persisted for over two decades and why efforts put in place to sustain more effective economic policies have proven much more difficult. The central aim of this section is to understand the underlying structure of neo-patrimonial states and how this affects day to day policy. This will assist in framing the understanding of the Kenyan context in later chapters.

Part II seeks to understand the role of IFIs in African neo-patrimonial states and how the relationship between IFIs and African neo-patrimonial states is structured. Locating the

discussion within the rationale for reforms in African countries, a broad NIE approach is employed to locate the narrow thesis of trade commitments as instruments of credibility in the context of telecom liberalisation.

Three main themes are developed through the chapter and form the context for discussion and analysis in later parts of the study. The first is the clientelist nature of political authority in African states. The second is the way in which these patrimonial states have interacted with the international community creating a co-dependency relationship. Allied to the second is the way in which an imperfect conditionality framework has over the years unwittingly created a 'culture of approval' in framing policy reforms. Third, is the way in which the GATS is structured with flexibility for manoeuvrability of a country's commitments. This is what this study appropriates as the transaction cost.

Part I: The neo-patrimonial state

2.1 Historical context

Any attempt to study any African political system and its issues confronts three problems: historical scope, comparability and generalisation. Does one start from the history of the pre-colonial era to the contemporary? Can one afford to make generalisations over such a vast and varied continent of Africa, encompassing several countries? On what basis does one generalise? Chabal (1999) suggests that one should focus squarely on how arrangements of power contrast with those found elsewhere. As he rightfully notes, politics in Africa is in no way unique, in spite of being historically singular it can readily be related analytically to Europe or Asia. Hence this study attempts to locate the theorisation of African political contexts firmly within its rightful historical context.

There are many imperfect democracies in Africa. These democracies are considered imperfect in that they do not fully comply with the conditions of inclusiveness, contestation and constitutional order as specified in common procedural definitions of

democracy. However, defining any country as democratic is also in itself problematic. Schmitter has proposed making the distinction between two sub-types: first, a *hybrid regime that combines elements of autocracy and democracy* and second, a *persistent but unconsolidated democracy* (Schmitter, 1994, p.59; see also Conaghan & Espinal, 1990). Hybrid regimes, in turn have been subdivided further into dictablandas and democrandus (Schmitter, 1994). In the former, there is some liberalisation with individuals having some rights but under government control where elections are concerned. In democrandus systems, there is some semblance of democracy but no liberalisation. However, both these two types tend to be short-term regimes not durable over a long period. On the other hand, Schmitter (1994) notes that a mix of autocracy and democracy tends to appear through what is known as delegative democracies. O'Donnell (1994) has described delegative democracies as those democracies in which the executive is granted the authority via elections, to do whatever it desires with little oversight or control by the other branches of government and with little participation by the country's citizens. Delegative democracies are thus characterized as displaying considerable overlap with the Weberian notion of patrimonial democracies (Bendix, 1962). Patrimonialism, according to the Weberian notion, is a type of government that derived from and was based upon traditional authority that was organised as more or less a direct extension of the royal household in which officials were personal dependents of the ruler (Weber, 1968). Naturally this type of state has changed since Weber's analysis. While neo-patrimonialism is no longer based on traditional appeals to legitimate authority, it now bears a mix of traditional and modern state practices. To expound on this further, I locate the discourse of neo-patrimonialism within its rightful historical context as discussed below.

Some authors have suggested that the colonisation of the continent of Africa resulted in the wholesale destruction of pre-colonial political structures and the restructuring of power around the norms and practices of bureaucratic colonial political order (Tordoff, 1997). However, such an interpretation is erroneous. It is not just that the observation of political practices belie the simplistic view that independence made possible the Westernisation of political systems; it is also that the assessment of the true impact of

colonial rule was misjudged. As has been well re-counted by post-colonial literature on Africa (see van de Walle, 2001; Bratton & van de Walle, 1994) Africa's colonial powers had neither the ambition nor the means to establish in Africa working models of their own political institutions. To recount briefly, the colonial masters of Africa were not interested in or for that matter zealous in eradicating pre-colonial political structures. Where this was done, it was simply because it worked for them. Instead, as Eisentadt (1972) and Synder (1992) note, in spite of the differing colonial powers with distinct political traditions, the colonialists went about managing their colonies in a surprisingly similar fashion. Where they were able to use African political systems they did so and where it was necessary to impose a hierarchical structure this was also done. In practice therefore the behaviour of the local colonial administrator (British district officers, French commandant de cercel or Portuguese chefe de posto) had broadly similar consequences for the political development of African states.

After independence, which occurred for most African states between 1960 and 1970, African leaders redesigned the new political structures they had inherited. While each country had their differences, the political development was similar, with the narrowing of politics at the top. In retrospect what has become clear is that there was a more important political process at work, the Africanisation of politics entailed the emergence of neo-patrimonialism. That is, a juxtaposition of an apparently 'traditional'-patrimonial logic and 'modern' formal state institutions derived from the Western experience (Bratton & van de Walle, 1994). This system of rule therefore became more informal than formal. In this way

politics at independence became patrimonial rather than institutionalised...despite their Western appearance, African political systems developed a logic of patronage which relied almost entirely on networks of personalised and vertical relations between rulers and ruled, elite and populace (Chabal, 2004 p.6).

Two characteristics therefore underlie the neo-patrimonial state: 1) the centralisation of power in the hand of the ruler, who seeks to reduce the autonomy of his followers and 2) the blurring of public and private purposes within the administration. At the level of ideal types, neo-patrimonial regimes therefore can be clearly distinguished from other similar types of regime; those based on rational-legal authority and impersonal law and/or those whose claim to legitimacy is based on ideology. The rather distinctive mark of African regimes is that they are neo-patrimonial. Neo-patrimonial regimes can have elements of patronage, law and ideology as is with different democracies discussed earlier in this chapter. Nevertheless, because of its nature, neo-patrimonialism clearly inhibits the effective exercise of the rule of law and the extent to which a state can be fully consolidated democratically. The orientation and approach to neo-patrimonial systems in this study is discussed further below.

2.2 Structure and agency and neo-patrimonial states

This study draws on the work of van de Valle (2001), who attempts to navigate between a structure-agency dichotomy through a 'structured contingency' approach, focusing on state institutions in the international and local contexts as contributory factors to the outcomes of policy in neo-patrimonial states. To avoid artificially separating agency from structure within neo-patrimonial context, the term 'agents' is used. By emphasising 'agents', this study recognises that agents in neo-patrimonial states are conceptualised by their *fields of power* a term borrowed from Bourdieu & Wacquant (Bourdieu & Wacquant, 1992 p.97). Agents are conceptualised as responding to a reconfiguration of their 'field of power' which is often triggered by contextual factors beyond their control such as the adoption of international policies. According to Bourdieu & Wacquant's (ibid, 1992 p.97) rather lengthy definition, a 'field of power' is:

a network, or configuration of, objective relations between positions. These positions are objectively defined, in their existence and in the determinations they impose upon their occupants, agents or institutions, by their present and potential situation (situs) is the structure of the distribution of

species of power (or capital) whose possession commands access to the specific profits that are at stake in the field as well as by their objective relation to other positions

By emphasising the locations of agents within a network of power relations, the metaphor of a field is a useful conceptual device to bridge structure and agency. Agents are able to influence the field without changing the structure, but are at the same time embedded in it and experience the agencies of others through it. The context of politics as part and parcel of the system in neo-patrimonial regimes means that dominant actors strategise in an attempt to maintain or enhance their positions in any changing context. Such strategising is necessary not only because of challenges by disaffected former members of ruling elites, 'outsiders' of the patrimonial system trying to get in (Bratton & van de Walle, 1997), but also because of the challenge from the international gaze through policy and aid demands that seek to counter measures to neo-patrimonial practices. Moreover, the state is a particularly important context in which to examine the role of dominant actors and their embeddedness in the political process in the telecom sector in Africa. This is because as Singh (1999) argues, countries have three elements that can act as policy constraints. The first aspect is the degree to which the state is independent on other stakeholders in carrying out its actions which he calls state autonomy. Second, the degree to which the state is effective in its actions and relies on its resources (both human and physical), otherwise known as state capacity. The third aspect is the degree to which states are development oriented, which is largely dependent on the history of the state interest and its involvement in development issues. Since the state acts as an enforcer of policy, privileged access to state institutions facilitates the material and symbolic reproduction of dominant actors' positions. Thus the state within the structured contingency approach is assumed to be embedded within social processes and is discussed in the following section.

2.3 Neo-patrimonial states: patterns of functioning

Africa's rules play out patrimonial politics on three different levels -the local, national and international simultaneously (Clapham, 1996; Reno, 1998). Key to neo-patrimonial states

is that they exist with formal trappings of the modern state. While the President's friends may be more powerful in the affairs of the state, legal authority rests with the legislature or cabinet. Public policy studies have tended to downplay the patrimonial dimensions of these regimes hence a striking reality of most reformist policies, such as anti-corruption measures tend to assume that there is a rational logic at the apex of the state that will be available to carry out the strategy (van de Walle, 2001). On the other hand, some neo-patrimonial studies downplay the rational legal dimension of these states. They argue that formal structures are irrelevant and that all meaningful decision making takes place within a parallel *shadow state* that is entirely patrimonial (Chabal and Daloz, 1999). I view both these views as excessive. As suggested in the introductory note of this chapter, the relationship between the domestic arena and international regimes is viewed as a key explanatory factor for policy outcomes in the telecom sector in Kenya.

While definitions vary, four defining elements of neo-patrimonial relationships are generally stressed in the literature: access to state resources, clientelism, an asymmetry in power and status, and hybrid regimes (van de Walle, 2001). While all forms are existent within neo-patrimonial states, these forms usually play out through clientelist practices as discussed below.

Clientelist relationships take on diverse forms and are found in a wide number of contexts at many levels in very diverse societies. Indeed, the patron-client relation as a concept fits with a number of relationships. However, it is the centralisation of authority through the state that creates certain forms of systematic patron-client relations that characterise a neo-patrimonial regime. A state is neo-patrimonial when state authority, exercised through institutions, is dominated by patrons and their vertical networks and the highest representative of the state in the executive (the President or Prime-Minister), is a paramount patron with wide control over bureaucratic appointments and resources (Clapham, 1982; van de Walle, 2001). The very presence of a centralised bureaucratic authority gives rise to particular forms of patron-client relations, particularly those in which the patron plays the role of a broker on behalf of clients that are distant from

administrative power centres (Boone, 1992). Here then it is not the prevalence or density of diverse patron-client relations in society that characterises such a regime but rather the integral role played by patronage in the exercise of power (Kaufman, 1974). According to Bratton and van de Walle (1997 p.62),

{t}he right to rule in neo-patrimonial regimes is ascribed to a person rather than an office, despite the official existence of a written constitution. One individual, often the President for life, dominates the state apparatus and stands above its laws. Relationships of loyalty and dependence pervade a formal political and administrative system, and officials occupy bureaucratic positions less to perform public service, their ostensible purpose, than to acquire personal wealth and status. Although state functionaries receive an official salary, they also enjoy access to various forms of illicit rents, prebends, and petty corruption... The chief executive and his inner circle undermine the effectiveness of the nominally modern state administration by using it for systematic patronage and clientelist practices in order to maintain political order

While these forms of rule are being challenged by more open political systems such as multi-party politics which now limit the rule of the President, forms of clientelism still exist as leaders seek to maintain their positions. Bratton and van de Walle (1997, p.63) refer to these presidents as individuals who have the *systematic concentration of political power in the{ir} hands*. In return for loyalty and capitulation to the state, the neo-patrimonial leader often takes responsibility *for the peoples' welfare and is willing to entertain and redress individual grievances personally* (ibid, 1997, p.64). As such, in neo-patrimonial regimes, the despotic power of the state is central. To provide for the welfare of the society, neo-patrimonial leaders intervene in the state economy. Extensive regulation of economic activity exists, *through which the incumbent elite control a wide range of monopolies and economic rents* (ibid, 1997, p.66). State ownership and control over public resources or individuals therefore helps to undermine the autonomy of clients who exchange political subordination for material rewards/and or protection. In such a context, clients are not confined to the poorer segments of society but include businessmen and elites who require state sanctions for their activities. While clients are agents and actively negotiate their way, into networks,

they do this largely because of the absence of physical security and legitimate public authority. In this way contemporary patron-client relations cannot be understood outside the workings of the state with its coercive capacities. Instead, it is *the vulnerability of clients which is most obvious and important, and determines the extent to which they need patrons and hence the degree of subordination to which they will be willing to subject themselves in order to obtain them* (Clapham, 1982 p.12).

Thus conceptions which posit a dichotomy between patron-client ties and a 'strong' state or bureaucracy ignore how certain bureaucratic institutional configurations and practices undergird and facilitate these frameworks (for example, Reno, 1995). Particularly marginalised are the unaccountable, coercive and predatory actions of members of state bureaucracy at the national level such as Ministers and heads of institutions, many of whom owe their positions to higher level patronage within the executive positions.

A number of scholars also argue that patron-client relationship ties are a substitute for coercion (Lemarchand, 1972; 1994). Thus, patron-client ties mingle material incentives with coercion. However, this level of analysis has been particularly ignored in the analysis of telecom development in Africa. Instead, there is a tendency to attribute issues and problems only as a result of international pressure for reform rather than also seeing how state actors interact with international policies and in doing so appropriate specific policy changes for their benefit. This is surprising, given that in neo-patrimonial regimes, patronage generates privileged groups with respect to the state; *defines the legal order* (Roniger, 1994 p.9) and undermines the public realm. Moreover, this is facilitated by the often colonial legal and institutional order, in which coercive and material power is concentrated. Critically, as the state has historically been the provider of public goods as in the case of telecom, neo-patrimonial regimes provide remarkable opportunities for those at the highest reaches of the patronage hierarchy to manipulate these rights. This explains why taking over the state with coercive capacities and institutional opportunities tends to become a high stakes, zero-sum struggle within the political class. van de Walle (2001) argues that control of the state, its resources and policy levers allows political elites to

expand clientelism practices through patronage, nepotism and the granting of various exemptions from laws, taxes and licences. While not all forms of political clientelism are illegal, van de Walle (2001) notes that most involve the subversion of public norms and objectives for the sake of personal gain. As shall be depicted through the case study, these features of clientelism and patronage were present in the reform process. The need to control institutions that hold immense power over material resources such as the telecom industry leads to informal and private negotiations over the control of these institutions and the right to manage them. In such a case, clientelism practices became attractive to the political class for the selfish reason that they provide a clear path to self-enrichment (ibid, 2001).

Neo-patrimonial leaders in such states therefore use their concentrated power to perpetuate their rule and hence such regimes are often described as electoral despotism states (Schmitter, 1994). The term emphasises the subordination of the public to the private interests of the ruler and his clique who are unconstrained by law and can use their power to win newly competitive elections and determine who will lead and who will head certain institutions perceived as powerful. In brief, persisting neo-patrimonial rule undermines the essential elements of democratic rule such as equality before the law. It also allows for the manipulation of property rights, such as land ownership, to punish resisters and reward supporters. This selectively impoverishes and enriches sectors of the population and, in the process, plays havoc with economic production and the stability of institutions within the state. In neo-patrimonial regimes, *state power and the interests of the ruling group are the central focus of state policy* (Callaghy 1987 p.100) or in Weber's words *governing powers and the associated advantage are treated as private rights* (1968 p.353). This deliberate blurring of the public/private boundary renders the emergence of resistance to these informal practices and organisation in the 'public interest' difficult.

Because the boundary between the public and private wealth is blurred, corruption - the abuse of public office for private gain, becomes part of the legitimate rewards of patrimonial states. As van de Walle (2001) notes, corruption becomes sanctioned at the

highest levels of the state and in doing so systematically lowers government revenue. Lofchie (1994) has convincingly argued that rent-seeking behaviours have not always motivated the initiation of policies but rather have over time yielded extensive rent seeking benefits for the political class. The issue of rent-seeking tendencies is also captured in Bayart's seminal book *'The state in Africa: The Politics of the Belly'*. In this book, Bayart draws on the popular Cameroonian proverb: *a goat eats where it is tethered* to illustrate his argument that *corruption and predatoriness are modes of social and political behaviour shared by a plurality of actors on a more or less grand scale* (1993 p.238). Similarly, Chabal and Daloz (1999 p.28), see widespread societal complicity in patrimonial practice with legitimacy primarily a function of who is able to create access to state resources. In these notions, Africa lacks *any tradition of the public domain* and hence discontent over corruption is explained by hypocrisy *where corruption is as frequently denounced in words as practiced fact* (Olivier de Sardin, 1999 p.29, 31). Public domains are thus not in the hands of the 'public' and as Williams (1987 p.639) notes, *little trickles down to the worse off through the patronage network*. While structural programmes and reforms have been introduced to try and curb such practices, conventional frameworks of reform such as structural adjustment programmes introduced by the IMF and World Bank ignore the contestations around the shifting boundaries between 'private' and 'public'.

As will be shown in the case study, when privatised channels of distributing wealth become a resource for a few or when public utilities and resources become utilised and ruled by a small group of elites, there is the notion that those who benefit will only be those close to this clique. This is called *'kukula'*, a popular metaphor in Swahili translated as 'eating' which in Kenya is often used to refer to the process in which political elites acquire posts so that they can gain wealth through the system. Nonetheless, the system of neo-patrimonialism is better located within its complex ethnic political landscape.

2.4 Imagined communities and patrimonial politics

Clapham (1985, p49) notes that neo-patrimonialism is *the most salient type of {authority} because it corresponds to the normal forms of social organisations*. I draw a finer distinction and concur with Bratton & van de Walle (1994, p.459) that *while neo-patrimonial practice can be found in all polities, it is the core feature of politics in Africa* as normal forms of social organisation in Africa depend on the arrangement of ‘imagined ethnic communities’.³³ Mozaffar et al., (2003 p.380), concur with this noting that ethno-political groups facilitate political action *because the identities that define them are strategic resources that are contingently (not reflexively) activated to define group interests that help to reduce the cost of collective political action in response to the institutional incentives that structure competition for power and resources*.

The politics of neo-patrimonialism is therefore intricately related to the politics of identity. A multiplicity of identities is at play in African politics. Africans are not only members of imagined ethnic communities, but also citizens, subjects, townsmen and city dwellers, believers (Ranger, 1999) workers, consumers and family members. As shall be depicted in the case study, struggles over patrimonial control implicate various identities within the political and public realm. This dates back to colonial history where most African societies, once profoundly local yet fluid and interactive, were administratively ‘containerised’³⁴ during the colonial period (Mozaffar et al., 2003). Van de Walle (2001) argues this point, noting that the issue of inequality and hence the need to manipulate state resources dates back to the colonial legacy. In addition, Ranger (1999) notes that during the colonial period, units were formed on the basis of constructed ethnic categories, some corresponding to the pre-colonial groupings and others more to colonial

³³ Here I draw on Benedict's [Anderson, B. (1983) *Imagined Communities*. London: Verso p.7] definition of a nation as an “imagined political community” and further from Lonsdale [Lonsdale, J. (1992), “The Moral Economy of Mau Mau: The Problem” in *Unbappy Valley Book two: Violence and Ethnicity*. Edited by Bruce Berman and John Lonsdale. London: James Curry p.267] in understanding “tribes” (- a term shunned by most post-colonial academics with good reason, but very much part of the African lexicon) essentially as nations without states and hence as ‘moral arenas of political debates’ or ‘civic republics’.

³⁴ I borrow the term from Mandami [Mandami, M (1996). *Citizen and Subject*. Princeton: Princeton University Press].

imagination. Berman (1998) also concurs with this view adding that the uneven colonial penetration of markets and production generated economic differences across the territory as well as differing degrees of class formation and the ethnogenesis of inequality. Locating the discussion of ethnicity and African institutions in its rightful context, the following section discusses present day institutionalised ethnicity in Africa.

2.4.1 Ethnicity

Probably the most important event that explains contemporary ethnic relations in Africa is European colonialism (Ekeh, 1975). In regularising the scramble for Africa, colonialists partitioned Africa among themselves in a manner that reflected their spheres of influence, paying little regard to matters concerning ethnic heterogeneity or hitherto existing institutions of governance. As a result, different ethnic groups, each with its own language, culture, religion, traditions, customs and political and economic systems, were brought together to form a single political and administrative unit. In Kenya, for example, an assortment of more than 40 ethnic communities were brought together to form one country, while in Nigeria, more than 400 ethnic groups were combined to form one country (Kimenyi, 2002). Additionally, as has earlier been mentioned, colonial rule did little to develop democratic institutions in Africa, the interest of colonialists being mainly in maximising economic gains. Their rule which consisted of favouring certain ethnic communities over others was therefore manifest during the struggle for independence and continues to be an important factor in present day Africa.

In a bid to retain unitary governments bequeathed by colonialists, Kimenyi (2002) argues that African leaders sought to homogenise otherwise heterogeneous groups. This was done through the centralisation of the state and power. Similar arguments were further advanced for single-party political systems where all ethnic groups would be joined together under a one-party state. For example, in Kenya leaders promoted tribalism by warning that political unity would be compromised if party competition was introduced because particular tribal and linguistic groups would dominate different political parties

(Holmquist & Ford, 1994). The approaches to coexistence that were adopted involved suppressing expressions of ethnic identity ostensibly to promote national unity and integration. Therefore, the common response to diversity in many African countries has been the adoption of institutional arrangements that seek heterogenous populations by limiting expressions of group differences (Kimenyi, 1997).

The result over the last 30 years, however, has shown that institutional arrangements adopted by African leaders in the 1970s were not suited or capable of harmonising the interest of heterogenous groups. As Kimenyi rightly points out, *since the state is highly centralised, the leader of the group that captures the state has control of an enormous amount of resources* (2002, p.13). There is ample evidence to show that many African governments have maintained their control of governance structures by redistributing resources in favour of groups and specific ethnic communities. Instead of unifying various ethnic groups, African leaders have perpetuated a rule and divide system in which certain groups benefit at the expense of others (Kimenyi, 1989; Brough & Kimenyi, 1986; Kimenyi & Shughart, 1989). The result in part has been the proliferation of claims to various interests based on local identities. This tendency is exacerbated by the practices of neo-patrimonialism.

In struggles over the state and appointments to its bureaucratic apparatus, claims around ethnic community tend to dominate. While African Presidents rely on patronage for control, they do this through what Anderson (1983, p.7) calls *the imagined ethnic community*. As a result, neo-patrimonial politics relies on gathering the necessary resources to control the ethno-political landscape. This is because a ministerial appointment or an appointment to positions of power within state institutions brings with it patronage opportunities as well as significant perks and status enhancing privileges (van de Walle, 2001). Within the context of neo-patrimonialism, appointments of certain members of an imagined 'ethnic community' to particular positions of influence, particularly plum posts associated with higher level politicians, are often interpreted to confer benefits on a number of clients and sub-clients from that 'community' as well as the 'community' as a whole. For example, in an electoral context, patrons may use appeals to ethnic solidarity to solicit support,

drawing wider or narrower boundaries around the imagined 'ethnic community' and thus deepening in part the effectiveness of uniting people or cementing divisions as electoral strategy. Subordinates also make claims on those in power, naming them as part of their 'community' as a means to claim access to state resources, security and representation at the national level (Ndegwa, 1987).

Thus ethnicity as it is practised in neo-patrimonial regimes is flexible, with debates concerning the 'real' ethnic identity of patronage appointees. This becomes highlighted when the head of an institution is analysed not only as executives or professionals in their own right, but also as belonging to a certain 'ethnic community' and therefore perceived as gaining from that position especially if the President belongs to the same 'ethnic community'. This feature is further entrenched through the political system. While African states have long been accused of having large cabinets, these are rarely a response to economic policy concerns but rather to facilitate compromise and cohesion within the political class as a result of ethnic diversity. This is evident in Kenya where membership to Parliament and more so to ministerial positions requires the President to preserve national unity by including elites from as many ethnic communities as possible. The categories that arise within ethnic practice are fluid and incorporate multiple sub-identities. This does not imply that the 'choices' around ethnicity are either arbitrary or purely instrumental. Rather they must be understood to be historically produced and *are related to the social conditions of their emergence and perpetuation*, including the historical institutional context (Carter-Bentley 1997, p.47). As Gilroy aptly puts it, *identity-making has a history even though its historical character is often systematically concealed* (2000, p.100). For example, within Kenya, the category of 'Kalenjin' identity, a tribal grouping, subsumes many identities: Tugen, Keiyo, Marakwet, Pokot, Terik, Saboat, Nandi and Kipsigis. Kipkorir (1985) traces the formation of this politically charged category to a 1950s meeting by young educated men within these communities who wanted a more appropriate collective term. Thus, they chose the word 'Kalenjin' which means 'I say', in all the languages and was a common expression

used by John arap Chemalian³⁵ in his vernacular radio broadcasts during World War II. Thus, to emphasise that ethnicity is historical is to recognise that it raises moral and political debate over the problems of exclusion, distribution and representation within the ‘imagined community’ of the nation (Yeros, 1999). Thus, the national community in Africa is most often imagined along communitarian lines as nations of communities. This places the notion and agenda of liberal citizenship in tension with local ethnic understandings (Ndegwa, 1997).

Nevertheless, ethnicity is not necessarily pitted against an over-arching nation. Here Lonsdale’s distinction between ‘political tribalism’ and ‘moral ethnicity’ is a useful one. *‘Political tribalism’—the unprincipled competition for access to the state on behalf of leaders who draw support from administratively contained, ethnicised constituencies..*, should not be confused with ‘moral ethnicity’— *...the moral economy at the core of ethnicities that allocates ‘reputation’ to the means by which people pursue their self interest* (1994, p.138-139). The former is part of domination, the latter has potential to resist domination and, when projected onto the imagined national community, to create the basis for a more accountable national public realm. Depending on political context then, ethnic claims can be a form of resistance to marginalisation and coercion or a form and means of domination (Berman, 1998). This can be seen in the Hutu Power movement or even the Moi or Kenyatta regime in Kenya where both leaders were perceived to have allocated most of the resources to the Kalenjin and Kikuyu communities respectively. Lonsdale (1992; 2000) explains the relationship between ethnicity, power and politics in his analysis of the Kikuyu ethnic community of Kenya, locating the construction of the Kikuyu community and their rise to power through the colonial underpinning of the Mau Mau resistance.

Thus, ethnicity must be understood as embedded within existing power relations. Neo-patrimonial regimes tend to lead to proliferation of ethnic and regional claims and mobilisations. Patron-client politics often deepen prior inequities and leave room for the

³⁵ Well known radio presenter in the Kalenjin community during the colonial period.

perception by the general public that public resources are being abused. Indeed this may be the case, but an executive in a public institution can also be merely doing his or her work but be perceived to be 'eating' from this office simply because he or she belongs to the same ethnic group as the President.

'Political tribalism' then, is rooted in a failure of representation, which the institutional configuration of neo-patrimonial regimes engenders and ruling cliques quite intentionally foster. Through appointments to ministerial posts, by becoming clients of higher up patrons, or by directly soliciting Presidential support, Members of Parliament (MPs) access state resources that can then be used to buy support for 'development' in their constituencies. In this way, elected representatives, particularly but not exclusively those in the dominant political party, are often part of cascading patron-client networks clustered around the President (Barkan, 1979). For example, in his study of the Kenyan electoral process, Barkan (1987) notes that these networks between the MPs and the rural/ethnic community are at times parallel and at times, overlapping. As part of these dual systems of networks, MPs engage in intense competition for access to the President and his power over appointments and allocation of state resources.

As shall be shown through the case study, this network relationship, based in part on ethnic identities explains why the telecom process took different twists and turns as political rife over state resources became part of what was to be contested. Within this struggle over access to the state, particularly the concentrated power of the presidency, the practice of ethnicity becomes an integral part of strategy. Van de Walle (2001) notes that state-led clientelism should not be viewed as lessening state autonomy but rather the opportunity for the ruling elite to use the system for their own material wealth. While it is difficult to generalise and assume all political elites as prone to such tendencies, van de Walle (2001) notes that these elites are mainly holders and potential holders of offices at the apex of the state. However, he points out that these elites tend not to hold these positions for long as *insecurity of office appears to be a prevalent mechanism for Presidential control over the elite* (p.125).

2.5 Summary

This section has examined the nature of political rule in Africa. Utilising a neo-patrimonial framework it has been argued that African states are inherently bound up with negative synergies of clientelist practises and have a form of democracy that is patrimonial.

Nonetheless, the character of neo-patrimonial states raised in this section raises a central question: Can neo-patrimonial tendencies change with international and economic reform? In the literature, it is often hypothesised that a new leader has the potential to be a so called 'new broom' who can carry through more far-reaching reforms than a long standing leader because they are less tied in by the established patronage networks (Kjaer, 2004; Haggard & Kaufman, 1995). The literature offers two reasons why a newly elected leader is supposed to be a better initiator of change. First, a newly elected leader is supposedly granted a 'honeymoon' grace period during which he bears no responsibility for the previous government's failings. In this period he can introduce economic reforms that create a new group of winners who will then provide the support necessary to keep him in power and sustain reform (Haggard & Kaufmann, 1997).

Second, it is often assumed that new leaders have fewer ties to the established patronage networks and thus *simply tend to change previous reward structures*. Coupled with the requirements of international financial institutions for adjustment, this will usually entail some kind of economic liberalisation (Bienen & Herbst, 1996 p.33). In differing from this view van de Walle (2001) notes that in Africa, winners have not always emerged and reforms have therefore been difficult to sustain. While in the honeymoon stage, new economic reforms are made, interests tend to regroup and reforms have tended to stagnate. Thus, new leaders return to what van de Walle (2001 p.60) has termed the *partial reform syndrome*. The new leaders remain rhetorically committed to reform, but only carry out reform to the extent that it does not politically hurt important individuals among the elite. After some years in power, leaders may continue to receive aid but they are no longer able to live up to the pledges made when negotiating the agreement with donors. It

is in this light that van de Walle (2001) argues that the largest improvements in economic management are likeliest immediately after the democratic transition, before the weight of the past reasserts itself and while some of the transformist activities of the transition survive.

Taking van de Walle (2001) argument further, a key feature of conceptual confusion between ethnicity and patronage in the literature stems from the failure to distinguish between two forms of patron-client ties present in most African countries such as Kenya. The first form involves the ties between a patron and a local community as a whole through the provision of public goods. The second form involves the ties between a patron and select individuals within either the local community or at the national level of the administration. As will be evidenced in this study, there is little doubt that political party competition is likely to make the political leadership more responsive to a wider cross-section of the population or that reforms will take place. This is because as Kimenyi (2002) suggests, political parties take on an increasing ethnic character under a multi-party system as power brokers prey on their ethnic background to drum up political support.

The historical evidence from Kenya appears to confirm Kimenyi's (2002) hypothesis. For example, in Kenya, the first multi-party elections in 1997 and subsequent elections in 2002, political parties tended to form along ethnic lines: the ruling party Kenya African National Union (KANU) became the party of Rift Valley; the National Development Party (NDP) became the party of the Luo and Nyanza tribes; the FORD-Kenya party became the party dominated by the Luhya community in Western Kenya; while the Democratic Party (DP) and FORD-Asili party were largely dominated by the Kikuyus of Central province. When considering the telecom sector which has evolved under the Moi and Kibaki Government, the case of the new broom debate presents an issue for consideration.

The following section examines the relationship of neo-patrimonial states with the international arena and in doing so sets a background to understanding telecom reform in Kenya.

Part II: Telecom and development: the rise of the neo-liberal ideology in telecom policy.

By virtue of their global reach, organisational strength, professional expertise, and close connections with core governments and private banks and corporations, these international institutions [the IMF and World Bank] have acquired an authoritative status within the world economy comparable in some respects to that enjoyed by the state vis-à-vis the national economy. To this extent, the leading international organisations, of which the World Bank and the IMF are the most conspicuous, may be said to play an increasingly important initiating, monitoring and regulatory role in the reorganisation of economic activity on global scale
Camilleri & Falk
(1992, p.95-96)

2.6 Neo-liberalisation: A historical perspective of telecom reform within the wider economic development of Africa.

The concept of telecom reform within the ambit of development is entwined with the wider economic and social development in Africa. By the mid 1970s virtually every country in Africa officially structured its development effort through a planning process. Pegged to this planning process was that aid projects were meant to train the staff who would eventually replace the foreign experts and create or strengthen the services that would one day be housed in capable ministry hands. Between 1980 and 1990, the aid system that emerged was essentially intergovernmental with rich country governments providing resources to poor country governments. From the 1990s onwards, a third group - the western non-governmental organisations (NGOs) had become a part of this process, intertwining themselves not only with governments in Africa but also with their own governments in the West (van de Walle, 2001; Kruger et al., 1989). In some international forums, less developed country (LDC) governments engaged in the rhetoric

of entitlement suggested that substantial and regular aid inflows was their right. However, Jackson & Rosberg (1982) note that this was never an unambiguous norm of the regime as the developed countries steadfastly refused to recognise such a right on either legal or moral grounds. In practice, however, the system of aid between the years 1965-1985 worked as if it was a right as the international community did not choose to punish African governments who misappropriated funds. In spite of the funding received by western donors, African governments did not retain the final say over its allocation. While the rhetoric during this period was one of partnership, government control over the expenditure of funds was retained by donors. Nonetheless as Mosley (1994) and Ali (2003) show, donor funds continued to increase government corruption due to its mismanagement by African leaders. To tackle this problem, most donor agencies created their audit process resulting in the creation of numerous stand-alone agencies that were required to 'police' the flow of funds. As van de Walle (2001) notes, in the end these structures began to slowly replace government ministry planning.

Olukoshi (2003) argues that two somewhat contradictory issues combined to motivate the emergence of a modified aid regime in the 1980s and 1990s. The first was the criticism directed towards the aid-regime system and the actions of the International Monetary Fund (IMF)³⁶ and the World Bank³⁷ which had lent unwisely to most African states. The inability to repay these debts resulted in an economic crisis in most African states in the early 1970s. The second was that the economic crisis in Africa was linked to poor governance structures. However, Olukoshi (2003) notes that in the initial phase of

³⁶ The IMF is an international organisation of 184 countries established in 1945 that works to ensure the stability of the international monetary financial system. The IMF's mandate includes facilitating the expansion and balanced growth of international trade, promoting exchange stability and providing the opportunity for the orderly correction of countries' balance-of-payments. See www.imf.org

³⁷ The World Bank is made up of two unique development institutions owned by 184 member countries - the International Bank for Reconstruction and Development (IBRD) and the International Development Association (IDA). Each institution plays a different but supportive role in our mission of global poverty reduction and the improvement of living standards. The IBRD focuses on middle income and creditworthy poor countries, while IDA focuses on the poorest countries in the world. Together they provide low-interest loans, interest-free credit and grants to developing countries for education, health, infrastructure, communications and many other purposes. See www.worldbank.org

Structural Adjustment Programmes (SAPs), there was little explicit or formal concern within the international lending organisations over issues of governance and it was not until the early 1990s that governance began to enter the discourse of these funding agencies. SAPs were introduced in Africa on a massive scale from the early 1980s onwards at a time when most African economies were already caught up in a deep crisis of accumulation. These crises manifested themselves not only in terms of rapidly declining output and productivity in the industrial and agricultural sectors but also in terms of worsening payments and budget deficits, acute shortages of inputs and soaring inflation, growing domestic debt and a major problem of external debt management (Tarp, 1993). Thus, the reform programme under the SAP framework which was introduced under donor pressure and implemented under the supervision of the IMF and the World Bank were, as Ali (2003) notes, ostensibly aimed at stabilising the African economies, restructuring the basis for accumulation and permitting the resumption of growth.

In retrospect, neo-liberal theories grew out of the discourse on what the medium and long-term effects of the SAP would be on the economy. Championed by Africanists based in North American universities and later embraced by international financial institutions such as the World Bank and the IMF, neo-liberal ideology under the guise of 'political economy of African development or 'public choice', rested on the assumption, whether explicitly stated or not that 'democracy' and 'economic liberalisation' are two sides of the same coin (Ghai, 1991; Olukoshi, 2003). Within this view, it was argued that underpinning the failure of the post-colonial African state and its policy-making process was the neo-patrimonial nature of African states based on rent-seeking and poor governance (Bates, 1981; Sandbrook, 1991). Central to the discourse of neo-liberal theories was their thesis on neo-patrimonial states that produced such terms as 'prebendal', 'parasitic', 'personalistic', 'clientelist', 'kleptocratic', 'unsteady', 'overextended', 'predatory' and finally 'neo-patrimonial' to describe the state of most African economies (Olukoshi, 2003). Neo-liberal perspectives argued that the process of retrenchment of the state should result in the strengthening of civil society and associational life which, in turn, would enhance Africa's economy (Bratton, 1989, 1990). The role of the private sector was

therefore emphasised as a means by which to reduce government control and create independent institutions. Thus, in the case of the telecom sector, the old view that telecom development was a natural outcome of economic development was slowly eroded as telecom activities intergrated into the operations of all industry sectors.

Telecom reform was thus spurred on by both technological change and a growing urgency to attract financial investment for development. While it is impossible to detail the entire genesis of telecom reform, the linkage between telecom and development was unsurprising given that in effect these changes are closely tied to the quality and availability of telecom infrastructure. One of the seminal studies examining the relationship between telephone penetration and GDP is by Hardy (1980).³⁸ His examination of aggregate variables of economic development (eg. GDP and energy consumption) and telephone penetration (eg. telephone lines per 1000 people), between 1960 and 1973 in both developed and developing nations, found that *the coordination of economic activity is better facilitated by the telephone and is mainly done through information flows which have an impact on the way in which economic activity is organised* (Hardy, 1980 p.282 and 285-286). This connection between telecom infrastructure or investment and economic development is well reflected in the ‘Jipp curve’, frequently used to illustrate variations of the ‘telephone gap’ and the positive correlation between telecom infrastructure and various indicators of economic growth such as GDP (Jipp, 1963).³⁹ It is this causality that underlies the claim that telecoms services should be viewed differently from other services.

While the direction of causality in Hardy’s (1980) analysis has been criticised, it suffices to note that the most basic of the arguments about the links between telecom and development is that telecom is foundational to other developments in the economy. It is

³⁸ See also Hudson, H, Hardy, P. and Parker, E. B. (1982) “Impact of telephone and satellite earth station installations on GDP”. *Telecommunications Policy* 6 (4) 300-307.

³⁹ The first study exploring a correlation between telephone infrastructure and economic development was published in 1963 by A. Jipp, (1963) “Wealth of Nations and Telephone Density”. 30 ITU *Telecommunications Jnl* p.199-201.

for this reason, that telecom sector has been referred to as the *central nervous system of the emerging international economic order* (Mukerji, 2000 p.60). But, as noted in chapter 1, until recently telecom had been provided in most countries as user-pay public services administered by the government. Typically, this was done through PTT organisations or by government regulation of private monopoly and operators. PTT organisations therefore fell under the category of public utilities. Given the important link between the concept of public utilities and development, the following sections briefly discuss this shift from PTT to the proffered reform models of liberalisation and privatisation.

2.6.1 Public utilities and universal service obligations (USO)

The concept of public utility is not new to most countries. Public utilities have always been recognised as a ‘special’ form of business in which public interest was more of a priority. According to Melody (2003 p.12), public utility describes *industries that have been classified apart from industry in general and, at the same time, distinguished from government services*. Until recently therefore, the most common industries classified as public utilities included telephone, electricity (gas), water services and in some cases, public transport. The actual definitions of public utility however, have largely been dependant on each country. More often than not as Melody (2003 p.12) notes:

where the demand for a good or service is {was} considered a common necessity for the public at large, and the supply conditions are such that the public may not be provided with reasonable prices, the government may regulate to ensure they are.

The concept of public utility has therefore provided the foundation for government control in the form of regulation in most countries. Based on the concept of public utility, telecom services have been considered a strategic means to create social and economic responsibility and, as such, are thought to be required in all sectors of a country. Like the term public utility, the term Universal Service or Universal Service Obligation (USO)⁴⁰

⁴⁰ For uniformity, herein after referred to as Universal Service Obligations (USO). See *supra* note 13

has thus tended to be aligned to the provision of basic telephone services at affordable rates. The term USO has its roots in the 1907 ideology of AT&T's President, Theodore Vail, which called for 'one system, one policy under universal service' and formed the foundational underpinning of the argument in favour of a regulated monopoly (Mueller, 1997; Hadden & Larnett, 1995).⁴¹ For many developing countries, the term, as an offshoot of its historical roots, generally refers to policy aimed at promoting access to and affordability of telecom services through various policy interventions (Hudson, 1997, 1999) and has been attributed to the provision of basic voice telephony also known as Plain Old Telephone Service (POTS) (Sawhney, 2000)

The idea behind USO was for PTT organisations to provide POTS services to all citizens, hence ensuring USO. Nonetheless, by the early 1980s, various arguments were made in favour of privatising PTT organisations based on the shortcomings of PTT companies reviewed in chapter 1. For example, it was argued that PTT organisations unable to adopt new technologies and adjust to market changes were inefficient and consuming government resources that could otherwise be directed elsewhere (Melody, 1997b). Thus the idea of USO in the international arena shifted to one of efficiency. In essence the crusade to privatise was driven by the underlying neo-liberal ideology of privatisation. Neo-classical economics therefore provided telecom policy makers with *a normative structure to consider questions of efficiency of resource allocation and institutional setting to achieve efficiency* (Joseph, 2001 p.75).

While various models of telecom development exist, two main models of telecom development have been espoused by the WTO and define the range of options available to African nations. Namely: liberalisation and privatisation. The following section

⁴¹ He also notes that more recent usage of the term is applied to broader access of new technologies.

summarises the ideologies behind these models which are inherent in the GATS framework.⁴²

2.6.2 Liberalisation

Liberalisation seeks to increase the number of participants in the market. In the telecom sector this often occurs when the telecom framework is based on a monopoly system. The aim of the government intervention would be to expand the number of communication service providers or lower barriers to entry on all or part of the market achieved through policy amendments (Petrazzini, 1997; Mosco & Reddick 1997). However, Piscotta (1997) notes that liberalisation is the slowest form of introducing reforms as competition is allowed in slow increments starting often with the introduction of new entrants in the mobile services (such as cellular and paging).

Supporters contend that liberalisation lowers prices and expands services (ibid, 1997). In addition they contend that liberalisation provides the possibility of many more developments, more so with changes in technology and opening up of markets that would not have been possible with government control (ibid, 1997). Critics counter that liberalisation substitutes private oligopoly regulation for state regulation, carrying out prices, service and innovation mandates that advance the interests of an oligopoly cartel (Mosco, 1989). However, the latter has been seen as a misconception given that the trend experienced in most countries is an increase in regulation (Pisciotta, 1997).

2.6.3 Privatisation

Privatisation is a process of state intervention that literally sells a state enterprise such as a public broadcaster or state telephony company. Privatisation takes many forms depending on the percentage of shares to be sold off, the extent to which any foreign ownership is

⁴² For a more in-depth analysis of the trends in privatisation and liberalisation see Piscotta, A. (1997) "Global Trends in Privatisation and Liberalisation" in William H. Melody (1997) *Telecom Reform: Principles, Policies and Regulatory Practices*. Lyngby, Denmark, Den Private Ingeniorfond, Technical University of Denmark.

permitted, the length, if any, of a phase-in period, and the specific form of ongoing state ownership. In the telecom industry this typically constitutes a regulatory body (Melody, 1999b; 1997a). In addition, supporters of privatisation argue that unlike commercialisation, privatisation allows market control. Those who do not favour privatisation argue that privatisation promotes the loss of sovereignty for nations selling off to foreign firms and inevitably leads to the loss of control over national policy. Although the specific approach to privatisation varies among countries, two main models are beginning to emerge:

(i) Privatisation with full competition: both developed and developing countries have followed this model, for example New Zealand and Chile (Kelly, 2003). In New Zealand the Telecommunication Corporation of New Zealand (TCNZ) was privatised in 1990 to a strategic investor led by New Zealand companies and American companies Bell Atlantic and Ameritech. Since the sale, the government's shares have dropped to 49.9 percent for special control purposes. While New Zealand pursued a deregulatory approach by implementing competition without the establishment of a regulatory authority, the government still retained controls on compliance, foreign ownership and pricing rules. In contrast, Chile's process was more gradual, with the introduction of a regulatory authority to maintain a fair market environment (Madden, 2003).

(ii) Privatisation with Phased-In Competition: in this model, privatisation of national carriers is accompanied by a sustained period of exclusivity rights or limited competition (Pisciotta, 2003 p.337). Two main reasons can be cited for opting for this model: 1) governments want to maximise the sale value of their national carrier and 2) countries want to retain market share and accumulate income prior to sale. Two examples of this model from developed and developing countries include Japan and Argentina. In Japan, two competitors were introduced in to the market to compete with the government-owned telecom provider. However, analysis of Japan's policy model shows that there have been problems because of the lack of competitive safeguards as well as the abuse of market power from the incumbent government operator (Warren, 2002). The rate of

privatisation has increased over recent years with the phased in approach being the preferred route taken by most governments. Advocates of privatisation see it as being able to remove all control of the state (which has failed in providing service and efficiency) and moving it to the hands of the private sector which, it is argued, can provide more efficient services.

In relation to this study, while the concept of privatisation and liberalisation has been separated in the literature as observed above, both concepts will be viewed as one and utilised interchangeably. This is because the GATS model does not distinguish between liberalisation and privatisation as they have been two processes that have taken place together globally with liberalisation facilitating the process of privatisation. Melody (1997b) and Fransman (2003) note that liberalisation was introduced to increase the rapid entry of other competitors in the market and has often consisted of the privatisation of the incumbent operator in the sector.

Three issues of privatisation require emphasis. First, under the privatisation and liberalisation model, competition is viewed as the key factor in meeting the shortfalls of PTT organisations and therefore development - the factors of which have been suggested above. Second, as illustrated in the two models above of privatisation, regulation is viewed as the key model to manage competition in the sector. In other words, any reference to competition is taken to mean 'regulated competition' (Horowitz, 2001 p.254). Thus under the privatisation model, competition is generally a means to an end but not an end in itself. As outlined in chapter 1, the perceived 'best method' globally has been to commercialise and separate operators from government. This is viewed as a means of promoting competition and reducing monopolies and increasing private and foreign investment while introducing independent regulators. The need for independent regulators is based on the assumption that regulators will 'referee' the market to maintain fair competition. The assumption often underlying regulation therefore is that the regulator is an independent arbitrator (Samarajiva, 2001). This view is supported by research into the nature of privatisation in developing countries which has observed that

the success of telecom reforms largely depends on the independence of the regulator. The term *regulatory capture* (Melody 1997a p.195-199) has therefore been used to refer to the loss of the regulator's *independence to make professional decisions on their merits because of undue influence either from politicians, politically driven Ministries, or the regulated monopolies* (ibid, 1997, p195). It is in this light that Melody (1997b) notes that the lines of separation must be clear and should take three forms which are discussed briefly below.

1) Policy development: in which policy is directed at long time societal goals that are able to encompass long-term implications of future developments in the sector. Consequently, the ability to perform this function would depend on a specialised policy unit which is able to provide professional and detailed information and analysis not only on the implications of changes in the sector but, more importantly, the implications of this for policy development. This, Melody suggests, *eliminates the need for policymakers to intervene in the detailed affairs of the PTO {Public Telephone Operator} or the regulator except on matters of compelling policy significance* (1999b, p.12).

2) Operations Management: which, Melody opines, must be separated from the government so as to reduce the interference of bureaucrats. More commonly, it is essential that the management be responsible to a Board of Directors that is insulated from government interference. While the Board may have political appointees, it needs to have a mandate to act independently.

3) Regulation: Melody notes that this must be independent from both the PTO and from day-to-day government interference. The regulator is to implement policy and ensure that performance by all service providers in the sector including the PTO is fair. It is in this light that the RP was designed to ensure legitimate, non-discriminatory, domestic regulatory choices do not serve as barriers to trade.⁴³

⁴³ See chapter 4 and the discussion ensuing.

The third issue when considering privatisation is the issue of change in ownership from government entities (partially or fully) to private business entities. This raises the question: does the kind of ownership - public or private make a difference? Melody (1997a) notes from the experience of European countries, ownership may make no major difference in the efficiency of a nation's telecom system and in the provision of its USO. He points out that there are usually three main regulatory areas: 1) integration: this takes place when countries link regional and international networks policies; 2) USO: this represents the goal of providing telecom services to the majority of the population and can take various forms such as a levy from service providers; and 3) competition: this takes place when market forces dictate the telecom sector (and in doing so increases efficiency).

In sum, the concept of efficiency dominates contemporary telecom policy models and receives theoretical justification from neo-classical schools. Where USO levying is concerned, Joseph (2001) argues that this is simply tolerated for political reasons. The efficiency ideology coupled with changes taking place globally in the telecom industry limited the options that policy makers advanced in the sector. In this way, government intervention is viewed only as a necessity where the market had failed. For example, the market could fail when consumption exceeds available resources or when the market is more expensive such as telecom services in developing countries.⁴⁴ It is within this context that the case of privatising the telecom sector emerged under the banner of WTO free trade negotiations.

In brief, free trade theory is the liberalisation of trade between states. It includes the removal of both tariff and non-tariff trade barriers. The accompanying theory of comparative advantage which is pegged to free trade theory suggests that once an environment devoid of trade barriers is in place, the most efficient producers in all areas will emerge allowing for the production of lower priced and higher quality goods and services. According to the WTO Secretariat:

⁴⁴ See Edwards, L (2002) *How to Argue with an Economist*. Cambridge: University Press.

*open markets are expected to encourage quality improvement and product process innovation; reduce the scope of wasteful resource use and rent-seeking; constrain the power of individual economic operators; and ensure users continued product availability at reasonable conditions.*⁴⁵

The comparative advantage theory further assumes that each state will produce that which it has an advantage in producing over other states. This advantage could take the form of capital, land, climate, technology or any combination of these which makes a country more efficient in its production of goods or services. Theoretically, this would allow states to focus on producing that which they are best able to do and, through trade, secure that which is cheaper to import than to produce, thus allowing these freed resources to be allocated to the most profitable production. Of course, this theory fails to take into account inequalities such as natural resources. Nevertheless, over the years, as argued by van de Walle (2001), the need to privatise became more of a system of confirming good governance in African states. Thus, over the last decade, several hundred billion dollars have been transferred from developed countries to African countries with the aim of helping liberalise their economies. This network of funding has led to a network of relationships based on donor to donor, donor to government and donor and recipient. Drawing on the broad concepts of NIE, the following section examines the rationale of institutions. NIE is used in the sense that Gamble (1990, p.405) refers to as an *organising perspective* as it *provides a map of the subject and signposts to its central questions* (Rhodes, 1995 p.49). My quest here is to utilise NIE for its strong explanatory value in understanding the institutional motivation needed to ensure credibility and the role played by international institutions such as the WTO in doing so.

2.7 NIE: A window into international institutions and credible commitments

NIE is a broad theoretical domain characterised by many strands and capable of application in many areas across many disciplines. While NIE literature is mainly

⁴⁵ Excerpted from “The Development Impact of Trade liberalisation under the GATS” an Informal Note by the Secretariat of the WTO.

characterised as constituting two general threads:- Transaction Cost Economics (TCE) and agency theory or theory of collective action, this study assumes their work to be linked. Thus a broad NIE approach is employed to locate the study's narrower argument that of the value of the WTO and the GATS as an instrument seeking to deter opportunism and encourage predictability. To this extent, the overview that follows is limited by the requirements of this specific task and draws on the work of North (1990).

NIE evolved in part out of a dissatisfaction with looking at politics purely in terms of executives, legislatures and constitutions (Parsons, 1995). It operates within the neo-classical framework but augments and advances it considerably by acknowledging that norms, rules and ideologies matter (Clague, 1997). The neo-classical framework on the other hand argues that social relationships and institutions do not fundamentally matter or alter decisions, as rationality in the form of perfect information is assumed.⁴⁶ Importantly, NIE recognises that economic problems experienced in countries are not necessarily the same and therefore do not warrant the same analytical approach and remedial tools. This makes NIE a useful heuristic device for analysing the WTO's role in structuring the 'rules of the game' and the value of GATS instruments as a tool that seeks to reduce uncertainty. Combining elements of different origins, NIE proceeds from the central assumption that the market involves buying and selling and that there are costs associated with engaging in the decision to buy and sell (North, 1990). **In other words, because of the uncertainty and lack of trust in engaging in the process, transaction costs - costs associated with addressing questions of trust in economic behaviour such as, the costs of negotiating, drafting and enforcing agreements⁴⁷ - need to be addressed.**⁴⁸ The form that institutions will assume will be *determined by the nature of the costs, and the cost of minimising arrangements {which} may change and evolve with changes in the nature*

⁴⁶ See Nee, Victor (1998). "Sources of New Institutionalism" in Mary Brinton & Victor Nee, eds, *The New Institutionalism in Sociology*. New York: Russell Sage Foundation

⁴⁷ This embraces Williams *ex ante* and *ex post* costs.

⁴⁸ **Bold** words as used within the body of the study represent an emphasis from the author.

and sources of transaction costs and the means for minimising them (Nabil & Nugent, 1989 p.1336). According to NIE, transaction costs arise for two main reasons: the fact that an individual's capacity to retain and process information is limited (bounded) and that information is asymmetrically held. This is encapsulated in the often quoted statement *human behaviour is intendedly rational but only limitedly so* (Simon, 1961 p.xxiv).

According to Williamson (1996, p.103), this *unavoidably incomplete* nature of contracts is the most important implication of bounded rationality. There is also an enduring risk of opportunistic behaviour where actors undertake to do one thing but when circumstances change may seek to do another. Economic actors thus develop and use institutions to address these constraints created by uncertainty or limited alternatives and by doing so create a stable structure for human exchange, lowering the overall cost of enforcing the exchange process⁴⁹. Institutions thus develop and use instruments that seek to limit uncertainty and create 'stable' structures for human exchange and in doing so lower the overall costs in the exchange process. Transaction costs that institutions and members of those institutions use in agreeing to contract (including measuring all the attributes relevant for the exchange) and the costs of enforcing the contract (including the costs of detecting infringement, policing and punishing) (Khan, 1996).

The vast literature examining institutions defines them in a variety of ways.⁵⁰ Ostrom's well known definition of institutions is arguably the most expansive and summarises the concept as:

⁴⁹ Nonetheless, the implicit assumption by North that a deliberate act is required to create institutions has been critiqued. See Zinnbauer, D., (2001). "From Neo-Classical Economics to New Institutional Economics and Beyond-Prospects for an Interdisciplinary Research Programme" in *LSE Development Studies Institute, Working papers Series, No.1* 3rd May p.4

⁵⁰ Definitions differ in emphasising their formal nature; the extent to which organisations and institutions coincide; whether they were created by deliberate act or evolve spontaneously; whether they are embedded in, or differentiated from other institutions; whether they are universal or particularistic; and whether or not they are linked to technology. Ostrom's definition above is arguably one of the most inclusive ones.

...the set of working rules that are used to determine who is eligible to make decisions in some area, where these actions are allowed or constrained, what aggregation rules will be used, what procedures must be followed, what information must or must not be provided, and what payoffs will be assigned to individuals dependent on their actions... All rules contain prescriptions that forbid, permit or require some action or outcome (1990, p 51).

This is similar to North's (1990) definition in which institutions comprise formal rules and informal constraints that facilitate coordination or govern relationships between individuals, and the enforcement characteristics of both. Taken together these comprise the 'rules of the game' which are distinguished from 'organisations' or the 'players of the game' which comprise *groups of individuals bound by a common purpose to achieve objectives which are defined by the opportunities afforded by the institutional structure* (North, 1990 p.132). However, it is important to note that institutional instruments do not necessarily all have positive results and by influencing transaction costs, institutions can both raise and lower these costs and can have the adverse effect of inhibiting economic growth.

While the issue of GATS and its direct impact on economic growth is not directly examined in this study, the extent of economic growth is indeed influenced by the nature of the perceived relationship between the GATS instruments and the way it structures the telecom sector in a specific country. This explains why the same institutions might have different outcomes in different countries.⁵¹ As suggested in this study, there is already a co-dependency system between neo-patrimonial states and international institutions. Thus how institutions are designed, how they function and how they respond to change and the incentives they create through various policy instruments or formal or informal rules therefore has an impact upon policy development and outcome. The following section expands on the inter-relationship between institutions in what this study argues is an 'aid-

⁵¹ North abandoned an efficiency view of institutions because rulers devised property rights in their own interests and transaction costs resulted in typically inefficient systems prevailing with no corresponding economic growth. See North (1990), *Institutional Change and Economic Performance*. Cambridge: Cambridge University Press

cartel'. Its purpose is to locate the WTO as part of the 'aid-cartel' institution that structures the 'rules of the game' in the global financial and trading arena.

2.7.1 The 'aid cartel' system and credible commitments

The aid system functions within a complex set of relationships that can be called an 'aid-cartel' institution, where donor agencies, IFIs and trade blocks such as the WTO rely on each other to sustain the dependency on aid. According to Easterly (2002), the guiding principle motivating IFIs is self preservation. Individually, IFI agency staff members have a heartfelt concern for eliminating poverty, advancing good governance and building viable civil society. Yet, as with any agency or bureaucracy, the overriding concern of the institution is its own existence (Niskanen, 2001; Moe, 1997; Wintrobe, 1997). Easterly argues (2002, p.6) that it is for self preservation that *foreign aid agencies agree to coordinate their actions rather than compete, forming a 'cartel of good intentions*. He reasons that IFIs moved towards the cartel model to manoeuvre around issues of accountability. With a questionable record on reducing poverty in African states, Easterly argues that donors evolved from a cooperative to a cartel model to thwart any effort to place blame on the cartels' actions. The cartel model creates an environment where each agency duplicates the work of the other and a monopoly on foreign assistance eliminates a competitive challenge. As a result, he argues, by engaging in redundant activities, no single agency within the cartel is exclusively responsible for any one assistance programme. For example, if the United Nations Economic Commission for Africa (UNECA) wider programme of telecom development under the banner of 'ICT'⁵² fails to increase the development of interconnection in Kenya, it can explain that the World Bank E-programme also failed and vice versa. In addition, the cartel's monopoly on foreign assistance eliminates competition so that any effort to reduce the UNECA ICT programme or the World Bank's or the recently introduced 'ICT' programme by the New Partnership for Africa's Development (NEPAD), harms the entire effort, as the cartel is

⁵² See discussion in chapter 1 regarding this terminology.

the ‘only game in town’. Thus, through the use of redundancy and monopoly, the cartel structure sustains IFIs as long as rich countries feel obligated to aid impoverished African countries. With respect to African nations, the IFIs cartel structure begins to mirror that of a ‘David and Goliath’ situation, in which, as Easterly (2002 p.12) explains:

Foreign aid is approved by voters of rich country A. whose national government gives the money through its own aid bureaucracy and international aid bureaucracies to the government of rich country B, who in turn is supposed to make some effort to give the money to poor people in country B. The poor people in country B have little voice in their own government, much less voice in the distant national aid bureaucracy, international aid bureaucracy and political campaign of rich country A. The rich country aid bureaucracy and international aid bureaucracy, although well intentioned, have little incentive to hear poor people of country B who do not vote or form pressure groups in country A.

In this way, much of the work involved in generating public projects in African countries has been removed from most African governments to the lending institutions (van de Walle, 2001). If a state requests assistance, the evidence suggests that IFIs determine the structure and implementation of the aid programme.⁵³ This leaves African states with little manoeuvrability when seeking assistance and forces them to capitulate to IFI demands. While African nations are the clients of IFIs, the donor countries are the constituency that dictates the way IFIs function. For each of these donor countries, the primary concern is how they can effectively export their development goals. For example, Carothers (1999) documents the evolution of US economic development on the part of the people of developing countries, through the encouragement of democratic private and local institutions. During the Cold War, Gibbon (1993, p.37) notes that the superpowers used aid *as an instrument for changing and maintaining the developing country’s political alignments*. Because this can be viewed as a primary constraint on IFIs, complex aid conditionalities such as SAPs and long-term development goals have been developed, which form a reflexive

gesture designed to respond to donor country requirements for IFIs to report on their progress.⁵⁴ IFIs in turn report their use of donor funding in the form of visible outputs as described above.

With the formation of aid conditionalities, such as public sector reform and privatisation, IFIs must promote these aims, report on their effectiveness, monitor reports, and re-evaluate success or failure⁵⁵ as a means to maintain their relationship with their clients – Western donor countries. Because of this, donor institutions are constrained by the need for aid disbursement to justify development assistance.⁵⁶ Thus, proponents of IFIs have justified multilateral aid based upon precise calculations of funding necessary to meet the development goals of their Western donors. Easterly (2002 p.13-15) and van de Walle (2001 p.188-235) document the evolution of this measure through the actions of numerous IFI leaders and government officials. For example, Easterly (2002 p.15) notes that IFIs annually project an arithmetic growth in funding needs to reduce poverty, *meanwhile, the typical poor country has stagnated over the last two decades, and in many aid-intensive African countries even longer.* The result is a paradox where IFIs increasingly distribute aid with conditionalities to African states and those states, in turn, commit to implementing

⁵³ For a concise reading on this see: Thandika Mkandawire and Charles C. Soludo (2003) (eds) *A companion to our continent, our future: African Voices on Structural Adjustment.* Africa World Press, Inc.

⁵⁴ Easterly (2002, p.24) comments that “{t}he standard response to any Third World tragedy is to hold a meeting about it”. The World Summit on the Information Society recently completed in December 2005 could be said to be a form of meeting which was convened in response to the lack ICT development within developing countries such as those in Africa.

⁵⁵ Easterly (2002) outlines an alarming series of expensive developmental goals, international summits and broad institutional reorganisations that had minimal effect on changing the landscape of aid dependent countries. In addition, van de Walle (2001) also outlines how the international aid system buttressed African states. Also see work by Aghion & Ferrira (1995) which show how the World bank maintained its role as lending institution by intentionally overlooking the failure of African nations to comply to policy requirements and instead continued to fund them in spite of this.

⁵⁶ This cannot be more clearly revealed than by the statement of Douglas Hurd (British High Commission, Lagos 1990 - British Foreign Secretary until 1955) “the relief of poverty, hunger and disease is one of the main tasks of overseas aid. And must go where it can clearly do good...Countries tending towards pluralism, public accountability, respect for the rule of law, human rights and market principles should be encouraged. Those who persist with repressive policies, with corrupt management, or with wasteful and discredited economic systems should not expect us to support them with scarce aid resources which could be better used elsewhere?” (quoted from Olukoshi, 2003 p248-249)

these conditions in order to have a resource for funding to sustain them. IFIs are thus forced to develop agreements for credibility – a transaction cost.

The result is a **co-dependency** system where IFIs increasingly distribute aid with conditionalities on African states. African states in turn commit to implementing these conditionalities in order to have a resource for funding to sustain their states. IFIs are thus forced to develop a system or what is can be termed a transaction cost in which agreements for credibility are enforced. Broadly speaking, North (1993) suggests that credible commitments are made in two ways: one, by establishing a reputation for playing fair and two, by voluntarily constraining the power to act in various ways. If applied to African states and international institutions, it is possible to articulate this as taking steps to cater for the situation where an African state which at the time of agreement intended to apply a policy reform (eg liberalisation of the telecom sector) or refrain from doing something (eg unfairly protect domestic monopolies), but later discovers that it may be contrary to their interests to honour that intention (in order to protect monopoly rents and political clout) and seeks to act differently (not honouring the commitment of telecom reform). As North and Weingast (1984 p.806) note: *while parties may have strong incentives to strike a bargain, their incentives after the fact are not always compatible with maintaining the agreement: **compliance is always a potential problem** [emphasis added]*.

In order to reach an agreement, each side must agree to the conditions, however as suggested above, African states are also tied because they depend on aid for the development of their countries. Nonetheless, IFIs require a situation in which they are in some way able to determine the compliance of their conditions on these African states. IFIs thus play a crucial role in addressing these compliance concerns and facilitating smooth exchange. As Moe notes, the mutual goal may be one of cooperation with one another but states are *self-interested and opportunistic, because information is imperfect and sometimes asymmetrically held, and so on, they will not necessarily have the incentives to live up to the terms of their agreements* (1991 p.122). They therefore need to devise incentive schemes – monitoring, enforcement, governing arrangements - that promote compliance *when (ex post) problems can*

be anticipated at the time of transacting (ex ante) the parties can also alter incentives and device institutions and/or superior governance structures that promote compliance with bargains after the fact (Keohane, 1984 p.95).

In light of this, the credibility issue takes on an added urgency. What does this imply in the context of neo-patrimonial states and the GATS framework? It is argued that reforms such as the telecom privatisation model inherent in the GATS have been used as a policy output tool by the international donor and development institutions as a pre-condition for aid and any form of international support. **Together with the IMF and World Bank, the WTO has created an ‘aid-cartel’ system in which the co-dependency between it and African states is based on a transaction cost namely ‘aid for trade’.** This pre-conditionality has thus been institutionalised and entrenched into the relationship between international institutions and neo-patrimonial states in Africa

As observed earlier in this chapter, the principles outlined above are not only evidenced at the level of theory but are clearly evident in development strategies in Africa by international agencies which advocate reforms in government service provision. This articulates and enlivens at least two core tenets of NIE theory and the arguments proffered in this study. The first is the recognition of the role of the state and the second is that privatisation and economic reforms are not enough for development. As a policy tool then, NIE goes well beyond the approaches of economic development and suggests that the focus on the static analysis embodied in efficiency models is insufficient to foster efficient markets and development. NIE thus encompasses the pluralistic approach to economic life, paying close attention to the diversity of institutions, which are incorporated as potential constraints, and the practices and underlying conditions for economic activity (Ostrom, 1990). This applies to the WTO and has two significant implications for any member seeking to participate in the telecom sector. First, the GATS instruments dictate the terms of accession. Second, the relationship between member states and the WTO will largely depend on its manoeuvrability of the state in relation to its development prospects. This has merits for countries in Africa like Kenya, where the

'rules of the game' are not in favour of Kenya given its dependency on external aid for development. Moreover, as has been explained earlier, neo-patrimonial tendencies of governance, specifically where public goods are concerned suggest that a level of confrontation and/or failure to abide by the rules may take place. In the telecom context, it is precisely because of the need to address the risk of opportunism that the WTO GATS telecom instruments emerged.

This study thus applies this claim to the WTO as an example of an international institution (working together with the IMF and World Bank), whose aim through the GATS telecom framework is to reduce uncertainty for potential investors in foreign telecom markets through the liberalisation process. As will be evidenced in chapter 4, tools such as the GATS become necessary in complex trading environments in which information is limited and asymmetrically held and rationally bounded. The quote below by Furubotn & Richter (1997, p.104), albeit applied to international agreements rather than trade pacts such as the GATS, but equally applicable to trade in telecom services and the reasons why the GATS accession is important to enhance credibility, aptly summarises the relevance and usefulness of NIE in the present study:

...what is at issue is the definition, guarantee, and transfer of political or economic property rights. Transactions lead to implicit agreements, explicit (formal) treaties, or anything in between...The distributional problem is central: who gets what out of a lack of knowledge of what the future will bring, it is impossible for the parties to agree ex-ante on all future eventualities that may affect the relationship. Nor do they have the ability to verify all relevant variables...Transaction-specific investments are generally necessary, and thus ex post opportunism of the parties may be invited. Ex ante safeguards against ex post opportunism have to be arranged...Ex post dangers of contracting include expropriation, debt repudiation, confiscation, renegeing, and other forms of opportunism. International contracts are involved, not only between governments but also between firms and governments across borders with respect to the public regulation of contracts

But how do international institutions such as the WTO ensure that binding agreements are made over space and time? Bardhan (1989) notes that the possibility of opportunism is less when transactions take place between two parties or where the exchange process is such that both parties have an ongoing mutual relationship and where the relationship is not protracted and non-simultaneous. A key application of addressing opportunism is to take (pre-commitment) measures to ensure trust between parties that the promises and undertakings made between them are 'credible', or more specifically, that they will be enforced and will be reneged upon when circumstances change or occasion to revive the rules at a later stage emerges. Looking at the broad characteristics of institutions-their ability to act as structures to govern relationships and prescribe, as well as enforce certain behaviours over time- this study argues that the WTO and specifically the GATS telecom instruments suggest rules for ordering negotiations, behaviours that must be engaged in (eg the requirements of the RP) and those that must be avoided.

The GATS Fourth Protocol negotiation process aptly illustrates how the various interests and power dynamics, disparate development levels, as well as varying stages of domestic reform processes all contributed to the complex nature of the negotiation that was needed to ensure a critical mass of signatories. The GATS pre-commitments can be viewed as a means of reducing opportunism and legally constraining nations that would seek to otherwise 'change their minds' later in the process. To be sure, the stakes for opportunism or self-interest remain high, given as was noted earlier, that neo-patrimonial state institutions in African countries serve as government agencies of power providing, for example, large sums of income to the government and funding from the private sector. It is because of this, it is argued, that if the GATS lacked flexible arrangements such as enabling domestic governments to schedule their own commitments, it would not have received the favourable support it did given that most developing countries such as Kenya, had placed strict limits on foreign participation to encourage domestic ownership and limit the repatriation of profits. The dependence of the GATS framework on the participation of states and the encouragement to open up markets for telecom investment therefore requires a form of transaction cost

More importantly, as suggested in this study, African neo-patrimonial states utilise their public institutions as a means of political power and as opportunities for rent-seeking behaviours. With regard to the bargaining context, the precise problem to be avoided during the negotiations for the Fourth Protocol, in particular, was to minimise the risk of ‘free riders’ and induce a critical mass of countries willing to open their domestic markets while benefiting from the open markets of others. Thus, at the heart of the GATS framework is the idea that telecom would now not be in the hands of the state. As is documented in the following chapters, this was no easy task and it is precisely the risk of free riders coupled with a lack of trust that signatories might alter their regulatory promises after the fact that the RP (key conditionality outputs) and its disciplines came into focused analysis.

The commitment of the GATS rules that guarantee the liberalisation process at the domestic level is therefore a significant issue for the WTO. The extent of commitment to the GATS is best seen through its effect on markets. For example, the USA Government calculated that approximately 85 percent of the world market, measured by revenues, is covered by strong market access commitments in the WTO (Cowhey & Klimenko, 2001). The implication of this statistic is that doing business in the global arena, be it in trade goods or services, requires an agreement governed by the WTO. Moreover, recent figures from the WTO place trade services firmly within the GPE, estimating that the value of international cross-border services trade now accounts for an in excess of US\$ 1345 billion annually (WTO, 2005).⁵⁷ Thus, even if a government did not make binding commitments to liberalising its economy, the GATS commitments are still valuable as they are enforceable. The GATS telecom framework is an important policy tool for analysis as this is the framework that will shape future policy outcomes and contexts for service trading globally.

⁵⁷ See website www.wto.org

Previous empirical studies using NIE all indicated the importance of a broader interaction between institutional environment and domestic policy processes. Keohane (1984) himself has applied NIE and TCE to the formation of international regimes in examining broader questions of co-operation in a variety of contexts. The study of NIE has also increasingly been utilised in policy studies as a theoretical tool for social science research in the telecom sector. A notable example and the only existing study of this nature in the telecom sector in Africa, is Tracy Cohen's (2004) study on the telecom sector in South Africa which examines the crucial role of the GATS as a credibility tool for the South African government and also as a credibility tool for South Africa in the standing of other African states as an economic super-power. Another notable example is Spiller and Levy's (1996) comparative research in five countries examining the interaction between social and legal institutions on the design of regulatory structures. They note that performance can still be satisfactory even in undeveloped institutions provided there are restraints and appropriate discretionary actions by the regulator. In a more general context, Wilson (2004) and Singh (1999) examine telecom policy outcomes and seek to explain these outcomes as the result of structural contexts such as politics. For example, Wilson (2004) asserts that political structures and political preferences in the policy process have had a direct influence on the outcomes of telecom policy implementation. NIE therefore offers this study a framework upon which to understand the WTO's GATS telecom framework.

Nonetheless, three brief points require noting. First, beyond suggesting that institutions are not always efficient, North's account does not fully consider the diverse, distinctive and often unequal attributes and endowments of individual or collective actors to participate in the structures that institutions manifest or impose. Significant in this study, therefore, is the contextual underpinning of neo-patrimonial theory against that of transaction costs. While the above studies have sought to explain telecom policy outcomes from the perspectives of institutions, this study employs an understanding of neo-patrimonial politics to explain how African states interact with the international context within the concept of transaction costs. By locating a historical understanding of the African neo-patrimonial state and its relationship with international aid institutions,

the study addresses the gap inherent in NIE by specifically questioning the objective approach to institutions in light of developing countries differing abilities to meaningfully participate in the creation and renegotiation of the rules, norms and principles that underpin global institutions.

This underscores Knight's primary critique of the NIE; that is its failure to address the importance of power asymmetries and instead focus on the problem of transaction cost minimisation among *symmetrically endowed actors* (Knight, 1992 p.113). This is important for the case study in the context of the WTO and Kenya where its history reflects these disparate bargaining power asymmetries. Bargaining asymmetry is discussed further in chapter 7, where it is noted that the capacity to adequately garner the option to use the GATS is completely dependent on a country's relative capacity to participate in the trade negotiation regime. This is also noted by Ensminger (1997) in his article on property rights to land in Africa which notes that the institutional environment and the existence of (Western defined) property rights and the economic agents simply tend to assume that choices are made within an assumed decision set. He notes that in African countries, property rights are based on social understanding of the context such as historical kin ownership and thus informal rules dictate the 'rules of the game'.

Second, on a cautionary note, North (1989; 1993) points out that credible commitments are not a panacea for the problems of development and concedes that describing the characteristics of institutional or economic change are quite different to prescribing how to improve the performance of economies. He maintains, however, that the fundamental characteristics of institutions do provide some guidance and offer some explanation. This is a view also held by Peters (1999) and Lowndes (2002). It is in this vein that Peters (1999, p.150) asserts that *institutions are the variable that explain most of political life, and they are also the factors that require explanation*". The concept of transaction costs thus offers "an organising perspective (Gamble, 1990 p.405) to explain the interwoven relationship between the GATS telecom framework and Kenya's neo-patrimonial state.

Third, it should be noted that in the absence of empirical studies the enforcement aspect of the GATS in regard to telecom remains ostensibly untested and offers little insight into how those not abiding will be treated or how the WTO will react. Several disputes have been logged to date and the pronouncement suggests enforcement through compliance.⁵⁸ The literature, however, notes that to be credible a commitment *must be irreversible or at least very costly to do so* (Shepsle, 1991 p2-4). Keohane (1984,) offers an explanatory note on this issue. He opines that institutions derive their value not by promoting enforcement rules (because they have no real enforcement powers) but by contributing to cooperation between states by changing the bargaining context within which states make their (self-interested) decisions. In this light he sees commitments or rules not as restricting states but rather as a means of empowering them by promoting cooperation. In addition, North and Weingast (1989) suggest that compliance can be reduced when the institutions anticipate the problems and seek to meet them through incentives. In this context, the Fourth Protocol to the GATS adequately addresses this concern. As will be demonstrated, the GATS offers a flexible time-frame for implementation, allowing for the existence of domestic telecom monopolies and exemption rules of national treatment for limited periods. Like its counterpart the General Agreement on Tariffs and Trade (GATT),⁵⁹ the GATS also contains a safeguard clause in Article XIV, provided that certain conditions are met.⁶⁰ Nonetheless, while GATS commitments are not irreversible, altering a

⁵⁸ See WTO: Disputes section: http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm# for a list of the countries that have put in complaints.

⁵⁹ General Agreement on Tariffs and Trade {GATT}, Oct.30, 1947, Art. XXV.TIAS No. 1700, 55 UNTS194. The current version of the GATT is in Annex 1A to the WTO charter, THE LEGAL TEXTS.

⁶⁰ Article XIV specifies general exemptions to the GATS which include measures to protect public morals or maintain public order, to prevent human, animal or plant or health life, to secure compliance with laws or regulations which are not consistent with GATS, eg. to collect taxes or avoid double taxation.

commitment once scheduled is no simple task⁶¹ and being known as a country reneging on its commitments is not a role to which a state aspires.

Notwithstanding the above, a broad NIE has been usefully employed to examine the problem of credible commitment in exchange and offer a rich context in which to frame an understanding of the value of the GATS in the present study as shall be examined in chapter 4. As the GATS, through the RP offers a common set of regulatory principles and practices recognised by all WTO members and hence an avenue for appeal through the WTO processes,⁶² it is a useful tool in enhancing credibility between member states

2.8 Conclusion

This central aim of this chapter was to present the theoretical framework framing the study. This chapter has drawn on the theoretical concepts of neo-patrimonialism to explain the importance of the political, economic and social structure of African states. The chapter further sought to establish the link between African states and the international arena. Utilising selective principles of the NIE to explain the position and importance of the international institutions relative to African states, the chapter adopted a broad definition of institutions as a set of devised rules and norms that govern, shape and structure human interaction by helping them to form expectations of what other states will do (Shepsle, 1991).

⁶¹ There are four ways in which a country can modify, suspend or withdraw a commitment: First, any commitment must may be withdrawn or modified after it has been in force for three years. On request 'compensation' may need to be negotiated with members who feel their trade position has been affected. Second, Article XIV of the General Exemptions to the GATS can be invoked through is generally only applicable to where issues of 'public interest' need to be protected. This could include for example: national security or human safety. Third, a government may seek a temporary waiver and finally, a member may suspend commitments in the event of serious financial problems.

⁶² While the WTO provides an enforcement mechanism, although still largely unproven, The GATS still remain a binding commitment. Case law is limited where enforcement is concerned however. Arup [Arup, C. (2000). *The New World Trade Organisation Agreements: Globalising Law Through Services and Intellectual Property*. Cambridge: Cambridge University Press] suggests that the GATS decentralised negotiation process and the inherent specificities of the various service sectors work against the development of jurisprudence in the WTO.

In relation to this study, emphasis has been placed on the attempt to explain how institutions reduce transaction costs inherent in reaching agreements on complex exchanges for financial aid development assistance to African neo-patrimonial states. It was thus argued that 'aid-cartel' institutions structure the norms, cognitive and regulative frameworks that dictate the relationship between African neo-patrimonial states and international aid institutions. Applied to trade in telecom in African neo-patrimonial states, the specific mischief sought to be addressed is that member states do not renege on their commitments to liberalise their markets or service sectors and more so that a number of standardised measures to ensure fair play will be assured for foreign operators who enter domestic markets. As suggested in this study, these conditionalities are pegged on the exchange of the subtle but often present need for financial assistance. The need for credibility to gain financial assistance is therefore a topmost priority for many African states. This urgency is borne out more so in African neo-patrimonial states where the functioning of the state suggests that opportunism and self-interest are the norm rather than the exception. It is within this framework therefore that the study's hypothesis is borne out.

Hypothesis

In applying commitments as a form of credibility, neo-patrimonial states necessarily only partly conform to the conditionalities and have instead utilised these reform agendas as platforms to further their own underlying interests.

Three assumptions are drawn from this hypothesis based on the framework in this chapter.

- 1) That the Kenyan state is neo-patrimonial in which Kenyan elites utilise forms of clientelism to maintain their political authority and positions.
- 2) That the Kenyan state is co-dependent on the international community for financial assistance.

3) That in creating a transaction cost, the GATS legitimises telecom policy actions at domestic level.

The contribution of this chapter and therefore this research lies in its analytical framework for developing critical analysis of how the policy can be understood within the context of African states. Drawing on the three themes, namely clientelism, co-dependency and conditionality or what NIE theorises as a transaction cost, chapters 4 to 7 present evidence in support of the arguments presented in this chapter. In conclusion, as Dickens observes *too often critical social scientists have contended themselves with providing critiques of traditional research without engaging in empirical research of their own* (Dickens, 1983 p.155). While falling short of critical theory in not providing a *strategic guide for bringing about an alternative order* (Cox, 1981 p.130), the utilisation of a combined framework exposing an understanding of both the national and international context of telecom reform offers a deeper understanding of how the two usually separate contexts are linked.

This research seeks to provide a 'formative' evaluation, where the object is to improve upon the understanding of the telecom policy-making process in neo-patrimonial states rather than provide a 'summative' evaluation where the object is to give a score (Guba and Lincoln, 1989) to the GATS policy being evaluated. The self-reflexivity of the research is further explained in the methodological chapter which follows.

THE JOURNEY OF LEARNING

Knowing what you want to find out leads inexorably to the question of how you will get that information

Miles and Huberman

(1984 p.42).

Introduction

Following on from the preview of the research methodology outlined in chapter 1, this chapter provides additional detail on the methodology and fieldwork undertaken to collect data and analyse the research questions. It describes the way the research project unfolded, the approaches employed to select the research case study and the research sites, the selection of respondents and the protocol used. The findings and discussion follow in chapters 4 to 7. The aim of this chapter is to describe my process of learning from the state of tentative questioning to the point where possible answers to the research questions have been obtained.

3.1 Research questions:

As indicated in chapter 1 and developed in chapter 2, the main research inquiry which dictated the study's research was to explain Kenya's telecom reform outcomes through an analysis of the political and international context shaping the framing and implementation of the KCA. In order to draw out answers, four subsidiary questions were formulated, namely:

- 1) What is the nature of policy making in Kenya?
- 2) Under what conditions was the GATS adopted and implemented in Kenya?

- 3) How has Kenya's approach of policy making influenced the telecom outcomes?

The remainder of this chapter discusses the research strategies used to gain the primary data.

3.2 Considerations for research design

The choice of research questions for this study was chosen through a consideration of a number of issues raised in chapter 1. This relates specifically to the positioning of the study as discussed in chapters 1 and 2 and my own previous background working in the telecom sector in Africa as explained in chapter 1. Apart from the assumptions raised in chapter 1 which influence this research, this study was also influenced by five methodological inadequacies highlighted in chapter 1. First, there is an unfair privileging of telecom outcomes over the telecom policy process itself. Second, the framework used is inherently techno-deterministic in the way it views actors as 'machines' that do not play a role in the policy process. Third, there is a preoccupation with perceiving telecom as the solution to development problems in developing countries. The corollary that telecom will create development has thus normalised the concept of poverty as static. Fourth, there is a tendency for telecom literature to focus on diffusion patterns and therefore place emphasis on structure over agency. While this study acknowledged in chapters 1 and 2 that structural issues are an important explanatory variable for outcomes, telecom diffusion rates are inadequate in explaining how agency and structure operate. Fifth, while there are obvious differences to what constitutes telecom policy or the term 'digital divide', there is an inherent assumption to view the term ICT as neutral concepts that needed no elaboration.

The privileging of the above issues has therefore sustained a narrow view of the world of telecom, which has mainly employed the use of quantitative analysis in the study of telecom policy outcomes. In this respect, Singh (1999), Wilson (2004) and Mosco (1996) acknowledge that quantitative studies have plagued the telecom research and are ill suited for evaluating the effects of restructuring. While several reasons have been given for this

inadequacy, most studies accept that quantitative studies lend a focus on structural issues such as teledensity, number of mobiles in a country and the number of internet users. This is not to say that these authors reject quantitative statistics or that these indicators are not useful. However, in employing these indicators in their research these authors use them illustratively rather than as the focus of creating meaning.

This study lends particular weighting to a qualitative framework as it seeks to understand the role of actors in the policy process. This means that the research methods employed were based on the underlying premise that the use of research methods that collect baseline data on variables such as the number of telephones in the country and other useful macro-level information are secondary to the research methods that ascertain meaning and context. A qualitative methodology was thus chosen to explore meanings and gain understanding of the deeper issues that operate in the policy arena. It has also been argued that qualitative research can overcome the implicit problems of context stripping, exclusion of meaning and purpose, inapplicability of data to individual cases, and the exclusion of the discovery dimension often found in quantitative studies (Denzin & Lincoln, 2003). All these issues are central to this study. Indeed, this is not to suggest that qualitative research solves the problems of quantitative research. Rather than trying to find ways to reduce the effects of uncontrollable social variables, quantitative research investigates them directly. In addition, Holliday (2002, p.4) notes that qualitative research *describes actions within a specific setting and invites rather than tries to control the possibility of a rich array of variables*. Data from different sources is used to collaborate, elaborate and illuminate the research. This is seen to strengthen the research's usefulness within the setting of telecom policy.

The research plan was further influenced by one study imperative - the need to locate the data collected within critical political theory. A dialectic (Lincoln & Guba, 2000) framework in methodological approach is therefore commensurate with this study. Moreover, it serves as a secure base from which to gain an understanding of the particular issues in the policy arena from a social context (Hall, 2005). In addition, critical political

theories view social research as the analyses of social meaning (Hall, 2004). Knowledge of a phenomenon is better understood as something that emerges from a discursive interaction or dialectical clash of competing interpretations. As a result, explanations of phenomena are not limited to one view but are subjected to a range of analysis that seek to explain the phenomena from different standpoints. The aim is to not see the advantage or disadvantage of one viewpoint over another but rather to seek to explain the issue from all angles and give a full account of how and why events took place.

An interpretive interaction is thus sought in this study. As Fischer (2003) points out: *only by examining data through conflicting frameworks or standpoints can unrecognised and hidden suppositions that give it meaning be uncovered or exposed* (p.131). Taking this view on board, data and data findings in this study are viewed as the products of a chain of interpretive judgments (Toulmin 1990). This, Fischer (2003) argues is especially appropriate to the study of politics and policy. More significantly, this study provides a detailed analysis of telecom policy making as it engages directly not only with the institutions (actors) directly engaged in the telecom policy-making process in Kenya (domestically and internationally), but also with the GATS framework and its implementation in Kenya through the KCA. With these underlying principles identified, the research design was determined.

3.3 Case study design

Yin (1994) argues that the selection of a case study should confirm, challenge or extend the research and should provide revelatory information that has not been privy to previous observers. The analysis of Kenya's telecom policy-making process therefore fits this criterion in which the main purpose of the research is not only to extend theory but to reveal information about the nature and process of policy making. In addition, with the exception of South Africa and Egypt, Kenya's role as a leader in political issues in Africa stands out not only regionally but internationally.

The choice of the term 'case study' in this research is used to refer to three contexts: macro, meso and micro. A macro setting refers to the geographical location of Kenya; a

meso level refers to Kenya's participation in telecom policy issues through the WTO and finally, a micro-level analysis refers to the case of telecom policy making in Kenya. The focus on Kenya is used not as the main purpose of the study but rather as an instrument (Stake, 2004) to provide insight into the telecom policy arena. Yin (1994) calls this method an 'embedded case study design' in which sub-levels of the case are analysed (as opposed to holistic design which deals with examines only the global nature of a problem). However, he argues that the rationale for the case study should fit in with the criterion of a case study. While both have strengths and weaknesses, he argues that an embedded design facilitates a focusing on sub-units of the study. He also warns that there is a danger in focusing on the sub-units and forgetting to return the study to the larger unit of analysis. Taking heed of this warning, this study has endeavoured to provide a detailed analysis of Kenya's policy-making process and in doing so ensures that the focus on all sub-unit analysis remains on the issue of Kenya's application of the GATS framework. The focus on sub-units such as institutional relationships serves to enrich and provide further detail.

Originally I had intended to provide a comparative case study across countries in Africa. I had limited my framework to two countries, one in West Africa and the other, Kenya. As the research proceeded, it became clear that this was going to prove impossible for the nature of a PhD. Confirmation that this method would not suffice was provided by the review of the literature, which prompted the focus on a single country. In addition, my initial letters to the Ghanaian Government in the initial five months of study revealed that I would need a lot of patience and some help in gaining access to the respondents. As a consequence, a different (but related) approach was chosen - to focus on Kenya as the country of case study and provide an in-depth analysis of the events that took place. This proved to be a better choice as my knowledge of the political terrain, my relationships with Government political leaders and bureaucrats, my working knowledge of the telecom and my ability to 'piggy back' on my network of friends in the sector, would facilitate my access inside the corridors of power. In spite of this, I was later to find out that documenting and collecting information on Kenya is a hard task that requires patience.

I choose to mention the above issues as I consider them an important feature of fieldwork analysis particularly in African countries. Unlike the West where information is often readily available, in Kenya, the provision of information can be equated to rescinding 'power'. Thus information is tightly held and elites wield this to their political advantage. Lee (1995), in his book *'Doing research on sensitive topics'* discusses issues on collecting data from sites or on topics considered sensitive and notes that it is important to understand the subtleties of the terrain of investigation. Fuller (1988) on the other hand draws attention to the role of the state in creating and maintaining what she calls 'forbidden research terrains'. While I would not consider Kenya's telecom policy making terrain a 'forbidden research landscape', I was aware that the state was weary of researchers drawing any attention to them. This was evidenced by the fact that I had to go through long and sometimes unnecessary bureaucratic process to get permission to interview policy participants and members of Parliament.

Since I could not anticipate the exact numbers of interview participants or meetings and observations that I would be allowed to attend, my initial attempts to gaining access were broad, with letters sent to every institution partaking in policy (as depicted from the policy document itself (KCA, 1998), readings from the press and contacts with colleagues in Kenya). As noted in chapter 1, I was keen to locate myself within the policy and regulatory offices which I had hoped would provide me with data and a spin off into my research. The details of that process are discussed in the methodology section in chapter 1 and require no further repeating here.

I also requested to attend international meetings; more specifically I was keen to attend the WTO regional meetings in which Kenya took part, as well as the World Summit on the Information Society (WSIS)⁶³ meeting. I considered that such meetings would provide

⁶³ The UN General Assembly Resolution 56/183 (21 December 2001) endorsed the holding of the WSIS in two phases. The first phase took place in Geneva from 10 to 12 December 2003 and the second phase took place in Tunis, from the 16th to 18th November 2005. Its aims and objectives were to find solutions for creating an Information Society for all. While WSIS as a subject is not covered in this study, it is noted that participation in the WSIS has implications for Kenya's future implementation of its draft ICT policy process.

a broader access to individuals I may not have met in Kenya, more so, in meeting personalities involved in the WTO negotiations. This proved useful as shall be later discussed in the analysis chapters. Uncertain of the reply I would receive, I also sent supplementary letters to both the WSIS organising committee and WTO respectively. In the WSIS letter I asked the organising committee (UNECA and ITU) if I could attend the conference under the banner of civil society (academic), explaining that I was there to observe and interview participants taking part in the deliberations of Africa's position on the WSIS issues as part of a wider study on policy making.

The responses I received from the Kenyan Government were pleasant, asking me to present myself in Kenya before further negotiating details and formalities in attending the WTO meetings. In the meantime, UNECA confirmed that I could attend both the Bamako (November 2003 conference) and Ghana WSIS (February 2005) regional meetings. The discussion in chapter 7 thus in part draws on the issues of participation observed while attending those meetings. Moreover the meetings also provided further opportunity to interview individuals such as the WTO representative with whom I had been communicating on email. While there were no WTO meetings relevant to the study while I was in the field, I had first hand interviews with the Kenyan participants in WTO meetings and the NCWTO team as well as email discussions as shall be discussed later in this chapter. In addition, the research involved observations of two key telecom policy meetings in Kenya, one commissioned by the Government and the other by stakeholder interests groups. In addition, I talked to most of the participants in the telecom reform process. This was done through attending meetings and visiting sites with staff members of KCA and Telkom. In total, I interviewed 70 individuals representing all sectors of Government and non-government involved/and or interested in the telecom policy-making process of Kenya (domestically and internationally).

I was also fortunate that once in the field, the network of contacts I had built over the years as a Kenyan professional facilitated unstructured interviews with past and present members of Parliament as well as bureaucrats. I was also invited to speak at the WSIS

regional meeting as a representative of Kenya under the banner of the Women's Gender Caucus which then provided further meetings with senior Government policy-makers who had initially proved difficult to meet with. In addition, CCK (the regulator of the telecom sector) sent letters to all its networks letting them know that I would be conducting interviews and making observations of the policy-making process. This proved to be a key aid in my access to several organisations and individuals. Nonetheless, as briefly noted in chapter 1, it was difficult to find current statistics on the telecom sector and the Kenya Bureau of Statistics, had little to offer where telecom statistics were needed. Interviews with the policy unit of CCK (the regulator) later revealed that they too had difficulty collecting data from service providers.

3.4 Multi-method data collection

In seeking to understand the nature of policy making in Kenya, the use of a multi-method design was deemed appropriate. Multi-method or triangulation (as it is also called), is used to ensure transferability and conformability (Denzin & Lincoln, 2003). Data from different sources is thus used to corroborate, elaborate and illuminate the research. This is seen to strengthen the study's usefulness within the setting of policy. Qualitative researchers in the field acknowledge this, noting that qualitative research is inherently multi-method in focus (Brewer and Hunter 1989; Denzin and Lincoln, 2003). In addition, Yin (2003) and Bryman (2001) confirm that triangulation is a process common to most types of case studies and provides a strategy that seeks to add rigour, breath and depth to the investigation of the study.⁶⁴ Among the types of instruments considered for this study are documents and archival records, statistical information, direct observations, participant observations and interviews. The methods used are discussed in the following sections of the chapter.

⁶⁴ For further discussion see Flick, U. (1992). Triangulation revisited: strategy for validation or alternative? *Journal for the Theory of Social Behaviour*, 22, 175-188

3.4.1 Interviews and participant selection

The participants were identified based on the reading of policy-documents, their coverage in the main local papers – the *Standard*, *Nation* and *The EastAfrican* and their role in policy making as depicted through the KCA and my knowledge of the players in the industry. In addition, the ‘snowball’ technique which combines positional and reputational criteria in the identification of elites was used to identify potential respondents and institutions. A list of formal policy makers in core committee meetings was compiled as well as a list of titular heads of each organisation.⁶⁵ Other executive personnel as well as bureaucrats involved in assisting these elites and working in the institutions were also contacted. In total I had the names of 20 actors involved in the policy process. Positional respondents were then asked to identify those they considered to have been involved in the telecom policy-making process. On the basis of this, a further 52 respondents were included in the sample.⁶⁶ A list of main respondents, incorporating reference to the organisations with which they are affiliated is provided in table 1 on the next page.

⁶⁵ Their actual titles vary from organisation to organisation for example, Director in the case of CCK and Communications Coordinator in the case of the National Communications Secretariat. (NCS).

⁶⁶ The majority of those identified as influential had been targeted already on the basis of positional criteria.

Organization name	Sector	Number Interviewed
Communications Commission of Kenya (CCK)	Government Regulator	12
Telkom Kenya Limited (Telkom) and former KP&TC	Government	10
Postal Corporation	Government	1
E-Government Directorate	Government	2
Celtel	Mobile industry	4
Safaricom	Mobile industry	4
Econet Wireless	Mobile industry	2
Wanaichi Online	Civil society	2
Africa Online	ISP industry	2
KENIC	Domain numbering	1
Telecommunication Service Providers of Kenya (TESPOK)	Telecom civil society	2
WTO Committee Members	Government and Private sector	5
Kenya High Commission to the WTO-Geneva	Government	2
Ministry of Information and Communication	Government	3
Ministry of Broadcasting	Government	1
Association of Progressive Communications (Kenya and International)	NGO	3
International Development Research Center (IDRC)	Research	2
Kenya Institute for Public Policy Research and Analysis (KIPPR)	Research	2
Kenya Information and Communication Federation (KIF)	Civil society in-telecom sector	2
African Technology and Policy Studies(ATPS)	Research	2
Kenya Leadership Institute	Research	2
Kenya ICT Federation	Private sector alliance for the telecom sector	1
Nation and East African Media Houses	Media	3
Other Key personalities in the sector not affiliated to key telecom institutions	Ex-government officials and Kenyan representatives at international conferences, consultants and other personalities not affiliated to organisations	5

Table 1: List of key informants in the telecom sector

While many were contacted by letter and telephone, the success rate of those who agreed to be interviewed was as a result of my direct approach, as well as letters sent on my

behalf from CCK and the Ministry of Education explaining the nature of my study. Approximately 90 percent of those approached agreed to the interviews, the remaining 10 percent declined.

The above decline rate is based on the lack of response and the lack of access to certain individuals as no formal letter of decline was received. Notable among those who did not respond, despite numerous phone calls and personal calls to his office was the then Minister of Communication (2003-2004) who asked me to talk to the NCS. Nonetheless I did manage to interview the Minister of Education and the Minister of Transport and Information. As luck or fate would have it, Ministry of Communication and Ministry of Transport and Information were later to merge into one institution, with the then Minister of Transport and Information (whom I had interviewed) taking the lead role as Minister. In addition, my attendance at the Bamako and Ghana WSIS regional meetings, further allowed me to interview WTO representatives of Kenya.

As well as identifying respondents using positional and snowball techniques, informal discussions with fellow professionals in the field as well as media reporters and political grassroots leaders were contacted. I conducted the interviews using a conversational style format that guided the interviews by questions and discussions. Un-rigid structured interviews were employed (Hall, 2005; Denzin & Lincoln, 2003), whereby I conversed with the respondents concerning the general topics and themes in which I was interested. Moreover, the lack of rigidity allowed the respondents to structure and define the issue and problem within telecom policy making as they saw it. Open-ended questions were used in soliciting answers. In some cases, where elites requested questions in advance, the provision of a list of open ended questions proved useful in making them feel at ease. While this ensured that the core issues were covered, the interview content was otherwise shaped by respondents' answers and no attempt was made to constrain respondents to a predetermined line of questioning unless the topics swayed away from the main issue of telecom policy making.

In the review of my first few interviews, I noted that many of the respondents preferred an open style forum discussion in which they could just talk. This review then allowed me to structure the questions more appropriately. In addition, while the intention had been to record all interviews via a digital recorder, the majority of the Government respondents were not keen on this and requested that I switch it off. Rather than provide an initial ground of hostility, I ceased to carry the digital recorder for the remaining Government interviews and instead made notes as the discussion proceeded. Perhaps the attitude to digital recording had something to do with the nature and view of information. As noted earlier, soliciting information is an issue that is linked to the lack of a fully democratic and 'open society' in which information is freely given. While Kenyans would like to think of themselves as democratic, Government control is still very much present. This is an issue that Singh (1999) notes in his view of the role of the state in developing countries as reviewed in the previous chapter. Another possible explanation for the fear of digital recording lies in the fact that where respondents were based within an institution, some of their views were contrary to the institutional goals. As a result they would in many cases request that I not record their personal views where a critique was made of the organisation for which they worked. The interviews covered a range of topics in policy-making processes. For example: the actors involved and how decisions were made.

The richness of the data collected in these interviews did not vary considerably. However, where they did, this could be traced back to two factors. In the first instance, the amount and extent of experience that the interviewee had in telecom policy making over the years 1997 - 2005 impacted on the depth and expansiveness of their contribution. This can be attributed to the change in Government which took place in December 2002 when the former ruling party, KANU, was defeated by the Opposition party. As a result, new members of Parliament and various bureaucratic offices were appointed. Being aware of this, I ensured that interviews were also conducted with previous office bearers. Moreover, a change in position in most cases was at senior level and others in the organisation were usually left intact. These individuals provided continuity where response gaps were found. The candour with which the participants spoke about their experiences

was also influenced by their perceptions of organisational expectations and political correctness. The interpretations of the data therefore bear on these limitations.

I took the opportunity to also conduct interviews at the end of telecom meetings and participated as an observer during the sessions. In as much as I was in Kenya and international meetings in my capacity as a researcher, many of the Kenyan participants as well as the members of the Organising Committee and other participants some of whom I was familiar, regarded me as one of their own. This was because I had initially presented a paper at the pre-WSIS meeting as a guest panel speaker and had associated with many of the respondents on different levels. In the Ghana WSIS conference I was asked to speak as a panel speaker in the ministerial conference. I spoke on the role of women in telecom and thus veered away from the issues in my thesis which I felt would make me biased. Doing so led to many more contacts for interviews as well as conversations with many African delegates that provided deeper insight into the nature of policy making at the regional level. The WSIS meetings provided a microscopic assessment of the decision making process at international and regional level. The analysis also augmented interviews conducted in Kenya, in which mythology about a process was enacted. Interviews were conducted with five Kenyan Government and two private sector participants present at the conference. A standard format questionnaire was administered to the interviewees with discussions on issues of the participation.

In Kenya, I attended two telecom meetings. The Government through CCK in September 2003 sponsored one and the other was sponsored by IDRC in February 2004. In both meetings, I was merely an observer jotting down notes and mingling informally with various participants during the session breaks. Both meetings facilitated contacts for subsequent interviews. In the main, insights drawn from attendance to these conferences have been used to add colour and depth to the nature of telecom policy making. This supplemented the interview material and shifted the focus onto the structure and nature of telecom policy meetings. This phase of the research engendered a clear understanding

of the main tensions and schisms that Africa (and Kenya) is dealing with in international decision making.

3.4.2 Email interviews and discussions

Apart from face-to-face interviews, email group discussions provided complementary information. Most notable of these email discussions was the Kenya telecom policy network. This email group discussion proved a key source of information and also produced a number of key interviews via email (the email list was begun in late 2004 after I had left Kenya). The range of participants in the email list comes from stakeholders (Government and non-government) and is administered by IDRC. As such, permission has to be gained to join and consideration given to those mainly involved in telecom projects. The majority of the participants in the email listing are both from the Government and the NGO community. My request to have a list of members provided was denied based on policy protocol of the IDRC. However, I made myself known to the group not only as a professional in the field but as a researcher. I channelled my questions to various individuals who had made their contacts known and the 'snowball' technique was used to gather more names of participants on the list. Where I had questions to ask participants in the group email, I emailed them individually. The questions asked were similar to the questions already raised. The significance of this group email is that it provided information on the telecom process as perceived by telecom civil society participants. In addition, I was later made a key participant of the Kenya telecom policy group which therefore facilitated further interaction into the issues of policy making from a civil society perspective.

3.4.3 Proposed survey

I also attempted to compile a list of all Kenyan Government representatives who had attended international WTO telecom meetings from 1997-2005. I had wanted to compare who they were, their role, the organisations they came from, the frequency of attendance and the nature of discussions. Unfortunately, access to such information was impossible. I

want to emphasise that while it would have been useful to have this data to complement the interviews, the fact that this was not possible does not negate the study. Instead, as with all interviews, I inquired of the nature of participation in regional and international meetings and, in turn, was also provided with more names from their institutions to whom I could refer. In many cases, the positional respondents were the very same delegates who attended these meetings.

3.4.4 Documentary analysis

An array of primary source documents pertaining to telecom policy issues as well as policy documents and meetings notes from many of the institutions involved in policy were used to gather the data analysed herein. They include:

- Meeting minutes from several Government offices as well non-government organisations
- Policy and legislation documents from Parliament. Apart from the KCA, several different versions of the draft telecom policy exist which were also availed to me
- Kenya Bureau of Statistics data and local newspaper data as well as emails from reporters on what was happening on the ground
- Personal documents - a number of respondents gave me personal documents and copies of their minutes in Government policy meetings which provided further detail.
- Confidential reports - these were mostly 'in-house' documents prepared by members of various committees of the telecom policy team. The most notable of these were those drafted by CCK (the regulator) and NCS (the Government policy adviser). As with personal documents, these were given to me by respondents who did not want to be identified, but who gave me permission to use them for doctoral research. In some cases, however, I was only allowed to read the information and not take it out of the institution.

A wide array of secondary material was also used extensively. Notable here are academic publications (books and journals), telecom websites and policy forums. While documents are stable, unobtrusive and can have broad coverage (Yin, 2003), they do have some weakness. More specifically, where websites are concerned, they can be selectively biased and can contain reporting bias. However, at face value information from government websites as well as international governance institutions (such as the WTO) have to be presumed to be accurate in relation to statistics, value statements and publicity of government projects.

In particular and worth noting was the documentary evidence gained from newspaper articles and listening to the online radio broadcasts through the internet.⁶⁷ The broadcasts, along with relevant reports and newspaper articles sent to me from Kenya, enabled me to follow the telecom reform process while in Australia.

3.4.5 GATS and KCA reading

In addition to seeking legal expertise as discussed in chapter 1, an understanding of the GATS framework was made possible through the WTO website which has endeavoured to break down all legal documents with supplementary readings. In addition, through online purchase of WTO readings, I was able to read WTO interpretations of legal issues and the various issues with the GATS framework, which is reflected in this study.

As noted in chapter 1, the KCA analysis was achieved with the help of CCK staff and Mr Bernard Sihanya, one of the original consultants in the drafting of the KCA. In addition, I ordered my own hard copies of the KCA through the Government of Kenya printers as well as all subsequent gazetted amendments.

⁶⁷ One can now listen online via : www.kissfm.co.ke, www.nationaudio.com and www.capitalfm.co.ke

3.5 Data analysis

The data analysis in this study emulates the grounded theory approach. This approach is concerned with the development of theory from the data and is iterative or recursive in that the data collection and analysis are in reciprocal relationship that is mutually affective. Debates about grounded theory approaches are vibrant and its use not easily contained or defined (Silverman, 2005). The tools of grounded theory used in this study are informed by the neo-patrimonial literature which seeks to analyse how the nature of neo-patrimonial relationships affected the telecom reform process. As such, the analysis of the data is grounded in political critical/constructionist theory that seeks to understand the world of policy making. This process enhances the triangulation approach while also bridging the gap between theory and empirical research. Further discussion on this is provided through the themes of ethics, validity and the role of the researcher.

3.5.1 Ethics

The ethical questions reflected in the process of collecting, collating and presenting this study included issues such as: informed consent, confidentiality, and bias. Formal ethics clearance were obtained from both the University of New South Wales (UNSW) and the Government of Kenya. In addition, all participation was voluntary and every effort made to ensure confidence was maintained by the signing of a confidentiality agreement. Some respondents required a guarantee of confidentiality before they would allow me to interview them. Most requested that I did not acknowledge the origin of particular comments, while others were quite happy to have the rest of their remarks attributed to them. Approximately 60 percent of respondents expressed concerns about confidentiality. Majority of those who did, however worked for various Government ministries.

In order to respect and protect the identity of those who did not wish to be identified (either in whole or in part), numbers have been attributed to all respondents including those who were happy to have all their comments formally cited. Proceeding in this fashion had the advantage of preserving the integrity of each interview and any issue

arising based on respondents citing comments ‘on the record’ and ‘off the record’. The only exception to the use of numbers however was when comments or opinions were cited as a matter of public record. For example, as cited in written documents or expressed in speeches.

3.5.2 Validity and reliability

As indicated earlier, the interview data has largely been used qualitatively rather than quantitatively. Silverman (2005), notes that the issue of validity has been one thorny issue within various paradigms and suggest that it be viewed within the constructs of authenticity (fairness) and ethical relationship. This study therefore upholds the perspectives, claim, concerns and voices of all interviews (as stakeholders) in the policy process. The recollections recorded in the interviews have not been semiotically interrogated or systematically deconstructed, but rather have been used in a more straight forward manner, as albeit value-impregnated descriptions of events as remembered by respondents. Thus, some of the information has been treated as ‘fact’. For example, statements made of the type x, y and z were involved in policy A, or a given meeting occurred at such and such a time and at such and such a place. Other information on the other hand has been treated not so much as ‘fact’ but as a ‘perspective’ on events-most notably when respondents attempted to give reasons or explain why this or that happened.

‘Perspective’, as is used above, has a good deal in common with Weber’s notion of ‘motive’ which he defined as *a complex of subjective meaning which seems to the actor himself or to the observer as an adequate ground for the conduct in question* (1947 p.98-99). As already explained, many of the interview questions were intended to elicit ‘perspective’-type information because gaining some understanding of why respondents took the positions they did, or why a process happened the way it did, was a high priority for the intended outcomes of this research. It should be reiterated that is not the intention of this study to provide an evaluation of which perspective is ‘right’ or provide ‘conclusive answers’ or

unquestionable ‘truths’. Rather, the aim of this study is to understand telecom outcomes through the political and international context that shapes its identification and implementation. I have thus tried to include the range of perspectives or explanations proffered so as to highlight the variation in the goals, values and frames of reference that informed the strategic political choices made by the major actors in the telecom policy process.

3.5.3 The role of the researcher

The issues of validity raised above therefore imply an acknowledgment of my role as researcher as partly discussed all through this chapter and in previous chapters. In keeping with critical theory, self-reflexivity was a key part of my criterion of analysis (Kincheloe, 2003). The use of reflexivity as applied in a methodological sense had two outcomes. The first was in relation to the interpretation of my ‘findings’. While making every effort to acknowledge the perspectives of the interviews, approaches to my analysis of the research were framed by my interpretation of occurrences. These interpretations reflect the social interaction between the participants and I and is therefore, not a simple reflection of what exists.

It is also correct to assume that my background, gender, age and cross cultural marital status (Kenyan, western educated, female, aged between 30 and 40 and married to someone from a different ‘tribal’ group) and my previous professional background in the industry did play a role in shaping the study and communication with participants. Lee (1993) notes that these are issues linked to a perspective of power that may shape the dynamics of the interview process. I was therefore aware that gender issues as well as age and my names and ethnic background (which in the Kenyan context automatically link you to certain communities) shaped the way participants responded to me. For example, at times some participants would inquire of my tribal affiliation given that I carried both my maiden and married names. At other times many of the male participants (who as expected were the majority holding high offices and positions of responsibility) would

comment on my female status as well as view me in their words as ‘the new Kenyan woman’. I had prepared myself for such situations, and did not let it get in the way of discussions. My previous professional background in the industry and further training in the university as well as my role as teacher and tutor at UNSW, helped me facilitate smooth discussion in the interviews.

The second outcome of reflexivity involved an awareness of my impact on the research and an acknowledgement of any bias that may emerge. This included the analysis of the literature that was read and its interpretation as well as the way in which the questions were phrased. My role in the research process from its inception to completion is therefore seen as one of a *bricoleur*⁶⁸ (Levi-Strauss, 1966 p.17; Grossberg, 1997) hoping to produce a *bricolage* (Denzin & Lincoln, 2003 p.5).⁶⁹ In seeking to gain understanding of the telecom policy process then I am aware of the great social researcher’s privilege in trying to shed ‘light’ on an issue so that the researcher and readers alike may gain an understanding of the problem. By exploding the myths of ‘objectivity’ and/or ‘value neutrality’, I make no claim to have been an ‘all seeing spectator’ (Carter, 1988 p.xv). While I have been aware of my creative presence in the research process, as highlighted above, I have not acknowledged my creative presence in the body of the text primarily because critiquing the disciplines and making a contribution to the sociology of knowledge is not my primary objective. My problematic is different. For my purposes, it is sufficient that the critiques of conventional approaches applied to the study of policy research which rightly highlight the inevitably creative subjective presence of the author in any text are acknowledged as affecting the way this analysis proceeds.

⁶⁸ Levi-Strauss (1966, p.17) define a bricoleur as a “Jack of all trades or a kind of professional do-it yourself person

⁶⁹ A bricolage is a “pieced together set of representations that are fitted to the specifics of a complex situation” (Denzin & Lincoln, 2003 p.5).

3.6 Conclusion

This chapter has described the paradigm that has informed the choice of methods for the empirical data of the research. The choice of method was found to best correlate with the theoretical framework and the central research inquiry shaping the study. Seeking to provide a different approach to the methodological inquiry of telecom, it was argued that qualitative methods respect the diversity of human experience and are best suited to creating comprehensive understandings of various perspectives. In doing so, the relationship of research methods to research questions was affirmed. The following chapter seeks to present the ‘findings’ of the study. In order to analyse the analytical universe of Kenya’s policy-making process as well as to present the outcomes of the policy process, the next chapter begins by evaluating the GATS framework in light of the framework developed in chapter 2.

**PART TWO: THE GATS AND
KENYA'S TELECOM REFORM
PROCESS**

THE GENERAL AGREEMENT ON TRADE IN SERVICES (GATS) AND THE INTERNATIONAL AID CARTEL

Trade and commerce, if they were not made of India-rubber, would never manage to bounce over the obstacles which legislators are continually putting in their way; and, if one were to judge these men by the effects of their actions and not partly by their intentions, they would deserve to be classed and punished with those mischievous persons who put obstruction on the railroads
Henry David Thoreau (1962 p.85)

Introduction

In Civil Disobedience, Thoreau (1962) bemoaned the increasing role of government in commercial matters. His assessment, underscored by his view of legislation and regulations as hindrances to trade and commerce, positions Thoreau as an early proponent of deregulation. In many ways, the multilateral trading system, boosted by the establishment of the WTO in 1995 with relationship to the IMF and World Bank, has become the modern equivalent of Thoreau's railroad in centrality, influence and importance to national and international economics. And depending on which perspective on the contemporary discourse one aligns themselves with, the debates have no shortage of protagonists, pessimists and protestors whose actions rather than intentions are the yardstick by which they judge and are judged. Indeed, the rules-based regime has become a norm rather than an exception. The WTO, as the main international institution of global trade, sets the framework for market entry, establishes the terms and basis for reciprocity, requires a system that respects safety for users or concessions to entrants and provides for the conditions of exclusion and inclusion. Moreover, as it expands its reach through new treaties and further member accessions, its significance as a regime for co-operation in trade matters also increases.

Of the various agreements that constitute the global trading order, the GATS may well become the most significant of all as commercial services become the ambit upon which the global world is based. Equally to this prominence is its counterpart, the General Agreement on Tariffs and Trade (GATT), which is primarily concerned with the overall elimination of tariff barriers on manufactured goods. Nonetheless, the monitoring and implementation of an agreement on service liberalisation is by far a more complex enterprise, given that most trade barriers in services are inextricably linked and tied to domestic regulatory choices and objectives. These domestic objectives pose considerable challenges to liberalisation efforts, enforcement, compliance and the implementation of WTO treaties. This chapter draws on the framework developed in chapter 2 in understanding the value of the GATS as a commitment in exchange for credibility.

The purpose of the chapter is twofold. First I will establish a background understanding of the WTO and its relationship to IFIs. I examine the GATS framework, its norms, and procedures and the set of financial institutions that have together with the WTO carved out a monetary system of aid lending and trade policy advice. The second purpose is to show how the GATS rules, norms and principles in an attempt to reduce transaction costs inherent in reaching agreements provides a flexibility for scheduling commitments for developing countries. The argument here, is that while the GATS serves as an institution to reduce the transaction costs of negotiating complex multilateral trading agreements, the commitments undertaken also increase the costs of discretionary action that may follow over time (opportunism) (Shepsle, 1991). This chapter is of particular importance as it allows the chapter to establish an internal context for Kenya's accession to the GATS.

While obvious, it is worth noting here that a detailed treatment of the entire WTO agreements is outside the scope of this study. For purposes of this study; the analysis provided herein deals mainly with the framing of the GATS telecom agreements and the wider financial structure that embodies the 'aid-trade' relationship and its related instruments as they apply only to telecom within the context of the arguments put forth in

this study. Understandably, this chapter draws on the legal instruments of the GATS⁷⁰ framed within the WTO Agreements.⁷¹ As the WTO Agreements comprise several annexes and articles, an attempt has been made to provide footnote references to the specific WTO articles or sections within the WTO Agreements.

4.1 Understanding telecom trade services in context: the WTO, GATTs AND GATS

The WTO began life on 1 January 1995, but its trading system is half a century older. (WTO, 2005). Prior to the completion of the Uruguay Round of trade negotiations in 1994, which resulted in the creation of the GATS,⁷² the trading system was geared solely towards the elimination of both tariff barriers and quantitative restrictions affecting trade in manufactured goods. This system operated under the general agreements known as the GATT. Since 1948, the General Agreement on Tariffs and Trade (GATT) had provided the rules for the system. Over the years GATT evolved through several rounds of negotiations. The last and largest GATT round, was the Uruguay Round which lasted from 1986 to 1994 and led to the WTO's creation with a membership of 148 countries in 2005 (WTO, 2005). A growing international paradigm shift to telecom deregulation (discussed in chapters 1 and 2) and the perception that trade in services would generate comparative advantage given the increased role of service industries provided by technological advances, saw increasing attention turn to trade in services that would eventually lead to the creation of the GATS. The GATS was essentially inspired by the same objectives as its counterpart the GATT: creating a credible and reliable system of

⁷⁰ The GATS comprises of 6 sections, 29 articles (32, with 3 Bis Articles). The totality of documents includes 7 other Annexes in addition to Telecommunications and a number of related instruments, including various Ministerial Decisions and national Schedules of Specific Commitments detailing undertakings in various service sectors and subsectors.

⁷¹ As noted earlier, the WTO Agreements refers to the Marrakesh Agreement Establishing the World Trade Organisation {hereinafter WTO} and the substantive multilateral agreements attached thereto, April 15, 1994, in WORLD TRADE ORGANISATION, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 33 I.L.M. 1143 (1994)

⁷² WTO, General Agreement on Trade in Services, contained as Annex 1B to the Agreement Establishing the World Trade Organisation, 15th April 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Legal Instruments-Results of the Uruguay Round, 33 I.L.M. 1143, 1169 {GATS}

international rules; ensuring fair and equitable treatment of all participants; stimulating economic activity through guaranteed policy bindings; and promoting trade and development through progressive liberalisation.

Nonetheless, two issues emerge as highly significant to this study in the creation of the GATS. First, the creation of the GATS saw the emergence of a service agreement which underscores the ideological shift away from the historical view that services are largely non-tradable. As noted in chapter 1, because this study engages in the analysis of the WTO from the perspective of African states, this shift in services as a tradable good has implications for developing countries like Kenya whose telecom industry lacks appropriate basic infrastructure and is discussed further in the following section.

Nonetheless, the WTO's Appellate Body has stated that GATS is applicable to 'all' service sectors with two exemptions:

- 4) the GATS excludes 'services supplied in the exercise of government authority' and must be supplied neither on a commercial basis nor in competition with other suppliers. Examples include health, education and any other public services.
- 5) the Annex on Air Transport Services exempts from coverage measures affecting air traffic rights and services directly related to the exercise of such rights. (WTO, "The Legal Texts", 1994)⁷³

And while the GATS itself is silent on what constitutes a service, it defines it by reference to four modes of supply, the characteristics of service industries and the nature and type of barriers confronting their free exchange, namely;

⁷³ Online at: <http://tsdb.wto.org/wto/JobNo4904.html>

Mode 1 - cross border: where service is provided in one country to consumers in another

Mode 2 - consumption abroad: where the service is provided in one country to consumers of another

Mode 3 - commercial presence or affiliate trade: where a foreign supplier offers services in another country by establishing a commercial presence in that country

Mode 4 - presence of natural persons: where the service is supplied by a foreign supplier by being physically present in the consuming country (WTO, "An introduction to the GATS" 2005).

The above method of definition may eventually suggest some interpretation over the scope of services, leaving the precise ambit of the agreement reasonably wide. In applying to *all measures* affecting services, the agreement encompasses laws, regulations, rules, procedures, decisions and administrative actions taken by national, provisional and local governments, as well as non-governmental bodies who exercise powers delegated by different government bodies (GATS , Article 1:3). Even at the very early stages of negotiations it was recognised that while the dominant means of cross-border trade would likely be telecom, the obstacles to trade would thus be embedded in domestic policy, laws and regulations as well as the practises of local operators (Tuthill, 1996 p.90-92). Distinguishing these modes is crucial to recognising that different forms of trade in services have implications at the domestic level and will be affected by the forms of regulatory instruments and thus create specific regulatory concerns for cross-border application. These issues have shaped both the principles and rules embodied in the GATS, as well as the specific commitments that WTO members have undertaken in their Schedules.

4.2 Understanding the aid-trade relationship in context: The WTO, IMF and World Bank

The relationship between aid and trade begins with the structure of the WTO. While this is now a formally institutionalised process, the following section briefly highlights the symbiotic relationships that the three organisations (the IMF, World Bank and WTO) share in maintaining what this study conceptualises as the ‘aid cartel’.

The relationship between the IMF⁷⁴ and the World Bank⁷⁵, the two main global funding institutions, is a continuation of a long standing relationship between the two institutions and the Contracting Parties to the GATT,⁷⁶ as modified by new developments associated with the establishment of the WTO. In July 1944, participants in the Bretton Woods Conference⁷⁷ agreed that, in addition to the IMF and the World Bank, an international trade organisation to liberalise trade would benefit the world. Together the IMF, the World Bank and this organisation, would work towards the expansion of international trade; the trade organisation would have jurisdiction over the underlying transactions and IMF over exchange controls and the World Bank would have jurisdiction over development and sectoral issues. Several provisions in the WTO agreements provide the legal basis for the co-operation of the three institutions and specifically address its relationship to the IMF and the World Bank. For example, Article III.5 of the WTO charter provides: *with a view to achieving greater coherence in global economic policy making, the WTO shall cooperate, as appropriate, with the International Monetary Fund and with the International Bank*

⁷⁴ See *supra* note 36

⁷⁵ See *supra* note 37

⁷⁶ The contracting parties to the GATT are styled “CONTRACTING PARTIES” in the GATT documents when acting jointly. General Agreements on Tariffs and Trade, Oct. 30, 1947, Art. XXV, TIAS No. 1700, 55 UNTS 194. The term will simply be capitalised (“Contracting Parties”) in the study when used in this sense, except for quotations of GATT materials. The current version of the GATT is in Annex 1A to the WTO charter, THE LEGAL TEXTS, see *supra* note 53 and 11 {hereinafter GATT}.

⁷⁷ The Bretton Woods conference was the first international conference that sought to find mutual solutions on economic matters globally. The IMF and World Bank were instrumental in the process. For further reading see online at: <http://www.ibiblio.org/pha/policy/1944/440722a.html>

for Reconstruction and Development {the World Bank} and its affiliated agencies (WTO, “The Legal Texts”, 1994). In addition the Declaration on the Contribution of the WTO to Achieving Greater Coherence in Global Economic Policymaking states:

the interlinkages between the different aspects of economic policy require that the international institutions with responsibilities in each of these areas follow consistent and mutually supportive policies. The WTO should therefore pursue and develop cooperation with the international organisations responsible for monetary and financial matters, while respecting the mandate, the confidentiality requirements and the necessary autonomy in decision-making procedures of each institution, and avoiding the imposition on governments of cross-conditionality or additional conditions (ibid, Para 5).⁷⁸

In addition, the IMF and the WTO signed a formal cooperation agreement⁷⁹ which implements the legal relationship between the organisations established in the WTO agreements because it is based on authority and mandate to cooperate in the respective charters. The Cooperation Agreement includes, for example, several provisions on document exchange, reciprocal attendance at meetings and other routine ‘bureaucratic’ matters that facilitate cooperation. The role of the IMF and World Bank are however guided by their mandates which sets out the primary responsibilities of the two institutions. The Concordant between the MD of the IMF and the World Bank President states that each institution *must be allowed to explore their legitimate concerns with regard to macroeconomic and structural issues*⁸⁰ albeit relying as much as possible on the monitoring of the other institution with the primary responsibility. In relation to the WTO, the IMF and World Bank perform two key interrelated functions. First, the IMF and the World Bank have regular consultation. Both have observer status in the WTO and participate actively

⁷⁸ Declaration on the Contribution of the World Trade Organisation to Achieving Greater Coherence in Global Economic Policymaking, Para 5, THE LEGAL TEXTS.

⁷⁹ For a useful historical view see Dukgeun, A. (2000). Linkages Between International Financial and Trade Institutions: IMF, World Bank and WTO, *Journal of World Trade*. 1, 3-5.

⁸⁰ Bank/Fund Collaboration on Public Expenditures Issues (SM/03/73, Feb. 19, 2003), Para. 4.

in meetings of the WTO committees working groups and bodies. The WTO secretariat attends meetings of the IMF and the World Bank executive board on matters of common interest such as the surveillance activities of the IMF. In addition, the WTO is required to consult the IMF when it deals with issues concerning monetary reserves, balance of payments and foreign exchange arrangements. For example, the WTO agreements allow countries to apply trade restrictions in the event of balance-of-payments difficulties. The WTO Balance-of-Payments Committee (BPC) bases its assessments of restrictions on IMF's determination of a member's balance-of-payments situation.

Second, the IMF, the World Bank and other international donors work together to improve their ability to trade through the technical assistance and training programme known as the Joint Integrated Technical Assistance Program for Selected Least Developed and other African countries (JITAP).⁸¹ As shall be discussed later in the chapter, technical assistance was identified as a core area for developing countries in the framing of the GATS agreements. Key to this relationship is the development of the Integrated Framework for Trade-Related Technical Assistance to Least-Developed Countries (IF),⁸² discussed later in this chapter, which seeks to strengthen the capacity of countries to formulate policy and negotiate trade agreements. In addition and of specific interest to this study is the Poverty Reduction and Strategy papers (PRSP) which seek to ensure that poorer member countries incorporate appropriate trade reforms which forms the basis for concessional funding by the IMF and the World Bank under the Poverty Reduction and Growth Facility (PRGF). As shall be evidenced in chapters 5 and 6, the PRSP has been the main tool used to decide Kenya's funding structure under the PRGF and is a key tool of conditionality for funding. The PRGF and PRSP were established in 1999 by the World Bank and IMF. The aim of the PRSP is to provide the link between national public actions, donor support and the development outcomes needed to meet

⁸¹ See chapter 7 for a review of JITAP activities in Kenya

⁸² The IF was inaugurated in October 1997 at the WTO High Level Meeting on Integrated Activities for least Developed Countries Trade Development by six multilateral institutions (IMF, ITC, UNCTAD, UNDP, World Bank and the WTO). For future detail see www.integratedframework.org/about.htm

United Nations Millennium Goals (MDGs),⁸³ which are centred on halving poverty between 1990 and 2015. The PRSP operation basis for IMF and World Bank concessional lending is done through a process of reviews which are prepared by individual member governments. These reviews are used by the Executive Boards of the IMF and the World Bank to make decisions about concessional lending. The PRSP focus is on strengthening governance and reforms and in particular, improving public resource management. When appropriate, the IMF draws on World Bank expertise in designing PRGF supported programmes and the staff of both the IMF and World Bank cooperate on conditionality. Given the high level coordination between the IMF, World Bank and WTO during GATS negotiations with developing countries, it seems that the relationship between these three institutions will continue to intensify. An analysis of this negotiation is set out in later sections this chapter. Table 2⁸⁴ below provides a guideline of the delivery vehicles of the three institutions as it relates to the ‘aid-trade’ relationship.

⁸³ In September 2000, all the 191 Member States of the United Nations adopted the Millennium Declaration (GA Resolution A/54/2000) which outlined measures necessary to attain peace, security and development. This was further elaborated in the subsequent UN Secretary –General’s Report titled “A Road Map Towards the Implementation of the UN Millennium Declaration (GA, Resolution A/54/2000). The importance of the Millennium Declaration is that it mainstreamed a set of interconnected and mutually reinforcing goals into the global agenda. In subsequent meetings, an agreement was reached among UN, Organisation for Economic Co-operation and Development (OECD through its Development Co-operation Directorate (DAC) (referred to as OECD –DAC), World Bank and IMF on key elements of a framework of this global agenda in the context of goals, targets and indicators, collectively referred to as the Millennium Development Goals (MDGs).

⁸⁴ Diagram reproduced from IMF (2005) Review of Fund Work on Trade, prepared by the Policy development and Review department, Online at <http://www.imf.org/External/np/pp/eng/2005/020705.htm>

	IMF	World Bank	WTO
International architecture for trade	Article VIII Standards and codes (financial services, jointly with Bank)	Standards and Codes (financial services, jointly with Fund)	Negotiating machinery Dispute resolution Accession process
Surveillance	Article IV Staff Reports Selected Issues Papers <i>World Economic Outlook</i>	Economic Sector Work (ESW) Country Assistance Strategies Diagnostic Trade Integration Studies. <i>Global Economic Prospects</i>	Trade Policy Reviews World Trade Report Background Papers
Program Support	Stand-by Arrangement (EFF/PRGF) Trade and Integration	Adjustment Lending Trade facilitation lending Infrastructure for trade	No lending or advisory capacity
Technical Assistance	Tax and tariff reform Customs reform	Capacity Building (WBI) Customs reform Regional trade agreements	Capacity building workshops
Research	Research clustered around trade-macro linkages	Broad research agenda with focus on sectors, micro-linkages and institutions	Research emphasis on market access issues

Table 2: The Aid and Trade relationship: IMF, World Bank and WTO (IMF, 2005)

In light of the various agreements between the IMF, WTO, World Bank and their respective member states, various provisions in the WTO Agreements require that the three institutions work together to address overlapping jurisdiction and to avoid imposing conflicting obligations upon a common membership.⁸⁵ While various other legal aspects of the relationship between the IMF, World Bank and the WTO exist, it serves to note that the IMF and the World Bank engage in substantial day-to-day collaboration significantly as relates to structural and macroeconomic implications of reforms and lending, key of which is the PRGF discussed earlier. Specifically, the reader is directed to the conditionalities section which elaborates on the structure of funding and its relationship to trade.

Having provided evidence of the ‘aid and trade’ framework established within the formation of the WTO, the following section elaborates on the GATS itself. Drawing on

⁸⁵ Agreement between the International Monetary Fund and the World Trade Organisation, Dec. No. 11381-(96/105), Nov. 25, 1996, Selected Decisions, 28th Issue, p.823.

the broad NIE principles discussed in chapter 2 regarding credible commitments, specific attention is drawn to the norms and practise and how this structures the telecom sector more so for developing countries such as Kenya. Given the divergent tension between domestic goals and international goals, it is argued that the GATS telecom instruments were structured to facilitate this tension. Inherent in the GATS telecom instruments therefore is the availability for countries to schedule commitments based on their domestic goals while still committing to international best practice. However, as suggested in the introductory note of this chapter, this flexibility inherent in the GATS also increases the cost of discretionary action. As shall be evidenced in chapters 5 and 6, while the GATS provided credibility for the Kenyan Government at international level, the flexibility inherent in the GATS also allowed the Kenyan Government to structure its agreements pursuant to its own goals.

4.3 The GATS: rules and principles

The GATS was concluded in Marrakesh on April 15th 1994 and came into effect on January 1st 1995. Its primary aim is to reduce, and, where possible, eliminate measures that prevent services from being freely provided across national borders. In addition, the GATS aims to prevent measures that discriminate against foreign-owned companies from providing services locally where market access has been granted. In doing so, the GATS establishes the framework (norms, rules and principles) for trade liberalisation in the telecom sector. In addition, by instituting this framework, the GATS creates, as argued in chapter 2, some degree of certainty for foreign investment and negotiates the rules of the 'playing field'. The main elements of the GATS are contained within the document '*The results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts*' and is a large and daunting document covering 60 agreements, annexes, decisions and understandings. Although complex, the major components of the GATS can be located within six main sections of the document: an umbrella agreement (establishing the WTO); agreements for each of the three broad areas of trade that the WTO covers (goods, services and

intellectual property) and dispute settlement and reviews of governments' trade policies. Figure 1 below depicts this framework, the details of which are explained below.

<i>Umbrella</i>	AGREEMENT ESTABLISHING WTO		
	Goods	Services	Intellectual property
<i>Basic principles</i>	GATT	GATS	TRIPS
<i>Additional details</i>	Other goods agreements and annexes	Services annexes	
<i>Market access commitments</i>	Countries' schedules of commitments	Countries' schedules of commitments (and MFN exemptions)	
<i>Dispute settlement</i>	DISPUTE SETTLEMENT		
<i>Transparency</i>	TRADE POLICY REVIEWS		

Figure 1: Framework of the WTO agreements (WTO, 2005)

Good and services share the broad principles of the GATT and the GATS respectively. The third area, Trade Related Aspects of Intellectual Property Rights (TRIPS), also falls in this category, but has no additional parts. Both agreements (GATT and GATS) are supplemented with extra agreements and annexes which deal with special requirements of specific sectors or issues. Finally, there are detailed and lengthy schedules (or lists) of commitments made by individual countries which provide details on how the telecom market within a specific country is structured. These commitments correspond to what this study argues is the transaction cost inherent in the GATS framework. For example, the commitments allow countries to state how much access foreign service providers are allowed for specific sectors. This is further discussed below. Drawn from the GATT framework, the GATS is similarly threaded with, and predicated on, the canon of non-discrimination. This imperative is comprised of the complementary principles of the 'most-favoured nation' (MFN) and National Treatment as explained below.

4.3.1 The GATS: credibility, commitments and transaction costs

Drawing both the GATT and GATS framework together is the canon of non-discrimination and is the foundational bedrock of the agreements. This imperative of non-discrimination is comprised of the complementary principles of the Most Favoured Nation (MFN) and National Treatment⁸⁶. Article II of the GATS states that: *...each member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country* (GATS, Article II).

This principle seeks to prevent favouritism in trade arrangements between foreign services and service suppliers, and between foreign and domestic services and suppliers. Basically, the principle requires that a country treats its trading partners equally on the principle of non-discrimination. Therefore, if one country favours another country, it must apply the same principle of favouritism across all the other countries. As a general obligation, the MFN applies to all member states of the WTO irrespective of whether a country has made commitments to the GATS. However, because preferential treatment between countries pre-existed GATS⁸⁷, exemptions were made subject to conditions and provided it was noted at the time of scheduling. Senunas (1997) points out that those conditions were not particularly onerous and were only there to ensure that exemptions were not to last more than 10 years. Suave (1995) concurs, suggesting that the formulation of this clause does not preclude the extension of exemptions beyond the 10-year period, although he questions the ease with which the Services Council would allow this to occur.

⁸⁶ For a deeper discussion see "Understanding the WTO" Chapter two - "The Agreements": http://www.wto.org/english/thewto_e/whatis_e/tif_e/utw_chap2_e.pdf, p.34; Also see WTO legal texts http://www.wto.org/english/docs_e/legal_e/legal_e.htm

⁸⁷ A number of bilateral, regional and sectoral agreements predating GATS remain in place. For a deeper analysis see: Grey, R. (1990). *The Service Agenda*. Halifax: The Institute for Research on Public Policy. Also see Trebilock, M. J. & Howse, R. (2000). *The Regulation of International Trade*, 2nd ed. London: Routledge p.271-73.

It is somewhat of an anomaly that the mechanism primarily devised to ensure a level playing field allows for exemptions to the general rule of fair treatment among nations. Indeed, the original fundamental condition of the GATS and GATT was that commitments should not be conditional on reciprocity (Arup, 2000). **The MFN is therefore a rapprochement reflecting a compromise that was struck to overcome concerns by the United States and other members who threatened to derail the negotiations (ibid, 2000).** In brief, the US was anxious that insufficient members of member states were committed to pursuing market liberalisation goals. And other members were worried that the US, dissatisfied with the outcome would pursue bilateral sectoral deals.

By allowing a system of exemptions, it meant that the US and others wishing to seek liberalisation arrangements based on reciprocity may do so, and hence withhold these concessions from others at the time, but cannot continue to justify ongoing refusals to extend these arrangements to all other members (ibid, 2000). The need to secure membership commitment was therefore established through the MFN. **Securing a commitment therefore became part of the negotiating process.** A specific commitment in service schedule is therefore an undertaking by a government to provide market access and national treatment for the service activity in question on the terms and conditions specified in the schedule. **Thus contrary to what the GATS name suggests, there is no single basic agreement on Services or telecom at the WTO.** The consensus as it has evolved in the international trade regime since 1994 is reflected in a set of interrelated Agreements, Annexes and Ministerial Decisions, whose whole of which is comprised of the sum of its parts. Thus for example, Article XVIII of the GATS allows members to *negotiate* commitments with respect to measures affecting trade in services not subject to scheduling under Articles XVI or XVII, provided that they are inscribed in a member's Schedule.

When making a commitment a government stipulates⁸⁸ the specified level of market access and national treatment and undertakes not to impose any new measures that would restrict entry into the market or the operation of the service. National treatment is provided for in Article XVII. Under the GATS, by virtue of Article II exemptions, a state can determine who is allowed to enter its borders and provide services. However, once they enter the market, they must be treated in the same manner as every other service provider. This access is dictated through the transparency clause⁸⁹ which is contained in Article III:1 and states that:

Each Member shall publish...all relevant measures of general application which pertain to or affect the operation of this Agreement. International agreements pertaining to or affecting trade in services to which a Member is signatory shall also be published (WTO, 1994 Article III:1).

The idea behind the transparency clause is to engender predictability and provide information on domestic regulatory environments. It also aids the Council for Trade in Services (CTS) in its mandated assessments of the system.

Through rules of transparency, the WTO aims precisely at restraining the unilateralism of discretionary Hobbesian power politics in international economic matters...There is conflict but there is also cooperation, based on a comprehensive process which stems from the rationality and functionality of the reciprocity of interests {which} can only be perceived and judged adequately if public disclosure makes them visible (WTO, 1994 Article 111:1)

This issue of negotiating specific commitments is of particular importance to the argument of this study which contends that the GATS provides the Kenyan Government the ambit upon which to legitimise the actions taken within the domestic arena and at the same time facilitate it with credibility to access funds from international institutions. Specific commitments thus have an effect similar to a tariff binding. This is what this

⁸⁸ The terminology often used in this case is 'binding' and is the more common word found in the reading of the GATS.

⁸⁹ Subject to Article V exceptions

study constitutes as a **transaction cost**. They guarantee economic operators in other countries that the conditions of entry and operation in the market will not be changed to their disadvantage. Moreover, commitments can only be withdrawn or modified after the agreement of compensatory adjustments with affected countries, and no withdrawals or modifications may be made until three years after entry into the Agreement. Commitments can however be added or improved at any time.⁹⁰ Several types of commitments exist, but these are usually limited to:

- 1) **market access commitments**: this seeks to guarantee operators in other countries that conditions of entry into the ‘said market’ will not be changed or cause a disadvantage to their operation in that country. For example, a government can commit to allow foreign banks to operate in the domestic market.
- 2) **market-access limitation**: This allows governments to limit the number of licences it will grant in that market while the **exemption to national treatment** principles allows governments to, for example, limit the incorporation of companies requiring that companies have partnerships with local companies or limit the number of branches a foreign bank can have. (WTO, “Understanding the GATS”, 2005).

The MFN and exemptions principles are, however, not something that a country can easily manoeuvre from once it has been ‘bound’ as noted earlier. Like bound tariffs in trade for goods they can only be modified after negotiations with affected countries. As such, the MFN exemptions make it difficult to unbind and in effect are guaranteed conditions for foreign market entrants into any domestic market. These conditions have direct bearing on Kenya’s compliance to the GATS. As noted in chapter 2, the aim of a transaction cost as is evident in the GATS rules is to try and limit market irregularities. However, precisely because of the ability to have MFN exemptions, the GATS provides

⁹⁰ This applies in Kenya’s case where the first schedule of specific commitments was signed in 1994 and improved upon in 1999. This is discussed in chapters 5 and 6.

enough leeway for countries to slowly adapt the agreements. For African neo-patrimonial countries the MFN accords them the opportunity to comply with the agreements while still having the ability to dictate domestic patterns of policy through the schedule of specific commitments. The importance of the **flexibility** that these exemptions provide to African nations, as shall be observed through Kenya's adoption of the GATS in chapter 6, underscores the importance of the exemptions that this offers to Kenyan policy making.

Nonetheless, the negotiations of specific commitments is underpinned by the obligation that members enter into successive rounds of negotiations within five years of the GATS agreement to achieve 'progressively higher levels of liberalisation'. While this provision is discussed later in this chapter, it warrants a brief introductory note here as it establishes the framework and conditions relevant to developing countries for ongoing and subsequent negotiation rounds (GATS, Article XIX). While setting substantive goals in the form of further liberalisation and the reduction of any adverse effects of market access on trade, it also prompts an 'exchange' standard or what this study conceives as a 'transaction cost'. Its inclusion in the GATS agreement is thus of central importance. So too is similar provision in the Annex which authorises developing countries to place reasonable conditions on access to and use of public networks and services where necessary to strengthen domestic telecom infrastructure and service capacity (GATS, Annex, Article 5 (g)).⁹¹

As noted in the preceding section, the conditions informing the bargaining context have direct bearing on the prospects for future compliance. The importance of this is underscored by arguments advanced in chapter 7 which suggest that African states such as Kenya are able to negotiate what seems on the outside an 'acceptable' degree of reform.

⁹¹ Provided that such conditions are listed at the time of scheduling.

4.4 Further telecom agreements in the WTO

As suggested earlier, contrary to what the name suggests, there is no single basic agreement on telecom at the WTO. The consensus as it has evolved is reflected in a set of interrelated Agreements. Each part, however has significance in itself and will be considered here briefly to clarify their interaction and set the context for assessing the efficacy of their implementation. Three documents comprise the core texts relating to trade in telecom services and are crucial in interpreting the GATS objectives: the Annex on Telecommunications (Annex) signed in April 1994, the Fourth Protocol which was entered into force in February 1998 and the RP adopted during the negotiations of the Fourth Protocol. Analysis of the Annex, the Fourth Protocol and RP as they relate to telecom application in Kenya is provided below.

The main aim of the Annex is to ensure that suppliers of all liberalised commercial services, be they financial or professional services or any other service falling within the GATS ambit, can have reasonable and non-discriminatory access to public telecom networks and services, for communications and commercial purposes.⁹² Tuthill characterises the Annex as a document balancing *user rights* and *regulator rights* as it guarantees access, whether the networks are privately or government owned and whether or not they are monopolies, while conditioning access in certain prudential circumstances, for example, to protect the public operator, to restrain companies from illegal competition or preserve network integrity (Tuthill 1996, p.90-92). In so doing, the Annex provides important supplementary provisions to the framework agreement.⁹³

It warrants highlighting, however, that the GATS accession imposes the Annex obligations on all members, regardless of whether they have begun to liberalise domestic

⁹² The Annex offers a definition at 3:b and 3:c which essentially incorporates access to the public telecom infrastructure which permits services offered to the public generally, eg telegraph, telephone, telex and data services.

⁹³ The Annex does not apply to measures affecting the cable or broadcast distribution of radio or television programming, Annex, *ibid.*, 2:b.

telecom markets or scheduled any commitments. Nonetheless, irrespective of the imposition on all members, the Annex itself is not a sine qua for liberalisation without the inclusion of a specific commitment in a particular sector. Effectively, the Annex was designed to try and standardise conditions of behaviour for members and ensure that domestic regulation would target monopoly abuses, in order to create a 'level playing field' for all service suppliers who depend on access to telecom networks. A review of Kenya's market access commitments in chapters 5 and 6 highlights the difficulties in this regard.

4.4.1 The Annex on Telecommunications, Fourth Protocol and the Regulatory Reference Paper

At the close of the Uruguay Round in 1994 only an 'in principle' commitment between members to 'freer market access' and liberalisation of basic telecom was reached. Meaningful gains, however, had only been secured in the supply of value-added or enhanced services.⁹⁴ The Annex⁹⁵ on Telecommunication was therefore primarily focused on rectifying this problem by ensuring that suppliers of all liberalised commercial⁹⁶ services had reasonable and non-discriminatory access to public telecom networks and services for communications and commercial purposes. However, specifically because very few countries showed willingness to open their markets to basic services whether to domestic or foreign competition, voluntary negotiations took place to try and rectify this problem. Not surprisingly, the source of the problem rested with the MFN exemptions as countries could list the market access limitations as reviewed above. The source of conflict was therefore that countries with closed markets could list market access limitations while having access to other open markets. As an indication, initially only 48

⁹⁴ The Schedule of commitments has its own system of classification for distinguishing services. VANS include: e-mail; voice mail; online information; facsimile and database retrieval; electronic data interchange; enhanced facsimile services (including store and forward, store and retrieve fax); code and protocol conversion; online information and/or data processing (including transaction processing).

⁹⁵ For a concise history of the Annex on Telecommunications, see: Tuthill, L. (1996) "Users Rights? The Multilateral Rules on Access to Telecommunications" *Telecommunications Policy*, p.90

⁹⁶ This includes all services be they financial or any other service as falling within the GATS. See section 3:b and 3:c of the Annex.

governments were prepared to schedule access to basic services (Bronckers & Larouche, 1997). To this end, a further transaction cost was needed, the aim being to ensure that all members participated in the process. A set of regulatory principles (RP)⁹⁷ crafted by the USA and Canada were therefore designed to limit problems with market access. The guidelines amount to a framework for designing national regulatory rules and institutions to ensure some degree of domestic compatibility with the rules of the GATS.

Simply put, the legacies in monopolies in telecom industries creates complexities for the introduction of competition in a market that has structural advantages for dominant players. This advantage arises when liberalisation occurs from a status quo where the former monopoly, as a dominant player, has an established network in place, an existing and often apathetic customer base and political access to policy processes. As shall be evidenced in chapters 5 and 6 these factors acted as key advantages for the main telecom provider in Kenya. Thus, the RP was seeking to curb these so called incumbent advantages, as, if not carefully monitored, would result in the monopoly of engaging in a variety of strategies to delay or even refuse access to facilities and interconnection requests by new entrants, promote unfair cross-subsidisation between services and engage in predatory behaviour (Ayogu & Hodge, 2001). Bronckers & Larouche (1997) confirm the **RP as further institutional rules seeking conformity and reducing transaction problems by creating the requisite safeguards in domestic law for market access and foreign investment commitments and ensuring that the non-compliance of these rules at the domestic level becomes challengeable through the WTO Dispute Settlement System.**

The main components of the RP are outlined below and further detailed in appendix C, which shows Kenya undertakings of the RP. Structurally, the six principles are divided into six sections. All underscore the importance of transparency and non-discrimination

⁹⁷ Reference Paper on Regulatory Principles Used for Consideration as Additional Commitments in Offers on Basic Telecommunications, WTO Negotiating Group on Basic Telecommunications (April, 1996), Online: <http://www.wto.org/wto/english/tratop_e/serv_e/telecom_e/tel23_e.htm> {RP}

in regulation. The first two apply to regulation of ‘major suppliers’, while the remaining four pertain to general regulatory issues. A ‘major supplier’ is defined as one that can materially affect the terms of participation (having regard to price and supply) in the relevant market for basic telecom services as a result of its position in the market, or its control over ‘essential facilities’⁹⁸ (GATS, RP). Proceeding with this clear understanding of the monopoly legacy, the RP’s six key principles articulate a number of safeguards that attempt to prevent anti-competitive behaviour and ensure fair regulation. In many ways, as noted in chapter 1, these principles are drawn from the existing best practise in telecom regulation mainly from western countries such as the USA and serve as the minimum basic requirements for any regulatory reform project.

The RP⁹⁹ commits those members who signed to:

- Establish competitive safeguards to prevent anti-competitive practices, For example: major suppliers using information gathered from competitors with trade-restricting results
- Provide for interconnection: PTOs are required to provide (non-discriminatory) market entrants with interconnection at any technically feasible point in the network while ensuring that costs are limited and where possible unbundled
- Apply USO in a neutral and transparent way: services are to be administered in a transparent, non-discriminatory and competitive neutral way
- Make licensing criteria publicly available: where licences are needed, information and decision making procedures are to be transparent

⁹⁸ Essential facilities are defined in the RP as those of a public telecom transport network or service that are exclusively or predominantly provided by a single or limited number of suppliers, and cannot feasibly be economically or technically substituted in order to provide a service.

⁹⁹ At the time, 57 countries made full commitments while 63 countries in accordance with Article XVIII of the GATS, adopted these pro-competitive common regulatory principles. See www.wto.org

- Establish an independent regulator: they should specifically be separate from the actual suppliers and employ impartiality in all cases.
- Allocate scarce resources fairly: eg allocate frequencies in a timely and transparent manner (WTO, 1996).

In sum, the principles require that national governments do not engage in historical practices common to telecom monopolies by virtue of their position in the market, such as anti-cross-subsidisation and unfair interconnection fees. This is to be effected through creating appropriate regulatory institutions that provide for a separate regulator independent from the provision of services. Notably, and recognising the historical process of most countries' transition from monopoly to competitive service provision and accommodating the myriad ways in which such institutions might be designed, the requirement for independence extends only to suppliers of basic services, and is silent on the need for autonomy from government. This is particularly important to note, as the study argues in chapter 5 that the line between major suppliers and government blurs in Kenya where the latter retains majority ownership of the former and where neo-patrimonial tendencies in management tend to exacerbate the relationship between the incumbent and the Government.

Nonetheless, the RP, as a starting point for approaching liberalisation, recognises the tendency for existing monopolies to dominate their markets and hence seeks to provide measures to limit the incumbent's position in the market. It is for this reason that the widespread adoption of the RP is arguably the most important lubricant to the mechanics of the GATS and the realisation of the objectives of telecom trade. It is also significant for its role in altering the framework for co-operation. Drake and Noam (1998 p.33) summarise the paradigm shift as follows:

the incorporation of regulatory principles into a trade policy framework was a remarkable achievement. After all, the entire history of global telecommunications has involved states regulating their national systems as each saw fit. The instruments of the international regime

negotiated in the ITU positioned sovereignty as an overarching principle, and governments sought to insulate the markets from foreign influence. ...With the shift to a trade framework of global governance, the new forms of international service delivery require what have been called beyond-the border and deep integration measures...Members have bound themselves to make their domestic regulatory institutions and rules consistent with multilateral trade disciplines and transnational market forces.

As is evidenced in the next section, new service negotiations were introduced to accommodate developing countries which had made minor changes in their telecom sectors under the initial GATS agreements. Notwithstanding the stringent measures that were developed, it was obvious that controlling domestic environments in developing countries would prove more difficult. In part, the new service rounds were specifically incorporated to find solutions for developing country states and, in turn, to provide credibility to the WTO trade process. By locating the discussions in the context of developing countries the following section examines how the negotiations of the GATS sought to incorporate agreement from developing country states and thus create a transaction cost.

4.4.2 New Service negotiations: Doha Development Agenda (DDA) and the ‘aid-cartel’

Article XIX of the GATS embodies a commitment by member states to progressively liberalise trade in services through subsequent negotiations. The first round known as the Doha Development Agenda (DDA) was launched in Qatar in November 2001¹⁰⁰ and for the first time placed developing country interests at the centre of multilateral trade negotiations. These arrangements were not meant to be static with the latest rounds of taking place in Hong Kong SAR in December 2005 and subsequent meetings scheduled

¹⁰⁰ WTO, Ministerial Declaration, Ministerial Conference, Fourth Session, WT/MIN(01)DEC1, 20 November 2001, Adopted on 14th November 2001. Online: www.wto.org

for January 2006.¹⁰¹ In terms of telecom services, the DDA simply seeks to reaffirm the already existing guidelines of the GATS DDA.

One significant issue which emanated from the Doha rounds is important to this study, namely: the continued acknowledgment of the relative position of strength possessed by developing countries and the concurrent constraints faced by developing countries such as those in Africa. For these reasons, the Doha Ministerial Declaration reaffirms the WTO's commitment to differential treatment for developing countries and least developing countries.¹⁰² The architecture of the WTO and its various agreements repeats throughout its texts the importance of acknowledging the needs of developing countries (who form the bulk of the number of members in the WTO) while proceeding with progressive liberalisation. The second paragraph of the Preamble to the GATS (WTO, 1994 "GATS Objectives, Coverage & Discipline") states:

*Wishing to establish a multilateral framework of principles and rules for trade in services with a view to the expansion of such trade under conditions of transparency and progressive liberalisation and as a means of promoting the economic growth of all trading partners **and the development of developing countries** {emphasis added}*

Additionally, Articles IV.1, IV.5 and IX of the Marrakesh Agreement to establish the WTO, speaks of the need to be mindful of the increased importance that members attach to the participation of developing countries and the need to ensure that the system fully responds to the needs and interests of all participants. In response to this need, it was recognised that developing countries, and more so those from Africa, faced major hurdles in realising the potential offered by increased trade. Most notably, three main issues were identified 1) the need for increased capacity, 2) the need for investment and economic

¹⁰¹ The WTO Ministerial meeting in Cancun, Mexico, in September 2003 was considered a failure due to lack of agreement from rich nations to support the needs raised by developing countries. On August 1st, 2004, the WTO General Council put the Doha Development Agenda back on track.

¹⁰² The WTO separates developing countries from least developing countries. Kenya, according to the WTO, is classified as a developing country.

stability and 3) the need for infrastructure. Moreover it was argued that to reach the MDGs,¹⁰³ growth was to be accelerated through the liberalisation of trade services and goods (WTO, 1994).¹⁰⁴ In this light, it was argued that aid for trade, which comprises technical assistance, capacity building, institutional reform, investments in trade related infrastructure, and assistance to offset adjustment costs, such as fiscal support to help countries make the transition from tariffs to other sources of revenue become a key part of the negotiation. As noted earlier in this chapter, key in this framework was the creation of the ‘aid-cartel’ which sought to provide assistance to developing countries¹⁰⁵. Together both these institutions combine resources from various multilateral institutions and include the World Bank, IMF, United Nations Conference on Trade and Development (UNCTAD), European Commission (EC), United Nations Development Program (UNDP), ITU and WTO. This in respect, as argued in chapter 2 forms an ‘aid-cartel’, in which all fund agencies co-operated to release funds within the agenda of helping developing countries liberalise their markets. Box 1 (IMF & World Bank 2005)¹⁰⁶ below summarises the key aims of the IF or what this study terms as the ‘aid cartel’.

¹⁰³ See supra note 82

¹⁰⁴ WTO, WT/MIN(01)/DEC/1

¹⁰⁵ The WTO separates developing countries from least developing countries. Kenya, according to the WTO, is classified as a developing country

¹⁰⁶ Aid for Trade: Competitiveness and Adjustment, Joint Note by the Staffs of the IMF and World Bank, April 12th 2005. See <http://www.imf.org/external/np/pp/eng/2005/041205b.htm>

Box 1: The Integrated Framework

“The Integrated Framework for Trade-Related Technical Assistance (IF) brings together multilateral agencies (the IMF, ITC, UNCTAD, UNDP, WTO AND World Bank) and bilateral and multilateral donors to assist least-developed countries (LDCs). It has two objectives; (i) to integrate trade into national development plans such as the Poverty reduction Strategies (PRS) of the LDCs; and (ii) to assist in the coordinated delivery of trade-related technical assistance in response to needs identified by the LDCs. The IF is built on the principles of country ownership and partnership and is financed from a Trust Fund comprising two main “Window/”

The first step in the IF process is a Diagnostic Trade Integration Study (DTIS), financed under Window 1. This contains the main elements of a trade integration policy framework and an action matrix that serves as the basis for delivery of trade-related technical assistance and identifies other main needs for investments to address trade integration. A special facility (Window II) was created in May 2003 to finance high priority projects from the action matrices.” (IMF & World Bank, 2005)

The ‘aid-cartel’ was therefore institutionalised within the WTO negotiations and specifically through the Doha round. While the different roles and the relationship of the IMF, WTO and World Bank were discussed earlier in this chapter, of particular importance is their role in the DDA. In this respect, the IMF and the World Bank took a lead role in DDA in two main areas: first, helping to catalyse a Doha Round outcome that promotes developing country objectives of poverty reduction and growth to the maximum extent. In this area, the joint IMF-World Bank initiatives have particularly been prominent, including communication by the two institutions on a joint paper on market access. Second, helping developing countries to integrate pro-poor trade policies into their national development strategies with specific emphasis on trade reform, capacity building and structural adjustment programmes (IMF, 2004).

To this end, a ‘New Strategy for WTO Technical Corporation for Capacity Building, Growth and Integration’ was adopted to support domestic efforts for *mainstreaming trade into national plans for economic development and strategies for poverty reduction* (WTO Ministerial Declaration, Para. 38). The stated aim of the technical assistance programme is

*to assist developing and least-developed countries....to **adjust to WTO rules and disciplines**, implement obligations and exercise the rights of membership, including drawing on*

the benefits of an open, rules-based multilateral trading system (ibid, paras 21 and 39-41)
{Emphasis added}

Notwithstanding the content and quality of the technical assistance rendered, or differences in expectations by developed and developing countries of its meaning¹⁰⁷, it is however argued in chapter 7, that while the GATS telecom instruments afford developing countries such as Kenya, effective tools with which to balance competing needs to participate in telecom reforms, the ability to do so is entirely dependent on the increasing capacity of countries. This applies to both human and capital capacity resources. In particular, it is argued that rather than provide a means in which to enhance reforms, the aid for trade mechanism under the ambit of PRGF provides more stability for neo-patrimonial practises in Kenya. Future agreements and negotiations thus build on this acknowledgment. A summary of the progress to date on the ‘aid for trade’ collated from various sources is set out below.

¹⁰⁷ For example, the COMESA Ministers have defined capacity building in the context of negotiations of trade agreements. Online at: <http://www.comesa.int>.

- The Organisation for Economic Co-operation and Development (OECD) through its Development Co-operation Directorate (DAC) database indicates that resources devoted to trade-related capacity building and technical assistance increased significantly in 2003. Between 2001 and 2002, trade policy and regulations support increased from US\$ 660 million per year in 2001-2002 to almost US\$ 1 billion in 2003. Commitments for trade development activities increased from US\$ 1.35 billion per year in 2001-2002 to US\$ 1.8 billion in 2003. (OECD website, 2005)¹⁰⁸
- The World Bank has scaled up its activities, with lending for trade increasing from US\$ 0.8 billion in the financial year (FY) 1998-2000, to US\$ 1.4 billion in FY 2001-2003, to a projected US\$ 3 billion in FY 2004-2006¹⁰⁹. (IMF & World Bank, 2005)
- So far there are 28 countries out of the 39 identified countries in Africa receiving IF assistance and 4 countries receiving IDA financial assistance. (WTO Secretariat, 2005, “Integrated Framework”)
- According to the World Bank DDA report, annual development aid is expected to increase by US\$ 50 billion between 2005 and 2010. (IMF & World Bank, 2005)

It is against the above background that it is argued that developing countries such as those in Africa acceded to the GATS negotiations specifically the RP. Kenya is one GATS signatory whose actions thus far indicate a wholesale identification with this approach ie. the GATS telecom framework in totality as discussed in this chapter. It is argued therefore that the GATS framework and the donor role in ensuring implementation have institutionalised the ‘aid for trade’ relationship. As will be depicted in the following chapter, Kenya has continued to rely on donor funding since the early 1970s. Through the guise of development and reforms, the ‘aid-cartel’ has progressively transformed itself into a stable international regime, with its norms, institutions and myths. The GATS

¹⁰⁸ Facts pulled out from a range of highlights in the website. In particular see database containing information on funding: http://www.oecd.org/topicstatsportal/0,2647,en_2825_495656_1_1_1_1_1,00.html

framework therefore provides a unique study in which to understand how neo-patrimonial states have adjusted themselves to the new institutionalised framework in the telecom sector.

4.5 Conclusion

The aim of this chapter was twofold. First, it sought to show the role played by the WTO within the broader ambit of the ‘aid-cartel’ and second, it sought to understand how the GATS instruments act as transaction costs in structuring the conditions and behaviour of members in the telecom sector. The chapter described the GATS framework showing the primary aim of the GATS as a credibility tool to reduce and where possible, eliminate measures that prevent services from being freely provided across national borders or where market access has been granted, to prevent measures that discriminate against foreign owned companies providing services. In doing so, it has located the argument that committing to the GATS was both a credibility issue for all members and a transaction cost, which sought to structure the ‘rules of the game’. The relevance of this aspect of the GATS becomes more evident in the context of Kenya as discussed in chapters 5 and 6.

Drawing on the broad principles of NIE and specifically the concept of transaction costs, this chapter has shown how the GATS sought to structure market uncertainty and issues of opportunism. While the complex way in which this was structured was not detailed, the broad principles of the GATS such as the MFN; allowing countries to schedule their commitments and the RP, provide a basis from which to understand the value of the GATS as a transaction tool.

Locating the evolution of Kenya’s telecom sector within its historical neo-patrimonial context, the following chapter begins the analysis by showing how Kenya’s historical patrimonial relationships, as well as its relationship with the international community,

¹⁰⁹ Trade related lending here refers to the trade theme component of loans (ie., those components with a significant impact on trade).

have come to shape the telecom sector. I emphasise the role played by the IMF, World Bank and WTO in creating an institutionalised system of 'aid for trade' in Kenya and which structures how Kenya relates with these institutions in the international arena.

KENYA: THE NEO-PATRIMONIAL STATE AND TELECOMMUNICATIONS



Figure 2: Map of Kenya (CIA Fact book, 2005)

As some day it may happen
That a victim must be found,
I've got a little list,
I've got a little list
Of society offenders
Who might well be underground
Who never would be missed
Who never would be missed
There's the highly paid expatriate
Who tells us we're all wrong
And the biased journalist
I've got him on the list!
And the expert who knows Africa
But is never here for long
He never would be missed,
He never would be missed.
Then the idiot who praises
With enthusiastic tones
Everything that's foreign
Every country but his own

Gilbert, W. S. (Writer) & Sullivan, A. (Music) (1885).
The Mikado. Performed by the Phoenix Players, Nairobi (1991).

Introduction

The purpose of this chapter is to set out the history of telecom reform in Kenya. Drawing on the framework developed in chapter 2 on neo-patrimonial states it applies this to the Kenyan state, locating how the Kenyan economy has developed within the broader political transformation from colonisation to independence. This chapter provides a canvas upon which the significance and distinctiveness of Kenya's telecom reform process is sketched and is crucial to understanding the themes of both the importance of credibility – enhancing measures to attract foreign aid for the Government of Kenya and for assessing compliance with Kenya's GATS commitments. It is also important to understanding the central place that redistributive policy goals (such as universal service) hold within the broader political and economic environment.

The chapter is discussed within two sections. Part I provides an overview of Kenya as a neo-patrimonial state. It examines the evolution of the economic sector in Kenya, the links to the 'aid-cartel' and, focuses on the political adjustments that state elites have made in the evolving development of Kenya since independence. I show that the need to reform was pegged on the aid-dependency relationship that Kenya had with IFIs. In addition, I show that this legacy of economic development in Kenya is both cause and effect of its historical political context. The neat separation between economic and political growth is artificial but necessary for narrative purposes. Part II focuses on the telecom sector. The analysis is organised through a periodisation of events in both the political and economic context. While this at times may present challenges for the reader, as political and economic developments overlap one another and, in addition, that telecom reform takes place in both contexts, there has been an attempt made to flag this where it occurs.

Part I: Context and Perspective

5.1 Overview

Touted as the 'gateway to Africa' and the political and economic hub of eastern Africa, Kenya borders the Indian Ocean to the east, Ethiopia and Sudan in the north, Uganda to the

West and Tanzania to the South. The population was estimated at 28.7 million in the 1999 census and was projected to have grown to 31 million in 2002 (RoK, 2002-2008). Like most of the landscape of the African continent, Kenya is ethnically diverse, with at least 42 distinct main tribal groups¹¹⁰ (Okumu, 1970). As discussed in chapter 2, ethnic identification is very strong in Africa, and this is no less so for Kenya where, as Collier & Hoeffler (2001) observe, tribe and kin groups are the most powerful levels of social identity. The tribal factor in Kenya dates back to British Colonial rule, which subdivided the Kenyan landscape into districts, locations and provinces based on tribal regions and today remains the same. The concept of city and rural area delineates Kenya's socio-economic stratification with the capital towns of the provinces growing to cities and has significant ramifications in the Kenyan political landscape as shall shortly be explained.

While historically Kenyan communities were religious with traditional beliefs based on the relationship between God and nature, the colonial period brought Christianity to the region. Today, 80 percent of the Kenyan population can be classified as Christian (the majority of whom are Catholic) and 20 percent as Muslim (RoK & UN, 2005). This difference can mainly be explained from a historical perspective. The coastal region is mainly Muslim with the influence of Arabic and Portuguese settlements during the 14th to 17th century. It was not until the late 18th and early 19th centuries that the first British settlements were established in the coastal town of Mombasa.

The issue of class was not evident during pre-colonial times, this changed after colonialism and independence (Homlquist et al., 1994). According to the Kenya Economic Survey, almost one in every two Kenyans is poor and three quarters live in the rural areas of the country (RoK, 2001). Of the poor, subsistence farmers account for 47 percent while the remaining 46 percent are agricultural farmers. In spite of this, most poverty reduction interventions have not managed to bring an end to poverty and its manifestations (Omosa, 2002). The HDR (UNDP, 2005) thus ranks Kenya's Human Development Index (HDI) as 154 out of 177 countries. In terms of education, Kenya boasts one of the regions top

¹¹⁰ This excludes sub-groupings within each main tribal group.

educated population though this only amounts to 40 percent of its population (Alila & Omosa, 1999). The official languages are Kiswahili and English though tribal languages remain prominent within the communities and geographical boundaries of tribal groupings. Kenya became a multi-party state in 1991. The then ruling party won the two subsequent elections in 1992 and 1997. However, in December 2002, a coalition of Opposition parties, the National Rainbow Coalition (NARC), won the elections and ushered in a new administration that vowed to rid the country of poor governance.

Drawing on the framework of neo-patrimonial states in African countries developed in chapter 2, the following section seeks to provide evidence of Kenya's neo-patrimonial structure. My starting point draws on the assumption made in chapter 2, namely; that the Kenyan state is neo-patrimonial in which Kenyan elites utilise forms of clientelism to maintain their political authority and positions.

5.2 Political development

Kenya was a colony of Britain between 1895 and 1963 and the country inherited an economy whose structure and direction were shaped by British colonialism. During this period, social and economic policies heavily favoured British interests, with the country mainly managed as a source of raw materials for British industries and a market for their products (Brett, 1973; Mwege & Ndungu, 2004). As briefly noted in chapter 1 and discussed further in chapter 2, the neo-colonial context of Africa is situated within the transition from colonisation to independence and the concept of nationalism. The fact that this transition was not undertaken properly is apparent by the fact that social, political and economic structures of colonisation were retained at independence in Kenya. After independence, the new government moved quickly to monopolise the concept of nationalism, making certain that only institutions authorised by the state were allowed to pursue so called nationalist themes. As part of that process, Kenya's first President, Jomo Kenyatta, implored white settlers to remain in Kenya and Kenyans were told to forgive them but not to forget (Kimenyi, 2002). During the Kenyatta regime (1963-1978) no formal attempts were made to overhaul the colonial institutions and structures or empower popular African constituencies. Just as the colonial edifice had promoted ethnicity in its unequal development approach in

governance and ethnic exclusivism, the Kenyatta era further politicised ethnicity. The democracy eulogised at independence was crafted on abstract Western principles but operationalised ethnically in Kenya under Kenyatta. As noted by several policy analysts in Kenya, the state was constructed as an exclusive entity whose structures were utilised by various class and ethnic interests to enrich themselves at the expense of greater Kenyan society (Barkan, 1984; Makau wa Mutua, 1994; Cohen, 2001; Murunga, 2002). There was also apparent Kikuyu nationalisation (the President's ethnic community) at the expense of the greater Kenyan society. This was the beginning of various ethnic alliances and class formations not only for attention but also to reap maximum benefits through careful and deliberate plundering of the economy (Murunga, 2002).

The Kenyatta regime had correctly identified illiteracy, poverty and disease as the country's foremost enemies. At the level of political rhetoric, these were verbally combated through public '*harambee*' (meaning to gather) rallies which were organised to raise funds for illiteracy, poverty and disease. Although '*harambee*' was an innovative approach to tackling local problems, it was abused and manipulated to serve personal whims and interests of ethnic bossmen. Harambee served the interests of patronage relationships because through them the ordinary citizens could see who contributed more money at public rallies (Murunga, 2002). The rallies therefore turned into a campaign strategy for one to ascertain their position and power, and became a tool for deciding who represented a community in Parliament. As Muruga (2002 p.92) notes *the idea of harambee soon acquired a compradorial tag and changed the role and meaning of the term MP in Kenya*. While harambee did not tackle effectively the problems of illiteracy, poverty and disease, Kenyans came to believe that the best MP was one who made more contributions during public fund raising meetings and was therefore more able to deal with society's problems.

Moreover, because Kenya had inherited the political structures of the British colonial empire, Kenya's pattern of politics mirrored this system. In the colonial Government, state administration was the focus, creating a division between urban and rural. When the Kenyan Government took over, MPs became elected members from their local tribal communities, and were expected to represent their people in the state Government (located in Nairobi).

As such, these legislators were perceived to have power because they played the unique role of linking the community to the state Government (Ndegwa, 2002). While, as Barkan (2002) points out, they may never be an important factor in the actual making of policy they often have the opportunity to affect the pattern by which resources allocated to a given problem are distributed across society, in this case the tribal communities. Subsequently, during the Kenyatta regime and into the Moi regime (1978-2002) it became fashionable to elect an MP because of her/his wealth and not on the basis of her/his ability, principles and forthrightness as a leader. Thus, as Murunga (2002) argues, it was in the interest of the incumbent governments to maintain issues of development to ensure that the patron-client network function continued to work. Thus, during the 1960s and 1970s economic resources were allocated through tightly knitted patron-client relationships. With the ascension of Moi to the Presidency in 1978, this system of competitive resource allocation became more regulated to ensure that the ruling groups won the public resource allocation game (Mwega & Ndungu, 2004). As is evidenced in the following section, between 1980 and 1990, little progress was made in terms of trade liberalisation as politics became the name of the game played between donors and political elite in order to decide what reforms would be introduced.

Shortly after taking over as President in 1978, Moi introduced a programme to de-Kikuyunise the Government and its supporting structures. During the Kenyatta years, members of certain ethnic groups had dominated the Government, notably the Kikuyu ethnic group of which Kenyatta was a member. Moi's intention was to reduce the influence of the Kikuyu on the Government and allow members of his own ethnic group to take over positions vacated by Kenyatta's men. This process was a gradual one and included questioning the integrity of senior Kikuyu politicians and civil servants to force them to resign (Throup & Hornsby, 1998). The Kalenjinisation programme unleashed by Moi after his election as President in 1979 did not go unopposed. Often violent and bitter struggles erupted between the Kikuyu and Kalenjin over the allocation of resources. For example, Murunga (2002) notes that during Kenyatta's regime, land was allocated in the Rift Valley to the Kikuyu community. This land was considered ancestral land by the Kalenjin and therefore convinced many Kalenjin and other tribal groups that the most important post-

independence struggle was to resist Kikuyu domination. The Rift Valley issue continues to remain an important policy issue in Kenya. In fact, in October 1991, violent land clashes erupted between the Kikuyu and Kalenjin. There is evidence to suggest that the 1991 land clashes were orchestrated by the Government at a time in which it was under immense pressure to liberalise the economy and introduce multi-party elections.

Multi-partism was introduced in 1991 and the Opposition groups ran against Moi for Presidency. However, Moi won elections in December 1992. The votes cast largely followed ethnic lines with those communities who supported Moi giving him their vote. Despite having an Opposition party, Opposition leaders also remained essentially ethnic with the primary interest of capturing the Government for the benefit of community members (Muigai, 1993). Thus, none of the Opposition parties presented the Kenyan people with a genuine alternative agenda for social, political and economic transformation. Nor did any of them effectively articulate to the people of Kenya how they were going to deal with poverty, marginalisation and deteriorating economic conditions. Instead of providing the country with a genuine reconstruction plan, the Opposition spent most of its time fixated on ousting Moi from office under the popular slogan 'Moi Must Go'. Professor Julius O. Ihonvbere refers to this as the *abnormal fixation on the incumbent leaders*. (Ihonvbere, 1997, p.5)

The telecom reform process enters into the political scene at a time when President Moi was getting ready for elections in 1997. As noted by van de Walle (2001, p.274), *patterns of non-reform and reform have to be understood in the context of African rulers attempting to protect and adopt their mechanisms for rule to the increasingly stringent fiscal situation and the exigencies of the international donors*. As shall be shortly depicted, Moi's bid for his re-election in Government was based on the promise of sweeping reforms in telecom given the pressure from the international community to change the governance structures that had been shown to slow down the progress of the economy (Nasongo, 1993).

In sum, as has been evidenced in this section, the political development of Kenya is predicated on historical neo-patrimonial roots. Locating the discussion within the theme of co-dependency developed in chapter 2, the following section seeks to confirm the second

assumption made in chapter 2, namely that the Kenyan state is co-dependent on the international community for financial assistance.

5.3 Economic development

After independence, Kenya like most African countries tended to emulate development strategies of western industrialised countries. The policy stressed the role of major agents of change: entrepreneurship and capital accumulation (Holmquist et al, 1994). In a sense, the role of the market mechanism was believed to work in order to transfer entrepreneurial talent or attributes from the developed countries to Kenyan entrepreneurs. Second, the emphasis was placed on a massive injection of capital into the economy to accelerate the formation of strong market links both in product and financial markets which was to accelerate the pace of economic development (Mwenga & Ndungu, 2002). Because the pre-colonial economy was mainly a subsistence one, after independence Kenya's 'white highlands' were allowed to grow cash crops allowing agricultural growth to expand rapidly. Between 1963 and 1970 most of the restrictions to farming by Kenyans during the colonial period were lifted and farming land transferred from Europeans to Kenyans (Omosa, 2002; Alila & Omosa, 1999). There was also an attempt to push production to small-holder farmers who made up the majority of the population. But the small-holder population has some peculiar characteristics in Kenya. Over 80 percent of the population in Kenya live in rural areas and almost 70 percent are to be found in small holdings. The integrated rural survey of 1979-1983 shows that about half of the small-holder population were less than 15 years old and the other half were over 50 (RoK, 1979-1983). While rural farming was encouraged, those who engaged in it faced volatile incomes as a result of volatile export prices, weather cycles and falling terms of trade. All these factors combined to make rurality a major consideration for policy development in Kenya as shall later be observed in part II of this chapter.

Nonetheless, Kenya experienced a relatively stable economic environment in the 1960s and early 1970s, with a GDP growth rate of 6.5 percent per annum between 1964 and 1971 (Nasibi, 1992). The situation changed rapidly however between 1970 and 1980 when the economy entered into a phase of macroeconomic instability and stagnating incomes. In 1971

Kenya experienced its first major payments problems. This was followed by the oil crisis in 1973/74. The Government reacted to this crisis by tightening the trade regime and seeking external finances whose general policy conditionalities were spelt out in the 1974-1978 development plan (RoK, 1974-1978) and the 1975 sessional paper No. 4 on Economic Prospects and Policies (RoK, 1975). Thereafter the country opted for direct controls in its economic planning.

The introduction of SAPs that took place in Africa as discussed in chapter 2 can be traced to the late 1970s and early 1980s in Kenya (Kabubo-Mariara & Kiriti, 2002). By 1980 Kenya had received its first loan from the IMF to finance structural changes in the industrial sector, promote efficient use of external resources and enhance the competitiveness of public investment (ibid, 2002). Nonetheless as Mwenga & Ndungu (2002), note that these loans and policies were geared towards enhancing competition, whereas market reforms started in the 1980s and with a slow pace, they were not geared towards institutional reform until the late 1980s early 1990s. During this period (1980-1990), trade liberalisation commenced but with little success because of the lack of coordination with macroeconomic policies (ibid, 2002). The logical conclusion by the World Bank and the IMF was that *if Government could not make enterprises run efficiently, and if it could not afford to subsidise operations, it would have to divest* (World Bank, 1992). The Working Party on Government Expenditure in 1982 had argued that Kenya's economic crisis was attributable to the proliferation of commercial activities by Government, which diverted scarce management talent away from the central function of Government. The solution then required a *firm decision by Government to focus public expenditures and management talent on the essential functions of Government in order to ensure that they are performed efficiently and that available resources are used for essential and productive services* (RoK, 1982). In order for Government to acquire a more constructive role, it was recommended that *...Government investment should be reduced to a minimum, some existing investments disposed of and those parastatals and other investments considered essential be operated efficiently and more effectively by Government...* (RoK, 1982 p.41). The process received more lip service than action and *the dilution of the privatisation imperative was reflected in the virtual absence of genuine initiatives* (Adam, Cavendish & Mistry, 1992 p.337).

Between 1986 and 1991, SAP with various sectoral loans were directed towards reforms as follows: industrial sector (1988), financial sector (1989), agricultural sector (1990), and export development (1990 and 1991) (World Bank, 1992). These loans had little impact with slow growth rates registered in all sectors attributed mainly to weak reform efforts on the part of the Government. As noted in chapter 2, there are divergent views on the impact of reforms on poverty and growth in Africa. In Kenya critics have argued that economic reforms have contributed to even worse economic and social outcomes, only exacerbating the conditions that lead to poverty and vulnerability (Mwega & Ndungu, 2002; Murunga, 2002; Ndegwa, 1998). Others maintain that while macroeconomic adjustment programmes have not been directly deleterious to the poor, they have not proved sufficient to generate substantial economic growth and have thus failed to contribute in a large way to poverty alleviation (Sandbrook, 1991). In Kenya the failure of the SAP was later attributed to weak institutions (World Bank, 1992; 1994) and in 1990, the push for institutional reforms had begun. Several types of reform programmes were therefore implemented and include: Institutional Change Oriented Policy Reforms, Parastatal Reform Programme, Public Sector Reform Programme and Financial Liberalisation Programme (Kabubo-Mariara & Kiriti, 2002). This period began a phase of dependence on financial aid for development, with aid pegged on the degree of institutional reform. As discussed below, the role of foreign aid and the conditionality programme attached to foreign aid have continued to dictate Kenya's reform process.

5.3.1 The role of foreign aid in Kenya

Between 1970 and 1999, the flow of donor funds to Kenya averaged about 9 percent of GDP, accounting for about 20 percent of the annual Government budget and financing slightly over 80 percent of development expenditures (OECD & AfDB, 2005). Though aid flow to Kenya has increased over time (from an annual average of US\$ 205 million in the 1970s to slightly over US\$1 billion in the 1990s before the standoffs with the donor community this flow has not been smooth (RoK, 1975; RoK, 1998). Donor assistance in Kenya comes in two forms: grants (recorded as revenues) and loans (recorded as expenditure). Donors have two broad options of disbursing their funds, as Appropriations-in-Aid (A in A) or as revenue. A in A is the most popular form of aid within the donor

community in Kenya since it gives them direct control of funds. Under the revenue disbursement system, donors disbursed funds directly to the Treasury through special accounts at the Central Bank of Kenya (either in advance or on a reimbursement basis). The donor community avoids this system as it has been open to abuse as a result of weak accounting systems at the Treasury and has led to corruption and misappropriation of funds. The result of this has been the accumulation of donor funds in special accounts. An estimated half of the committed programme funds are disbursed but most of the external assistance lapses before the accounts are fully drawn.

The main donors to Kenya are bilateral donors with key sources of funding (mainly project and technical assistance). The UK was the major source of foreign aid in Kenya until the 1980s, when Germany, the Netherlands, Sweden, Denmark, Japan and others significantly increased their contribution. Japan has since become a major bilateral donor to Kenya. Since the 1980s however, multilateral sources have increased in importance with a shift in emphasis from project aid to programme aid. The major donors now include the World Bank, IMF, EU and the OECD-DAC. Despite being among the first African countries to receive structural adjustment funding from the World Bank and later the Enhanced Structural Adjustment Facility (ESAF) loan from the IMF, Kenya has experienced two major aid freezes. These freezes occurred in 1992 and 1997/1998, and a minor suspension in 1982 due to issues of corruption and dissatisfaction with the Kenyan Government's implementation programme (IMF, 2002). It is worth noting that although major donors withheld their funds to Kenya after November 1991, aid for ongoing projects, technical assistance and emergency relief (humanitarian aid) from other donor agencies continued to flow as before. After three years of successful implementation of donor conditions, more donor funds were released. Unfortunately, in 1996/1997, the Government backtracked on its reform agenda, which resulted in a new standoff between the donor community eventually in the suspension of funds from the IMF, World Bank and the African Development Bank (AfDB) (ibid, 2002).

Attempts to end the stalemate between the Government and the donor community heralded another era of intensive lobbying. With the help of the World Bank, a team of experts from

the private sector and international organisations (popularly known as the economic recovery team or the 'Dream Team') were recruited into the civil service to initiate the economic recovery and ensure economic reforms and good governance at Treasury. In response, the IMF and the World Bank agreed to release the funds initially cancelled in 1997/1998. Six months later however, in December 2000, funds amounting to US\$198 million were withheld when the Government backtracked on the agreed conditions. In addition, other lending institutions (the World Bank, EU, ADB and Department for International Development of the United Kingdom (DFID)), withheld about US\$300 million in budgetary support (RoK, 2005). Between 2000 and 2005, donor aid has been uneven only resuming when there is significant progress in the fulfilment of donor conditions. While the subject of foreign aid is beyond the scope of this study, Njeru (2003) confirms through his analysis of foreign aid and public expenditure in Kenya that the country's economy is sustained to a large extent by its dependence on foreign aid. In addition, his study confirms that the relationship between the share of Government expenditure and GDP is based on foreign aid 'income'.

5.3.2 The conditions: the privatisation programme

The lack of credibility that African nations such as Kenya exemplified in the 1980s in part led to the conditionality programme. Before the 1990s, very few government reform programmes had been implemented. In fact, as Elbadawi & Helleiner (2004) note, the IMF was relatively inactive as a source of balance of payments for finance. And while the World Bank provided support for the SAPs, these were not pegged on conditionalities. However, during the late 1980s and early 1990s the IMF and the World Bank institutionalised the conditionality programme as a means to force African governments to adhere to commitments they had made (Mkandawire & Soludo, 2003). Under the conditionality programme, key conditions for aid were pegged on reform and governance as noted in chapter 2. In Kenya the key conditions for aid were pegged on the privatisation programme and begun in 1991 under the Public Enterprise Reform Programme (PERP) (RoK et al., 1996). The main objective was encouraging private sector development, improving economic efficiency of state-owned enterprises (SOEs), reducing the drain on Government

budget by loss-making SOEs and raising revenue for Government. The key areas earmarked for privatisation and for aid conditionality were key public institutions, namely: Telkom, Kenya Railways Corporation, Kenya Ports Authority and KenGen - Kenya's electricity company.

These conditions thus began to shape not only the nature of what took place in Kenya but also the nature of decision making in Kenya. Government planning as shall be evidenced was based on calculations of how much money would be received and what conditions needed to be seen to be fulfilled in order to receive aid. Nonetheless, as van de Walle (2001) points out, neo-patrimonial rulers such as those in Kenya could not have resisted pressure to reform had they not had the assistance of the international community. As shall be shortly evidenced, Kenya received large amounts of financial aid with conditionalities of reform but was still able to detract from actually fulfilling the conditions.

5.4 Summary

While a discussion on Kenya's neo-patrimonial state in relation to the framework developed in chapter 2 is further borne out in chapter 7, two key issues require mention here. First, from the analysis in this chapter, it is obvious that the political and economic sector of Kenya is closely intertwined with patrimonial tendencies. Clientelist practises thus spill over from the political to the economic sector. Second, the 'aid-cartel' through its conditionality programme has generated a norm in which little actual progress on policy reform has to be achieved to remain in good standing of the regime. As was evidenced in this section, the flow of aid between 1970 and 1999 accounted for over 20 percent of Kenya's budget. Thus the rhetoric of 'aid based on condition' has simply facilitated a norm that pressure to reform is not really contingent to aid flow. Focusing specifically on the telecom sector, the remainder of the study locates the above argument within Kenya's telecom reform process and the economic and political events happening in the country which led to Kenya's accedence to the WTO GATS framework.

Part II: The Kenyan Telecommunications Reform process

Since their emergence as recognised entities, states have been concerned with their role in the international order with increasing their stature therein. Economic strength is one clear indicator of state power. To enhance their position, states throughout history have entered into legal and other arrangements to protect and further their economic interest
Celia Taylor (1997 p.775)

Drawing on the third assumption premised in chapter 2, namely that instead of committing to reforms, neo-patrimonial elites instrumentalise systems of conditionalities to evade forms of policy reforms that would dilute their control on state resources; the remainder of this section and chapter 6 presents evidence of this characteristic in the telecom sector. This suggests that an understanding of the importance and nature of the telecom sector in African countries as public institutions merits our understanding. As shall be evidenced in the remainder of the study, the telecom sector in Kenya not only provides employment for a large portion of its citizens but acts as a power base for many political elites therefore making liberalisation an issue of contestation.

While it is difficult to accurately characterise and artificially construct distinct telecom policy eras, this study classifies these periods based on a number of factors that underlie and facilitate their 'classification'. It should however be noted that there is some degree of overlap. This study therefore uses themes as a means of conceptualising the periods. While dates are provided they are only a means of indication of the period in which the events took place. The first period - colonial heritage (pre-independence to 1970) evidences the nature of the landscape of the telecom sector that the Kenyan Government inherited. Articulating the needs of the country, the second period - pressure to reform (1970-1997) evidences the initial steps towards reforms and the issues of contest between state interests and international conditions for reform that were articulated through the GATS. The third period - accession to the GATS (1997-1999), articulates the policy legislation, with the promulgation of the KCA in 1998, the establishment of an independent regulator and the licensing of telecom which afforded Telkom a five-year period of exclusivity on all basic services and supply of facilities. The fourth period – dancing to tunes, which starts in 1997 and overlaps the third, evidences the various tensions and problems of meeting the GATS

conditions. While all four periods are significant, the period – dancing to tunes, is discussed in chapter 6 as it lays out the events that took place in implementing the GATS. Appendix D provides a summary of the main events in the telecom sector in Kenya as discussed in this chapter and Chapter 6.

5.5 Overview

As noted, it is difficult to artificially construct distinct policy areas that would delineate the shifting balances from monopoly to privatisation. Running parallel with the broader political and economic transformation in the country reviewed in part I of this chapter, the process of reform in the telecom sector has evolved gradually, increasing in the late 1980s in line with international trends and technological advances. Nonetheless, viewed from a legal policy perspective, change for most telecom analysts in Kenya occurred following the enactment of the KCA. This Act constituted the framework for exclusive Government provision of all telecom services. While this study has chosen to classify four main policy periods commencing prior to independence, this is done within the context of the broader political changes taking place at the time. At the risk of repetition, this interplay is crucial to understanding the unique policy milieu that set the framework for examination of the current telecom policy and understanding its implementation. Moreover, as noted earlier, locating Kenya's telecom reform process within the broader international context of telecom reform as framed within the WTO provides the basis upon which to examine the way in which neo-patrimonial states interact with IFIs.

5.6 Colonial heritage (1895-1970)

The history of the telecom sector in Kenya can be traced back to 1895 when Kenya was part of the East African Protectorate. Records of 1895 indicate that the British East Africa Trading Company operated the telecom route between Mombassa and the then Sultanate of Witu (Encyclopaedia Britannica, 2005). The submarine cables linking Zanzibar, Mombasa and Dar es Salaam laid by the Eastern and Southern African Telegraph Company in 1888, were Kenya's earliest telecom connections to the outside world. Within the country, the construction of the telegraph network began with a 200-mile coastal line linking the port city

of Mombasa with Lamu. Further linkages to other parts of the country began in 1896 in conjunction with the building of the railway system, forming a dual 'backbone' for Kenya's telecom infrastructure. The telegraph line reached Nairobi (which later became Kenya's capital city) in 1898 and Entebbe in Uganda in 1900. In the same year 18 telephone subscribers were connected (ibid, 2005). The East African Railways later built and operated telecom facilities to the hinterland. In 1948, the East African Posts and Telecommunications Corporation which covered Kenya, Uganda and Tanzania all under British colonial control was incorporated (East African Posts and Telecommunications Act, 1951). Like all aspects of the colonial regime, any form of telecom infrastructure was constructed for the benefit of the British Government and its allies, rather than for the people of Kenya. The main purpose of the telecom infrastructure then was to facilitate communication between trading routes from the coastal region around the Indian Ocean to the hinterland.

Indeed, even with Kenya's independence from its colonial master in 1963, existing telecom infrastructure reflected British interests with access to telecom restricted largely to the main trading hubs. The main impact of this infrastructure was the creation of cities that followed similar patterns as the trade routes established by the British. Thus, although Kenya has one of the better developed infrastructures in Southern Africa (not including for South Africa), its underlying social context developed within the classification of rural and city has meant that telecom infrastructure is concentrated more in urban than rural areas.

Rurality (rural conditions in Kenya) has inherent structural challenges which impose a penalty on Government and telecom service providers to expand access to rural areas. This penalty is expressed in two ways in Kenya. First, rural areas have a lower socio-economic development and, consequently in many cases, a lower purchasing capacity for telecom infrastructure and services. Second, the nature of work in the rural areas is oriented towards farming and therefore any telecom policy would have to provide mechanisms that allow these technologies to complement rural socio-economic development and therefore benefit from both synergies. The challenge of economic and social development therefore required detailed Government policy to develop rural areas. Mantra-like, the idea of changing the landscape of rural Kenya was to be enshrined in the telecom legislation to follow and inform

subsequent policy and later amendments. Development objectives and the promotion of small and medium sized enterprises all enshrined in the spirit of 'harambee' were later to jockey for priority with more pedestrian aims often given the highest priority in western countries, such as the promotion of competition and industry stability.

5.7 Pressure to reform (1970-1990)

In 1977, telecom services which were managed under the East African Community (EAC) collapsed.¹¹¹ In response, the Kenyan Government established the KP&TC under the Kenya Telecommunications Act, which came into force on December 31st 1977. Until 1999, KP&TC was vertically integrated into postal services, telecom services and regulatory functions and operated under the traditional functions of a PTT organisation, under the full control of the Postmaster General (PMG). It was a statutory monopoly provider in the postal and telecom services.¹¹² Predictably under that structure it was a Government department with its finances controlled by the Treasury; revenue was paid into and expenses paid from the exchequer. It operated an internal system of cross-subsidies from telecom to postal services and coupled with its historical budgetary dependence on the Government, suffered from a perennial shortage of capital required for expansion. As a regulator it easily locked out competitors as it also owned the network in addition to providing telecom services. The inequity in this was manifest as it charged competitors and consumers exorbitant fees with limited regulatory oversight from the Ministry of Broadcasting and Telecommunications. All communications functions, from post, to telephone and telegraph, were owned, operated and regulated by the state. As a Government entity, Moi's regime used KP&TC to employ people from his community. So entrenched was the employment of the Kalenjin community in KP&TC that the joke was that to get good services at the KP&TC one had to speak the ethnic language of Kalenjin. Like all other public institutions, the head of KP&TC was a Presidential appointee and not surprisingly came from the Kalenjin community. On the operational side, KP&TC was heavily bloated with personnel,

¹¹¹ East African Posts and Telecommunications Act, 1951, Laws of the East African Community. For further insight see Bernard Sihanya, *Transferring and Regulating Telecommunications Technology in Kenya (1995)* (Unpublished LL.M thesis, Warwick Law School) (Given to author for review).

¹¹² Kenya Posts and Telecommunications Corporation Act, 1977.

exhibited little evidence of concern for consumer interests and was highly inefficient with long waiting lists for line installation (Sean, 2002). In addition, KP&TC, along with other parastatals, had accumulated enormous foreign debt through loans on the international capital markets to fund its network expansion in the preceding years. With the rapid decline of the Kenyan shilling in the international market in the late 1980s these debts escalated dramatically.

In spite of the problems besetting the telecom sector, Kenya's telecom capacity grew from an exchange capacity of 88,000 lines for population of 15 million in 1977 to 310,000 by 2001. Payphones increased from 100 in 1977, 588 in 1981 to approximately 5000 in 2001 (CCK, 2005). In the years between 1980 and 1990 the growth and change of the telecom sector internationally was reflected on the changes taking place domestically. While slower, the changes were the start of the reform process of the telecom sector in Kenya and the rest of Africa. The main users of the then new technologies such as internet and electronic communications were civil society organisations (CSOs) led by international organisations such as the UN which had many of its main offices for the African region in Kenya. But given the high costs of access and lack of competition in the sector, internet access remained the privilege of a few. In 1982, Kenya hosted the first ITU Plenipotentiary Conference in Sub-Saharan Africa that recognised the critical inadequacy of telecom in the continent. The Plenipotentiary Conference established a Commission¹¹³ to identify and recommend ways of stimulating the expansion of telecom across the world. Three years later in 1985, Tanzania hosted a global conference on telecom - the first World Telecommunications Development Conference (WTDC) to evaluate and make recommendations on the way forward based on the Commission's report. For the first time, world governments, including the governments of Africa (Kenya included), made a declaration to ensure that there was a telephone line within 'easy reach' by the early part of the twenty first century (Mureithi, 2002). This set the pace for the reforms in the telecom sector in Kenya with the priority hinged on rural access or what then later become known as Universal Access.

¹¹³ Independent Commission for the World Wide Telecommunications Development established under Resolution No. 20.

Coupled with pressure from the international community and technological developments in the late 1980s, especially cellular communications which heralded a serious challenge to the rationale for a single operator to most efficiently supply all basic telephony, Kenya joined the WTO, placing its membership on April 15th 1994. Accession to the WTO was ratified on December 23rd 1994 and Kenya became a member of the WTO on January 1st 1995 (WTO, 2005). Under the Single Undertaking, all WTO Multilateral Agreements became binding upon Kenya. As a developing country, Kenya utilised the flexibility inherent in the GATS and made its first schedule of specific commitments to the GATS on April 15th 1994 (GATS/SC/47 (94-1045)). While the need to reform the telecom sector in Kenya was obvious, no commitments in relation to the telecom sector were made with the focus instead chose to make commitments in the banking, transport and insurance sectors. This was based on the conditions of privatisation programme that had begun in 1991 as discussed in the previous section. As shall be argued, the Moi regime had no intention of reforming the telecom sector. Nor did they have any intention of institutionalising the WTO trade process within Kenya's institutional structure. Nonetheless, NCWTO¹¹⁴ was formed in 1995. Its main mandates were to raise issues of Kenyan interest at the WTO (Ikiara, 2000). In spite of pressure from the donor community, interviews with KP&TC management in this period reveal that the Government had no intention of ever selling its main asset as noted by one interviewee: *do you think Moi was willing to sell Telkom? Oh no! there is no way he would sell or even privatise parts of it, that was part of his political power base* (interview #20).

In 1991, frustrated by the off-track movement of the economic reform as well as the Government's anti-democratisation posture, the World Bank and IMF cut off the aid programme. This led to a major economic and political crisis in 1992 which was an election year. Seeking to pacify the donor community, the Government under the Moi regime announced that it had provided for partial liberalisation of telecom allowing other players to enter only the terminal equipment market in 1991 and was therefore abiding by ongoing negotiations at the WTO (KP&TC, 1992). Under the new regulations, consumers could secure the services of qualified engineers. What was not said, however, was that the terminal

¹¹⁴ Full meaning first used in chapter 1 and refers to the National Committee on World Trade Organisation.

equipment market was already an open market registered by KP&TC (interview #12). This was to be the first of much political rhetoric on the intended reform process.

Nonetheless, due to technological changes sweeping the global market, Mobile phones were introduced in 1992. They were provided through an analogue system that was widely known as the Extended Total Access Communication System (ETACS), and was commercially launched in 1993. During this entry period telecom services were so expensive that only a few elites within the upper echelon of society could afford them. The cost of owning a mobile handset was as high as Kshs.250,000¹¹⁵. This resulted in a marginal mobile subscriber growth of less than 20,000 for a period of seven years (from 1993 - 1999) (interview #17). In 1995, a second international gateway project was completed at Kericho Earth Station. In the following year, KP&TC launched a high-speed digital data circuit service known as KENSTREAM. Other services were to happen in due course including very small aperture terminal (VSAT)¹¹⁶ known as KENSAT. All value added services such as VSAT, packet switching and leased lines were under the control of the monopoly - KP&TC, while paging was made a private monopoly. There was virtually no competition with the KP&TC except international services offered by call-back operators which Kenya had declared illegal through a notice to ITU. In 1995, a workshop organised by the Telecommunications Foundation of Africa to understand the use of internet and the new opportunities it offered attracted more than ten email service providers. Attendance was high reflecting a growing interest in the sector. Nevertheless, immediately after the workshop, KP&TC declared internet services an illegal use of leased lines, thus ensuring that the KP&TC and therefore the Government had a firm hold on the sector (interview #15).

¹¹⁵ The equivalent to the monthly earnings of a senior manager in a private organisation..

¹¹⁶ A VSAT is “an earthbound station used in satellite communications of data, voice and video signals, excluding broadcast television. A VSAT consists of two parts, a transceiver that is placed outdoors in direct line of sight to the satellite and a device that is placed indoors to interface the transceiver with the end user's communications device, such as a PC. The transceiver receives or sends a signal to a satellite transponder in the sky. The satellite sends and receives signals from a ground station computer that acts as a hub for the system. Each end user is interconnected with the hub station via the satellite, forming a star topology. The hub controls the entire operation of the network. For one end user to communicate with another, each transmission has to first go to the hub station that then retransmits it via the satellite to the other end user's VSAT. VSAT can handle up to 56 Kbp” (Webopedia: <http://www.webopedia.com/TERM/V/VSAT.html>).

Moi stood for re-election under the newly formed multi-party system with the promise for change and liberalisation of the telecom sector. But between 1992 and 1997, the status quo remained in the telecom sector. By 1997, there were only 290,000 telephone lines to serve a population of about 30 million people. Only about one percent of the population was served with fixed-line telephone lines and there were only about 9,000 mobile telephones in the country due to relatively high installation and running costs. Kenya's teledensity (telephone lines per 1000 people) in the second half of the 1990s was therefore lower than the African average (ITU, 1998).

Meanwhile discussion with the World Bank and the IMF had been taking place with the aim of resuming aid that had been cancelled in 1998. With the help of the World Bank, as already noted, a team of experts from the private sector and international organisations (popularly known as the Economic Recovery Team or the Dream Team) was recruited into the civil service to initiate economic recovery and ensure economic reforms and good governance at the Treasury. The negotiations that took place between 1997 and 2000 led to agreement to continue to further liberalise the telecom sector which was still a Government owned monopoly. With the freeze on all aid by the IMF and the World Bank in 1996, the Kenyan Government acceded to the World Bank and IMF conditions, confirming their intention to fully liberalise the telecom sector. In doing so the IMF granted Kenya a three-year loan as depicted in box 2 below.

Box 2: IMF Approves Three-Year Loan for Kenya Under the ESAF Program

"The International Monetary Fund (IMF) today approved a new three-year loan for Kenya under the enhanced structural adjustment facility (ESAF) equivalent to SDR 149.55 million (about \$216 million). This loan will support the Government's economic reform program for 1996-98, which is built on the policy framework paper published by the Kenyan Authorities on February 16, 1996. The first annual loan will be an amount equivalent to SDR 49.85 million (about \$72 million) will be disbursed in two equal semi-annual instalments, the first of which will be available on May 15, 1996" (IMF, 1996).

According to the IMF press release (IMF, 1996) the main objectives of the new loan were to achieve

*...progress in privatisation and restructuring of a number of key enterprises (eg., completion of the privatisation of Kenya airways, commercialisation of the National Cereals and Produce Board, the contracting out of management of the container terminal of the Kenya Port Authority in Mombasa, and **partial privatisation of the telecommunications functions of the Kenya Posts and Telecommunications Corporation***{Emphasis added}.

Seeking to meet the new funding framework under the ESAF, the Kenyan Government in 1996 adopted a policy framework paper known as the Economic Reforms 1996-1998 (RoK, 1996-1998) and included a draft telecom proposal which was formulated partly to respond to pressure from the World Bank, IMF and WTO. It largely reproduced the suggested RP framework of the GATS which Kenya was yet to commit to. The key elements of the telecom proposal related to reforms in restructuring and liberalising the telecom sector namely: the separation of postal and telecom services, the selling of 30 percent of KP&TC's shares to a strategic investor through public flotation, an introduction of joint ventures for cellular phones; and liberalisation of pay phones and VSAT (RoK, 1996-1998). This draft telecom proposal was never formally published as the broader negotiations of the draft policy were mainly hindered by Kenya's second multi-party elections which took place in 1997. Telecom priorities took a back seat while other political priorities such as the introduction of small and medium financing, agricultural support and accessibility through the construction of roads rose to the fore. Between the first and second multi-party elections (1992 and 1997), very little in terms of telecom policy was achieved. This is not to suggest that telecom objectives were lacking in importance but rather that the delay in telecom reforms was evidence of more pre-eminent political priorities. The 1997 elections reflected the differing opinions on developmental priorities as each aspiring party ranked telecom reforms as first and or second in their objectives. For example: the main political party - KANU in their development programme, noted that telecom would be the first issue they would attend to if re-elected (KANU development plan, 1997).

Immediately after the 1997 elections, the Ministry of Transport and Communications wrote a Postal and Telecommunications Policy statement that was drafted as a Bill and published. The Bill proposed to map the orderly expansion and modernisation of the telecom sector up to 2015 by including, for example, specific targets for telephone penetration, privatisation and market structure (KCA, 1998).¹¹⁷ The Bill reflected intended changes as proposed through the GATS. However, because MPs felt that the Bill would reduce monopoly of Telkom and hence their perceived benefits, the Bill received heavy criticism (interview #17). In addition, MPs complained about the broad definition of telecom that would have regulated almost all electronic equipment (interview #17). In the end, Parliament was prorogued before this Bill could be passed. Finally after much political debate, another Bill was drafted that largely reproduced the 1997 Bill. The Bill known as The Kenya Communication Bill was passed and some of its provisions became law on February 15th 1999. The KCA¹¹⁸ provides the framework for the regulation of the communications sector in Kenya. Enacted by Parliament in 1998, the Act was a deliberate attempt to give legislative teeth to the Postal and Telecommunications Sector Policy Statement (the Policy Statement).

Nonetheless, it must be recognised that consultation in the KCA was not part of the process. No stakeholders were invited to the drawing board and as interview informants reveal, *we were not considered and neither were we invited...the industry has mainly been a non-participatory sector, with Government as the final say in all issues* (interview #56) Thus, key actors participating in the writing of the KCA came from KP&TC under the stewardship of the then Minister of Posts and Telecommunications (interview #16, and #17). The Government appeared content for telecom reform to steam-roll without stakeholder deliberation.

¹¹⁷ The draft bills later become known as the Kenya Communications Act 1998, discussed shortly in this chapter.

¹¹⁸ Sometimes referred to as KCA No. 2 of 1998. While officially known as the Kenya Communications Act 1998, others refer to it as KCA, 2001 to depict additional changes made to the Act. In this study, the term KCA 1998 reflects all amendments.

5.7.1 1999 - Entering into a transaction cost: Kenya utilises the flexibility in the GATS telecom instruments and makes commitments

Against this background, Kenya made amendments to its schedule of specific commitments (GATS/SC/47)¹¹⁹ of 1994 (see Appendix B) specifically as they related to the telecom sector on November 18th 1999. Kenya thus expanded its offer on basic telephony made in 1994 to include both facilities-based and public switched telephone network (PSTN) services.¹²⁰ Together this would include voice telephone services, telex services, telegraph services and private leased lines under public use and Value Added Network Services (VANS)¹²¹ (excluding Voice over VANS), email, paging and electronic data interchange services (EDI). A further limitation on the horizontal level was placed on foreign investment to a maximum of 30 percent to encourage local investment in the sector (interview #23). However, on all the above services, monopoly of the supply was left to exclusively to Telkom until 2003. This would mean that by December 31st 2003 the feasibility of an additional network operator and or the addition of more PSTN suppliers would be possible. In terms of PSTN, Kenya retained its market access limitation on cross-border supply limiting service only through Telkom. This also applied to mobile services and satellite services in which Kenya placed a limitation on the gateway operator as Telkom. In all cases international call back services were not permitted. It was noted however, that a subsequent operator would be licensed after December 2003.

In making commitments, Kenya's Schedule of Specific Commitments adopted through the KCA reflected an intention to limit the extent to which foreign investment in the telecom sector could take place and therefore retain Government control in the sector. Thus, the Kenyan Government utilised the flexibility inherent

¹¹⁹ Kenya schedule of specific commitments in Basic Telecommunications- GATS/SC/47/Suppl.2; which replaced pages 2 and 3 of GATS/SC/47 of 1994.

¹²⁰ PSTN refers to the international telephone system based on copper wires carrying analogue voice data. This is in contrast to newer telephone networks based on digital technologies. Telephone services carried by PSTN are often called Plain Old Telephone Services (POTS).

¹²¹ In general, VANS include cellular telephony (either mobile or fixed), cable television, email and web-based services. In this particular case however, VoIP was not included. Nonetheless there is still a lot of controversy surrounding the precise distinction between POTS and VANS.

in the GATS to specifically ensure that the incumbent provider KP&TC would retain exclusive monopoly under the new framework. This commitment as shall be discussed was to undermine any progress in the telecom sector. Nonetheless as one former member of the Moi Government noted *future course of action in the telecom ensured that the Government of Kenya had a stream of revenue from Telkom that was guaranteed* (interview #10). In addition, the new services to be licensed would provide Kenya with added long-term revenue in which to invest in the sector. However, as shall be shown, this process was delayed even after accession to the GATS.

Kenya also adopted the RP in its entirety (see appendix C). As discussed in chapter 4, the adoption of the RP and the scheduling of commitments, was done after long and protracted negotiations in which African countries as a block argued that their commitment would only be made if they were allowed to ensure that they could limit competition for a while so as to ensure that the provision of USOs were met. Chapter 4 detailed the main premise of this document, which requires broadly that competitive safeguards constraining major operators are developed, including mandatory interconnection; that licensing, spectrum allocation and USO are transparent, any obligations are effected in a non-discriminatory manner, and an independent regulator is established. Although all the principles in the RP were specified in the KCA, as noted in chapter 4, a telecom sector in transition from monopoly to competitive service supply infrequently lends itself to the smooth introduction of competition. The endorsement and adoption of these principles at international level is enormously instrumental in sustaining what constitutes the minimum regulatory elements within the domestic regulatory environment.

As discussed in chapter 2, the institutionalisation of these principles at international level created certainty and uniformity for all potential investors. But this left the Government in a difficult position. Not adopting the WTO agreements would signal a lack of commitment on its part not only to other nations (which would endanger its other GATT commitments) but, more importantly, to the 'aid-cartel' of which the WTO was part. Acceding to the GATS was therefore based on the need to assert Kenya as a credible country to invest in and also as a country that would be able to abide by conditions set out within the international

standards. Not surprisingly all 6 members of the NCWTO interviewed were in agreement that Kenya's accession was to show that Kenya was committed to the reform. As eloquently put by one of the NCWTO members:

Even if we were not so sure of what we were doing, really, at the end of the day there was nothing to lose, we had merely articulated the Governments intended interest as specified through the ongoing discussions of reforming the {Kenyan} sector (interview #60).

In signing the Fourth Protocol, Kenya had now committed to opening its domestic market in basic services over a phased in period. It has been suggested elsewhere in this study that if one were to overlay the Fourth Protocol commitments on to the KCA, it is evident that the augmented schedule was fashioned directly from the structure and tenor of the KCA. As noted by the members of the NCWTO, the overarching theme remained the preservation of Telkom's exclusivity on basic services and concomitant protection of its revenue stream. A novel feature, however, concerned the motivation for this protection as articulated in previous policy development reports and canonised in the Act through the objective of providing affordable telecom access. Thus, in scheduling commitments, Kenya was merely utilising the flexibility of the GATS which provided for it to ensure that the reasons given for closing and limiting market access to other service providers was based on the need to ensure that it was committed to first and foremost providing basic telecom services to the majority of the Kenyan population rather than creating market competition.

The details of how the GATS schedules were canonised in the Act are discussed below. Specifically, the discussion of the KCA remains limited to the telecom policy goals under the Act.

5.8 The Kenya Communications Act (KCA)

Structurally, Kenya's Schedule of Specific Commitments breaks down telecom into four main themes, namely: operating procedures, market structure, financial provisions, regulation (licensing and competition and interconnection) and universal service obligations, mirroring the KCA. A reading of the KCA in line with Kenya's Schedule of Specific

Commitments provides a number of thematic focal points. The first is the recognition that a careful balance had to be struck between the phased introduction of competition in the telecom sector with its emphasis on the free market on the one hand, and the protection of a regulated monopoly in order to secure access to telecom services for under-serviced areas (mainly the rural community) (KCA, 1998). Underlying this assumption, arguably correctly reasoned at the time, was that exclusivity would best serve the goal of expanding the national telecom infrastructure; the development of universal access as well as overall economic growth; be conducive to customer focus and would enhance Kenya's international capacity. In his address to Parliament following the enactment of the KCA, the then Minister for Transport and Communications, Mr Musalia Mudavadi emphasised the role to be played by the new Act in providing service to the entire country. He noted that:

The Government of Kenya has embarked on a series of initiatives to revitalise the economy into a modern market oriented one. The aim is to improve the economic well-being of Kenyans by establishing Kenya, in the medium term, as the centre of industrial and financial activities in the region. The sector policy statement aims to define the framework within which telecommunications and postal services will be provided (Postal and Telecommunications Policy Guidelines, 2001).

The KCA therefore reflects the development priority of providing telecom service to all parts of the country (more so the rural areas). The KCA thus articulates it as:

...to best promote the goals of the sector, which include: the expansion of the telecommunications infrastructure and attainment of universal service, the promotion of growth within the sector and as an enabling infrastructure for economic growth in other areas...Telkom should be granted a period of exclusivity to provide basic public switched telecommunications services ...Particularly during the period of exclusivity, the central goal is the building out of the basic network as quickly and as extensively as possible (KCA, 1998 Part III)

The second thematic focal point provided by the Act is that competition is necessary to ultimately advance the delivery of high-level services that are capable of meeting the needs of a growing Kenyan economy but that is gradually phased in so as not to erode the public

interest objective underlying exclusivity. This is reflected in the KCA through the exclusivity clause for Telkom (KCA, 1998). Thus drawing on the discussions in chapter 2, specifically Melody (1997b), any reference to competition was taken to mean 'regulated competition'. Competition was to be a means to an end, not an end in itself. So, for example, services-based competition such as resale was only to be permitted in year four of the exclusivity period. This would translate to 2003. It was accepted that peripheral competition would begin and indeed continue in enhanced services but the core of the PSTN was to remain protected until Telkom could prepare itself to compete effectively. This approach was in line with international developments at the time, outlined in chapter 1 and 2. Globally, in applying the GATS framework, countries were promoting competition, reducing monopolies, increasing private and in some cases foreign investment, while introducing independent regulation.

Independent regulation is the third emerging theme and was crucial to managing the reform process in the sector. Outside the market structure question, other provisions in the KCA envisaged the deregulation of customer premises equipment, the rebalancing of tariffs by year four of the exclusivity period and the establishment of a Universal Service Fund (USF) to collect contributions from all operators. These contributions were to be collected to subsidise the costs of universal service. The failings in the implementation as shall be discussed are however, as it is suggested, not only as a result of the GATS provision which provides for the ability to schedule limitation on the sector, but also a lack of independent regulation to implement effective regulation.

In line with the above themes, the KCA made three main structural changes to the telecom sector. First, it repealed the KP&TC Act of 1977 (Cap. 411). Second, it separated postal and telecom services (KP&TC), establishing the Postal Corporation of Kenya as a statutory monopoly.¹²² Telecom services were to be provided by Telkom, which would be the network owner and service provider and was to have an interim monopoly of five years. At least, that was the intention on paper. As shall be evidenced later on; this is still a thorny

¹²² It should be noted that while this paper does not deal with postal services it is mentioned here in reference to the Act's objectives and purposes.

policy issue to date. Third, the KCA created a separate regulatory agency - CCK¹²³ to regulate both postal and telecom services. To accommodate the provisions of the Act, which required the separation of both the postal and telecom sectors, KP&TC was split into three legal entities in July 1999, namely Telkom, Postal Corporation of Kenya (POSTA)¹²⁴ and CCK. This mode of implementation, namely: splitting KP&TC to create three policy sectors was to provide regulatory problems as shall be discussed.

Telkom was incorporated under the Companies Act (Cap.486) as a limited liability company with the Government of Kenya as the shareholder. However over time the Government intended to offload 49 percent of its shareholding. Consequently, Telkom was issued with licences in all areas as reflected through Kenya's Schedule of Specific commitments. Figure 3 (adapted from Mureithi, 2002) below depicts this policy framework as it stood between 1999 and 2004.¹²⁵

¹²³ Communications Commission of Kenya abbreviated as CCK. First referred to in chapter 1.

¹²⁴ Understandably, this study does not enter into a discussion on POSTA which was established under the Postal Corporation of Kenya Act (No 3. of 1998) to provide postal and postal financial services.

¹²⁵ In late 2004, the Ministry of Transport and Communications was merged with the Ministry of Broadcasting to create the Ministry of Communication

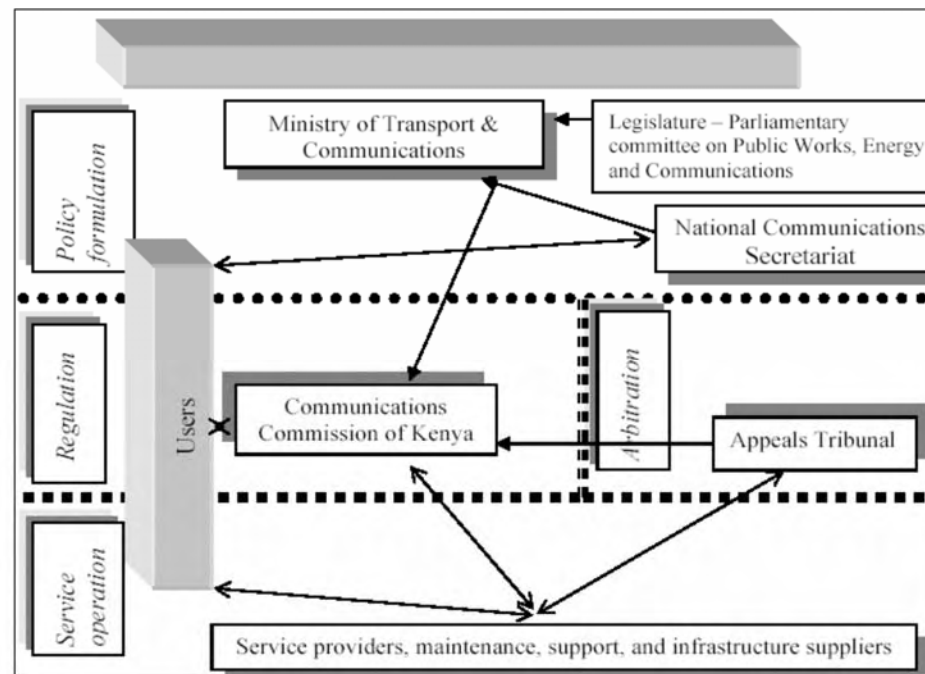


Figure 3: A depiction of the telecom sector after the implementation of the KCA

To the extent that it is possible to graphically represent the relationships in the sector, the graph shows the main features of the policy framework. Three main sectors are evidenced. First, the policy sector-responsible for making policy and creating a framework upon which the sector would develop with a policy adviser - NCS. Second, the service sector responsible for supplementing Government resources and expanding infrastructure – Telkom and other service providers. Third, a market referee - CCK, responsible for ensuring the operations of the Act. This fulfilled the mandates of the RP and became effective on July 1st 1999.

While regulatory practice does not always dichotomise neatly into policy creation and implementation, the latter inevitably shapes and contours policy. The Act, in separating policy formulation, operations and regulation, accords with Melody's (1997b) three-tier model and definition discussed in chapter 2. It is important to note, however, that Kenya's legislation does not fully limit the regulator to mere implementation by setting out precisely what it must implement. In implementing a broad policy mandate, it is argued that the regulator is also making, rather than merely implementing policy, and indeed shaping it through this implementation. To that end, the characterisation of a strong dichotomy

between policy formulation and implementation is not fully possible. This, as we shall see, provided a source of tension between NCS and CCK.

As will be illustrated, however, while assigning various responsibilities to individuals and institutions seemed relatively easy on paper, the actual mechanics of this implementation proved less than easy. In this regard, Howlett & Ramesh (2003), suggest that an analysis of domestic outcomes starts at the relationship and linkage between the executive, legislative and judiciary provided under a country's constitution which affect institutional design and public policy making within the domestic arena. Thus, because of the special interest that the Government had over the telecom sector, political wrangles were manifest. Moreover, because power resides with the President who appoints all Cabinet Ministers and heads of Government and parastatal offices *it was all about who the President wanted for the position and any case the President wanted to make sure his own men would be running the show given the important nature of Telkom to the Government* (interview #4).

Thus, with members of Parliament trying to get their opinions heard over who should head the new offices, political disagreements became manifest through various reports in the press ("Big changes expected", 1999; Omari, 1999; Akumu, 1999). In the end, the four positions of Executive Director of Telkom, CCK, Posta and NCS were appointed based on affiliation to the President (interview #45) and all came from the same tribe as the President. In addition, it has been argued by some interviewees that the appointments were based on specific ethnic ties and friendships between the four heads (interview #12). This is not farfetched given that all appointees (CCK, NCS and Posta) were at the time working with the KP&TC and held different managerial positions prior to the split. The new MD of CCK was the then former Company Secretary of Telkom, the new MD of Telkom was the former head of the KP&TC and the new PMG was the former head of the Postal Services Department. The fourth, - the new head of the NCS was a former colleague and friend of the Minister of telecom. The Ministry of Transport and Broadcasting and the Ministry of Communications and Tourism were retained and as indicated earlier merged in late 2004.

The regulatory body for the sector, CCK, was mandated by the Act to discharge the following major functions: issues licences, regulate prices, establish interconnection

principles and manage the radio frequency spectrum. The development priority of the sector was 'set in stone' through the KCA's stated objective to provide; *efficient, reliable and affordable communication services throughout the country* (KCA, 1998 Part I). For example, in the area of telecom services, it intended to improve penetration in the rural areas from 0.16 lines (in 2001) to five lines per 100 people by 2015 and increase service penetration in the urban areas from four lines (in 2001) to 20 lines per 100 people by 2015 (KCA, 1998). These targets translated to an installation of 1.5 million fixed-lines in rural areas and 2.4 million fixed-lines in urban areas. This would amount to a total investment US\$ 5.85 billion over 15 years at an estimated cost of about US\$ 1,500 per line. This means that, on average, the new annual capital requirements for Telkom would have to amount to an estimate of US\$ 390 million. It was within this context that the restructuring of Telkom and a step by step liberalisation of the sector was undertaken with a view to attracting capital from the private sector and, in turn, enhance the development goals.

The telecom policy strategy to achieve this was divided into two sections: developing a regulatory framework and creating competition. First, like the terms of the RP, the KCA set out a modern regulatory regime suitable for a multiple-operator environment necessary to support the revitalisation of the telecom and postal sectors. The Act's regulations are defined in line with the roles of the Commission and are divided into two main areas which address all six principles discussed in chapter 4, and can be summed up as competitive neutrality - which refers to the fair treatment of business and persons involved in the telecom sector. The KCA articulates this as: *the commission shall, in performance of its duties under the Act and these Regulations, promote, develop and enforce fair competition and equality of treatment among licensees in any business or service relating to communications* (KCA, 1998 Part II). In addition, telecom licensing procedures governs the commission's role in providing licences based on the Act. (KCA, 1998)

The second aim of the telecom policy strategy was to create competition in the sector. Bearing in mind that KP&TC was a monopoly as were most telecom sectors in Africa before liberalisation, competition was seen as the key solution to the sector's progress. As noted earlier, the concept of USO relates to the provision of affordable rates of basic

telecom services to all areas particularly those that were un-served or under-served. In seeking to promote a liberalised sector and at the same time provide telecom services, the Kenyan Government, through the KCA, placed the objective of USO as a burden on all players in the market. The KCA states that *all players will be expected to contribute towards this goal, however, where the service is deemed to be uneconomical the Government would undertake to avail appropriate subventions* (KCA, 1998 Part III). This is in line with the RP which states that:

any member has the right to define the kind of Universal Service obligation it wishes to maintain. Such obligations will not be regarded as anti-competitive per se, provided they are administered in a manner and are not more burdensome than necessary for the kind of Universal Service defined by the Member (WTO, 2001).

The idea of taxing a potential would-be player in the market was, however, not fully operationalised as shall be discussed in chapter 6. Nonetheless, in spite of asking other new potential players to participate and enshrining this in their licences as shall be evidenced, the main burden of USO was in the hands of the incumbent operator - Telkom as a Government-owned company. In line with its horizontal commitments placed on the schedules, Kenya's equity participation in the telecom market was canonised in the KCA to ensure that the wider Kenyan populace was part of the liberalisation process and that Government would continue to have some stake in the processes.

The Government would continue to encourage Kenyans to actively participate in the sector through equity ownership. Consequently, it will be a requirement that any firm licensed to provide services in the liberalised market segments should have at least 30 percent of its equity owned by Kenyans. However for all listed companies, the equity participation shall conform to the equity rules and regulations of the Capital Market Authority (CMA). This policy would be reviewed from time to time in line with the country's investment and socio-economic needs (Postal and Telecommunication Policy Guidelines, 2001).

Finally in opening up the sector and complying with the GATS, the KCA made provisions for the sale of 49 percent of its equity in Telkom to a strategic investor and the licensing of a

SNO.¹²⁶ Thus in adhering to the Schedule of Specific Commitments as well as policy development priorities such as ensuring local investment opportunities, the KCA enshrined the limitations of market access. In doing so, the importance of the GATS framework is depicted not only as a credibility enhancing framework for Kenya in the international arena and for its donor community but also in structuring the outcomes of the telecom sector in Kenya.

In placing limitations on market access, Kenya made the following segments exclusive to Telkom to December 31st 2003 after which time all areas would be subject to competition. Nonetheless, as a service provider in the telecom market, Telkom was granted a licence for 25 years in each of the below sectors. However, market access was restricted to Telkom until its expiry on 31st December 2003, (KCA, 1998) with the following sectors restricted only to Telkom:

- Global mobile Communications by Satellite (GMPCS);
- International Commercial VSAT networks;
- Internet Node Backbone; and
- Local Network Operators covering the geographic region of Nairobi (all other areas would be licensed immediately).

As indicated in the Postal and Telecommunications Policy Guidelines, 49 percent of the Kenyan Government shares would be sold and a second national operator also licensed (Postal and Telecommunications Policy Guidelines, 2001). The following sectors were therefore restricted to Telkom until a second national operator was licensed:

- National Long Distance Telephone Service; and
- International long Distance Telephone services.

¹²⁶ Second National Operator (SNO). First used in chapter 1.

Kenya's Schedule of Specific Commitments also placed limitations on Mobile Satellite Service including the GMPCS citing previous global agreements made under the GMPCS memorandum of understanding (GMPCS-MOU) with the ITU. The following telecom services were given full market access for liberalisation with no exclusivity to Telkom:

- Value added services (this includes electronic mail, voice mail, store and forward fax, Internet Service Provision, Video Conferencing and EDI); and
- Public Telephone Service Resale (this includes customer Telephone Service Resale and Internal and External wiring) and Paging.

It should be noted, however, that the precise length of exclusivity was negotiable. Telkom's licence stipulated that if the roll-out and quality of service targets specified in its licence were met, exclusivity could be extended by an additional year (KCA, 1998). However, as shall be discussed, the legality of this was challenged. This unresolved issue caused conflict in the telecom sector as is indicated in chapter 6. Nevertheless, the commitments made under the Fourth Protocol reflect a minimum undertaking. As long as there is compliance with the principle of non-discrimination, Kenya may freely engage in autonomous liberalisation and open markets beyond that committed. The WTO Trade in Services Council has also subsequently addressed the modalities and procedure for 'giving credit' to countries that have autonomously liberalised their services.¹²⁷ As a signatory, Kenya was obligated to implement its schedule without delay and any violation is subject to determination under the WTO's Dispute Settlement Body (DSB). Moreover, full breach is not required to prompt redress: the GATS (Article XXIII(3)) contemplates *nullification and impairment* of a specific commitment or benefit as grounds for recourse to the DSB.¹²⁸

As has been described, it is obvious that the KCA was fashioned directly from the GATS. It is however contestable whether the issue of liberalising the telecom sector for many

¹²⁷ WTO, Modalities for the Treatment of Autonomous Liberalisation, Adopted by the Special Session of the Council of Trade in Services, 6 March 2003.

¹²⁸ GATS, Article XXIII(3). See also: Jackson, J. H. (1998). Dispute Settlement and the WTO: Emerging Problems" *Journal of International Eco. Law* 329 p.821. Jackson notes the ambiguity inherent in this term, and documents how DSB panel practice tends to require breach or violation.

developing countries provides the ambit upon which to provide the corollary argument of the GATS that telecom services are a necessity to economic development. This, as was discussed in chapter 1 and developed further in chapter 4, forms the bedrock upon which most African states such as Kenya enter into the telecom reform process. While it is accepted that trade in services is firmly within the WTO and that there is no need to engage in the best method debate, an analysis of Kenya's implementation of the KCA in the following chapter provides an opportunity to evaluate this undertaking in light of this argument.

5.9 Conclusion

The aim of this chapter was twofold. First it sought to draw together the host of factors and events explaining Kenya's political and economic landscape as a neo-patrimonial state. In doing so, the chapter framed the discussion of Kenya within the neo-patrimonial literature discussed in chapter 2. The findings reveal that a pervasive political clientelism largely structures Kenya's economic development. Over the years this has resulted in a co-dependency relationship with what the study calls the 'aid-cartel'. While, this ofcourse is not a full account of the causes of Kenya's economic and political crisis, it bears noting, that the interaction between economic ideas of SAPs and the political clientelism within the state, structures to a large extent, Kenya's decision making process. Alluded to earlier is also the allied argument that this co-dependency has created a peculiar norm - a 'culture of approval' based on meeting conditions specified on paper. The relevance of this, is portrayed in chapter 6.

Having located the discussion of Kenya's telecom reform within the background of its political and economic neo-patrimonial history, the chapter was able to proceed with its second aim, namely: to discuss the development of the telecom reform process. What is revealed here is that Kenya's Schedule of Specific Commitments was based on its ability to utilise the flexibility inherent in the GATS framework discussed in chapter 4. Thus, in specifying its market access limitations, the Kenyan Government was simply abiding by international standards. However in doing so, it was also, - underpinning the schedules within its own reform plans. This commitment nonetheless arguably reflects a trend towards

compliance with the GATS agreements, lending support to Chayes and Chayes' (1995 p.4) contention that *compliance {with an international treaty} is the normal organisational presumption*. However, although this appears to be the case, the notion that compliance follows simply because it is in the country's interests to do, as shall be shortly examined, is a contested one. As was discussed in chapter 2, there is a need to evaluate how state agents and international regimes affect calculations of a state's self-interest.

That said, the criticism levelled against the Kenyan Government for not pursuing an alternative liberalisation model by various policy analysts of the Kenyan sector (Murithi, 2003, Sane, 2002) as well as various industry players have largely been without foundation. As at 1999, Telkom needed a return on an uncertain investment over the period of exclusivity. The Government needed the capital infusion and had little to offer in return. Whether competitive tenders for USO, like those carried out in Chile, would have met national policy objectives, remains open to question (Wellenius, 2000). Nonetheless, the Government sought to preserve and maximise the value of a potentially lucrative state enterprise by applying the 'rules of the game' played in the WTO. Namely: Scheduling Specific Commitments.

Proceeding with the discussion on telecom reform, chapter 6 locates the telecom reform process in the fourth policy period - *dancing to tunes*. It examines the implementation of the GATS telecom commitments undertaken by Kenya as described in this chapter through its legal framework the KCA and, considers the evidence of the country's compliance with those undertakings. It should be noted that literature on undertakings in Kenya and even Africa's compliance with international treaties and obligations is scant and although implementation of the GATS is not necessarily comparable to executing those treaties focused on human rights or the environment, it bears repeating that in so far as implementation is concerned, Kenya largely planned its Schedule of Specific Commitments with consideration to the local context as reflected in the KCA framework.

THE GATS IMPLEMENTATION: DANCING TO TUNES

We have to decide whether we want to be a country that embraces ICT or consign ourselves to backwardness.

Raphael Tuju¹²⁹

Liberalisation of ICT, and indeed, any other market must be done in an orderly manner in order to serve the interests of both investors and consumers

Mutua Muthusi¹³⁰

Introduction

Drawing on the framework developed in chapter 2, the aim of this chapter is to provide evidence of the main hypothesis that in applying commitments as a form of credibility, neo-patrimonial states necessarily only partly conform to the conditionalities and have instead instrumentalised the reform process as platforms for their own underlying interests. Having confirmed the implicit assumptions inherent in this hypothesis in the previous chapter, this chapter analyses the GATS telecom commitments undertaken by Kenya since 1999 and considers the extent of the country's compliance with those undertakings.

To organise and circumscribe the analysis, this chapter draws on the structure of Kenya's Schedule of Specific Commitments submitted at the time of accession to the Fourth Protocol¹³¹ (attached in appendix B and C) as reflected in the KCA. Nonetheless, this approach is inherently limited in that it focuses only on those aspects with regard to market access limitations in the telecom sector (refer also to Appendix D which provides a summary of the telecom process in Kenya). Compliance therefore needs to be evaluated within the

¹²⁹ Minister for Ministry of Information and Communication 2004, speaking at a meeting on the ICT policy draft paper – July 2004. (*The Standard*, July 20, 2004).

¹³⁰ Mr Mutua Muthusi, CCK Assistant Director of Communications and Public Relations, reacting to criticisms of the Government's policy process of licensing. (*The Standard*, 12th March 2004).

¹³¹ WTO, 15th April 1994) Schedule of Specific Commitments (Kenya) GATS/SC/47(94-1045).

divergent needs of neo-patrimonial states and the conditionalities of the GATS as reflected through the RP.

As this is a complex and lengthy chapter, the material is organised in accordance with the Kenya's GATS telecom commitments undertaken in 1999. As noted earlier, by structuring the chapter in line with the Schedule of Commitments, sequencing of events chronologically at times presents challenges for easy following as sectoral developments overlap between different commitments. Where this occurs this is flagged.

6.1 The mechanics of monopoly under corporatisation and the Moi Regime (1999-2002)

The corporatisation, effected by the KCA in 1998 ensured that the enterprise would remain wholly state owned, but would be formally registered as a company and reoriented according to market principles. That is, state subsidies were to cease and the company could declare profits and pay dividends. It was to be responsible for its own funding and pension policy and was required to pay taxes (Omari, 1999). Save for these changes on paper, Telkom was simply still the KP&TC. This is not surprising given that, as Lane & Lubatkin (1998) argue, institutions display inertia in relation to attempts to reform as they resist change focusing on their core operations in order to safeguard what is typical for them. Moreover, as noted earlier, Moi's Government had no intentions of implementing the new KCA framework (interview #20). Thus in every respect it would be a corporate entity, but with only one shareholder, the state. Subject to the supervision of a board of directors with regard to strategic direction, the company Telkom then replaced the KP&TC as the sole vehicle through which all telecom services were to be provided.

However, given the wrangles that went on with the employment union over the issue of the separation of KP&TC ("Big changes", 1999; "Most Telkom Workers", 1999; "Court extends Telkom Injunction", 2001) the Government in order not to lose votes and political standing, was forced to mandate that a large number of employees would not be retrenched (interview #19). As a result 70 percent of the 26,000 employees were seconded to Telkom and 5,200 were retained by the Postal Corporation. In addition, 26,000 were deployed from the former KP&TC to work for Safaricom (a mobile company partly owned by the Government) and

the remaining employees to the newly created regulatory office (interview #12; “Most Telkom Workers”, 1999). Telkom therefore retained the exclusive power it always held as the KP&TC and continued to maintain exclusive monopoly on all listed services as discussed in chapter 5.

It is important to note that beyond structural changes affecting financial operations and corporate governance, the locus of power and mechanics of monopoly remained completely unchanged. The former senior manager of KP&TC and a close friend of President Moi, Mr Augustine Cheserem, was appointed as the first MD of Telkom. He was required to administer, control and manage the provision of telecom services subject to the authority of the Minister of Transport and Communications, who retained power to determine tariffs and fees levied for services. The core authorising provisions of the KCA under the Postal and Telecommunications Policy Guidelines continued to give Telkom the exclusive power it had always held as the KP&TC to construct, maintain and use PSTN, lease out facilities and to prohibit others from offering any service except under Telkom’s explicit authority and subject to any terms and conditions it deemed fit (Postal and Telecommunications Policy Guidelines, 2001) as discussed in chapter 5.

Commercialisation of KP&TC to create Telkom was never a panacea. The report (KP&TC, 1997) on commercialisation which was not published in the press highlighted a number of legacies the new company would inherit, including excessively high debt and other structural problems endemic to PTT organisations at the time (see Melody, 1999b). As noted earlier, in having an exclusive monopoly Telkom also had four years from 1999 in which to address the shortfall in connectivity in the country. However, it is argued, that the four years was not sufficient and Telkom did not have the capacity or the funds to provide the needed services. In spite of this, this reflected Kenya’s specific commitments and was similar to many other developing country commitments in which monopoly periods of the incumbent service providers were granted for a period of four years (Cohen, 2004). The provisions in the KCA allowed the Government, at least for at time, to retain control. There was wide acknowledgment by most players in the sector that Telkom intended to reap huge profits before the introduction of competition in the sector (interview #21). With the imminent

deadline, several external consultants were hired in 2000 to evaluate the impending cost of the sale as well as reforms needed in Telkom. Moreover, politically, President Moi needed to pacify aid donors who had begun pressing the Government to fulfil its obligations under the Enhanced Structural Adjustment Funding (ESAF) programme.

In early 2000, the Kenyan Government produced an Interim Poverty Reduction Strategy Paper (IPRSP) claiming that a consultation on the strategy with civil society was to take place, especially through the National Stakeholders Consultative Forum. The Stakeholders Support Group (SSG) that included Members of Parliament contradicted this report. Led by Dr Apollo Njonjo, the SSG in March 2000 warned the IMF and the World Bank not to enter into any new loan agreement with the Government unless it met conditions it had breached since 1997 (Pettifor, 2001). However, on July 12th 2000, the Government of Kenya wrote a letter to the IMF (RoK, July 12th 2000). The letter (highlighted in box 3 below), aimed at requesting funds from the IMF, described the policies that Kenya had established and those it intended to introduce, key of which was the intended sale of Telkom.

Box 3 Poverty Reduction and Growth Facility (PRGF) letter of Intent

“...Under the first phase of the privatisation program, which was initiated in 1992, the government privatised a large number of small and medium-sized enterprises, but progress in privatising key utilities and transportation enterprises has been slow. In 2000/01, the government will accelerate the second phase of its privatisation program on the basis of a new privatisation strategy that emphasizes limiting the role of government in commercial activities, putting in place the appropriate regulatory framework, and using competitive bidding and other modalities to ensure transparency and fairness. This is being done with assistance from the World Bank. The Kenya Posts and Telecommunications Corporation has been split into TELKOM and the Postal Authority, and a regulatory body has also been created....In this context, the government has offered for sale 49% of the governments share in TELKOM.”
(RoK, 2000)

The classified report of the evaluation of Telkom, which was never published despite persistent calls for its publication by the Opposition and local press, became a thorny issue for the Government. By the end of 2000, several leaked statements of the report were published in the local newspapers with varied statements on the number of job-cuts in Telkom. For example, one press report noted that 10,000 jobs would be cut while another

noted that 1,000 jobs would be cut. (“Telkom Kenya to cut 10,000 jobs”, 2000; “Resolve Telkom Debt”, 2000). Confirmation with those close to the consulting team noted that the report indicated that the first phase of the programme would see about 1,000 employees retrenched at an estimated cost of US\$ 26.6m (interview #12). The staff cuts were intended to achieve a staff-to-telephone ratio of 1:55 from 1:14 and reduce the employees from 19,800 to 18,000 (“Telkom Kenya to cut 10,000 jobs”, 2000). The proposed lay offs raised alarms in the public with media reports calling for a review of the intended sale (“Telkom, Ownership is not the Key”, 2000)

In August 2000, 20 international firms pre-qualified to bid for the 49 percent stake in Telkom after the launch of the privatisation process in April (CCK, 2000). According to interviews with members of the bidding team, of the 20 firms, SA telecom company MTN South Africa¹³² had been the favourite contender (interview #12 and #13). However, interview sources familiar with the privatisation process noted that when the five consortiums bidding for the 49 percent shareholding carried out due diligence studies on Telkom, they indicated they would like to operate a business where the ratio of personnel to connected lines was at most 1:55 with about 9000 employees (interview #15, 2003; “Telkom Kenya to cut 10,000 jobs”, 2000)

Of concern in this process was the Government’s ‘closed door’ policy on matters pertaining to the sale. Like the split of the KP&TC, a largely state run process took place away from the public, with developments only appearing in press reports. No press releases were issued by the Government. As shall be seen, the shift away from a time-table of a process that was to end by 2000 to one marked by ministerial discretion is monumentally significant for its continued impact on the sector in the years to follow as it largely reduced the independence of the regulator as soon as it was established. While the provisions that allowed the Minister

¹³² MTN is a South African cellular network operator and is listed on the Johannesburg Stock Exchange under the umbrella of the M-Cell Group. Launched in 1994, MTN now has close on five million subscribers. MTN’s GSM network is one of the largest in the world.

to approve all major licences and regulations raises alarm bells on the issue of regulatory independence, the Act did make provision for the Minister to enact Part V¹³³ which states:

Any policy guidelines, rules and regulations issued by the Minister shall maintain the role of the Commission ...and no monopoly or duopoly licence to operate a telecommunication system or provide any telecommunication services shall be granted by the Minister or the commission (KCA, 1998 Part V).

This meant that through a simple gazette notice by the Minister, the regulator would be able to licence other operators in the market. It is argued extensively in later parts of this chapter that this provision lies at the heart of the failings within the regulatory environment to date and of great concern, its immediate remediation is not forthcoming.

In August 2000, pending an announcement of the privatisation process, the IMF approved a three year PRGF arrangement for an amount equivalent to SDR 150 million (about US\$ 198m) of which SDR 13m (about US\$ 18m) was available to Kenya immediately (IMF, July 28th 2000). As indicated in box 4 below, the funds were to be made available immediately and were based on the letter of request made by the Kenyan Government in July 2000.

Box 4: IMF Approval of Kenya PRGF Credit Takes Effect

“...The decision by the IMF Executive Board was contingent upon the discussion by the World Bank of Kenya’s interim Poverty Reduction Strategy Paper (PRSP) and a decision that the World Bank had concluded that the interim PRSP provided a sound basis for the development of a fully participatory PRSP and for concessional assistance by the World Bank” (IMF, 2000).

Like other previous loans, interview sources reveal that there were indications that the Moi team had convinced them that they would tackle corruption (interview #40). This was evidenced by the fact that in July 1999, Moi appointed Dr Richard Leakey as head of civil service. Richard Leakey, previously known for digging up fossils, saving elephants and opposing the Moi Government, was given similar power to the Vice-President and was

¹³³ In the Act stated as Part V, referred to also as Section V. For consistency the term ‘Part’ has been used.

asked to work with a team of technocrats who were posted to key financial departments (Mbatua wa Ngai, 1999). As noted earlier, the ‘dream team’ was put in place essentially to purge the civil service of corruption and make it more efficient and set the country on a recovery path (Kjaer, 2004). The ‘dream team’ immediately began to address the mismanagement and corruption that had plagued the public sector. Many public enterprises never paid taxes, and failed to remit revenues collected for Government. But any team appointed for this task is *faced with the difficult and potentially dangerous task of reducing pervasive inefficiency and corruption in these organisations as a condition for receiving further source transfers* (Miller & Yeager, 1994 p.176). Those who knew Moi well, however, saw the appointment of Dr Leakey and his team as a tactic designed to keep the ‘white world’ off his back while he managed his politics (interview #43).

After receiving the funding from the IMF and the World Bank, in August 2000, the Minister of Finance, Mr Chris Okemo, announced that he hoped to name the winner of the 49 percent Government stake by November of the same year (Mutizwa, 2000). However, November came and no announcement to effect the sale was made. In addition, as predicted by the SSG, the governance mechanisms put in place began to unravel. Richard Leakey was replaced just as quickly as he was appointed. In a bid to threaten the Government, the World Bank announced that aid would be stopped. The local newspaper, the *Standard* headlines on 3rd November 2000 read:

Box 5: “No Privatisation, No Aid, World Bank Warns Kenya”

In December 2000, after securing the loans, the judiciary ruled that the Kenya Anti Corruption Authority (KACA), a centrepiece of the conditionalities, was unconstitutional. The KACA had been created in 1997 after the Parliamentary Accounts Committee revealed that US\$ 10 billion in public funds had been lost between 1994 and 1995 including funds from the Central Bank of Kenya (CBK), former KP&TC (now Telkom), and the Kenya Railways Corporation (all key Government institutions) (“Graft so entrenched in Kenya”, 2001). The KACA’s mandate to investigate corruption allegations turned out to be no easy

task. Its first director, who was seen as a key ally of President Moi, was dismissed after a year and faced a judicial tribunal examining his competence. Interviews with subsequent directors (interview #65 and #67), suggest that working conditions remain just as hard, each claiming that the Attorney General (AG), was blocking their attempts to prosecute well connected suspects.¹³⁴

At the end of 2000, with no deal struck on privatisation, the World Bank and IMF cancelled the loan disbursements that had earlier been agreed (“Cash crunch looms”, 2001). On January 2001, it was reported that the President was trying to reverse the changes made in 2000 ahead of the return of the IMF team in February and in particular to jump start the sale of Telkom (Wahome & Orlale, 2001; “Moi to Push Through”, 2001). Yet, at the end of January 2001, Moi was quoted as saying he *was not in a hurry* (“Kenya agrees to sell”, 2001) to privatise the company and would not sell it to foreigners *at a throwaway price* (President Moi as quoted in Kiseru, 2000). In addition, he announced that the Government would not meet the conditions for the privatisation of key public assets, namely: Telkom, Kenya Railways and Kenya-Reinsurance. He stated that *caution must be exercised in devolving the state-owned corporations to the private sector lest the Government loses its assets* (President Moi as quoted in Kiseru, December 14th 2000).

This cancellation of the loan facility was a set-back for Moi’s Government who had hoped to use it to support its public expenditure (Kabubo-Mariara & Kiriti, 2002). The cancellation presented a political opportunity for the Moi Government to rally the Kenyan public against the IMF and the World Bank, suggesting that Western donors were infringing on Kenya’s sovereignty by attaching loan conditions (“Telkom, WB stand queried”, 2000). This was easy to do, given that in August 2000 the Opposition partly led by Mwai Kibaki had argued that the IMF and World Bank were imposing strict conditions to their loans (Kelly, 2000). This prompted an IMF press release published in the *Economist* on September 16th 2000 (box

¹³⁴ This is also evidenced by recent developments in 2006, in which the former KACA head, contravening Government sanctions, went to Britain fearing for his life, after revealing the embedded corruption of the new Government. KACA continues to face difficulties in implementing its mandates.

6 below) which noted that conditions were a key feature of the IMF and the World Bank lending.

**Box 6: Lending to Kenya, a letter to the Editor, by G.E Gondwe, Director,
African Department, International Monetary Fund**

“...Several other features of the Kenyan program that your article mentions are similar to those found in most other IMF supported programs. Provision of daily balance-sheet information is not unique to the Kenyan program. Likewise, the release of funds in tranches after periodic reviews is a standard feature of IMF programs. Nor is the Kenyan program distinguished by an unusually long list of conditions attached to the loan. And, in any event, the majority of these conditions pertain to one of the IMF’s core areas of responsibility, namely fiscal reforms” (Gondwe, 2000).

Ultimately, the principal reasons cited for the delay of the sale of Telkom were the global downturn in telecom markets and the domestic squabbles over the amount of money needed for the sale to go through (Mureithi, 2004). With an election looming in December 2002, it was obvious that prospects for the sale proceeding were minimal. By November 2002, with little progress, Mr Musalia Mudavadi, Kenya’s Communications Minister admitted to the press that the prospect of the privatisation programme happening within 2002 were not good and would take place after elections in 2003 (“Telkom privatisation restarts”, 2002). While a delayed sale meant higher returns for Moi’s Government; lack of clarity as to who the new entrant would be created uncertainty and threatened future gains in credibility for the Kenyan Government. The privatisation of Telkom was a key indicator of Government commitment to privatisation; the two year delay from 2000 to the end of 2002 threw into question the Government’s ability to adhere to the time-frames it developed and whether the policies required to attract investment by fostering faith in local markets and the regulatory landscape were in place.

The delayed sale of Telkom requires further elaboration on a number of issues that were linked to the lending process of the IMF and World Bank. First, the privatisation of Telkom was linked to the wider privatisation programme and governance. On August 14th 2001, the

local press reported that both the Opposition and Government had thrown out the 'Corruption Bill' a key criterion for the resumption of aid ("We can't afford to rejoice", 2001). The Corruption Bill was to be a significant Bill as the Moi Government had been linked to the biggest corruption scandal in the country known as 'The Goldenberg Scandal'. In brief, a private company, the Goldenberg Corporation, had received large Government export subsidies for gold and diamonds which Kenya did not produce. The Corruption Bill was therefore significant given that the Goldenberg scandal had won the Opposition mileage in its campaign for new elections. It seems evident that the Opposition did not want to make any commitments on the privatisation hoping to negotiate their own terms if they won the December 2002 elections. Out of the total 240 enterprises that were under the control of the Government, 207 formed the core of the privatisation programme and were earmarked to be sold by 2000. By 2002, the Government had divested 174 enterprises mainly to local investors (97 percent) and a few to foreign investors (3 percent) (AfDB & OECD, 2003). However, in spite of the significant reform, these Government enterprises had already been earmarked for privatisation were not considered core to the reform programme.

Second, in early 2001 the Government had also promised to table a Privatisation Bill aimed at streamlining and accelerating the reform programme. However, this draft Bill was delayed and was only ready by mid 2002 after extensive consultations with a broad section of stakeholders within Government. Nonetheless, the Bill was never to become law given the looming elections in December 2002. The protracted delays over the sale of Telkom therefore seem intentional on the part of the Government. The evidence accorded so far in the sale of Telkom shows that the Government was fairly independent from social pressures and was not keen to see the development of the sector. It seems evident therefore that the sale of Telkom was never a means for development in creating access to telecom for a wider populace but rather as a means for the Government to derive as much monetary value as they could.

6.2 Summary:

With regards to Moi's reform efforts in the telecom privatisation process, then, it seems that he was backing away from reforms to the extent that donor funding would continue but

without shaking up the existing system or hurting influential interests. This strategy places Moi's leadership and Government in the category of African neo-patrimonialism discussed in chapter 2, which Christopher Clapham (1996, p.176) has described as *the formal acceptance of adjustment programmes coupled with attempts to subvert them by failing to implement their least desirable provisions*. While more appropriately the subject of discussion in chapter 7, this phenomenon requires introduction here. The case of Kenya's aid-reform package seems to confirm the hypothesis drawn from Easterly's arguments in chapter 2 that IFIs and neo-patrimonial states simply depend on one another for self-preservation.

The saga of the Telkom privatisation process continued under the new Kibaki Government. As noted earlier, the telecom reform process overlaps both economic and political contexts. This should be borne in mind when reading the remainder of the chapter. Dates have been utilised to flag this. For easy note, the Moi regime within the telecom sector dates between 1997 and the end of 2002 while the Kibaki regime begins from 2003 to date. The following section also provides an opportunity to test the issue of new Presidents and their ability to implement reforms as discussed in chapter 2.

6.3 A change of Guard: the Kibaki Government (2003-2005)

Following elections in December 2002, Moi's political party under the leadership of Uhuru Kenyatta lost the Presidential seat to the Opposition under a coalition party – NARC - with Mwai Kibaki as the new President. The idea behind the name NARC came from the fact that it was meant to be a party of many ethnic communities (rainbow) who had joined forces to oust Moi. Nonetheless, Kibaki's new cabinet was made up of previous members who had defected from the former ruling KANU party. In his election campaign, the President declared himself personally responsible for the fight against corruption.¹³⁵ Wanting to quickly appease the international community, particularly the IMF and World Bank and

show his new position as a leader, Kibaki met the IMF African Department Director and his delegation on January 15th 2003, less than one month after assuming office. In their press release (IMF, Press release 2003 (03/07)), the IMF confirmed that:

the staff will continue to work closely with the authorities to facilitate an early re-engagement to support the Government's efforts. In the meantime, the IMF stands ready to provide the Government with the technical assistance that may be necessary.

After talks with the IMF, the Kibaki Government proceeded with launching the Poverty Reduction Strategy Paper (PRSP) and submitted it to the IMF on September 12th 2003 (RoK, 2003). In November 2003 the IMF approved US\$ 252.75m under the PRGF programme giving Kenya approval to withdraw about US\$ 36.11m immediately (IMF, Press Release (03/201) 2003). Box 7 below provides Anne Kruger's (First Deputy Managing Director and Acting Chair) comments on Kenya's new financial arrangements.

Box 7: IMF Approves US\$ 252.75 Million PRGF Arrangement for Kenya

“...Kenya's economic program which is to be supported by the PRGF, reflects the authorities strong commitment to break with Kenya's past record of uneven economic performance in order to raise the living standards and reduce poverty in an environment of macroeconomic stability. ...Bold reforms will also be essential to encourage significant private investment and to mobilize adequate donor support for the reforms” (IMF, 2003).

Interviews with key Government officials noted that there was little possibility that the Government would have been able to continue with its duties such as paying salaries and planning for development had it not received these funds (interview #55). Like most other leaders in Africa, the President quickly took to asserting his new position by appointing a

¹³⁵ A Constitutional Review Commission had been set up in 2001 under the Moi regime to make proposals concerning among other things, a multiparty system and the lifting of Presidential term limits. There was a rumour that a member of the Commission had leaked the conclusions (not to lift term limits) to the Government which had then put pressure on the Commission to change its view on the issue. After the new Government under Kibaki took power, the constitutional review process was slowed down amid political wrangling over the Presidential term limits and the multi-party system to be used. In December 2005, a referendum on the constitution was made and Kenyans voted an overwhelming No the proposed changes which would have favoured the current political ruling elite.

new Minister to the Ministry of Transport and Communications, John Michuki (“Telkom & KPLC Next”, 2003). Mr Michuki was a key ally of the President during his election campaign and was considered one of the President’s close confidants. He was also widely well known as the power broker behind the President and in the pre-election days had announced that the NARC party was only demanding constitutional changes as a ploy to defeat President Moi (Opala, 2003a). Along with a new Minister for Transport and Communications, the President made sweeping changes across most presidential appointed posts. Like his previous counterpart, Kibaki’s selection of candidates was seen to heavily lean on tribal lines and factions, with the Gikuyu, Embu, Meru alliance (GEMA) taking most of the key leadership positions in spite of having a coalition Government. Mr Mwititi (an Opposition party member) noted that:

Through these appointments, Kibaki wants to consolidate power so that he does not owe anybody anything. What is strange is that the President and his group think they have a superior logic that can save Kenya and which other Kenyans don't know. They think there was a golden era that they want to take the nation back to. Their hypothesis is that Moi was the problem and the solution lies in the Kenyatta presidency. It will not work (Mwititi, reported in “Unease in NARC” April 6th 2003).

Nonetheless, the other leaders of the coalition were able to assert their positions and ensured they had their friends and allies in some key positions. In the case of telecom, a new Permanent Secretary (PS) was appointed whose affiliations were linked to Mr Raila, a key leader in the coalition Government and a former KANU Member of Parliament under the Moi regime. It was widely speculated that the new Minister would make sweeping changes in the telecom sector. In March 2003, Augustine Chesherem, head of Telkom was sacked and replaced by Mr Waweru (“Chesherem, Eshiwani sacked”, 2003). Mr Waweru was a former engineer of Telkom and came from the same ethnic community as the President. It was widely known that engineer Waweru had been lobbying for the job immediately after the elections. Mr Waweru made no apologies about his intentions to rectify the problems of Telkom. In May 2003, he reduced the number of general managers from seven to two and promised to re-advertise all senior positions. However, interviews with Telkom staff note

that in the months following, the positions were never advertised but slowly filled with appointments made in favour of friends of the new regime (interview #10)

The changes in the telecom sector also meant that CCK and NCS management were changed, with a new board of directors appointed for CCK. Thus, neo-patrimonial linkages became part of politics. For example, Minister Michuki, appointed a son of the former Cabinet Minister Charles Rubia to a public office simply on account of his father who was a former Minister and friend (“Michuki has done it again”, 2004). The public cried folly, with the local press running a commentary on the new behaviour of Kibaki’s Ministers (ibid, 2004). However, Kibaki made no announcements and did not fault or deny the allegations. Like the Moi Government, Kibaki’s Government was not concerned with reform changes and was instead keen to maintain the status quo by balancing interests of his new coalition Government, NARC. As shall be depicted in the following section, the sale of Telkom continued to remain an issue of contestation between the Government and the donor community.

6.4 The Telkom sale: two steps backwards, one step forwards

On assuming power, Kibaki had announced that his Government had every intention to continue with the reforms made by the previous regime. In his speech which opened the ninth session of Parliament he noted his:

...commitment towards creating a culture of zero tolerance to corruption in Kenya.... We remind ourselves as leaders of our promise to put this nation's economy back on track... Related to the issue of good governance in public affairs I would like to emphasise the seriousness with which we intend to deal with non-performing parastatals. Most of these have in the past relied on the Treasury for funding. This was even when they were capable of making a profit. I want to reiterate that my Government has no business in supporting institutions that are a drain on public resources. Any parastatal that is not making a profit as required will not be retained by my Government (Kibaki, February 19th 2003)

To start the changes in the telecom sector, Mr Michuki announced that the Government was still looking for a suitable buyer to improve Telkom's efficiency and was going to privatise some of its core functions (Opala, 2003a). However, given the contradictory messages between 2003 and 2005, it was impossible to tell who was running the show as the Minister of Communication and his Assistant Minister provided contradictory information. For example, in June 2003, the Government, through the Assistant Minister for Transport and Communications, announced that the process of privatisation of Telkom had been postponed for a further three years saying that the Government would not sell up to 70 percent of Telkom ("Telkom sale put off", 2003). In November of the same year, the Minister announced that the Telkom sale would soon be re-launched and disclosed that instead of the 48 percent Government stake, the Government would sell up to 70 percent of the company's equity ("Government to sell", 2003). His remarks were made at the African Investment Forum being held in South Africa. It was widely believed that they were made to pacify industry buyers and the donor community (interview #15).

In addition, within the same period several draft proposals of the intended sale were leaked to the public. For example in 2004, interviewee correspondence via email with staff of Telkom revealed that Telkom would be restructured before being privatised through an initial public offer (IPO) on the Nairobi Stock Exchange as well as a sale of a proportion of the company's shares to a strategic partner (interview #7). This privatisation proposal was similar to another privatisation strategy paper (also in draft form) in which the Government noted that it would sell off 51 percent of Telkom with a strategic investor taking 26 percent while the Kenyan public through the IPO offering would take 25 percent (NCS, 2004). However, in June 2005, the PS of the Ministry of Information and Communication announced that the privatisation of Telkom had been pushed back to April 2006 (Irungu, 2004a).

The delayed sale also reflected tensions between the company-Telkom and its union.¹³⁶ Yet, in spite of this, an audit done by the Government of Kenya and PKF consulting noted that

¹³⁶ The main union is the Kenya Workers Union and the Kenya Congress of Trade Union (KOTU). The former represents the non-management employees of Telkom and the later, all employees in Kenya.

unless action was taken immediately to improve Telkom's performance and its financial resources, the country's fixed-line operations and the services which depend on fixed-line connections are likely to record minimal operational improvement, hindering the country's economic recovery (Kisero, 2004). A review of the events of the Telkom privatisation process discussed above, reveal the Government intended to retain control of Telkom. In spite of the reforms promised, the lack of privatisation of Telkom has continued to slow down the growth of the sector which is heavily reliant on Telkom. The overarching theme of retaining control of Telkom therefore remains a key factor for Kibaki's Government.

6.4.1 Telkom's exclusivity: the land of wasted opportunity?

During the same period (2002/2003), disagreements over the precise length of exclusivity arose from Telkom's licence which stipulated that if specified roll-out and quality of service targets were met, exclusivity could be extended by an additional year (KCA, Part V, 2001). Kenya's schedule of specific commitments took due cognisance of this date and only undertook to open markets in fixed-line services in respect to cross border supply and commercial presence by the end of 2003. Moreover, as discussed earlier, the RP provision of providing exclusivity served Government purposes and legitimised their actions.

Until the announcement by the Minister of Transport and Communication was published as a press release in late 2003, murmurings regarding the extension of the monopoly were best described as contradictory. Parliamentary debates suggested that the monopoly would end in 2003 given the poor service performance of Telkom (Rok, 2003). However, Telkom contested this, pointing to its right to consultation and noting that its senior management and board of directors had not internally resolved the question of whether to pursue the extra year (Okumu, 2004). It was finally resolved that Telkom's exclusivity would end on June 30th 2004 given the extra year (interview #2). However, the question of the legality of Telkom's exclusivity had earlier been raised during Moi's regime. A Parliamentary Committee for Communications in August 2000 (27th) found that the monopoly of Telkom was outlawed by the KCA (Parliamentary Committee Proceedings, 2000). As shall be discussed in chapter 7, there is no doubt that both the KANU and NARC Governments were aware of the controversy and the actual meaning of the KCA. However, political

control over the sector was more pressing and the question of legality was shadowed by the need to retain control of the sector.

In an effort to raise revenue for Telkom, pricing structures were changed as a result of tariff rebalancing. These were intended to slowly ease Telkom away from the dependence on Government support. The purpose of tariff rebalancing was to remove any subsidies that the former KP&TC and now Telkom provided prior to the reforms. For example: national calls were reduced from Ksh 28 to Ksh 17.80, a reduction equivalent to 36 percent over the five year period of its exclusivity. Local charges which were previously heavily subsidised by both international and local services were increased from Ksh 3.50 to Ksh 7.40 for three minutes and at the time of writing this chapter in December 2005, had increased to Ksh 10 for three minutes. In addition, the international tariff was reduced from a high rate of US\$ 3.30 to US\$ 1.66 a reduction of 49.7 percent (Telkom, 2005).

These figures are very high for the average rural income earner who earns less than Ksh 80 a day¹³⁷(UNDP, 2001) and is expected to pay Ksh 10 the price of local calls and as at November 1st 2005, the charge stood at a rate of Ksh 10 per three minutes (Telkom, 2005). The price of local calls does not include the installation charge which stood at Ksh 2300 as at December 2005. This in turn also raised the price of connecting to the internet as charges to the internet are charged at the same rate as those of a local call. A person accessing the internet in Kenya from home or office therefore pays Telkom for the entire duration of being online and at the same time pays the ISP for the cost of service which averages Ksh 10,000 a year. It is obvious that when compared to the average income earner in the rural area, and indeed an average income earner in general, these charges are prohibitive and continue to restrict the number of individuals that can access a telephone.

In mid 2005, in an effort to restructure the telecom sector after several claims of foul-play were attributed to interference from the Minister of Communications, the Minister reshuffled the MDs of Telkom and CCK and dissolved the board of directors of CCK. In

¹³⁷ The latest actual Human Development Index (HDI) for Kenya stands at 0.539 percent (UNDP, 2001). 1 dollar is equivalent to about Ksh 80.

what became a fiasco aired in the international media, the Minister finally reconstituted a new board. This reshuffling by mere exchange as well as the sacking of the board provides clear evidence of Government control in the sector and over the regulator. The Minister's interference in the sector has also contributed to the perception of interdependence between CCK and Telkom. It seems that the more difficult task for the Minister as policy maker and as principle shareholder has been the need to retain earnings while, at the same time, appease Telkom trade unions. However, it is argued that the Government's handling of the sale has further limited any prospects of huge financial rewards. Three main issues discussed below provide evidence for this: bloated staff, corruption and inhibited cash flow.

Bloated staff

In an effort to show changes in the sector, the Minister for Communication sought the advice of yet another consulting firm. PKF Consulting was commissioned to develop another restructuring strategy for Telkom. The report which was leaked to the press in late June 2004 noted unsurprisingly that Telkom had a bloated staff which included 3,052 watchmen, messengers and porters among its payroll of 17,480 staff¹³⁸ (Kisero, 2004). The staffing numbers are very high compared to many other African countries. For example, Senegal which has the same number of fixed-line customers as Telkom had only 2000 employees. The report recommended that 12,281 employees be laid off at a cost of between US\$ 74 and 200 million and pensions costing between US\$146.8 and 300 million (ibid, 2004).

Corruption

The delayed sale and financial losses of Telkom were further heightened by reports between 2004 and 2005 that Telkom officials had been conniving with Government officials and four other sons of powerful politicians in the current and former Government administration in

¹³⁸ The number of total staff is lower by about 1000 staff as compared to the Privatisation Report. Changes in staff number could be as a result of retired or already retrenched staff. In any case the issue at hand here is excess staff and not necessarily the exact figures which were taken directly from both reports.

an illegal termination racket¹³⁹ (Opiyo, 2004; “Probe irregular deal”, 2005; “Telkom can’t go on”, 2005). The influence of the syndicate was reported to have been so big that the investigative Government departments had been reluctant to intervene. The Minister for Transport and Communication reported that the racket had cost Telkom an estimated Ksh 120 billion (US\$ 12m). However, interviews with the staff of CCK, revealed that in August 2003 one of the Directors of CCK, blamed some Telkom officers for abetting the fraud. His report which had linked the fraud to powerful officials in Kibaki’s Government had led to his eventual unofficial sacking by the Government.¹⁴⁰ The details of the report to date remain secret. However, CCK senior officials interviewed noted that even the MD of CCK could do nothing about the sacking and had been forced to let the Director take forced leave (interview #30).

Cash strapped

It is unclear how Telkom as a company operates or what its profit or loss is. In spite of being a limited company under the Companies Act (Cap. 486), and therefore required to file company returns, Telkom returns are kept confidential. Interview data collected while on field work, however reveal that Telkom had a cumulative deficit believed to stand at Ksh 16 billion (US\$ 16m) and the company pension fund was owed a further Ksh 4 billion (US\$ 4m). In an effort to raise funds, the Government in February 2005 announced that it planned to offload 11 percent of its shares in the mobile company Safaricom. The move of the Government was viewed by industry analysts as a means for Telkom to raise funds for capital expenditure, redundancy payments and pay part of its debt (Esipisu, Isaac, 2005).

6.4.2 Summary

Nonetheless, the delayed sale has not produced the desired results. Instead, Telkom’s revenue has been on a downward trend and its service performance has been low. This is acknowledged by many of the players interviewed in the market. Several senior staff

¹³⁹ Basically, these individuals were accused of collecting money from third party networks located overseas.

¹⁴⁰ I was located in CCK offices and specifically reporting to this particular Director at the time. A few days into my arrival he was reported to have been on leave, however, the word on the ground was that he had been asked to leave.

managers from Telkom argued that the reasons for lack of efficiency in the market were as a result of limited finances to improve ageing networks. In addition they cited operational problems such as having switches from different manufacturers with different management systems. As one interviewee commented: *if there is a fault, we do not know where the problem is. We want to be able to trouble-shoot effectively* (interview #5). Operational staff at Telkom complained that: *we have customers at all levels who are very dissatisfied. There are demands from users that we are not able to meet. There are inefficiencies in the company. The company is not computerised or automated and this allows the potential fraud* (interview #35).

This has implications for the original roll-out targets provided to Telkom for provision of telecom services. To date, the ministerial announcements of the sale are best described as contradictory. Members of Parliament had suggested that the sale of Telkom would commence in 2003 or early 2004 but Telkom noted that their exclusivity licence allowed for an extra year in which to meet its obligations should they not be met.¹⁴¹ This now common spectacle of discord in the 'Government-Telkom alliance' is therefore evidence of mounting tensions between the two over future market structure that has left the impending sale in doubt. As a result, it is arguable that Kenya is on its way to breach its Schedule of Specific Commitments as the re-sale process seems scheduled for mid 2006 and is well behind its intended 2003 initial target date.

Perhaps more significant than the potential GATS violation, is the lack of trust that the general public has towards the Government over its failure to adhere to time-frames it developed and whether the policies required to attract investment to foster the local market and regulatory landscape are in place. In addition, this delay since 2003 implies that the Kenyan public continues to pay the cost of being locked out of the 'knowledge economy' as a result of a slanted liberalisation process. Telkom's inability to meet the specified goals within the last eight (1998-2005) years suggest that the targets may not have been rigorous enough or that the mechanisms instituted (such as provision of a regulator) were not adequate enough to enforce the targets. The ongoing relationship between Telkom and

¹⁴¹ Interview conversations with senior management of Telkom.

CCK attests to this. The majority of the staff of CCK associated in some way with their colleagues at Telkom. This co-relationship throws into question the ability of the regulator to perform its functions as shall be further discussed in the following sections. Thus, in spite of the expiry of Telkom exclusivity in June 2004, 39 licences were issued in 2005. This includes licences in local loop, private data network, commercial VSAT, and Internet backbone and gateway operators (CCK, 2005). This however did not include VoIP which was only licensed to other operators in August 2005.

While Telkom's inability to meet the specified targets by 2003 according to the KCA suggests that the matter was finally negotiated between CCK, Telkom and the Government, questions have been raised over whether the roll-out targets and the mechanisms chosen to measure the roll-out targets were rigorous enough. The closed-door nature of the negotiations however provides no means by which to test this. As shall become evident in the remaining sections of the chapter, a lack of transparency by the Government, and its association with Telkom and CCK, as well as administrative concerns on the part of CCK, continues to affect other services in the telecom sector.

6.5 Opening the fixed-line market: the licensing process of Regional Telecommunications Operators (RTOs) and the Second National Operator (SNO) (1999-2005)

As discussed in chapter 5, Kenya's schedule of specific commitments made limitations on local telephone service, long distance telephone service and international long distance service subject to the licensing of a SNO. In line with this, the Postal and Telecommunications Policy Guidelines (2001) mandated under the KCA, authorised Telkom to provide these services for a period of 25 years with a right to exclusive provision for the first five years with regional telecommunications operators (RTOs) and a SNO being licensed to provide competition with Telkom and help meet the objectives of the KCA. It was anticipated that RTOs would immediately be licensed to provide services that covered areas outside Nairobi and that a SNO would be licensed immediately after Telkom's end of exclusivity in December 2003. This was set to happen with the partial privatisation of Telkom. As has been discussed in the previous section, Telkom's sale has yet to be operationalised. The licensing was to take place through the licensing policy process

mandated by CCK as the regulator of the industry. The licensing policy is an integral part of the KCA and acts as a major governance mechanism for the regulator in the sector. The CCK chose a licensing-based option to determine the new entrants. This option is based on a bidding process with three stages: pre-qualification, technical and financial evaluation procedure. While the details vary slightly with each applicant, the basic components are outlined below:

- Pre-qualification stage: this includes evidence of network and financial history in the specified sector. For example, a mobile licence application requires evidence of more than 250,000 network subscribers and a turnover of at least US\$ 100 million.
- Technical stage: this includes an understanding of pricing and consumer needs, the feasibility of the offer (eg. a detailed description of the proposed architecture of the network) and an analysis of the applicant's credibility.
- Financial stage: if deemed successful at the technical stage, no 'point distinction' is made among the applicants and the process then moves to the financial stage where the process converts to (what could be termed) an 'auction' format, in that the firm that submits the highest amount for the licence is automatically made the winner of the process. (CCK, 2003, 2003).

Thus, based on the above procedure, CCK is obliged to grant a licence to an applicant whose bid has scored at least 75 percent based on a scoring matrix at the technical procedure stage and has offered the highest financial bid. The rules governing the operation of the service to be provided by the applicant are then stipulated in the licensing document as provided by CCK.¹⁴²

While the process for licensing appears clear on paper, a review of the events in the licensing process discussed in the following sections reveal a farcical comedy of delays and errors, resplendent with plagiarised bids and what has become pedestrian ministry -regulator sparring and power struggles. As is evident from the preceding discussion, policy vacillations

¹⁴² There are 13 main rules governing the process including, for example: licence duration, annual roll-out obligations and USO.

linked to tensions resulting from global market conditions, Government uncertainty about retaining a controlling share in Telkom and the restructuring goals of the wider privatisation programme resulted in substantial delays to the original proposals. As a result of such controversy, outcomes have not fulfilled intended objectives as set out by the KCA under Kenya's Schedule of Specific Commitments. As will be evidenced in the following analysis, the licensing process, intentionally steeped in secrecy, facilitated political interference in the telecom sector.

6.5.1 Licensing of Regional Telecommunications Operators (RTOs)

The licensing of the RTOs is better situated within the concept of the USO of Telkom and the context of telecom in Kenya in 2000. In early 2000, Kenya's virgin telecom market had just one fixed-line monopoly operator with over 120,000 registered 'waiters' on the waiting list. In an attempt to fulfil USO, CCK initiated the process of licensing RTOs. This followed a project trial aimed at evaluating the feasibility of introducing rural telecom operators. The decision to licence RTOs was justified by the argument that Telkom at the time held a monopoly on the provision of regional telecom provision, but needed support if the Government was to meet USO as well as fulfil the KCA mandates. The RTOs were expected to provide services in the country's eight provinces.¹⁴³ The licences would be granted for 15 years and would be renewable for a further ten years upon their expiration, as stipulated in the KCA. The licences would allow for the provision of local exchange basic voice services, inter-exchange basic voice services, and regional long-distance basic voice carrier services. The licensing process outlined in the previous section was used to determine issuance of the licence.

The provision of telecom was a highly sought after market and Kenya's announcement of the licensing of RTOs was received with much enthusiasm from the international community. Some 64 prospective bidders sought to provide services under the RTOs licence (interview #18) However, Telkom made protests to the proposed licence in the

¹⁴³ The Capital city, Nairobi, was not included on the list of areas to be serviced by the RTOs; Telkom was expected to have continued exclusivity status in this region.

middle of the bidding process citing its monopoly on the telecom market (Agoro, 2000). While no clear evidence is given for Telkom's right to interrupt the bidding process, interviews with Telkom management at the time suggest that the Government had had a change of heart (interview #35). Initially, tendering for eight licences based on the administrative boundaries of Kenya was launched in February 2000 with each licence covering a specified region in the country with the only other fixed-line competitor being the incumbent Telkom. The licences had a USO to provide at least two payphones in the smallest administrative unit (sub-location) in five years. However interviews with CCK's core management team reveal that protests from Telkom led to a policy change contrary to the KCA, in which each bidder was only allowed two licences instead of the original eight. By mid March 2000, further changes were made with CCK announcing that each bidder could bid for all eight licences. Breaking with its previously held view of issuing licences in all eight districts, CCK retained Telkom's exclusive coverage of Nairobi (the capital city) along with its ability to provide VSAT and international bandwidth services (interview #18). This meant Telkom retained the lucrative market of Nairobi which alone generates over 70 percent of Telkom's revenue. The initial bidding process which was opened on March 23rd 2000 employed a three step tendering process under the licensing policy. The bidders were first assessed technically and those qualifying with a score of over 75 percent then proceeded for the opening of the financial bids. The highest qualified bidder was then awarded the licence. From this process, three consortia were successful: 1)Telefair Telecommunications (K) ltd given to cover Central Cost Nyanza, South Rift and Western provinces, 2) Safitel Ltd given a coverage of Eastern and North Rift province and 3) Bell-Western Ltd to cover North Eastern province (Agoro, 2000).

The three bidders committed to invest up to US\$ 350m and to provide 299,000 lines in a fixed-line/wireless network the size of incumbent Telkom outside Nairobi in less than three years. Additionally, the consortia committed to pay the Government an upfront licence fee of US\$ 37m. This would have provided the Government with the much needed revenue given its upheavals with the donor community at the time. As stipulated under the new Government directions, no licence was issued for Nairobi city. Despite the exclusion of Nairobi city, the numbers appeared impressive. There were over 5.2 million households

barely served by only 120,000 lines (ITU, 1998) and 15 year licences with a further renewal for ten years. Moreover, six months before, Vivendi Telecommunications International and a local conglomerate Sameer Group, had committed to pay US\$ 55m for a national cellular licence to compete with mobile operator Safaricom which had been licensed in 1999. Against these parameters, the market for RTOs looked promising.

However, by the end of 2001, none of the RTOs had paid their licence fees and the telecom market was changing with the licensing of mobile operators in the market (as shall be discussed later in this chapter). Nonetheless, in the ensuing five years (to December 2005), full operations were still to begin. So far, only Bell-Western Limited was issued with a licence in October 2003 to operate in the North Eastern Province. This was issued after protracted negotiations and even then, under slightly modified entry terms (payment of the licence fee in instalments) to accommodate the bidder's financial difficulties. Bell-Western was expected to roll-out 20,939 lines in five years to meet CCK targets (Chepkonga, 2003).

Various allegations were reported in the press between 2000 and 2003 with complaints from both CCK and the RTOs over the handling of the licensing process and the amount of money due for the licences (Akumu, 2000; Amoro, 2000; Kiseru, 2001b; "Telkom firms to pay", 2003). While CCK has not come out openly on the issue, interviews with the licensing team reveal that the application for the licence was based on speculative bidding on the part of the bidders – bidding that was not necessarily supported by a commercial evaluation of the market (interviews #30 and 35). By the end of 2005, Bell Western was reported to have closed down its operation, citing that the proposed USO was too expensive given market changes (interview #12).

In spite of a change of Government in 2003, and Telkom's end of exclusivity in mid 2004, none of the overtures of the process could cure the changing telecom market. Rural market consumers with far lower disposable incomes, restricted technologies and explosive roll-out by the mobile industry, meant that no clear path for rural provision of telecom was provided. As is evidenced in the following section, the licensing of the SNO which would compete in every aspect with Telkom was still to leave Kenya's largest population, the rural community, without any clear direction to accessing telecom.

6.5.2 The licensing of the Second National Operator (SNO) (1999-2005)

During Telkom's exclusivity period, service provision was still below par indicated by complaints received by CCK. Seeking to address these concerns, in mid 2003, a paper by the Board of the regulator, recommended that Telkom be stripped of its monopoly in the provision of the long distance fixed-line by issuing a licence for a SNO (CCK, 2003). At the end of 2003,¹⁴⁴ the new Minister for Transport and Communications under the NARC Government, issued a statement instructing CCK to commence the licensing of a SNO to compete with Telkom (CCK, speeches, 2003). The Government expected to raise a minimum bid of US\$ 50m as evidenced from the Finance Ministers budget speech in June 2003 (Mwiraria, 2003). This was not far fetched given that in the context of other African countries, large sums had been raised from the SNO licence. For example, in Nigeria, the SNO process in 2002 was won by Globalcom with a licence bid of US\$ 200m and in Tunisia, the process was won by Orascom with a licence bid of US\$ 454m (World Telecommunications Statistics, 2002). The licensing of the SNO received much publicity in 2003 given that it was expected to choose any technology it wanted to deploy in its network. This was to be a big milestone in Kenya, given the restrictions on infrastructure due to Telkom's exclusivity. More significantly, the SNO would have been expected to utilise the new technologies such as VSAT and wireless and therefore reach the rural community through less expensive means bringing market prices of telecom down. However, the much hailed tendering process was delayed to April 2004.¹⁴⁵ It was clear that the Government was keen to stay the process until Telkom's end of exclusivity in June 2004.

A whiff of impending scandal in the SNO tendering process (which was held behind closed doors as was with all the other licensing processes) permeated the pre-bidders conference when the Treasury announced that the winning bid would be subject to a reserve price. The sudden change of the process, in which not even CCK or the Treasury had any idea of what the price would be raised concern throughout the sector. *The EastAfrican* newspaper quoted

¹⁴⁴ The statement was issued on 2nd October 2003 during a speech on liberalisation of the communications sector at the CCK offices.

¹⁴⁵ The submission of bids for the SNO licence was done on April 30th 2004.

the CCK MD as saying: *we have avoided discussion on the reserve price even at Government level to avoid information leaks that might influence the process* (Kirui, as quoted in Munaita, November 1st 2004a). Interview correspondence on email with CCK staff noted that a committee comprising the Government, CCK and bidders' representatives would agree on a formula for determining the reserve price (interview #14 and #23). However, bidders felt this was introducing a new condition too late in the process. No committee was convened, leaving the decision to the Treasury and CCK. A few weeks later, two bidders, SaskiTel and Detecon withdrew from the tender (Munaita, 2004a). In response, the CCK MD, made no mention of the bidding process and only noted that *they called this morning to say they will not pursue their interest* (Kirui, Nation radio online, 11th May 2004). While no formal reasons were cited, the inconsistency of the process probably informed their withdrawal. As one interviewee noted, the inherent conflict of interest would significantly reduce the chances of success, and the lack of transparency of the process called into question whether *any successful result can possibly be in the public interest* (interview #50). Yet the Government remained resolute that closed door negotiations would allow it to avoid leaks (Kirui, 2004). It was also argued that closed door negotiations would facilitate frank discussion and disclosure of business plans as competitors would not have to withhold sensitive information, allowing for a more thorough assessment of the bids. With CCK's compliance secured through its representation of the newly established SNO working committee, CCK announced that the consortium with the highest financial bid from the technically qualified firms would be subject to meeting the reserve price (ibid, 2004).

Predictably and certainly paving the way for a likely legal challenge to whatever the final decision would be, bidders complained that the pre-qualification stage had been marked by irregularities. For example, one of the bidding firms had no local partner, a key requirement of the licensing process as stipulated in Kenya's Schedule of Specific Commitments as well as the KCA, which had placed a limitation of foreign ownership. One of the bidders also complained that in spite of the consortium not having an original bid bond, CCK had accepted its financial and technical proposals. With such allegations, it was not surprising that Triple A, the premier financier and partner in the Telenor Management Partners consortium filed a court challenge against Mr Tuju who had since replaced Mr Michuki as

the new Communications Minister a corruption scandal. Significant to Mr Tuju's new appointment was the merging of the Ministry of Transport and Communication and the Ministry of Information and Broadcasting into one Ministry - the Ministry of Communication. This was done to reflect market changes in the convergence of technologies and to pave the way for what was hopefully to be a more clear licensing process which would allow one licence to be issued across several types of technologies.

The court case against Mr Tuju was further propagated by the fact that it was rumoured that Mr Tuju had been influenced by the Treasury to lower the price from the reserve of US\$ 80m to US\$ 25m (Munaita, 2004b), a contention that CCK denied (interview #23). The speculation in the market had been that the SNO licence would draw at least US\$ 70m given Kenya's economic conditions. Allegations of interference, undue influence, tampering with tender documents and irregularities plagued the tendering process between May and October 2004. Finally after much controversy, the court ruled that CCK should consider re-tendering the process, a move that was supported by the Communications Minister. This decision was challenged in court by one of the bidders. Thus by the end of 2005, the SNO licensing process had yet to be completed.¹⁴⁶

6.5.3 Summary: resale - a positive commitment negatively implemented

In many cases, although not all, telecom resellers generally do not own transmission infrastructure, but purchase services or bulk discounted minutes from network operators to sell to end users at a profit. It is widely considered to be a competition enhancing mechanism, facilitating rapid entry of newcomers with minimal investment, reduced risk and delays associated with capital intensive telecom infrastructure investments (Larson, 1996). In the current scenario, resale also extends to the proposed infrastructure sharing arrangement between the incumbent and the eventual RTO and SNO. In respect to Kenya's GATS commitment to introduce resale in both senses, between 2000 and 2003, progress was

¹⁴⁶ Recent developments in January 2006 indicate that CCK through instruction from the Minister of Communication is considering whether the licence should be tendered afresh, or, as before, or, repackaged to accommodate the new requirements in the sector in which the CCK scrapped the auction process in awarding licences in late 2005 (interview #6).

arguably stunted. As a result, it is arguable that Kenya is potentially in breach of its Fourth Protocol undertaking in this regard. Depending on how literally a DSB panel might assess these undertakings, the Kenyan Government might presumably argue that they complied with the process but have not been able to reach a conclusion on the matter. They might also argue that the terms stipulated by the Government for provision of these services were not fulfilled.

Perhaps more significant for consumers than a potential GATS violation, is the rising service tariffs, exacerbated by the existing prohibition of other competitors in the sector due to problems in the licensing process as discussed above. As shall be discussed in chapter 7, in the absence of a SNO and RTOs, the pre-existing possibility of meeting USO seems unlikely for Telkom. By mid 2005, Telkom continued to retain its exclusivity on VANS with the prohibition of voice services and VoIP to other commercial entrants, a matter discussed later in this chapter. The following section provides an analysis of the mobile sector in Kenya. Like the PSTN sector, the process of licensing the third mobile operator has been dogged by controversy due to Government interference and continues to hinder the process of telecom development in the country.

6.6 Mobile cellular services (1999-2005)

Under the KCA, Kenya committed to licensing one further cellular operator (beyond the existing two) after three years of operation of the existing network operators and subject to the fulfilment of the Government's policy targets (Postal & Telecommunications Policy Guidelines, 2001). This undertaking, like the PSTN services, echoed the provisions made in Kenya's schedule of specific commitments which noted that mobile services were to be liberalised subject to the provisions made under the GMPCS-MOU. The award process of the third cellular licence commencing in 2003 was the biggest legal and regulatory scandal to beset the fledgling sector at the time, both from a financial and perception of credibility point of view. The saga and the way it was handled also fuelled doubt as to the CCK's and Government's commitment in the telecom sector. The chaos that surrounded the process is undoubtedly linked to the blurred boundary lines of power between CCK and the Minister to invite and grant licences. Concerns about this provision become clearer as the assessment

of Kenya's compliance expands and the areas for concern emerge. Detailed discussion below of the process is instructive in further assessing GATS compliance, but also serves as a basis for examining the provisions of the RP regarding independence within a neo-patrimonial state. This analysis is taken up further in chapter 7 where a re-examination of the issues is presented.

6.6.1 The third cellular licensing process

The licensing process for the first cellular licence was completed without much publicity given the Government's own involvement in establishing a joint venture between Kenya's state-owned Telkom and Britain's Vodafone. In early 2000 Safaricom Ltd (the joint venture between Telkom and Vodafone) was issued with a licence to operate as the first mobile operator in Kenya. Prior to the opening of the cellular market, mobile operation was the domain of a few elites with restrictive prices from Telkom costing as much as US\$ 2000 a month. The licensing of Safaricom was therefore seen as timely in a region in which both Tanzania and Uganda had liberalised their cellular markets earlier.

In May 2000, a second cellular service was granted to Kencell Communications now known as Celtel.¹⁴⁷ The second cellular licence was heavily contested by six bidders including South African mobile operator MTN and Orascom from Egypt. The awarding of the two licences was highly significant for Kenya under its obligations to the international community, particularly the IMF and the World Bank which had stipulated conditions on the opening of the market. Moreover, the delayed sale of Telkom had placed Kenya in a difficult position. Its need to show credibility in meeting its obligations was therefore paramount. Under the World Bank's SAP, consultants from a US company were provided to work with the Ministry of Transport and Communication on licensing issues and develop a plan for mobile roll-out. The consultants had recommended a plan of a total of 200,000 users based on their experience in other African countries. A second opinion was sought from another consultant from the US who proposed the provision of a network capacity of 2 million. A

¹⁴⁷ In May 2004, 2 years after its operation, African mobile group Celtel won a tough battle to control Vivendi's share of Kencel and paid US\$ 230m for its 60 percent stake. Subsequently Kencell Communications changed its name to Celtel.

network of 2 million was therefore issued for both Safaricom and Celtel. The combined licensing process brought in US\$ 55m to Kenya's Government. By the end of 2002, both cellular operators had a combined connection of 1,068,000 users from 15,000 users in 1999 (Chepkonga, 2003). The licensing of the third mobile operator in 2003 was therefore seen as a progressive means to further open the market and lower market prices.

In January 2003, the CCK Board approved the licensing of the third cellular mobile operator. Four main reasons were provided as justification for introducing a third operator. First, the board argued that a large customer base would overstretch the network of the two companies and compromise on USO targets. Second, a third mobile operator was seen to provide a balance on the ongoing expansion of services in areas with no coverage. Third, the new entrant would lower access charges due to competition and thus create a larger customer base and fourth, the third operator would raise additional revenue for the Government through licence fee and taxes and thus create more opportunities for employment (interview #13).

The above views were largely supported by local and international advocacy groups who all saw the introduction of a third operator as a means of reducing charges on services provided to the public as well as increasing the viability of achieving USO. This was also largely supported by the ITU and WTO who in the pre-bidders conference gave consent for the process noting that the unmet market demand for telephony in Kenya was between 4.7 and 9.4 million and thus would enhance both qualitative and quantitative demand for economic growth (interview #55). The method of entrance was the licensing tendering procedure described earlier. All pre-qualified firms indicated that they would partner with the local firms in keeping with the Government policy through the KCA. Five firms were pre-qualified by CCK to tender for the third GSM licence: Econet, Mobile Systems International (MSI) Cellular Investment Holdings BV of Netherlands, Kenya Telecommunications Investments Group (KTIG)¹⁴⁸ and Telsar Solutions (Pty) Limited and Telecel International

¹⁴⁸ A partnership between Detecom International GmbH of Germany and Kenya (a partnership between Swedtel Ab of Sweden and Al Byte Information Technology of Kenya).

South Africa (CCK, 2003). The criterion used to short list applicants was based on the licensing process noted earlier on in this chapter.

The licence was awarded to Econet on September 19th 2003 with a bid of US\$ 27 million. The consortium beat Mobile Systems International (MSI) Cellular Investment Holding BV of Netherlands (with Industrial Promotion Services Kenya as local partners) who had also qualified at the technical evaluation stage and had made an offer of US\$ 11 million for the licence. The other two firms were disqualified at the technical stage. It was confirmed by an employee of CCK that no real definite reasons are given for the disqualification at the technical stage (interview #26). Clearly a lot of the evaluation was based on the subjectivity of the board members who spent an entire day debating the bid. I requested to attend the meeting as an observer but was denied access. Nor was I given permission to see the actual bids submitted. Press journalists also indicated that they faced much resistance in documenting and publishing the issue (interview #53 to #55). Once the process was deemed technically qualified, no point distinction was made among the applicants. The tender process immediately converted to an auction where the firm that submitted the highest bid for the licence would automatically win the tender. Four main issues emerged in the following weeks and months following the bidding process attesting to the problems reminiscent in the SNO and RTOs process.

First, Econet consortium suffered an acrimonious parting with its key local bidding partner, the Kenya National Federation of Cooperatives, which was having problems in funding the deal. To begin operations, Econet needed to pay licensing fees of Ksh 2.16 billion (US\$ 27 million) to the Government. The Kenya National Federation held an 82 percent shareholding while Econet's stake stood at ten percent with eight percent held by Corporate Africa and Rapsol equally. It should be noted that the local partners were not large scale investment companies but rather local savings bodies who require the decisions of their members before they can invest.

Second, Econet's winning bid was also the subject of disgruntled statements from the existing service providers Safaricom and Celtel. In an interview with Safaricom and Celtel senior management one respondent said:

We should have been asked what we thought of the third mobile operator. As it stands, Econet will have a hard task penetrating the market, even in Nairobi and Mombasa where the market is high, they will have to invest in a lot of money as we have done. We do not believe that Econet would enhance market competition. Instead of having a third Mobile Operator, we should have been asked about how we could expand the network to reach untapped areas and therefore fulfil our USO (interview #5).

While this could be read as fear of competition from Safaricom, which also experienced a similar process filled with complaints and wrangles in the media over the licensing procedure (which raised questions of a lack of impartiality in the technical and financial process) it is significant given that issues of USO were paramount as a reason given for the provision of all competition in the sector. Econet's Chief Executive quickly reacted to questions about its ability to provide service by noting in his statement that Kenya currently has a market of about five million people and Econet expected to secure a third of the market over the next five years (Balancing Act, 2004). Further, Econet based their belief on the support of Kenyans who they hoped would be more inclined to support a largely Kenyan owned company (interview #5). Further statements of protests, were issued by a consortium of MPs from the Opposition party KANU and the ruling NARC party who claimed that the licence was not granted in a transparent manner and that the US\$27 million that Econet was insufficient. This they claimed was based on the fact that Safaricom and Celtel had paid nearly twice the amount for their licences.

Third, striking in its similarity to the issues experienced by the SNO evaluation in 2003, KTIG, one of the consortia that had participated in the second leg of the tendering process began legal proceedings citing lack of transparency and fairness in the tendering process. Through its lawyer, Mr James Orengo,¹⁴⁹ the consortium argued that the tendering process was flawed as both the technical and financial evaluations were not considered together given that their financial bid was US\$ 55 million (*KTIG vs CCK and Econet*, HCCC No. 1570 of 2004). According to interview sources, during the technical process, Mobile Systems

¹⁴⁹ Mr James Orengo was a key player of the Opposition party and thus also received much press attention given his dual role as Member of Parliament.

emerged as front runner with a scoring of 90 percent while Econet scored 78 percent. The litigants, KTIG, scored 62.2 percent nearly 13 percent below the minimum 75 percent mark set in the tendering procedure and were thus effectively locked out from proceeding to the financial tendering stage (interview #53). In a press interview KTIG claimed that they were prompted to disclose their financial plan by stating the value of its monetary bid for the licence and that the information may have been a disadvantage (Capitalfm News, Nov 17th 2004).

Arguably the court did not find enough evidence to have the process repealed. Clearly there is a loophole in the tendering procedure. No documents were availed to the public to read and thus blame in the media was assumed to rest with CCK board members responsible for approving the tendering procedure. In my interviews with the various board members, it was clear that the subject of licensing was a thorny one and was met with much resistance and defence of their system. In reaction to the criticism of the licensing process from the public, CCK issued a press release in the Standard newspaper noting that the commission would not be moved by rising criticism of its licensing procedures (Mugusu, 2004). Details on the licensing process for the third GSM was classified and was only available to members of the board. Due to confidential agreements, the licensing team could not directly confirm the licensing problems but I was left with little doubt that problems do persist in the licensing process and that this process needs to be re-evaluated.

Fourth, on November 10th 2004, Econet was granted its licence. But this was not to last long as the Minister for Communications, Mr Tuju nullified the issuance of the licence to Econet on 27th November 2004. This announcement came following a long and arduous battle between Econet, the Minister and the regulator over Econet's raising of only US\$ 15m of the US\$ 27m licence fee. The Minister announced that *the consortium has been unable to make payments according to set deadlines and all discretionary extensions that may have been accorded to them are hereby rescinded* (CCK, Press release, November 27th 2004). After various court proceedings the Kenya High Court on December 4th 2004 (in what is no doubt to become a subject of analysis for many lawyers in the years to come) restored the licence to Econet. In his ruling, Justice Ibahirim said the Minister had no legal authority to cancel the 15 year licence granted

to Econet by CCK (*Econet vs Minister of Communications*, HCCC No. 1640 of 2004). After the ruling, Econet took the Communications Minister and the acting MD of CCK to court, accusing them of contempt and allegedly defaming Econet's trade mark in a speech made by the Minister in parliament and demanded that US\$ 75m be paid. The court case was yet to be completed as at January 2006. In addition, the payment of the licence fees was yet to be resolved. Rumours that Econet had had other problems in other countries in Africa seem to suggest that CCK may have made a mistake in the tendering process.

6.6.2 Summary

The third cellular licensing debacle, however, much like the unfolding the SNO and RTOs process is a cautionary tale of neo-patrimonial behaviour in which the lack of separation between Government and regulator as both policy maker and implementers serves the purposes of the ruling elite. While not pronouncing on the source of the problem, the court did question the role of the Minister in the tendering process (Court of Appeal, 2004). While the issue of independence is further discussed in chapter 7, it suffices to note that the dualist licensing provisions, in allowing both the CCK and the Minister to make statements on behalf of Government, suggest that Kenya is not complying with its undertakings on independence as stipulated in the RP.

The following section analyses the last market limitation placed on the telecom sector focusing on the opening up of the internet and the exclusivity given to Telkom's Jambonet for international leased lines. It must however be emphasised that a full discussion of the opening of telecom market, more specifically the internet and VSAT application is primarily the subject matter of another study. The detail that follows is limited by its summary nature and the fact that its outcome is an ongoing process at the time of writing. However, because the process also serves as a useful microcosm of the multiple problems with the current regulatory regime, the following narrative also serves to illustrate many of the institutional design flaws inherent in the current framework.

6.7 Facilitating competition and interconnection services

As noted in chapter 4, the RP requires member states to take appropriate measures to prevent major suppliers from engaging in or perpetuating three specific anticompetitive practices,¹⁵⁰ that is, anti-competitive cross subsidisation,¹⁵¹ improper use of information and failing to make available on a timely basis, technical and commercially relevant information which is necessary to provide their services. The RP also requires incumbents to provide or ensure interconnection (the technical term for access)¹⁵² by competitors to the incumbent's infrastructure. According to the RP, interconnection is defined as the *linking with suppliers providing telecom transport networks or services in order to allow the users of one supplier to communicate with users of another supplier and to access services provided by another supplier* (WTO, 2001 "Negotiating guidelines" Clause 2.1).¹⁵³ In a monopoly environment, this service also extends to the leasing of infrastructure or general facilities that would enable other service suppliers to offer services to their customers.¹⁵⁴ Interconnection principles are arguably a core mandate of the RP and the GATS itself as competition is totally precluded in the absence of an effective policy that does not curb negative interconnection practices. As interconnection agreements are generally commercial arrangements between companies, safeguards ensuring interconnection are largely commercial arrangements and require parties involved to negotiate suitable terms for service provision.

¹⁵⁰ For an assessment of competition in telecom and international trade in light of convergence, see Marcus Fredebeul-Krein and Andreas Freytag (1999), "The Case for a More Binding WTO agreement on Regulatory Principles in Telecommunications Markets" *Telecommunications Policy*, 23 p625- 628.

¹⁵¹ Note that cross-subsidisation is not always anti-competitive but can easily become so in monopoly markets where profits from exclusive licences are used to undercut competitors prices in non-exclusive services. In Kenya, prior to tariff rebalancing (which has been taking place progressively since the reform), Telkom has had leeway to cross-subsidise with a view to meeting its USO.

¹⁵² 'Access' may include access to physical infrastructure; local loop; network elements; leased lines; buildings, ducts; manholes and masts; location of points to connect; directory information and in the case of cellular services network access for the purposes of roaming. For further discussion on interconnection policy see Hank Intven, McCarthy Tetrault and Infodev (2000) "Module 3-Interconnection", *Telecommunications Regulation Handbook*, Washington, World Bank.

¹⁵³ See WTO online at http://www.wto.org/wto/english/tratop_e/serv_e/telecom_e/tel23_3.htm

¹⁵⁴ See the KCA (2001) Part VII, Interconnection and provision of fixed links.

The KCA mandates that the regulator deal with claims of anti-competitive behaviour in the market noting that *the commission shall have power to hear and settle disputes between a licensee and a subscriber or class of subscribers* (KCA, p243). An entire section of the Act is also directed toward the issue of interconnection and the provision of fixed-lines (see KCA, 2001 Part VII). The discussion that follows is therefore limited to evaluating the process of facilitating competition in the telecom sector.

6.7.1 Telkom and the opening up of the internet (1999-2005)

By the end of 2000, the telecom sector had contributed over US\$ 77m to the exchequer through various licences and benefited the Treasury US\$ 8m through licences granted to mobile companies – Safaricom and Celtel (Chepkonga, 2000). The paging market and internet market was open and by the end of 2000 there were 22 paging services and 39 licensed ISPs (CCK, 2000). However, establishing an ISP required an initial investment of Ksh 750,000 comprising a five year licence of Ksh 500,000 and annual fee of Ksh 250,000. The annual fee was later reduced to Ksh 100,000 after ISPs complained that the licence fees were too restrictive and reductive for market investment (interview #10).

While the growth of the internet sector was meteoric, ISPs had little leeway on quality of service to the consumer, input costs and therefore limited marketing advantage and means for innovation given the restriction on international bandwidth which had to be through Telkom's Internet gateway - Jambonet. While the initial opening up of the internet sector was well received, ISPs soon realised that they paid expensive tariffs which were used to fund the expensive international circuit operated by Jambonet. The implication of this was that local data which could be easily transmitted locally was being routed through the international bandwidth circuit first and rerouted. Since Kenya has no international fibre optic connection, transmitting via international bandwidth involved two satellite hops in order for traffic to reach its destination, which in many cases were just a few kilometres across Nairobi. This is a costly exercise for the consumer, the ISP and ultimately the country as a whole. More importantly the satellite hops cause latency, which affects the speed and quality of transmissions. Thus, without an internet exchange point (IXP), ISPs had to pay international bandwidth prices for traffic which is destined locally. It is not surprising,

therefore, that there was discontent with the perceived lack of independence of the regulator particularly their decision to license Jambo Telkom to provide internet services. The essence of the complaint was that Jambo Telkom was a subsidiary of Telkom who owns Jambonet. This move was seen as a further way of strengthening Telkom which still had monopoly in the delivery of most services at the expense of the ISPs. It was unclear how much Jambo Telkom would be paying for their bandwidth with most ISPs feeling that it was actually getting free bandwidth and better digital lines to enable them to acquire customers from the ISPs through cheaper and more reliable services.

6.7.2 Negotiating for a Kenyan Internet Exchange Point (KIXP)

After various negotiations with Telkom which commenced in August 1999, it was agreed that ISPs could transmit Kenyan internet traffic through their own exchange point thereby saving bandwidth cost and reduce demands on the international circuit. This led to the formation of the Telecommunications Service Providers of Kenya (TESPOK) in 1999, one of the first major civil society caucuses from the private sector launched to represent the interests of ISPs and other value added telecom services. The solution proposed by TESPOK was to establish a Kenyan Internet Exchange Point (KIXP) (interview #4). The KIXP was to reduce the time and costs required to send and receive electronic mail locally and act like a 'clearing house' among ISPs. The KIXP would save Kenyan ISPs more than half of what they paid for international bandwidth. While the subject of civil society is not a part of this study¹⁵⁵, it is noteworthy that TESPOK and other civil society caucuses under the auspices of Kenya ICT Action Network (KICTANet)¹⁵⁶ were to influence negotiation of the opening of the sector. In March 2004, KICTANet held its first multi-stakeholder

¹⁵⁵ See: Etta, F., & Elder, L. (Eds.). (2005). *At the Crossroads: ICT Policy Making in East Africa*. Nairobi, Kampala and Dar es Salaam: IDRC and East African Educational Publishers. This book is the first of its kind to compile specific details of the ICT civil society groupings and the development towards an ICT policy. The author was in part contributory to the title through discussions with Florence Etta. The authors in the book specifically look at ICT issues in relation to civil society and do not cover telecom or aspects of the KCA. Where this is done, it is only alluded to.

¹⁵⁶ While the formalization process of KICTANet took place in 2004, its preexistence dates back to early 1990's with interested members of civil society meeting in various forums without a formalized process.

meeting for the convening of a national ICT policy¹⁵⁷ to replace the current KCA. The heavy presence of diverse interest groups of which this author was part, underscored the participatory multi-stakeholder nature of the proposed ICT policy process. This was followed by a second multi-stakeholder meeting in March 2005. While the KICTANet has had its upheavals in pushing Government for changes, it is widely held as responsible for the current Draft ICT Policy which was tabled before Parliament in February 2006.

In early 2000, the KIXP was launched as the first internet exchange point between Morocco and South Africa. Almost immediately, Telkom filed a complaint with CCK arguing that the KIXP violated Telkom's exclusive monopoly on the carriage of international traffic. Within two weeks, in November 2000, CCK concluded that the KIXP required a licence, and ordered that it be shut down as an illegal telecom facility (Akumu, 2001). According to interviews with the TESPOK, during the two weeks of KIXP operation, measurements indicated that latency was reduced from an average of 1,200-2,000 milliseconds (via satellite) to 60-80 milliseconds (via KIXP). Likewise, monthly bandwidth costs for a 64kbit/s circuit dropped from US\$ 3375 to US\$ 200, and for a 512kbit/s circuit from US\$ 9546 to US\$ 650 (TESPOK, 2003). The closure was therefore deemed as simply a matter of protecting Telkom. After several negotiations that took nearly one year, KIXP received approval from CCK in the form of a licence granted in November 2001. The regulators licensing order represented a fairly dramatic turn in its decision making, noting that:

An IXP is not an international gateway but a peering facility that enables ISPs to exchange local traffic. The Internet is expanding very fast and since Telkom has demonstrated that it has some apparently insurmountable difficulty in rolling out Internet facilities, it would be in the best interest of the market to allow other companies to offer IXP services in the country (Board ruling as quoted in Akumu, October 9th 2001).

Nevertheless, CCK requested TESPOK to partner with Telkom. In April 2002, KIXP was officially re-launched by the MD of CCK, who had earlier revoked the KIXP (Chepkonga,

¹⁵⁷ As noted earlier, see the proposed ICT policy was to include all other technology infrastructures not covered under the KCA. For example, the KCA specifically does not include media and broadcasting which is covered under a separate statutory policy.

2002). By the end of 2005, Kenya had 73 registered ISPs (CCK, 2005). The case of KIXP presents yet further evidence of the linkages between the Government, Telkom and CCK. As is discussed in the following section, the Government in wanting to maintain its high stream of revenue given the failure of the SNO, RTOs and privatisation of Telkom, was reluctant to open up the market in spite of the expiry dates. In addition, CCK and Telkom's refusal to open the market were further complicated by changing market technologies most, significantly the introduction of VoIP. The developments of this issue and the Kenyan Government's reaction to it discussed in the following section.

6.7.3 VoIP

The introduction of VoIP in the market in 2001 caught Telkom and CCK by surprise. In 2001, CCK issued a statement banning any use of VoIP services and went about confiscating any equipment that provided VoIP. While this was seen as a means to protect Telkom's exclusivity, interviews and documents provided by CCK reveal that as early as June 2002, CCK wrote a recommendation to the Kenyan Government requesting them to legalise VoIP. In their management paper dated June 2002, CCK noted that:

the core distinction the Commission needs to make is that Voice over Internet is an application any user, company, or group can download or buy products for their own personal or organisational gain therefore an Internet Service Provider cannot be held liable for the actions of their customers. This would mean that the Commission would be pushing its responsibility to enforce the licence conditions on a commercial interest without due monetary service (CCK, 2002 p.2).

Nonetheless the report also noted that:

the use of Internet telephone services in the country is inevitably hurting Telkom revenue from International calls. VoIP is illegal in Kenya specifically to protect Telkom exclusivity on International voice services. However, VoIP calls do not herald the death of conventional telecom at the moment because the quality of Internet telephony is still not good enough. Also, the telecom infrastructure in the country over which VoIP operates, still needs to be improved. So, people who need to have that level of quality are still using the conventional international call (ibid, 2002 p.3).

The report concluded recommending that:

1) VoIP being part of Internet Services such as e-mail, WWW etc, should be allowed and encouraged as these services develop into more cost effective means of modern communication, by the deletion of the restrictive clause of the Internet Service Provider licence and Internet backbone facilities and service licence. 2) The Commission's policy remains to be technology neutral and new innovative technologies that enhance value to the end-users should be facilitated, in the best way possible. 3) That the Incumbent Operator, Telkom Kenya Limited, should be encouraged to follow ITU Recommendations to deploy more cost effective networks such as IP-based networks as opposed to the less efficient Circuit Switched Technologies. (ibid, 2002, p.5).

In spite of this report, Telkom retained its exclusivity in the market. As has been depicted in the analysis so far, political interest over Telkom explains the Government's reluctance to open the market. Confirming this, an editorial covered by the *Standard* newspaper (Opiyo, 2005), noted that the opening of Internet telephony was expected to *stir the political elite who had reaped huge profits from Telkom* (ibid, October 10th 2005). In February 2005, Telkom disconnected VoIP users who were using VoIP calling cards to make long distance international calls. This was in spite of the announcement by the Minister of Communications in May 2004¹⁵⁸ that the Government would re-issue licences to ISPs to provide VoIP services ("Kenya to liberalise" 2005). The CCK only confirmed changes to the licensing of ISPs in July 2005. Finally in November 2005, eight ISPS were issued with modified licences which allow them to carry multimedia traffic including VoIP (CCK, 2005).

6.8 Neo-patrimonialism and reforms

Given the length of this chapter's discussion, it is apposite to pause and offer a brief summary of the status quo within the neo-patrimonial political underpinnings of Kenya before proceeding to the discussion in chapter 7.

¹⁵⁸ Mr John Michuki made the announcement on 18th May 2004 while attending a workshop by telecom players to mark the World Telecommunications Day.

Recall that the de jure fixed-line exclusivity period was extended from December 2003 to June 30th 2004. This was agreed with the imperative licensing of the SNO and RTOs. The process to date, if instructive in any way, suggests that further delays can be expected and that there is no cause for optimism with regard to a definite licence being awarded in early 2006. In addition, the Government was to enact a Privatisation Bill which had been delayed for political reasons as discussed earlier. The Bill and the privatisation of Telkom as well as the liberalisation of the sector were therefore seen as key conditions under the loan money from the PRGF. However, one other politically significant condition had been fulfilled, the establishment of the Kenya Anti Corruption Commission (KACC) in May 2004.

KACC was, however, established under a fiery political battle. Kibaki's new Government began its term of office with corruption scandals that implicated key Ministers in his Cabinet. The IMF and the World Bank issued statements in the same period, noting they would cancel Kenya's withdrawal facility given the corruption accusations. In 2003 a law was enacted by Parliament which gave birth to the KACC. However, it was not until May 2004 that the Commission finally began operating because Parliament dragged its feet in approving and rejecting people and was playing politics of patrimonialism in which people nominated by certain members of Parliament were either accepted or rejected (see Nation newspapers through the Month of May 2004). At the end of December 2004, with the Government in need of funds to finance the payments of public service and its recurrent debts, the Kibaki's Government wrote to the IMF describing the policies that the Kenyan Government intended to implement in the context of its request for financial support in 2005. The Government of Kenya blamed the lack of progress on Structural Adjustment Reforms on capacity constraints and a lack of consensus on the objectives and modalities of reforms. In their letter (RoK, 14th May, 2004; box 8 below), the Kenyan Government noted that:

**Box 8: Recent Economic Developments and Progress under the
Program**

“Progress in implementing structural reforms had been mixed...Financial sector and parastatal reforms suffered from capacity constraints and lack of consensus on the objectives and modalities for conducting the reforms that has also delayed the enactment of the Privatisation Bill...Significant progress was made in building a robust governance architecture and in enforcing elements of the anticorruption regulations. Notable actions included the enactment of the AntiCorruption and Economic Crimes and Public Officer Ethics ACT in May 2003, completion of asset declarations by all public offers in November 2003, major restructuring of the judiciary and police over 2003/4 and the establishment of the Kenya Anti-Corruption Commission (KACC) in May 2004” (RoK, 2004).

After conducting an audit, the IMF approved SDR 50m (US\$ 76.9m) and *also approved waivers for the nonobservance of continuous and structural performance criteria* (IMF, Press Release (04/270) 20th December 2004). As will be argued in chapter 7, it is not surprising therefore that Kibaki’s Government was willing in 2005 to continue its slow progress with reforms. After all, they did not receive any penalties and, as shall be discussed, neither did the WTO issue any letter for non-compliance with the GATS framework. The Privatisation Bill was finally passed in August 2005. The Bill outlined how the Government would off-load its shares in state corporations. However, the Finance Minister, Mr David Mwiraria noted that *it will be selective privatisation because the Government must have control of those parastatals that offer essential services* (“Members pass privatisation bill”, August 11th 2005). Defending the lack of privatisation of Telkom, he noted, *Telkom Kenya employs 18,000 workers yet it has rolled out 340,000 lines compared with mobile phone providers Safaricom and Celtel with a combined workforce of 2,500 workers and 3 million subscribers*. This he said was as a result of *efficient management which privatisation aims at instilling in public institutions* (Mwiraria, speaking to Capitalfm radio on August 11th 2005).

Nonetheless, four years after gaining power, Kibaki’s record does not provide a clear case of reform. Between 2003 and 2005 many of his own cabinet Ministers were accused of

corruption.¹⁵⁹ It was not surprising therefore that the head of the IMF announced that the IMF was reviewing its aid flow to Kenya with a view to freezing it due to corruption that has infiltrated the new Government (Irungu, 2006). Thus between 2002 and 2005 many of the Government reforms that had been proposed under the Moi Government had been delayed. Blame for the delay has been laid on pressure from many of the conflicting interests in the NARC coalition and among top officials in the public service (Ndegwa, 2003). More significantly blame has been directed toward the neo-patrimonial nature of Kibaki's rule in which *he is concerned with establishing himself and NARC politically and therefore cannot use appointment strategies entirely for purposes of efficiency*' (Kjaer, 2004, p.406). From the foregoing analysis, it seems that neo-patrimonial politics, imbued in Kenya's policy process, was in part to blame for the sector's outcomes. Further discussion on this is provided in chapter 7.

6.9 Conclusion

This chapter set itself one primary task, to assess the implementation of Kenya's Schedule of Specific Commitments as indicated through the KCA drawing on the 3 themes in the framework developed in chapter 2, namely: patrimonialism, co-dependency and flexibility/transaction costs. The argument advanced was based on the study's hypothesis that the reform process has merely been instrumentalised to get more aid to fund the Government's needs at the expense of reforms.

It is now possible to summarise the patterns of implementation of the GATS telecom reform process over the last eight years (1998-2005). On a generous, though largely unconvincing interpretation, it could be argued that technically there has been a GATS compliance in that the Minister has announced the liberalisation of the SNO, RTOs and third mobile operator as well as the privatisation of Telkom and that the process was begun and has had setbacks. That said, to the extent that the above processes comply with the dates specified in Kenya's schedule of commitments, there is a clear breach on Kenya's part. Nonetheless the failure to introduce full competition in the telecom sector does have

¹⁵⁹ See the two national newspapers, Nation (www.nationaudio.com) and the East African Standard (www.eastafricanstand.net) which has had daily reports on the scandals of the Kibaki Government.

implications for the policy credibility that future liberalisation plans will carry. The legacies of past reform failures in Kenya reviewed in chapter 5 therefore continue to influence the dynamics of present efforts at reform. The realities on the ground therefore confirm arguments made by several African analysts critical of the reforms (van de Walle, 2001; Mkandiwire & Soludo, 2003) showing that the policy environment has changed less than is commonly argued.

As was evidenced in this chapter, African states manipulate the 'rules of the playing field in the GATS' to their advantage. The GATS thus becomes a part of the process that entrenches neo-patrimonial politics in African nations. A state therefore may be more reluctant to open its borders where there is a fledging or weak domestic industry that it wishes to protect. This, as this chapter showed, is the case in the Kenyan telecom operator – Telkom, which not only provides income and employment in the country, but, acts as an important political power tool in Kenyan politics. The only way therefore to limit companies and countries entering one's border is to refrain or limit scheduling commitments in a particular sector which may hinder the liberalisation process. Kenya's Schedule of Specific Commitments therefore afforded this opportunity. Given the data and analysis in chapters 4 to 6, the following chapter takes a holistic approach to the discussions, locating the issues within the three themes of the study (patrimonialism, co-dependency and transaction costs) drawn from the theoretical framework in chapter 2.

UNDERSTANDING TELECOM REFORM THROUGH THE LENS OF DOMESTIC AND INTERNATIONAL CONTEXTS: NEO-PATRIMONIAL STATES AND THE GATS

*What do we mean by an 'information society'? We mean one in which human capacity is expanded, built up, nourished and liberated, by giving people access to the tools and technologies they need, with the education and training to use them effectively. **The hurdle here is more political than financial.** The costs of connectivity, computers and mobile telephones can be brought down. These assets -- these bridges to a better life -- can be made universally affordable and accessible. We must summon the will to do it {Emphasis added}*
Kofi Annan¹⁶⁰

Introduction

The purpose of this chapter is to draw together the study's findings developed in chapters 4 to 6. Specifically, the chapter locates the discussion within the framework developed in chapter 2 and discusses the imbued nature of neo-patrimonialism and how the Kenyan Government interacted with the proposed liberalisation of the telecom sector under the GATS framework.

Following the analysis in chapters 4 to 6, it is evident through a review of Kenya's compliance with its GATS commitments that any apparent lag in meeting deadlines and achieving full compliance is attributable to specific domestic concerns in the Kenyan neo-patrimonial context. It has been asserted in this study that the very act of undertaking such commitments was to ensure ex post behaviour that may appear more rational to pursue after a commitment not to act in a certain way has been made. Yet, these commitments did not

¹⁶⁰ United Nations Secretary-General's remarks at the opening of the WSIS conference in Tunis, 16 November 2005, plenary meeting of the World Summit on the Information Society.

stop the Government from going against its commitments. For example, as evidenced in this study, in order to maximise returns for the further sale of state equity in Telkom, policy was designed to protect and advance the interests of the monopoly incumbent rather than promoting competition within the telecom sector. While it could be argued that this was possible because of the flexibility inherent in the GATS, one fact needs to be highlighted - the flexibility identified in the GATS framework and specifically the RP, does not compromise that commitment. There is a clear distinction between engaging in opportunist behaviour (for example, extending monopoly) contrary to an undertaking not to do so (liberalising the domestic Kenyan market), and utilising the 'flexible space' that inheres in the implementation of a 'vaguely precise' agreement which holds the signatory to specified guidelines and time-frames. In fact, as was argued in chapter 2, the usage of the flexible space is precisely what facilitates the development of this tension.

This 'flexible space' which allowed developing countries to negotiate their scheduling of specific commitments nonetheless came with the need to provide credibility in order to borrow money from the World Bank and the IMF. The lack of credibility, it was argued, stemmed from the fact that African governments had exhibited trends of non-reform and poor governance in spite of funding during the 1970s and 1980s. The creation of the WTO and the linkage between the IMF and the World Bank as was discussed in chapters 2 and 4 thus created the adjustment regime which gave rise to forms of various conditionalities such as the SAP. And it is within the ambit of the 'aid-trade' relationship that it was argued that countries such as Kenya had no choice but to accede to the GATS framework. One central theme therefore emerges from the analysis: the tension exhibited between gaining credibility in the international arena and retaining domestic preferences. This chapter analyses this tension as evidenced through the themes of patrimonialism, co-dependency and flexibility/ (the transaction cost) discussed in the framework of the study in chapter 2.

7.1 The Question of credibility: the GATS instruments

While solutions may diverge, there is apparent consensus among critics of the Fourth Protocol and the RP as to their perceived weaknesses (Bronckers & Larouche 1997; Fredebeul-Krein & Freytag 1999; Blouin, 2000). These include the vagueness of the

competition provisions and the interconnection principle, the voluntary and imprecise nature of the specific commitments which Suave describes as *selective a la carte, approach to making rule-making*, (Suave, 1995 p.132), the ability to file extended exemptions; the potential to free ride on other's assurances of market access; to erect disguised and sanctioned barriers through numbering, licensing and USO policies; the failure to specify sufficient regulatory independence from government and the opportunity to phase in changes and thus protect monopolies for extended periods. These weaknesses are claimed to frustrate the GATS in achieving its market access goals and which in the Kenyan case seem to be merited.

Others critique the nature rather than the form of these undertakings as consisting of binding liberalising measures or *regulatory freeze* (ibid, 1995 p.143) that has already been adopted at the national or regional level. Whilst this is true for many developed countries, there is less validity in this assertion for most emergent markets more so those in Africa at the cusp of regulatory reform in telecom. It has been conceded in this study however, that at least in the case of Kenya the commitments while not entirely at a *standstill*, are no more than expressions of intended domestic policy reform (Drake & Noam, 1998 p.54). Hence these undertakings echoed policy that was not yet to be adopted, but a process that was evolving.

The schedule of specific commitments does, however, create a fixed (and arguably stricter) timetable for realisation. In Kenya's case this meant ensuring that time-frames were more or less followed. However this was not achieved. The assessment of Kenya's telecom reform process confirms the weakness of the GATS in the control of domestic markets. This is evidenced by the fact that the RP and the GATS do not spur members particularly from developing countries, to act with greater precision. Indeed, the very essence of the PRSP and PRGF procedures laid out by the World Bank and the IMF is to ensure conditionalities are met. However, the PRSP is simply a working paper. There is as yet no evidence that actual compliance is checked against work done. Moreover, because the PRSP is a paper prepared at Government level, there is no opportunity for other stakeholders to participate in the process.

Instead, the aid system which has become institutionalised in Kenya over the years has shaped Government planning and expenditure and has been effectively utilised as a tool to

show compliance and in turn receive aid. This, it is argued, is because the PRSP does not ask for detail on the specific nature of how reform is being undertaken. While there is some coordination between the Government and the IMF and the World Bank assessment teams, this it is argued, is merely a paper exercise rather than actual on the ground checks and balances. Interviews with private sector participants in the telecom sector noted that in Kenya, only Government stakeholders were present at the meetings. A look at Kenya's PRSP evidences that the papers concentrate mainly on balance-of-payments details and Government budgeting processes. While the letter of intent and the policy framework paper were put in place to strengthen the credible commitment of African countries, it is argued that these procedures are imperfect. Indeed evidence of the imperfect nature of the conditionality process imposed by the donor community is reflected in the number of times the IMF and the World Bank have had to cancel disbursements to encourage implementation. As was reviewed in the previous chapters, the Privatisation Bill and the presupposed sale of Telkom provide two examples in which the international community explicitly made conditions on aid for reforms. Thus, in spite of the monitoring process which in the period of the telecom reform process (1999 to date) has taken place two times, the IMF and the World Bank confirmed Kenya's commitment to the reform process and proceeded to disburse the sums of money needed for Government expenditure.

It is therefore difficult to deny purchase of the concerns that the GATS framework does not provide a clear commitment for telecom development. In addition, although not a subject matter for this study, the testing of WTO's dispute mechanism seems to suggest that this would be a lengthy protracted process, leaving the status quo to be maintained. Second, the nature of interconnection which is based on the perceived interests of a company also mitigates against a floodgate of litigation to test the parameters and scope of the agreement. By this, it is suggested that even when there may be a clear breach of a licence condition or treaty provision, the nature of telecom and the need to remain interconnected to the network or to obtain network facilities in the face of a potentially protracted legal battle might prompt a continuation of the status quo. Supporting this argument, Bronckers has also indirectly questioned the efficacy of the DSB by querying the value of the competition safeguards. He opines that the vague standards articulated are not likely to be successfully

enforced. On the other hand, he also tacitly acknowledges that the inclusion of a competition-safeguard clause in the RP is a positive development as the GATS Annex and Fourth Protocol do not contain a comparable obligation. In this way, while competition law principles may differ from one region to another, members can at least demand the enforcement of those obligations through the DSB (Bronckers, 1999).

Nonetheless, as premised in the introductory chapter of this study, the GATS framework provides a guideline of the structure of the telecom sector. It is specifically because member states have differing domestic goals and trade objectives that a guide is needed to manage and allow for these differences while establishing a minimum common standard. It is for this reason that the proponents of the RP argue that *the principles are sufficiently broad to allow for diverse rules and practises but sufficiently specific to hold government accountable for the fundamentals of market-orientated regulation* (Bronckers 1999 p.562-3). Hence the nature of independence may vary in its degree of separation of government; as long as the regulator remains at arms length (Samarajiva, 2000), that the structure of USO conditions and policy and who should be obligated to carry it out should be decided on a national level, and that the licensing criteria for the provision of services should be capable of local tailoring. As Mukerji points out:

the challenge of participating in the international economic order for economic liberalisation had to be balanced out with the requirements of ensuring equitable socio-economic development, in which the role of government was as important as the role of the market (2000 p.36-36).

Yet is it strongly argued in this study that the above is only merited in governments whose leadership and democratic process portray clear evidence of abiding by fair standards. Indeed, as long as a floor of agreed standards and mutually acceptable guidelines are in place, which accord with principles of administrative fairness, domestic governments should have the leeway to craft policies that best give expression to broader macroeconomic and social goals while adhering to a firm timetable for implementation. But this is not the case in neo-patrimonial states such as Kenya, where evidence of corruption, nepotism, tribalism, state protectionism, and hybrid regimes, to name but a few, are the norm rather than the exception.

In the case of Kenya, it is submitted that the GATS framework facilitated the opportunity to portray credible commitments at the international level while still allowing it the flexibility to dictate the process of telecom reform domestically. In this way, the GATS framework plays a significant 'insurance policy' role in that the commitment to keep a sector open and subject to multilateral dispute settlement provides investors with certainty and predictability that domestic liberalisation alone cannot offer. Even Suave, a critic of the RP notes that in the absence of liberalisation, guaranteeing the conditions of access by offering a standstill undertaking on current practises can provide important security benefits for foreign service providers and, it is added, contribute to establishing policy credibility (Suave, 1995). This predictability and credibility, as has been previously submitted, is based on the historical relationship between African states and the IFIs.

Moreover, it was also argued that the very need to provide flexibility in the GATS framework in the form of scheduling a commitment was based on the need of the WTO to achieve a critical mass of signatories and hence enhance its own credibility in the wider global political economy. Similarly while acknowledging that a horizontal approach (that is, applicable to all service sectors) to market openness may allow for a more coherent perspective on the relationship between trade, competition and regulatory policy, Blouin (1999) concludes that the sectoral approach offers many more benefits. The most important of these is the recognition that including the specifics of competition policy and domestic regulation in multilateral trade agreements, at the horizontal level, would be viewed as an unacceptable encroachment on national sovereignty. This would, in turn, serve to undermine the very legitimacy of the international trade regime.

One further tension requires definition before proceeding. As highlighted in chapter 1, there are many who view the WTO and its agreements as adverse reflections of globalisation limiting the sovereign power of the nation-state. While this debate is not discussed here, it is contested that trade agreements can indeed result in what Lodge and Striton (2001 p.10) calls *loss of boundary control* and negatively constrain national governments' ability to act locally. It is also conceded that a certain amount of voluntary constraint or pre-commitment is adopted in acceding to any international treaty in order to curry credibility in the international trade

arena. This pre-commitment does not necessarily translate into a constraint on the sovereign power of the nation-state. This study contends that while there is merit in these concerns, in the case of GATS and specifically telecom, this concern is not warranted provided the requisite capacity is present. As shall be discussed in part three of this chapter, this is not the case for African states such as Kenya. Indeed, as noted in chapter 4, textual support exists in the GATS agreement itself to manage the pressure placed on national governments which is produced by pitting international trade demands against domestic policy. Article II of the GATS specifically authorises measures inconsistent with MFN, subject to certain conditions. Article XIX on specific commitments explicitly directs that negotiations *shall take place with due respect for national policy objectives*, and will include *flexibility for opening fewer sectors, liberalising fewer types of transactions* (GATS, Article XIX). This is the source of concessions granted to developing countries in opening fewer sectors by requiring only that market access be progressively extended in line with their development situation. The Annex also specifically recognises this tension within the developing country context and authorises reasonable conditions to be placed on access to, and use of, those public telecom networks and services *necessary to strengthen {their} domestic infrastructure and increase {their} participation in international trade in telecom services* (GATS, Annex).

Evidence from the Kenyan telecom reform process, however, suggests that one should not be too optimistic about the leeway these provisions grant, particularly where countries may not have the capacity or the political will to use them appropriately. Nonetheless it should not be forgotten that the flexibility of the GATS is responsible for shaping the context in which the GATS was negotiated and has a bearing on a state's adoption of the instruments in the first place and on their compliance with its provisions. Moreover, the emphasis on *increasing participation of Developing countries* (WTO, 1994 Article IV) and its restatement principle in the Doha negotiation round (WTO, 2001) cannot be overlooked. This flexibility has in the case of developing countries been negotiated and continues to do so under the ambit of 'Aid for Trade'. Current rounds reflect a clear intention to preserve this flexibility in future negotiation rounds hence creating a transaction cost.

Finally, summarising the essential argument made in this study on the issue of credibility and the GATS, the accession to the array of GATS telecom instruments reflects a credible commitment not to arbitrarily alter the terms of an investor in the local market and, further, a commitment to ensure that existing regulations inconsistent with market access ideals are changed over time. Whatever the strengths and weakness of utilising the WTO's DSB, it does suggest that an enforcement mechanism with which, at least notionally, countries who violate their commitments will have to compensate suppliers that suffer a loss as a result. The accession itself, notwithstanding questions regarding its compliance requirements based on the extent to which they draw on or include strong or weak credibility enhancing tools, increases the credibility of Kenya's signalled intent to liberalise its domestic telecom market and, in doing so, its relationship with the international monetary community.

7.2 Applying credibility in the Kenyan context

It bears repeating that Kenya planned its Schedule of Specific Commitments with its domestic telecom policy intentions in mind. From the detailed account of the formulation and evolution of telecom policy in Kenya, it is apparent that on one hand macro economic policy commits the country to liberalisation and privatisation, and on the other, to ensure affordable telecom access to the people of Kenya. This inevitably requires an environment attractive to foreign capital and investment. It is also trite that telecom reform requires significant private sector investment if development goals are to be met (Melody, 1999b). Yet, because of inequalities in the distribution of essential services as health and education, a 'redress initiative' - the 'development imperative' – was injected into all economic sectors in Kenya. Telecom was no exception. The provision of this 'development imperative' through the KCA was therefore not negotiable. For purposes of reinforcement the objectives of the KCA bear repeating:

The overall Government objective for the sector is to optimise its contribution to the development of the Kenyan economy as a whole by ensuring the availability of efficient, reliable and affordable communications services throughout the country (KCA, 2001).

While it is uncommon for legislation to carry such an extensive enunciation of aims and objectives, it is important to understand this ‘development imperative’ and the influence of the historical context from which it emerged, as well as the enormous political and financial stakes at issue. Both are apparent in the discussion in chapters 5 and 6. Singh (1999) in his book titled *‘Leapfrogging Development’* argues that the motivations for telecom reform in developing countries is largely to do with a country’s economic conditions and changes in ideas and technology, and will, therefore inform the degree to which it is valued as government priority. In Kenya’s case both reasons seem to have affected the impetus for the reform of the telecom sector.

Measures to promote the realisation of the KCA’s objectives, for example, USO, arguably present an inherent clash with the fundamental underpinnings of the GATS – open markets and non-discrimination. However, it is argued that the ‘development priority’ is also located within the ambit of the GATS which provides an expression of these ideals in order to attract a critical mass of signatories and support legitimacy of those signatories domestically. Thus, while the GATS seeks to provide a process and method for liberalisation (noting that for developing countries this would eliminate existing barriers such as monopoly, lack of infrastructure and finance through competition and therefore redress the issues of telecom distribution) based on signing the protocol, it was evident that within each country various divergent policies that seek to address economic development would exist. The RP accepts the right of any member to define its USO. It was recognised that applying competition in the Kenyan market, for instance, could not be immediately implemented. It is for this reason that the GATS positive listing approach of the schedule of specific commitments accommodates these domestic imperatives. This is because it acknowledges that scheduling commitments can potentially surrender some degree of control at home *that are not so much concerned with economic protection as with aspects of political autonomy and cultural identity* (Arup, 2000 p.99). It thus allows for the right to exclude certain services and also to impose measures and limitations on those scheduled commitments to ensure the integrity of the domestic goals the measures seek to protect.

Thus, because telecom was recognised as such an important domestic political issue, linked to imperative redress initiatives such as USO, redistribution and even employment policies, for Kenya to have been denied this flexibility to prescribe the content of the regulatory principles it undertook, with due regard for transparency and competitive neutrality, would have completely undermined its domestic reform agenda as well as the express recognition of these ideals in the GATS, noted above. Nonetheless, as argued in the previous section, the flexibility in the GATS did not preclude non-observance. The USO provisions in the GATS are not considered divergent to the GATS agreements and are neither considered as anti-competitive per se, provided that they are administered in a transparent, competitive and non-discriminatory manner and were to ensure that they did not create difficulties in telecom provision by investors. Further evidence of the flexibility inherent in the GATS is drawn from the telecom and financial service negotiations which reflect how developing countries have been able to withstand pressures to open up their markets entirely. Indeed, some countries like Botswana elected not to participate at all in the negotiations. In certain cases members were able to take binding WTO commitments at lower levels than their existing, domestic level of liberalisation in the sector. For example, South Africa scheduled a foreign cap in the telecom sector of 30 percent but allowed a foreign cap of 49 percent in its initial liberalisation process.

Thus, the GATS commitments had the very effect intended by the Kenyan Government – to provide sufficient leeway for domestic policy preferences. Neo-patrimonial leaders such as Moi and Kibaki could not have resisted the pressure to reform had they not had the assistance of the inherent structure of the WTO framework and its financial mechanisms through the IMF and the World Bank. This discussion is further borne out below through an analysis of the patterns of implementation evidenced in Kenya's telecom sector.

7.3 The art of mischief: regulation and independence

As has been observed through the study, the main characteristic of the telecom reform process has been the attempt by political leaders to derive political advantage by controlling the newly created institutions in the telecom sector. As reviewed in the previous chapters,

the Moi and Kibaki Government exhibited strong control of all key institutions, namely Telkom, CCK and NCS. Further detail on the issue requires elaboration as discussed below.

In keeping with the RP, Part VII of the KCA (KCA, 1998) also established the NCS, the aim of which as stated earlier was to advise Government, particularly the then Ministry of Transport and Communication on policy. Like CCK and Telkom, there was also political wrangling over who would head the post and in late 2001 a Commission Secretary was elected. Six other policy analysts with specialisations in economics, engineering, telecom, and broadcasting were brought on board gradually. In abiding by the GATS, therefore, the KCA had separated KP& TC into the three sectors, policy, operations and regulation. But effective telecom services, as the literature suggests in chapter 3 requires a clear separation of all three institutions. On paper, it is possible to confirm that Kenya implemented the above process. However, given Melody's (1997b) three tiered model, it is obvious that the actual issues of separation and resource capacities were not in place. Interviews with staff of both the NCS and CCK provide evidence of conflict and political manipulation where appointments were concerned. While the NCS and CCK appear to be fulfilling their roles and while there is no evidence of duplication, there is confusion over who does what. The majority of the staff of CCK were of the opinion that the NCS should be subsumed into a department of CCK. Clear separation of roles is further complicated by the fact that CCK revenues pay NCS (interview #21). Separation of roles is also further complicated by the fact that CCK has also been mandated with a policy role. Moreover, contrary to Melody's (1997b) structure which requires the policy maker to have expertise and knowledge of the sector; the NCS is often overshadowed by the more experienced staff of CCK who have been in the sector.¹⁶¹

Of all the three main players (Government, through the Ministry of communication, CCK and NCS), NCS has a clear policy role mandated by the KCA. Nonetheless, interviews with staff members of the CCK showed that CCK has been a key player in the making of policy while simultaneously implementing policy. For example, part of CCK's mandates as stated in

¹⁶¹ It was noted earlier that a majority of CCK employees ex-KP&TC staff.

its website is to conduct a review of the market structure in the telecom sector and exchanges views on policy and the regulatory environment with the NCS, predominantly through the office of the MD of CCK (“Role of CCK”, 2005). Employees of CCK were of the opinion that they made and implemented policy while NCS was simply there to legitimise what they had created. The implementation function is thus carried out not only by CCK, but GITS and the E-Directorate in their separate roles and functions. Table 3 (adapted from Bowman-Ngaruiya & Waema, 2005) below illustrates the policy roles. It should be noted however that the KCA does not specifically specify a policy role for CCK. However, in practice, CCK does carry out several policy functions as has been discussed.

ORGANIZATION	AFFILIATED MINISTRY	EMPOWERING LEGISLATION OR AUTHORITY	MANDATE	POLICY	IMPLEMENTATION
Communications Commission of Kenya (CCK)	Ministry of Information and Communications	Kenya Communications Act	Licenses and regulates telecommunications, radio communications and postal services in Kenya Allocates frequencies for communications and broadcasting	Yes	Yes
National Communications Secretariat (NCS)	Ministry of Information and Communications	Kenya Communications Act	Advises the government on communications policy	Yes	No
Government Information Technology Services (GITS)	Ministry of Finance	Government reorganization of Micro Information Systems Department	Provides computer services to government ministries, departments and selected parastatals	No	Yes
Directorate of E-Government Office of the President	Cabinet Office, Office of the President	Cabinet Approval of E-Government Strategy	Oversee implementation of e-government strategy	Yes	Yes
Appeals Tribunal		Kenya Communications Act	Arbitrate disputes under KCA	No	Yes
Telkom Kenya Ltd.	Ministry of Information and Communications	Kenya Communications Act	National telecommunications operator	No	Yes

Table 3: Policy and implementation mandates of key telecom institutions

The dualist relationships of the newly created institutions in the telecom sector have therefore had several implications for regulation and the ability of the sector to function effectively. While the demarcations between all institutions more so Telkom and CCK have been imbued due to the historical separation of KP&TC as has been discussed in chapter 5, this does not detract from the fact that the regulator is to ensure appropriate behaviour as indicated by the six principles of the RP. In assessing effective regulation Lodge & Striton

(2002) explain the outcome of effective regulation as an analysis that must explain how institutions are *embedded within a network of social relations* (p 681), that is, how various parties interact within the regulated space.¹⁶² Complaints in the media attest to the negative perception of CCK by the public due to the historical relationships between Telkom and CCK (Shaw, 1999). In addition, 60 percent of the ISPs interviewed felt that they did not see the regulator as having regulatory oversight over Telkom. This is not farfetched. Evidence of the problems experienced by CCK in performing the various tasks of regulation was clearly manifest through the licensing process of the third mobile operator and regional service providers discussed in chapter 6. Moreover, as was depicted, these appointments had implications for the way all three organisations functioned. Confusion over dual roles as well as political interests and preferences therefore undermined the process. In addition, it appears that regulatory functions were also undermined by the Government's dualist role of policy maker and service provider.

The dualist relationships between CCK and the Minister appear to have been encouraged rather than discouraged. In terms of the KCA, the Minister as opposed to the regulator had the power to invite and grant applications for major licences. For the first three years of operation this was further compounded by the fact that there were two ministries that had dual roles where the sector was concerned. It was not until February 2004 amid complaints and political wrangles over corruption in the telecom sector, that the President, following a major cabinet reshuffle established a new ministry with responsibility for both the telecom and broadcasting sector. One implication flows from this discussion and has roots in the literature discussed in chapter 2 that the institutions in the telecom reform process were not meant to be independent from the outset and were politically manoeuvred to the contrary.

To establish the telecom reform process within political preferences, the Moi Government ensured that the political instrument of policy was interpreted in their favour. This is not surprising given that neo-patrimonial states are defined by Presidential rule which

¹⁶² They borrow the term regulated space from Hancher & Moran [Hancher, L & Moran, M. (1989). *Capitalism, Culture and Economic Regulation*. Oxford: Oxford University Press] who coined the term to explain the regulatory process not as capture but rather as on in which various institutions with varying degrees of power are competing with one another to influence outcomes.

overshadows even the judiciary and legislature. The following discussion located within the legal ambit of the KCA serves to show what happened. In order to control policy, Part V of the KCA (quoted in chapter 6) was intentionally ignored and was subsequently overlooked by the Kibaki Government in 2003. The former Moi regime simply refused to bring the Act's mandates into operation – a provision that was not legally viable.

The powers conferred on the executive in respect of Part VII of the Act (the repeal of KP &TC) were subsidiary to the main legislation and are also very exact in two respects. First, the powers conferred on the executive specifically mention the Minister of Finance. Second, the powers thereby conferred only relate to the vesting of assets and liabilities of the former KP&TC. The Minister had no general power to override other provisions of the KCA or to determine at which date any of its other provisions were to come into force. Indeed all other parts of the Act necessarily and automatically came into being once the Act received Presidential assent and was published in the Kenya Gazette. Part I of the KCA provided for the cessation of the exclusive privilege of the former KP&TC to provide telephone and telegraph services within the country on commencement of the provision (KCA, 1998). As interpreted by the High Court of Kenya, this section came into operation when the KCA became law (KCA, 1998). Moreover, the telephone and telegraph service licences operated under Sections 59.I and 70 of the KP&TC (now repealed) extended over the whole of the Republic of Kenya and were not limited to geographic scope to particular regions.

From this it seems evident that the KCA gave the executive no powers of creation or deletion in respect of communications. Parliament seems to have taken extraordinary care not to allow the executive much leeway in the operation of the sector. But even so, the executive created an industry structure replete with monopolies. When vesting day was announced, the exclusive licence of Telkom was extended for a period of 5 years for a single region Nairobi. The Minister's action was nowhere envisaged in the KCA. In fact, it directly contravened Part V of the Act. Thus the five year 'exclusivity' granted to Telkom in 1999 was a violation of the KCA. Court cases (HCCC No. 1 of 2004) and media reports (Kisero, 2001a) attest to this. For example, ISPs had long argued that they ought to be able to be able to operate their own VSATs to provide services in competition with Jambonet, the internet

gateway operated by Telkom. During the Month of July 2004, the Communications Appeals Tribunal delivered a landmark decision on a case bought against CCK by Fastlane Limited, a conglomerate of ISPs (HCCC No. 1 of 2004). The ISPs argued that CCK had no basis for its decision not to grant Fastlane Limited a VSAT licence. The ISPs also claimed that the Minister had no legal power to make specific directions to CCK in regards to policy. The CCK for its part argued that there was no legal prohibition against granting Telkom exclusivity over the provision of such services. The Tribunal agreed with the ISPs and ruled against CCK. It was declared that the five year exclusivity granted to Telkom by CCK was *ultra vires* the KCA. The Tribunal further observed that CCK was mistaken in its indiscriminate acceptance of the KANU (Moi) Government's policy guidelines on telecom. The Tribunal further stated in its ruling that although Government policy guidelines were *strong recommendations* they *did not constitute law*. However, it also stated that Government policy guidelines could not be ignored except at *a great peril* (HCCC No. 1 of 2004). Evidently the Moi and Kibaki Governments were keen to ensure a variation to the law through administrative fiat. In what eventually turned out to be a norm rather than an exception, as has been observed in the preceding chapters, the regulator was tasked with assessing and evaluating licence bids and making recommendations to the Minister but could not ultimately award the licence. Its role was limited to merely issuing the licence on approval by the Minister. However, only in the case of restricted licences such as VANS and PSTN could the regulator take a decision and even then only after due consultation with the Minister.

Indeed, two main advantages could be argued for the choice of licensing as a policy tool in the telecom reform process. First, where there are limitations of licences to be granted, the process offers equal opportunities to all those interested in securing the licence. This is the case with most telecom and broadcasting licences where frequencies and spectrum management issues are not only dependant on local availability but on regional and international allocations. Second, the licensing process largely presents an opportunity for the Government to earn revenue upfront from an initial licence fee paid by the winning bidder. Sums of up to US\$ 55 million (the highest paid in so far for a licence) provides a large amount of revenue to the Government. It seems evident from the analysis that the

Kenyan Government was keen on reaping huge sums from the licensing prices and thus charged exorbitant rates for licences. However, it is argued that the licensing process presented several issues for regulation which were in part allowed by the Kenyan Government through its structuring of the KCA in order to maintain their interests and provided a means to slow the reform process without actually seeming to reject the process.

First, given the lack of specificity over who decides over the licensing process, several claims and counter claims were made over licensing of all categories. In fact, in all cases, the licensing process was announced during telecom public meetings where reporters were keen to find out what was going on in the telecom sector. Political rhetoric was used as a means of pacifying the Kenyan public and the international community who assumed that an announcement was equal to actual implementation of the process. One respondent from the media department confirmed that more often than not, CCK was caught in a 'catch 22' situation as it could not confirm or deny political announcements on CCK's supposed actions or plans (interview #4). It is not surprising therefore that in 2004 Econet sued the Government of Kenya (specifically the Minister of Information and Communication) for allegedly cancelling their licence illegally.¹⁶³ The case is still pending as at the end of December 2005 with the court currently grappling with preliminary objections. It is clear that the independence of CCK is put to question as most of the Ministers tended to see CCK as an entity reporting to themselves. It is also clear that Ministers felt that CCK was a Government entity and therefore had no right to act on their own.

Second, the process is open to subjectivity, controversy, litigation and other forms of disruptions. Much ink has been used in this study to describe and critique the various complaints that arose in the process. The issues of subjectivity begin from the application of the shortlist criteria and continue throughout the entire process, as discussed in the preceding chapters. This is not a unique case and is common also in other Kenyan Government offices where applications for tenders and projects are based more on the

¹⁶³ The CCK was also enjoined in the suit, lest they attempted to give effect to the Ministers wrongful order. Interviews with CCK management nevertheless confirm that they were not in any case going to do so since they had awarded the licence on 'justifiable' grounds (Interview # 40).

ability to convince the tender team rather than any actual proof of ability to meet stated criteria (interview #23 and #47). Thus what takes place in the tender space leaves room for individual preferences. As with all subjectivity issues, space for controversy and questioning is created. The lack of clear lines on the part of the application process and the lack of transparency of the process on the part of CCK, opens the possibility for litigation. As argued by Shihanya (2000, p 602) *in a licence renewal or cancellation there should be substantial procedural equity*. A licence cancellation or approval should therefore not take place until all parties have been heard and the issue made satisfactory to all. Questions of natural justice thus arise.

For example, during the licensing process of the third mobile operator, KTIG filed a case against CCK (*KTIG vs. CCK*) and enjoined Econet, over the licensing of the third mobile operator process claiming that they were wrongfully rejected from the tender process by CCK (*HCCC No. 1570 of 2004*). They alleged that CCK irregularly and unprocedurally disqualified them given that they had a higher financial bid than Econet (Econet had bid US\$ 27m while KTIG bid US\$ 55m). According to CCK, KTIG failed to obtain the 75 percent threshold required at the technical stage and therefore CCK argued the financial bid was a non-issue. Nonetheless, legal experts interviewed suggest that the technical and financial evaluations should have been looked at as a whole. This constitutes the substance of the suit. It was argued that anyone apart from the judge hearing the case could only explore at the risk of committing the offence of *sub judice*. (interview #12, #30 and #40).

The RP states that where a licence is required, if period of time taken to reach a decision is denied, reasons for, must be provided on request. This requirement is both valuable from the point of view of administrative fairness and to create certainty for investors. Nonetheless, the extent to which licensing criteria needs to be made available remains unclear. It is presumed that a guide as to approximate weighting of factors in licence awards would suffice, although this in principle is yet to be tested in a legal forum.

Third, it is argued that the licensing process often attracts speculators whose intention is not to roll-out networks but to eventually sell the licence for quick financial gains not related to service provision. As has been argued, the lack of due diligence means that applicants can

easily get away with providing untrue technical jargon; thus, a submitted proposal may not accurately reflect the applicant's experience. Cases of bidders having submitted successful applications only to sell their share to other firms and thus gain from the application process have also been rampant. An example of this is the case of the Commercial Trunked Radio Operators. In a bid to improve the efficiency and frequency utilisation of the numerous private 2-way radio operators, CCK in 2001 embarked on yet another licensing process. This aimed to introduce the migration of the numerous individual 2-way radio networks to shared commercial trunked radio networks, on Very High Frequency (VHF) and Ultra High Frequency (UHF) bands in order to facilitate efficiency. Unfortunately, none of the winning bidders came forward to pay the over US\$ 5m that had been bid as initial licence fees. The regulator blamed this behaviour on speculative bidding on the part of the applicants (interview #14). Such problems seriously call into question the ability of the licensing team involved in assessing the tender documents.

Fourth and following on from the above, the licensing process often leads to very high financial bids, which – if paid – give rise to very high service tariffs that are deemed necessary to recoup the heavy investments including payment of licence fees. This is evidenced by the case of the incumbent mobile operators – Safaricom and Celtel – who defend their service charges on the basis of trying to recoup the licensing fees paid to the Government. In addition, the issue of high fees has been linked to the Government's need to raise revenue. Those interviewed from both the private and Government sectors, as well as those involved in writing the tender documents, confirmed that the criteria for the tendering process of the third GSM was largely influenced by demands of the Kibaki Government, which needed to meet obligations that pertained to the new free education policy. Given the potential high sums of money that can be earned from this sector, the Government's expectations on the sale of a licence have been high. However, bidding at different times often results in different financial offers, which leads, in turn, to uneven and inconsistent market entry terms for different players. It is thought that the non-penalisation of Econet is due to the quoted amount on the second winning bid (US\$ 11m), which was seen as low and would therefore compromise envisaged Government revenue. The issue of

tariffs and the Government using the licensing process to raise revenue is further illuminated through the prolonged sale of Telkom discussed in the previous chapter.

Finally, the Kenyan licensing process is viewed as legitimising rent-seeking behaviours. While this has not been fully determined, complaints made by the public as well as reports from the KACA and the IMF and the World Bank indicate that the issue warrants further investigation. If financial applications based on an auction process are the sole determinants of success, this would seem to negate the licensing procedure, as decisions are made based on a government's expected financial gain rather than on the applicants' ability to provide services. In Australia, licensing of an applicant is done through an application based on the Terms of Reference, with 60 percent assigned to technical considerations and 40 percent to financial considerations. While an applicant has to pass the technical stage to be considered for the financial stage, the entire process is seen as one entity, rather than as two separate entities as is the case in the Kenyan licensing process.

Towards the end of 2005, in what can be described as a giant leap and which is to be implemented in mid 2006, CCK simplified the licensing regime under a technologically neutral framework. Prior to this new policy, all categories of telecom such as mobile, ISP, Internet, VSAT, radio communications, required a separate licence. As evidenced in this study, this resulted in a protracted and unclear process. The new licensing format, with only three categories - network facilities, applications and content will therefore apply to all categories in the industry. However, interviews with informants in the sector suggest that this process is still imbued with loopholes that will allow for political interference (interview #26). For instance, licences would be granted on a first come first served basis on demonstrated conditionality to roll-out the infrastructure needed.

The type of problems described above again call into question the regulator's ability to enforce rules. While there is substantive literature on how rules should be established to regulate firms in a competitive communications market, there is comparatively little literature on how to enforce such rules (Baldwin & Cave, 1999). The inability to enforce rules is, however, not unique to Kenya; it is cited by the Federal Communications Commission (FCC) as one of the many queries they receive from regulators (Wu et al, 2004). The role of

monitoring in policy implementation studies would suggest the need for a formative evaluation process, in which monitoring is used to inform policy makers and stakeholders (Hall, 2005). On the question of monitoring, CCK respondents provided three main reasons for the lack of good enforcement: 1) the lack of actual statistics; 2) lack of technical know-how in drafting documents; and 3) lack of equipment and other infrastructure that are needed to ensure that due diligence is maintained (interview #10).

The above gaps in the monitoring process might be reduced by various tools such as database systems and information packages, which are suggested as effective in ensuring that monitoring can take place. Studies in the area of knowledge management in Africa (Kerretts, 1998) attribute the lack of data to the absence of trust, lack of statistics and a lack of proper documentation procedures. Implementation studies in policy analysis further underscore the fact that the development of performance evaluation must be understood in the context of the need to control public finances and attain higher levels of value for money, efficiency and effectiveness (Howlett & Ramesh, 2003). Nonetheless, even if rules are enforced, questions on the extent to which the regulator is able to retract on legally binding documents are raised. What does the regulator do in a case where it is unable to re-issue a licence based on the no-show of a winning applicant? What options do regulators have in such cases? Such issues need to be addressed in the Kenyan sector. As it stands, the number of licences in the market determines the number of new licences that can be issued. While this in itself is a problem, the issue is further compounded by the fact that this number includes those applicants not in operation – therefore reducing any possibility of enhanced competition in the sector.

While the genesis of the RP and its perceived strengths are discussed in chapter 4, its adoption in whole or part by the Kenyan Government was undoubtedly a momentous event. It signalled an acceptance by Kenya that there was something distinctive about telecom services and it established a blueprint or baseline for the future design of regulatory institutions. For Bronckers (1999), this distinctiveness is captured in the fact that with regard to telecom, the WTO did not seek the reduction and elimination of government involvement in the sector as the primary goal, as has been the case with other areas of trade.

On the contrary, they recognised that the reality of a telecom market dominated by large, often state-owned incumbents meant that a simple removal of monopoly in favour of one company would not ensure effective competition. Instead government involvement and oversight of the commercial behaviour of formal monopoly is required and, moreover, the RP requires governments to act against anti-competitive behaviour.

While there have been many critics of the RP, its shortfalls and the enduring thrust of dissatisfaction against it can be summarised in Drake and Noam's (1998 p.54) notion of *standstill commitments*. Namely, that the obligations undertaken merely reflect members' existing or planned domestic liberalisation policies and plans to establish institutions and mechanisms necessary for that goal. Agreement with their claim is manifest in the number of times that it is noted in this study that Kenya's schedule of specific commitments reflected the Government's intended design over the KCA. Nonetheless as argued, the GATS provides a universally acceptable manner in which to proceed with the liberalisation process and at the same time provides a means of compliance. It is already apparent that while on the whole Kenya has honoured the time-frame for liberalisation, in many aspects, it has not met all goals in a precise manner due to varying pressures domestically. If one considers the delays and political conflict and interests besetting Kenya's fledging telecom sector, the importance of the RP as not only a gatekeeper in adhering to WTO policies but a timekeeper becomes a tool that cannot be overstated where fulfilment of WTO policies is concerned. In Kenya's case, all telecom services were to be provided under a licence issued in terms of the KCA. This was not unique and followed similar telecom policies around the world.

The importance of regulation is further reinforced by the institutionalisation of the reform process through the GATS agreements. The importance of this is acknowledged through the rapid growth not only of independent regulators in the last ten years but also the increasing requirement to establish international agreements as observed through the WTO. Indeed, the need for regulation seems not to be in question, the implementation of reforms and the establishment of a regulatory body is indicative of this. However, the myriad forms in which regulation takes place and the complex relationships that are forged with government and

sometimes even industry result in many manifestations of the ideal that cannot simply be measured by structural separation alone. Independence therefore becomes a blurred concept. As the ITU notes; ‘independence’ is: *a concept that is most refracted through the lens of political culture. What one government may consider vital in terms of independence, another may consider impractical, unwise or even impossible* (ITU, 2002, p.28). The ideal that ‘independence’ is absolute seems far from the reality.

As exemplified from Melody’s (1997b) three tiered model reviewed earlier, separation is merely a means to ensure that forms of fair competition are safeguarded in a market where uneven competition can take place. Thus, Melody points out that while ‘independence’ does not necessarily include the power to make policy it includes the *power to implement policy without undue interference from politicians, or industry lobbyists* (Melody, 1999c p.25). As noted, mindful of the difficulties inherent in a transition from monopoly to competitive services, the RP requires that an independent regulatory body whose decisions and procedures will be impartial and fair will be instituted to ‘police’ the telecom sector. The CCK mandate therefore requires that:

the Commission shall, in the performance of its duties under the Act and these Regulations, promote, develop and enforce fair competition and equality of treatment among all licensees in any business or services relating to communications (KCA, 2001, p 239).

It is acknowledged that the regulator and all institutions created as a result of the reform undergo a maturation process. Within this process, and although subtle, manifestations of ‘capture’ are thought to occur. This, it was suggested, is manifest in the case of CCK and Telkom. As discussed, the term capture refers to the situation in which the regulator proffers and becomes an accomplice or instrument of the regulated agencies rather than serving the needs of the general public¹⁶⁴. In the case of Kenya, CCK employees were in many instances perceived as sympathetic to Telkom staff. A case in point is the issue of VoIP, in which Telkom was found to have unfairly provided VoIP services without informing other ISPs

¹⁶⁴ See Rauf Gonenc, Maria Maher & Guiseppe Nicoletti. (2000), ‘The Implementation and Effects of Regulatory Reform: Past Experience and Current Issues’. *OECD, Economics Department Working Paper No. 251*, Doc. No. ECO/WKP

though it was widely acknowledged by industry players that CCK was aware of the situation but allowed it to continue.

The issue of regulatory capture is not only found in the telecom sector, but is further viewed as a behavioural function of organisations within a regulated market. Various theories on institutional capture exist, but two seminal accounts stand out for this study. Downs (1967) suggests that because organisation shifts occur throughout the life cycle of an organisation various bureaucrats with varying interests will dominate and influence the nature and function of the organisation. He provides various forms of agency bureaucrats with varying forms of influences. His study applied in the case of Kenya could explain how the staff members of CCK who were from Telkom had more bias and interests in maintaining the status quo than breaking it up. This is not far-fetched given that, as already indicated in this study, the split up of the KP&TC was one in which positional ties were re-solidified. While structurally separate institutions, there was little else initially to identify CCK and Telkom as separate organs. Moreover, interviews with individuals close to the original team deliberating on the break up of the KP&TC noted that there was a need to ensure that positions remained unchanged. Thus for example, it is alleged that the former head of KP&TC needed to be allocated a position equal to or similar to the privileges accorded him while working in the KP&TC (interview #11). Thus, it is not surprising that a role was created for the former head of KP&TC in the ATU.

On the other hand, Bernstein (1955) suggests that regulatory agencies have a life cycle based on historical patterns of evolution which may end up in regulatory capture. He suggests three stages of the process - gestation, youthful stage and maturity. His model suggests that regulation begins from the unknown relying on other elements in the society and slowly reaches maturity requiring no need for political or other support from the environment. This may well be the process in which Kenya is headed, but it is impossible to determine this at the moment. For now, eight years on, the regulation in Kenya continues to be marred by political interference.

Given the above, one may argue that this tool has not been successful, particularly in light of the antecedent analysis of Kenya's compliance with its GATS commitments. And granted, it

is not a simple matter to argue convincingly to the contrary. Yet, it is contended that the GATS commitments have had the very effect intended by the Kenyan Government - to provide sufficient leeway for domestic political preferences while maintaining its credibility standing in the WTO and international aid community. As has been argued and evidenced in this study, the historical nature of neo-patrimonial states such as Kenya suggests that patterns of reform and non-reform can be explained within the nature of political institutions first and second their interaction with the international community. The preceding chapters therefore show that Kenya's telecom reform process had both a political and international dimension and it is both these two conflicting dimensions that dictated the process of reform.

The narrative above suggests that reform processes in countries such as Kenya must be understood within historical terms. As pointed out in the literature in chapter 2, state capacity has been viewed as a critical component of state autonomy during the reform process. The IMF and the World Bank have thus been keen to provide funding under the ambit of improving state capacity as was evident even in the telecom reform process. Moreover, the DDA and future processes under this round suggest that state capacity will continue. The basis of this capacity concern pertains to the acknowledgement that Kenya and other developing countries will continue to be included in international decision making processes¹⁶⁵ but are seldom able to influence either the agenda of these organisations or the outcomes of their decisions.¹⁶⁶ The extent of this concern between and within developing countries varies but as this study has argued, neo-patrimonial states such as Kenya exhibit

¹⁶⁵ See new and emerging work on Regionalism by Timothy Shaw with specific reference to countries in the South. For example see: Shaw, T. (2000). "New Regionalisms in Africa in the New Millennium: Comparative Perspectives on Renaissance, Realisms and/or Regressions". *New Political Economy*, Vol. 5 No. 3 p.399-414. Also see: Shaw, T. (2002). "From Anarchy to Renaissance in Africa in the New Millennium: New Regionalisms as Responses to Globalisations" in *Globalisation, the third world state and poverty-alleviation in the twenty-first century* p.143-59.

¹⁶⁶ Concerns of this nature pertain not only to the WTO but also other ICT institutional bodies within the GPE such as the WSIS (as is suggested in this study) as well as the ITU and The International Corporation for Assigned Names and Numbers (ICANN). While quite different in institutional set and arrangements, they all however are dominated by a few industrialised countries and more particularly the USA -reflecting the interests of these countries in policy agenda's and in outcomes of decision-making processes. In addition to these three organisations, a number of other specific global governance organisations are relevant to ICT policy and developing countries such as those in Africa. These include: UNECA, the World Intellectual Property Organisation (WIPO), the United Nations Educational, Scientific and Cultural Organisation (UNESCO), the United Nations Development Programme (UNDP), the United Nations Conference on Trade and Development (UNCTAD) and more recently the New Partnership for Africa's Development (NEPAD).

poor state capacity as hybrid regimes. In addition, the facets of clientelism evident in Kenya as shown through Kenya's telecom reform process have subverted any form of capacity development within the state. Thus the outcome of the state's capacity to make decisions and implement policies can in part be explained by the outcome of political dynamics in Kenya and its interaction with the international community. As evidenced in the telecom reform process, a number of constraints exist in Kenya that have an impact on it and other developing countries in Africa. These constraints hamper more effective participation (and outcomes) and more importantly in Kenya's case present problems for domestic implementation of trade agreements. While a full analysis of the complexities that create such an uneven power dynamics is more properly the focus of another study, an attempt to explain these issues in the context of the neo-patrimonial literature reviewed in chapter 2 and the events of the telecom reform process analysed in chapters 4 to 6 is discussed in the following section.

7.4 Understanding state capacity: a neo-patrimonial perspective

7.4.1 Institutions and aid: progress or failure?

As discussed in chapter 2, to appreciate the development of African institutions such as Kenya, it is important to adopt a historical perspective and understand the progressive development of African economies within international aid institutions. The implications of this can be linked to the perceptions of the historical development of African states as reviewed in chapter 2. The discussion therein noted the progression of African states from colonial legacies to creating government structures beset by clientelist practises capturing the thesis that most African states are hybrid regimes, in which patrimonial practises coexist with modern bureaucracies. Through an examination of Kenya's historical context in chapter 5, it was shown that Kenya's political and economic development is linked to the flow of the structural adjustment policies and more recent conditional aid within the privatisation programme of the IMF and the World Bank.

One important question is therefore borne out of this analysis. Namely: does aid dependency sustain neo-patrimonialism in the Kenyan context? And while its discussion is

more appropriately the subject matter of another study, it cannot be ignored here. An integral component of Kenya's and other African states' economies was the idea that aid was temporary. With economic growth, the gaps would be filled and the necessary aid would disappear, as the Government would take on project expenses as more resources are allocated to the training of civil servants. Thus from independence in the 1960s aid was officially meant to train the local population who would eventually replace the foreign experts and create or strengthen the services that would one day be housed in capable central ministries. In sum, institutional building was a central objective of the aid paradigm. However, as observed through the Kenyan telecom reform process, donors have retained the final say over all allocation decisions as the Kenyan Government over the years persistently showed little effort in creating development. And while in 1965 the Kenyan Government had unequivocally taken the position that *the state can never become the tool of special interests catering for the desires of a minority at the expense of the needs of the majority* (RoK, 1965 p.3), by the early 1990s the state had shown that there was little capacity to develop public institutions. The capacity to develop vested interest, concerned too much with the benefits of its office and too little with the performance given to the public enterprises, for example Telkom, where there were no checks and balances on the institution or the services provided. Theoretically, enterprises are accountable to the public through the ministries that control them and who answer, to a certain extent, to Parliament. However, Parliament presented a *rather haphazard spot check on particular items of administrative performance* (RoK, 1970/1971 p.23). Debate on policy and budgets for specific enterprises was non-existent. Together with the reinforced principle of secrecy to arouse concern for national security, the enterprises operated almost entirely behind closed doors and depended entirely on self-criticism away from the public eye.

By the 1980s as evidenced in this study, Kenya's aid system had institutionalised itself and begun to shape decision making as every Minister of Finance in the subsequent years linked aid to the formal planning and budgeting process. Thus in the case of Kenya, the aid regime had problematised the issue of institution building by the 1990s. Government inertia, poor planning, inadequate monitoring and corruption had worked to render public institutions incapable of operation as briefly alluded to in chapter 1. The adjustment aid received from

the IMF and the World Bank have therefore been utilised to support the rehabilitation of these institutions. Aid it is argued has therefore substituted itself for core development tasks as budgeting and planning of development projects became less dependent on the Government's ability to plan and more on its ability to ensure that it was able to distribute aid for the core activities of Government. In Kenya foreign aid accounts for more than nine percent of public expenditure. In the case of the telecom sector, it was evidenced that foreign aid has been used to budget for Telkom's privatisation process as well as to continue paying the large number of workers (18,000) who cannot be supported by the income generated by Telkom.

A key feature of neo-patrimonial states has been the decline of national economic planning and budgeting. The World Bank and the IMF programmes thus dominate government planning. Nonetheless, as argued earlier, in spite of the PRSP process which aims to monitor government progress on meeting specified conditions, these processes have not succeeded. The ideal that *PRSP are prepared by governments in low income countries through a participatory process involving domestic stakeholders and external development partners* (IMF, 2005) is not the case in most African countries. Instead, the process dominated by World Bank employees and Kenyan Government delegates (of whom much secrecy surrounds who actually participates) has merely sustained the Government's dependency on these institutions. In addition, as was evidenced through this study, in most cases the IMF and the World Bank write-off poor implementation of conditionalities rather than penalising them.

Neo-patrimonial tendencies have been able to assert themselves with growing rent-seeking and moved the Government away from public interest to ethnic politics and factionalism. Thirty years on, Okumu's statement that a political leader in Kenya is provided *with unlimited opportunities to shape and reshape factional alignments in the party and elsewhere in the system* (Okumu, 1970 p.33) stands true. In the case of the telecom reform process, evidence of ethnic preferences were prevalent in the employment of former KP&TC staff as well as the newly created telecom institutions. True to his word and in the spirit of Nyayo, which means following in the footsteps of his predecessor, Moi carried on and deeply entrenched the patronage system giving the same jobs to favoured people from his community. When

Kibaki took over, in spite of his assertion of stopping tribal politics, he nonetheless continued in the same patronage system, electing his friends to positions of power regardless of merit.

The inevitable result of this evolution is the reinforcement of non-development tendencies within local policy making. The responsibility of aid in this system of evolution, while only partial is clear. The gap between aid donor objectives and neo-patrimonial states behaviour therefore needs to be accounted for. Recalling discussions in chapter 2, specifically work by Easterly (2002) on the role of IFIs, it seems that IFIs are keen to ensure that they retain their own legitimacy as an institution in which African economies provide the best candidates for implementing their broad SAPs. As is evidenced in the Kenyan case, despite donor rhetoric about the importance of conditionalities, it appears that the quality of political change and economic reform has not mattered much for the donors as long as the Kenyan Government plays the ‘culture of approval game’ in which a process based on paper work confirms that they have abided by or are intending to abide by the conditions.

Nonetheless, I do wish to emphasise that aid is indeed also responsible for a large proportion of the development work in Kenya and Africa. But as argued, aid’s complicity in the current institutional devastation can clearly be linked to its role in sustaining weak governments in power while at the same time emasculating their development institutions.

7.4.2 Resource constraints

It is clear that a general lack of human and financial resources within developing countries such as Kenya lies at the heart of any discourse seeking to explain sub-optimal outcomes in participation in the global telecom governance structures like the WTO.¹⁶⁷ There are a number of ways to consider this, first, that the emergence of a global matrix in which organisations and nations work together has created far more complex governance functions than those that existed at the bilateral level. Nevertheless, historical reasons will suggest that

¹⁶⁷ It is in this regard that work by Maclean et al., (2002) have emerged. See: Maclean, D., Souter, D., Deane, J., & Lilley, S. (2002). *Louder Voices: Strengthening Developing Country Participation in International ICT Decision-Making*. London: The Commonwealth Telecommunication Organisation and the Panos Institute.

representation at international fora is based on the dominance of western states, specifically G8 countries,¹⁶⁸ whose governments and corporations already exercise a disproportionate influence over global economic affairs. In such circumstances, one can safely assume inevitable disparities in relative capacities to participate equally in rule development, agenda setting and decision making. Participation in meetings such as the WTO requires and assumes state representation in all meetings. As a result, membership to the WTO is defined in terms of state units as represented by national delegations with each state considered as having equal rights in regards to the terms of participation. Equally, attendance to conferences is through state delegation and all procedural activities such as proposal submissions and technical meetings are done through state delegations. As such developing countries have always had a less than satisfactory representation at such meetings.

The problems of developing countries such as Kenya are therefore more acute: even if historical, economic and political factors are variable, the capacity problems faced by developing countries cannot be eradicated by addressing domestic institutional deficiencies alone. Various resource impediments remain.¹⁶⁹ For example, Kenya does not have the technical expertise either in Government or in the private sector to understand WTO technical matters prevalent in GATS and GATT. To date the NCWTO which was formed in 1995 to assist the Government in implementing WTO issues has had several problems, key of which is Government support for the programme. As noted by the report on the proceedings of the Kenyan WTO workshop held in September 2000, Kenya lacks *technical and financial capacity to make serious proposals at the WTO and other multilateral fora* (Ikiara, 2000 p.4). The report further noted that:

¹⁶⁸ The G8 refers to the "group of eight", the eight most advanced industrialised countries, measured by economic output. The current membership of the G8 includes the United Kingdom, Canada, France, Germany, Italy, Japan, Russia and the United States. The heads of state of G8 countries and the President of the European Commission gather for summit style meetings annually. Hosting of the Summit rotates among G8 members. China has also recently been invited to attend these meetings. The purpose of the Summits is to develop and implement strategies for reform and co-ordinate policy on issues of international importance. Stated purposes of the G8 also include influencing the International Monetary Fund and World Bank, other industrialised countries, and other global organisations. Summit agenda themes include macroeconomic policy, nuclear safety, environmental degradation, drug proliferation, international terrorism and foreign investment in developing countries.

¹⁶⁹ See supra note 167.

JITAP¹⁷⁰ and WTO Technical Assistance provisions have either not provided the required technical training or have not been exploited because of stringent conditions. Budgetary allocations to R & D {research and development} in the country are, additionally, very small yet capacity building is key to effective participation in the WTO (ibid, p.4).

The report concludes that as a result of the inherent capacity problems: *the commitments and bindings that the country has made so far have therefore not been informed by analytical research (ibid, p.4).*

The lack of financial resources to meet the costs of attendance at global fora, including travel and associated costs, acquiring and processing information, obtaining the necessary capacity to contribute and attempting to have an impact on agendas and decision making, remains high. This also often requires addressing the costs of an 'empty desk' within already under-resourced government departments in the member country. Kenya's Department of Trade and Industry, for example, is represented by Kenya's Permanent Representative who is based in Geneva with a staff of four. The Permanent Representative and her team are expected to attend most meetings and monitor operational developments in both the GATS and the GATT as well as participate in the service negotiation rounds such as the Doha rounds. This can be extremely damaging for many African countries which do not have the capacity to participate fully in the process. As Helleiner and Oyejide point out *the WTO is a member driven organisation with no permanent Executive Board. This requires delegates from member countries to be actively involved in the day-to-day activities. If they are not, their interests are ignored (1999, p.112).* And the costs of doing so remain significant. To participate in 'the continuous dialogue' that makes up the WTO procedures requires at least 45 meetings per year in Geneva which places significant pressure on the resources of cash-strapped smaller and developing countries (ibid, 1999). This lack of presence is an important inhibitor of meaningful participation as lobbying and the positions of developing countries are often

¹⁷⁰ The Joint Integrated Technical Assistance Programme for Selected Least Developed and other African Countries (JITAP). JITAP which was started in 1998 in Kenya, with an aim to building capacity has trained 40 specialised trainers in Kenya. They are expected to mount awareness campaigns on the Multilateral Trading System in the country. In the context of capacity building, the country has also implemented notification requirements, Trade Policy Reviews (which was first done in February 2000), and Customs Valuation legislation changes.

fashioned through the presence of a country ambassador or representative in Geneva rather than through regional meetings or organisations.

Again, notwithstanding the evidence of the G21's caucusing power shown at Cancun in 2003, this historical lack of presence in Geneva, is also exacerbated by the failure to caucus at the regional level or among other developing countries. One interviewee representing the African continent at the WTO and Internet Corporation for Assigned Names and Numbers (ICANN) global fora noted that *it is most difficult to negotiate meetings that require active participation both at global and local level. It is one thing to be there but it is another to consolidate support at the local level* (interview #68). Taken together, the facts and consequences for lack of capacity is central to the broader governance debate as it is both germane to addressing the lack of meaningful participation by developing countries and because to a large extent, notwithstanding financial limitations, curable.

7.4.3 Governance and participation

Linked to the development of institutions discussed above, is the context specific nature of neo-patrimonial states, which portrays a lack of effective governance structures and processes that foster meaningful participation at the domestic level. As argued in chapter 2, the development of neo-patrimonial states from colonialism in the 1960s was centred on reasserting nationalism. By the 1980s, governance was more about ethnically played politics combined with a weakening of the state. As was discussed in the preceding section, this in part was attributed to the aid-based financial system. Yet, as noted by the Ndegwa Committee assessing public institutions: *basic causes of the squeeze are internal and it is within the power of Government to introduce corrective measures, which should alleviate the financial crisis and promote development* (Ndegwa Committee, 1979 p.40). Thus the Government's responsibility, in light of the economic and political problems experienced should have been to define policy and appoint management teams that could orient enterprises to adapt to the prevailing economic environment.

By the early 1990s, Moi's politics had shifted and came to resemble those employed by Kenyatta (Cohen, 2001). Heightened ethnic consciousness and tensions were products of

uneven development and were stimulated by newly educated local leadership who defined their relationship to followers and potential followers in terms of ethnic identities (Holmquist et al 1994). As noted in chapter 6, by the time Moi was leaving, the campaign process that drove him out had more to do with him as a person than seeking to remove the bad governance structures he had left behind. The NARC party that took over in 2003 under the President Kibaki and which had been elected based on its commitment to ridding the Government of corruption, has done little as evidenced in the telecom reform process in the preceding chapters. NARC continues to foster ethnic lines and while Government cannot consist of every tribe and dialect, it has to tread carefully on the issue. It seems therefore, that any Government appointments or transactions have been and will continue to be measured against the ethnic barometer unless 'we' are able to move away from ethnicity.¹⁷¹

As evidenced in this study, there are consequences of an ethnic-based economy on national programmes that involves the transfer or redistribution of assets. The privatisation programme cannot escape the ethnic divide because it ultimately has an effect on the distribution of wealth. Thus, one of the problems in Kenya is not *that of deficient absorptive capacity, savings mobilisation, or even regulation capacity, but more deeply embedded in ethnicity* (Adam et al 1992 p.337). To the extent that privatisation is seen to redress the imbalance in economic power among ethnic groups, it is predominantly as volte-face rejection of patronage. The lack of political commitment that has exemplified the reform process such as is the case with the telecom sector has occurred because *successful planning and implementation would mobilise and liberate the masses enabling them to acquire economic and political power, and challenge the dominant class* (Ominode, 1988 p.211). The pursuit of policies controlling and constraining large business and civil society allowing them to develop only if they were aligned with the political establishment, diminished Kenyan civil society and capitalists seen as strong in the early 1970s (Tangari, 1999).

¹⁷¹ See also comment by Barkan which largely confirms this [Barkan, J. D. (2004) "Kenya after Moi." *Foreign Affairs*. Vol .83 (1)].

And while this study has not dealt with the broader aspects of the role of civil society, it is noted that their role in the policy-making process has only recently begun to emerge largely as a result of the WSIS process. This is because the world summit strongly criticised development planning without ‘peoples’ and ‘grassroots’ participation. As a result, the first formal delegation of civil society representation in the telecom global arena in Kenya can be traced to the Africa and Geneva WSIS meetings in 2002¹⁷² and 2003 and subsequent meetings in 2005. This translated to the mobilisation of civil society in Kenya and in 2004 a broader process was initiated with a multi-stakeholder regional workshop organised in July 2004. Government, private sector and civil society were represented in the meeting. In consultation with various other civil society caucuses, TESPOK, KICTANet was formed in October 2004. This has had several positive changes in the sector and in policy making, the most important of which is the joint production of the Draft ICT policy which was made in consultation with KICTANet members.

Nonetheless, various resource impediments remain as evidenced from interviews with participants in Kenya which noted that participation to international fora is still largely based on political ties and linkage and those attending such meetings in many cases held political linkages to Government politicians. Thus, selection procedures and structures for determining who should attend international meetings can be manipulated. Another element is the persistent failure of national governments to utilise the skill and talent that exists within the telecom sector but resides within the industry, academia or NGOs. The frequency of this concern was articulated in an international survey on capacity development and ICT – ‘The ‘Louder Voices’ (Maclean et al., 2002) - which was conducted in various countries including Kenya. The respondents identified the protection of Telkom’s monopoly as the reason why policy makers fail to utilise the wider pool of human resources in the telecom sector. That is, they fail to draw on advisers who might suggest policy positions which deviate from the goal to protect Telkom’s monopoly. This is not far fetched given that as was evidenced in this study, all Telkom evaluative consultations were kept secret and

¹⁷² The WSIS Africa meeting took place in Bamako in 2002 while the Geneva meeting took place in 2003.

not released to the public. It is thought that this is because suggestions made were contrary to Government intentions at the time.

7.4.4 Addressing participation constraints: Possible approaches

The participation constraints above suggest that while a framework for inclusiveness of all signatories exists on paper, potential problems for equitable participation by all stakeholders and GATS signatories remain which are institutionally embedded in the policy-making processes of Kenya.

Domestically, interviews revealed that in the absence of coordinated mechanisms for the telecom sector, each international organisation has tended to address its queries to the various ministries or departments that they had dealt with in the past. On the other hand, the ministries themselves had made no effort to ensure that the new telecom institutions in Kenya were understood by the various international organisations. In line with this, the various ministries have also been reluctant to let go of the former roles that they held. Where meetings have been required it was evident from the reasons provided that there was a lack of communication. There is therefore need for a more coordinated effort which seeks to channel and coordinate information to and from international meetings.

The views from various stakeholders in the policy process also confirm that while it is obvious that technical and policy capacity require learning over long periods, it is also recognised that there is no short cut to this process. Just as important to training and development is the need to recognise local capacity in other areas outside Government. It is noted that many countries in Africa less frequently utilise the academic institutions within their nations for expertise. As noted, the frequency of this concern was articulated in Maclean et al., (2002) which argued that most African governments failed to draw on local expertise.

Another concern is the fact that information gained from attendance at meetings is not being disseminated thus turning learning into a slow and often unrealised effort. There seems to be no accountability expected. This may have something to do with the awareness

of telecom issues and the understanding of how international issues affect Kenya and Africa's policy making. Efforts to facilitate the awareness of how international policy influences decisions made at the domestic level are therefore required. While the issue of capacity is being bridged through training provided by the international fora, it is evident that this in turn raises questions as to the degree of independence this training provides. Not undermining the training and capacity that international institutions provide, it is difficult to accept that the advisers, curricula and technical assistance used remains without institutional bias.

As suggested in chapters 2 and 4 and discussed in earlier sections of this chapter, through the case of the WTO GATS framework and specifically recent Doha rounds, there are tendencies where development assistance gives rise to what Dolowitz & Marsh (2000) term 'coercive' rather than 'voluntary' policy transfers, in which the role of international consultants usually insisted upon by donor countries most clearly manifests the problem. In addition, many of these international institutions do not provide technical assistance on how to participate in the international decision making process. There is clearly a limit on what these organisations can do to provide training since in many cases this requires funding and time from their normal activities. Coupled with this is the fact that lobbying is an issue that is not akin to Government policy making. Lobbying is usually seen as an anti-government stance that is usually done by Opposition members of Parliament, but even in their case, the ability to lobby, and knowledge of how to lobby is limited. This therefore is telling of Kenya in general and is not surprising given that the common word on the ground is that Kenyans are passive and would not in any way try and throw a stone even when the issue pinched their pockets.

At the international level, Melody (1999c) suggests that 'best practice' telecom regulation, should also be applied within the global arena. This is because the historical assumptions behind telecom and development and the importance of telecom seem to be founded on three false assumptions. First, there is the misconception that all countries are uniform in the degree of supply and demand of telecom. As such it is falsely assumed that developing countries such as those in Africa stand on equal footing to access and use these new

technologies as those in western countries. This misconception can be discredited based on the historically based hierarchical market structure of telecom. For example, access to the internet is based on a tier structure controlled mainly by international companies who lease or own the internet backbone that determine which countries are linked. And thus while there is intense competition for routes in the West, this is not the case in Africa where small traffic (users on the net or phone) exist¹⁷³. Thus, while costs associated with internet access in Kenya may be high and it can be argued is as a result of Telkom's action in tariff rebalancing and the profit-oriented nature of the organisation, there are also other historical factors that Telkom has had to deal with. Pricing structure can also be explained by the fact that Telkom and many other African nations pay much higher costs than other countries for access to bandwidth and interconnection. For example, until recently, when an end user in Kenya sent email to a correspondent in America, it was the Kenyan ISP that bore the cost of the international connectivity from Kenya to America. On the other hand, when an American end user sends email to Kenya, the Kenyan ISP also bears the cost of the international connectivity, and ultimately the Kenyan end user who bears the brunt by paying higher subscription fees. The above example is typical of most PTT organisations of developing countries and is linked to the second misconception. PPT organisations historically inherited policy models from the ITU that have had a bias towards an expert group of engineers who have used various mathematical calculations to determine the costs to be paid by each country in the access of telecom. However, in doing so, they have not looked at the significant inability of most users in Africa to afford the pricing structures laid upon them by the international market.¹⁷⁴

The third misconception is that the understanding of telecom has been based on the myth that supply is the main 'modus-operandi' (Melody, 1997b). Consequently, PTT organisations

¹⁷³ It is not the place of this study to go through the actual issues within the market structure of telecom, rather to point out the misconceptions. For further reading see Nicole (eds) (2003) *ICT policy: A beginners Handbook*, Association of Progressive Communications, available at www.apc.org.

¹⁷⁴ There is a growing demand to have the institutionalised pricing structure of telecommunications changed within the ITU. See for example Collins (2000) 'International Accounting Rate Reform: The role of International organisations and implications for developing countries', *Law and Policy in International Business*, 31, 3. Also see Thuswaldner (2000) 'The International revenue settlement debate', *Telecommunications Policy*, 24, 31-50.

have been unable to meet the demands for telecom. In Kenya, the supply myth is observed in the objectives of the KCA which seek to provide basic services in telecom. Furthermore, Kenya's position as a receiver and not a supplier of technology inherently makes it a buyer of technology which increases costs. Finally, while numerous institutional theories offer an explanation for the relative economic and political strengths and weaknesses of countries, the uneven power structure of developing countries like Kenya need not be laboured. The majority of these uneven power structures are economic in nature and stem from more recent policies such as SAPs and the conditional aid of such organisations as the IMF and the World Bank. With the establishment of regional trading zones such as the Common Market for Eastern and Southern Africa (COMESA) and the East African Community (EAC), the potential for regional approaches on matters of concern becomes more of a reality. Indeed, analysis on viable options for regionalisation is now slowly becoming part and parcel of the literature on globalisation (see Shaw, 2000a; 2000b). The utilisation of such institutions is therefore encouraged. The EU model offers considerable potential and scope for developing similar 'communities of interest' to shift the balance of power within international organisations. African governments would be served well to emulate such 'best practice'. Thus, agreeing with Melody (1997b), the historical nature of telecom suggests that the global market is highly imperfect and in need of regulation to permit fair competition and to encourage efficient allocation of resources for countries in Africa.

Although resolving the constraints reviewed in this section cannot be accomplished here, this section's discussion has served to confirm arguments made within the study that a technology cannot be analysed without evaluating how its political and economic structure constructs its development. Allied to this argument is that domestic structural institutions are a result of their neo-patrimonial systems of governance and its institutionalised aid dependency stunts the independent implementation of telecom reform nationally. Here once again, attention is drawn to the importance of institutions, and specifically the local regulatory authority; CCK.

It was suggested that the notion of independence in Kenya's context is constrained by the political context in which it was developed, as discussed in chapters 5 and 6. While Kenya is

not assumed to suffer a handicap in a way that completely or meaningfully limits it from participating in global governance arrangements made by the WTO, concern is raised over the manner in which its domestic political economy is thought to adversely affect its local institutions in effectively fulfilling obligations within the policy-process.

However, in the same regard, inclusiveness alone will not produce *proportional representational universal participation* (Dzidonu & Quaynor, 2002, p.3). True participation needs to address the institutional imbalances that inhere in these organisations as a result of historical factors and the structural nature of the policy process in which these organisations participate in as evidenced in this study. The development of telecom and the role this might play in the broader economic transformation such as the question of universal access, places the problems of participation by developing countries in global governance firmly at the centre of resolving how best to approach issues of access, affordability and other issues associated with the digital divide. This section has merely sketched the contours of the problem and the possible recommendations that could be investigated to address the inadequate participation by developing countries in international fora.

7.5 Conclusion

For the growing number of people who increasingly question the move to supranational regulation of trade and services and its potentially adverse effect on under-developed nations, and specifically neo-patrimonial states, the GATS offers a useful tool to consider these processes and issues. Drawing on an analysis of Kenya's GATS implementation programme, through the KCA as evidenced in chapters 4 to 6, this chapter argued that the GATS, and specifically the RP, provides Kenya with a leverage tool to advance domestic political interests, while honouring trade commitments and seeking to prove its policy and financial credibility with international investors and monetary institutions. The essence of this claim is based on the ability to limit scheduled sectors and services through a positive listing approach which allowed Kenya to determine the pace of its reform agenda domestically.

Concern was also raised in the manner in which governments in Africa interact with the aid-cartel. As argued, this, has sustained Kenya as a neo-patrimonial state in which the donor role in the adjustment process has come to be accepted and even institutionalised within the telecom process and in which clientelist practises have continued to develop, sustained within this donor role. Further concern was also raised on the way in which the political economy of neo-patrimonial states is thought to affect its local capacity development, in an attempt to protect interests of the political elite (such as retaining Telkom monopoly). These constraints highlight the salient factors that necessarily propagate neo-patrimonial relations with the international community and indirectly confirm the central claim of the study that the GATS commitments had the very effect intended by the Kenyan Government – to provide sufficient leeway for domestic policy preferences. Drawing the study to its conclusion, the following chapter summarises the arguments by encapsulating the framework developed in chapter 2 within the study's arguments and findings.

A MARRIAGE OF CONVIENCE: TELECOM REFORM AND THE AID -TRADE RELATIONSHIP IN KENYA

If your domestic institutions are strong, then you don't need very strong global institutions. If domestic institutions inside countries are weak, it won't matter how strong your global institutions are. They will not be effective
Robert Hormats¹⁷⁵

Introduction

The principal aim of this study was to understand Kenya's telecom reform process by evaluating how Kenya's distinct institutional features stemming from its historical political landscape and its relationship to the international context shapes the framework and outcome of Kenya's telecom sector. I thus devote this concluding chapter of the study to reviewing the objectives, presenting a summary of the research findings; the implications of the study; my contribution to the theory and application of policy, and suggestions for further research.

8.1 Revisiting the objectives

When Kenya signed its schedule of specific commitments in 1994, it was indeed poised to introduce substantial changes in its telecom sector. While the term 'revolution' is certainly hyperbolic, the changes envisaged in 1997 at the enactment of the KCA were far-reaching and of significant consequence. The wholly state-owned monopoly was split into three sectors establishing Telkom, postal services and a new regulator, CCK. While Telkom is still a Government-owned entity, the KCA changes ensured that Telkom could no longer act as a lone giant in the telecom sector free from competitors. The value-added service sector that

¹⁷⁵ Robert Hormats (the Vice Chairman of Goldman Sachs International as quoted in Thomas Friedman, *Heal Thyself*, New York Times, February 7, 1998.

had been burgeoning slowly while under Telkom's regulatory control burst forth onto the landscape with the licensing of competitors in the telecom market, testing the legal limits of Telkom's monopoly and its previous privileges in the sector. The introduction of mobile operators in Kenya's telecom sector saw positive policy developments directed at facilitating this 'revolution'. These changes were not unique to Kenya, but reflected the trends of the 'information era' sweeping across the globe, renovating telecom markets worldwide. This was expressed through the adoption of the GATS model premised on the separation of supply, policy and regulation sectors. The process as discussed in preceding chapters was based on Kenya's telecom commitments in 1999. However, the adoption of the GATS in Kenya as with every country has been unique. This study has sought to document that period of Kenya's telecom reform process which pertains to the GATS treaty and the accompanying RP.

As such this study had three primary goals. First, to further the understanding of telecom outcomes in Kenya by evaluating how its political landscape has shaped both the policy and implementation of the telecom reform process. To do this, the study applied a framework (neo-patrimonialism and NIE) combining both a domestic and international lens. The rationale for this study stemmed from its premise stated in chapter 1. Namely: that telecom policy making has privileged the role of economics and efficiency within the ambit of liberation that has precluded understanding of the distinct nature of policy processes in many African states. This study sought to offer a modest contribution to what was argued was a lack of theoretical analysis of not only the telecom sector in general, but more specifically, the issues that are involved when international telecom policies are applied at the domestic level. While it was recognised that the NIE and neo-patrimonial literature draw on different analytical theoretical assumptions, it was argued that the reality of the policy process pays less attention to the academe's disciplinary boundaries. The growing interdependence of governments with the global world is indeed undeniable and as Keohane aptly notes:

international-level analysis ...is neither an alternative to studying domestic politics, nor a mere supplement to it...On the contrary; it is a precondition for effective comparative analysis. Without a

conception of the common external problems, pressures, and challenges...we lack an analytical basis for identifying the role played by domestic interests and pressures...Unless the constraints imposed by the world political economy allows us to distinguish the effects of common international forces from those of distinctive national ones

Moreover, given that the aim of this study was to explain the empirical (what is) rather than the normative (what ought to be), it was argued that the tension proposed in the literature between domestic and international contexts does not require a resolution as neither frames on their own provide an adequate explanation of the outcomes in the telecom reform process in Kenya. To this end, the neo-patrimonial literature was used to shed light on Kenya's unique historical context emanating from both its colonial legacy and its relationship with the international arena. NIE on the other hand was utilised for its organising principles which focuses on the value of international institutions as institutions that seek to reduce uncertainties in the market. This argument was used to locate the narrower thesis that trade commitments act as instruments of credibility in the context of telecom liberalisation.

Second, this study has sought to contribute to the scant literature on telecom reform dealing with the interrelations between domestic reforms, GATS commitments and donor funding requirements in developing countries, and specifically in Kenya, by detailing the developments of the Kenyan sector between 1997 and 2005. The study of Kenya's telecom reform process also provides an opportunity to convey a sense of the challenges that domestic telecom reform presents in the distinctive case of a country whose telecom policy was shaped as much by its political historical context as it was by international best practice influencing the sector's reform in the global political economy.

The third goal of the study was to provide a detailed empirical study of the Kenyan telecom application of the WTO GATS framework. Previous comprehensive literature on the Kenyan telecom sector specifically with reference to the interrelation between international policy such as the GATS is scant and those in existence (Muruiki, 2002, 2004, Kane, 2002, Etta & Elder 2005), evaluate the growth of the sector without attributing the outcomes to international policy commitments such as the GATS framework and the aid and trade relationship. The case study therefore delved into a detailed account of how Kenya's telecom

reform outcomes emanate from the existing relationship with international aid institutions and its commitments made in the international arena.

The goals of this study as reviewed above enable it to add, as suggested through the study's main research aim, a new understanding of how different policy contexts affect the application of policy. The depiction of the tensions inherent between international and national policy making is illustrated through the selective application of the GATS instruments, specifically national treatment and the adoption of the RP. As depicted in the study, questions of the degree of independence and regulatory capture arise. This study did not proffer an exhaustive review of the theoretical discourse on regulation and regulatory capture, as this was not its main goal. However, the study discussed the issues of regulation which as was argued is tied to the specific constraints of Kenya's telecom legislation (viewed essentially as part of Kenya's 'institutional endowments') and how these constraints manifest themselves both in policy making domestically and internationally as discussed in chapter 7. A digest of the argument and findings are summarised below.

8.2 Argument and findings

At the outset, the question was posed as to why Kenya acceded to the GATS telecom instruments at all. As such, it was argued that the answer to this must be located within Kenya's domestic context. In answer to this, chapters 4 to 6 asserted that Kenya's accession to the GATS telecom instruments must be regarded primarily as an attempt to make the domestic policy credible to the international economic community while allowing it to maintain neo-patrimonial governance mechanisms at a domestic level. Drawing on the analytical framework developed in chapter 2, three central claims were developed to support this argument. First, it was argued that political authority in Africa is based on the giving and granting of favours under the rubric of what is known as clientelist practises. Neo-patrimonialism, it was argued, undermines economic policy reform because clientelism is based on the extensive use of state resources for political purposes as was evidenced in Kenya's case in chapters 5 and 6.

Patterns of reform in the 1960s as discussed in chapter 2, revealed that African regimes have sought to protect the interests of a narrow stratum of state elites. Policy outcomes were the result of the interaction between clientelist needs of neo-patrimonial states and the dominant international paradigms of SAPs and privatisation programmes of the international community. The framework explained that African political leaders had come to rely on patronage and the distribution of economic rents in order to ensure political stability. African political systems became neo-patrimonial, combining patterns of modern democracies with an international patrimonial logic. These neo-patrimonial states evolutionalised patterns of dyadic exchange, prebendalism, private appropriation of public resources and ethnic preferences creating a **patrimonial political logic** (van de Walle, 2001) in which the authority of the state is diverted to enhance the interests of political elites rather than the public domain.

It was argued that following independence, foreign aid helped sustain neo-patrimonial regimes by providing resources and technical capacity for development that the state was not able to generate on its own. Locating Kenya as a neo-patrimonial state, it was established that international institutions began to directly challenge the central mechanisms of neo-patrimonial rule. As shown through Kenya's development from its colonial masters, overall Government consumption and development expenditures were not declining during the 1960s and 1970s. However, as growing aid resources were not utilised for development objectives but rather for clientelist practises, donors moved to bring about liberalisation and real institutional reform in the country. Aid was pegged to the conditionalities of reform. The result of this was the second claim, namely: that a **co-dependency** was created between IFIs and African leaders, in which a 'culture of approval' based on a paper process, was institutionalised. Yet, in spite of this, it was evidenced that instead of pursuing reforms African leaders **instrumentalised** the conditionality system of the reform process for their own agendas. It is within this framework that the telecom reform process in Kenya is located.

Drawing on the broad concepts of NIE, it was further argued that outcomes in the telecom sector have to be understood not only within their domestic contexts but also within the

international framework shaping the adoption of the reform process. The GATS was viewed in this study as an institution which emerged **to structure exchange between countries, to lower the transaction costs associated with trade and investment across national borders and to minimise the adverse effects of asymmetrically held information between bargaining parties.** In effect the risks of opportunistic behaviour an argument made by North and Weingast (1990), was therefore addressed. The establishment of the KCA is thus an expression of this promise as the KCA addressed the issues of the GATS, by separating the policy and regulatory functions. This motivation was interpreted **as an effort by the Kenyan Government to credibly commit to policy reform, according to the ‘rules of the game’ being played in the WTO, and in doing so, still allow it to pursue its own political interests within the telecom sector.**

Thus within the nexus of the historical context of Kenya’s neo-patrimonial state and the development of the GATS framework, it was argued that Kenya acceded to the GATS mainly because of the *package deal* (Bronckers, 2003 p.548) effect of the GATS. **That is, that concessions and commitments in one area creates opportunities for obtaining concessions in another area.** As noted through the discussion in chapter 7, the portrayal of committing to telecom reform in a fixed timetable ensures that a ‘stick’ is offered alongside a ‘carrot’. The importance of this ‘stick’ and ‘carrot’ relationship, as evidenced through chapters 4 to 6, was linked to the need for investment to fund political interests in the name of ‘telecom development’.

8.3 Central finding: a marriage of convenience: international aid, trade and telecom reform

As evidenced in this study, critics of SAPs do have reason to be sceptical about the long-term success of privatisation conditionalities. While not conclusive, the telecom sector in part does suggest that international negotiation between the Kenyan Government and IFIs provided both entities with the means for self-preservation, but did not accomplish the outward goals of either entity. Unfortunately, the losers on the whole are the Kenyan people who continue to suffer at the hands of Kenyan leaders reluctant to introduce reforms. Thus, while the financial benefits from IFIs provide the Kenyan Government with spending

money for its development prospects, the results do suggest that the disbursements do not interfere with the neo-patrimonial strategy of prolonged delays nor do they curtail or stop such behaviour. Instead, they are used as an excuse not to continue with the privatisation process. It is thus both ironic and tragic that IFIs and African leaders over the years have failed to execute their one true mandate: supporting and assisting African societies in reforms.

In addition, as discussed in chapter 7, the overall findings of the study on the telecom sector, do suggest that the GATS framework allows Kenya to achieve optimum results, in so far as the interests of political leaders are concerned and at the same time constrains the effective application of telecom reform in Kenya. This has allowed Kenya to incrementally introduce policy changes in the sector at the Government's discretion, yet at the same time provide it with sufficient predictability to inspire confidence and enhance its credibility internationally. Specifically, the analysis in chapters 4 to 7 reveals that the two presidential regimes, Moi and Kibaki, were able to instrumentalise the telecom reform process and use it to their advantage.

Three main trends in this process were evidenced. First, the Government made attempts to recentralise power in order to more carefully manage the reform process. Understanding the challenge posed by telecom reform, Moi and Kibaki were keen to maintain discretionary control over state resources, a key cornerstone of patrimonial power. This was expressed in three ways. First, the Presidents ensured they retained power in the choosing and appointing of the new heads of the telecom reform. This was done within ethnic tribal lines which is a key feature of African neo-patrimonial logic as discussed in chapter 2. During Moi's presidency, most heads in the telecom sector came from the President's tribal grouping - Kalenjin. During Kibaki's presidency in 2003, this was changed to members from the Kikuyu community and other key tribal groupings within the key 'Mount Kenya Alliance' grouping, discussed in chapter 6. In addition, Ministers responsible for the telecom sector like all other sectors were presidentially appointed within ethnic lines.

Second, Moi and Kibaki used these larger Presidential powers through the newly appointed heads and Ministers to manage the reform process directly. Thus, in spite of the separation

of institutions as directed by the RP, CCK's powers were diverted to the Minister for Communications who received his commands from the President's office. The third trend has been to reassert Presidential control over key forms of rent seeking. As discussed in chapter 7, the licensing process which is controlled by the Minister has pulled the reform process out of the proper channels of the licensing process and ensured it remains clouded in secrecy and political manoeuvring at the expense of the process itself. In addition, the protracted delays and problems of the entire sector as discussed in chapter 5 provide further evidence of how Presidential control has been asserted over the sector.

Yet the creation of these processes in which Presidential control is dominant has mollified donors by giving the impression of Government commitment to reform. By removing the reform process from regular channels, Presidents Moi and Kibaki have been able to argue that doing so was in the interest of ensuring that the reform process would take place as agreed. This resulted in the creation of committees and subcommittees within the Presidential office which report to the President over such matters as the telecom reform process. It is argued that these structures have provided the Presidents with useful insulation against donor pressures. During the entire reform process, more than three Ministers have held the portfolio of Minister of Communications. In addition as was discussed in chapter 5, heads of telecom institutions have been reshuffled in and out depending on the needs of the Minister or the President.

The second trend in the instrumentalisation of the telecom reform process has been the attempt by Moi and Kibaki to derive political advantage from the reform process. This centralisation of Presidential power was reengineered in the guise of economic liberalisation and was supported by the World Bank and the IMF. This political advantage was based on the ability to use the telecom reform process as a means to argue for more funding and more sympathy from the Kenyan public. Thus, both Moi and Kibaki could argue that they were actually implementing the reform process yet at the same time were able to slow down the process to their advantage.

Finally, the third trend in the instrumentalisation of the telecom reform process in Kenya has been the withdrawal of development activities by allowing donors to take the lead in

providing the direction central to the country's development. While this study has not focused on the wider effects of this process, the analysis presented in chapters 4 to 7 suggests that Government expenditure and planning is dictated by such processes as the PRSP which facilitates the process of receiving funds from the IMF and World Bank. The findings suggest that Kenyan leaders consider aid and ethno-politics as part of a complex incentive structure when engaging in the reform process. As was discussed in chapter 7, the complex aid system dominated by IFIs provides both Kenyan leaders and IFIs with a means of self-preservation.

In regards to the 'new broom' thesis discussed in chapter 2, in which it is thought that a new leader is more likely to implement reforms, evidence from this study suggests that this is not the case. Kibaki's Government continues to face several corruption scandals and has to date, not provided any conclusive evidence (where reforms are concerned), that his Government is any different to its predecessor.

In sum, the findings in this study suggest that differences in the telecom reform process in Kenya cannot therefore solely be imputed to technical factors. Evidence from this study suggests that fiscal considerations have played a key role in this process. As the crisis unfolded in the 1970s, the fiscal implications of policies became key factors in the willingness of states such as Kenya to maintain or change them. Thus, the reticence to undertake privatisation reform has, to a considerable extent, been overcome by the lure of revenues from the sale of public enterprises such as Telkom. This has meant that not much has been done about the need to develop better management practices in Telkom but rather much time has been taken over the Government's indecision to determine how much money it can recoup from the sale. External public funding has thus resulted in the growing role for donor agencies in the day to day decision making process. As discussed in chapter 6, the inevitable evolution of this process has therefore been the reinforcement of non-development tendencies.

In concluding, the findings in this study of the telecom reform process in Kenya provides evidence of what van de Walle has termed the *partial reform syndrome* (2001 p.60) in which domestic factors of clientelism have interacted with the international aid system to drag out

the process of reform over the last eight years. The outcomes in the telecom sector in Kenya can thus be understood as a result of the Kenyan Government reluctantly being forced to liberalise by external agents. This has resulted in the manipulation of the process by the Kenyan Government for political ends such as the provision of rent-seeking incentives, ethnic preferences and centralised hybrid regimes. This study thus shows that international undertakings are indeed mediated through domestic politics which provides local agents with the ability to manoeuvre the 'rules' for their own 'game'. This confirms the premise made at the beginning of the study, namely: that domestic institutions and patterns of politics *will continue to function as highly critical filters* of global forces (Pempel, 1998 p.219).

8.4 Contribution to the theorising of telecom outcomes

The analytical framework used to analyse Kenya's telecom reform process, suggests the need to revisit the study of telecom and the wider field of ICT policy in Africa. Based on evidence from this study, trends in policy outcomes from a domestic or international perspective as suggested in chapter 1 can be challenged as discussed below.

First, evidence from this study shows that there is no need to belabour the point that the state is not a black box. As such, states while benevolent remain necessarily entrenched. While they must still implement restructuring processes, they will do so according to their prerogatives. Milner drives this point home noting that domestic politics and international relations are intricately bound because a nation's international position affects its internal politics and economics. Conversely, a nation's domestic situation impacts its foreign relations (Milner, 1997). Drawing on neo-patrimonial theory, this study was able to provide a microscopic assessment of how a country's political and economic development influences the actions of agents. As was evidenced, Kenya's flexibility to prescribe the content of the GATS through the Schedules of Specific Commitments accommodates these domestic imperatives because it acknowledges that scheduling commitments engages with the inherent tensions of the nation-state and international institutional control. In this respect, Arup (2000, p.99) in discussing the limits and potentials of the WTO agreement, notes that scheduling commitments has the potential to surrender a government's control of the telecom sector *that are not so much concerned with economic protection as with aspects of political*

autonomy and cultural identity. In Kenya's case, the commitments accorded it the right to exclude services that served the purposes of Kenya's domestic development goals as well as safeguarding political control within the sector. Nonetheless, it is precisely because of the varying levels of development, that telecom policy must also fall squarely within the domestic domain. The complexities inherent in designing an effective policy are too context specific to be determined at multi-lateral level. To do so would seriously compromise the pursuit of national goals at the domestic level.

This study also presents confirmation that international organisations cannot be abstracted from the GPE and the study of telecom policy. Institutions in the GPE must therefore be viewed as actors in their own right influencing domestic outcomes. NIE provides a window in which to do this. Specifically it provides a means to take into account institutions as critical constraints on economic performance. In North's (1995 p.17) words, NIE:

..builds on, modifies, and extends neo-classical theory to permit it to come to grips and deal with an entire range of issuesWhat it retains and builds on is the fundamental assumption of scarcity and hence competition – the basis of the choice theoretical approach that underlies microeconomics. What it abandons is instrumental rationality – the assumption of neo-classical economics that has made it an institution-free theory.

Drawing on NIE, the view that international institutions are rational arenas in which states convene to pursue their own interests, is therefore challenged based on evidence from this study. While it was not the aim of this study to provide an in-depth analysis of the WTO or the merits or demerits of the GATS, evidence from this study indicates that the GATS framework has proffered a liberalisation model at the expense of other models which has in turn influenced the construction and implementation of policy at domestic level. While the compromise of the GATS has served to allow participation of other states, specifically developing countries, the GATS cannot be viewed as neutral. This confirms North's argument (ibid, 1995 p.20) that: *institutions are not necessarily or even usually created to be socially efficient; rather they, or at least the formal rules, are created to serve the interests of those with the bargaining power to create new rules.* Indeed, as noted in this study, there is apparent consensus among the critics of the GATS as to its apparent weakness. It is thus somewhat of a paradox that

analysis of telecom policy development has remained techno-centric and where analysis has moved beyond this realm, remained state-centred. This study therefore, in part, corrects this anomaly.

8.5 Implications for telecom reform

In analysing the GATS framework and having noted the reasons for Kenya's accession to the GATS in the first place, I note that the drive to want to 'catch up' with the rest of the world in this ever changing telecom market is heightened. Nevertheless, such catching up should not be done blindly. The use of case studies from other countries, as well as suggested ideologies and frameworks presented in the international arena, ignore the fact that Africa's telecom landscape first and foremost lacks access to basic telecom services. The implications of this are that Africa needs policy where the drive is to meet targets of USO. The drive for reform should be grounded on this and not on trying to follow market oriented models whose sole aim is profitability. Indeed, it has been shown through this study that privatisation is not the sole determinant of competitive and efficient markets, but rather that sound management systems from both the government and the regulator are required if competition and efficiency are to be achieved, a position also echoed by Melody (1999c). Policy reform choices that advocate better and wider use of sound management practices should therefore be considered a priority over technological advancement.

Two final thoughts emerge with respect to the GATS and Kenya's telecom sector. First, it is important to note that both the GATS and its telecom instruments are at relatively early stages of operation. The fourth protocol is still largely inchoate. In addition to that, the GATS framework agreement is a fledging instrument. Many of the GATS rules are not complete, and are largely untested. Service negotiations, especially in telecom have been delayed and are relatively novel in the overall framework. Through the process, many gaps in the instruments will be identified and will need to be addressed. Some of the rules will need to be improved. Certainly, more rounds of negotiations are taking place. It is also worth reflecting again that the GATS has been negotiated as part of a multilateral treaty and, to that end, offers and commitments are binding and difficult to reverse. Because, as argued in this

study there is a correlation between telecom and the overall development of a nation, the significance of this treaty cannot be underestimated whatever its flaws.

Second, as outlined in this study, Kenya's telecom industry faces a formidable task as it seeks to open its fixed-line market for competition. The proposed changes in the sector for mid 2006 suggest that the country's social and economic development agenda is pressing, necessitating investment from the international arena. Whether its current vision to achieve this is sufficient will depend on many internal and external factors, but foreign and domestic investment is unlikely to flow if regulatory and management design matters are left unresolved. That said, it is difficult to avoid the temptation to conclude on a positive note. Despite obvious problems with market structure and policy design, Kenya's telecom sector still remains lucrative within the East African region and the rest of Africa. The growth of the mobile sector is indicative of the unmet demand and forecast short-term indicators suggest a substantial increase from the current figure of 5 million to 7 million by the end of December 2006 (Wandera, 2005). Attention will also soon have to turn away from the fixation of monopoly legacy and the problems of the past and begin to examine how to evolve regulation to foster long-term sustainable competition. This degree of focus may be a distance away from the current issue set in Kenya, but given Kenya's new ICT policy framework that is currently before Parliament, it can never be too early to begin to look forward.

Finally, this study has made much of Kenya's compliance with the GATS, claims have been advanced and while some have been proved to a greater extent than others, the story of the telecom reform process in Kenya between 1997 and 2005 has been told. The rest is for another study. Factual errors may well emerge, as will contested interpretations of those facts. It is hoped that this study will serve as a springboard for future studies, both supportive and critical of it. Lofty in ideal, as long as it contributes to the discourse on

telecom and the future of the wider ICT policy development¹⁷⁶ then it would have served its purpose.

8.6 Implications for policy making

Finally, the implication of the partial reform syndrome evidenced in this study, is that the perpetuation of austerity for an extended period of time and the manner in which the adjustment process has been managed has served to weaken bureaucratic rationality and reinforce patrimonial tendencies thus weakening the capacity of the state. This has meant that state resources are simply inadequate and have been further eroded by poor management and maintenance of budgets.

While the study has not provided discussion on the disempowerment of the central state bureaucratic apparatus of Kenya, the point to make here is that over time the underinvestment in state capacity by state elites has strengthened the relative power of neo-patrimonial interests within the state. This presents a concern for policy making. Moreover, the sum result is that Kenya's dependence on foreign aid continues to weaken the state even further as development planning and priorities are mapped within the aid structure. The adjustment regime that started in Kenya in the 1980s as discussed in chapter 5 can thus be viewed as a failure in the sense that it has allowed the Kenyan government to exaggerate the impact of the adjustment and enabled it to deflect its failure in managing programmes onto external agents such as the World Bank and the IMF.

Despite the clear impact of aid and reforms, in what direction is the aid system likely to evolve in the future? The GATS framework suggests that for the telecom sector, the 'aid and trade' relationship will continue. The question remains as to whether the Kenyan government and donor institutions can build a system of aid that directly promotes the emergence of development and which eliminates such political problems. In the West, there is clear indication of 'donor fatigue' and, while NGOs may continue with development projects, their traditional view of aid as small and independent projects reduces the

¹⁷⁶ Such as is evidenced by my report sent to the Kenyan Government on the implications of the GATS that emanated from this study.

likelihood of their influence in national planning. It appears that the impulse for reform must come from 'us' Africans. 'We' are the main beneficiaries of the aid system and therefore should have the greatest incentive to push for change both from a political and a governance perspective. While the current wave of democratisation taking place in Kenya is yet to confirm its capacity to control its future, there is hope in thinking that as more Kenyans begin to challenge the neo-patrimonial logic of governance, institutional structures imbued by a patrimonial logic will eventually disappear.

8.7 Suggestions for further research

In regards to the GATS framework, there are many future areas for research stemming from the operation of the GATS. Various rounds continue to be negotiated under the Doha Agenda, which implies that Kenya will continue to change and alter its GATS commitments in line with both technological changes and international best practice. In addition, this study provides a starting point from which to analyse Kenya's eventual adoption of the proposed ICT policy. Three areas however in particular should be considered for further research: global governance structures and telecom commitments, USO, and regulation.

First, the global-political nature of the sector has greatly changed, giving rise to the non-differentiation of private, international and non-governmental organisations (see Shaw, 2003). And while this study has not analysed these relationships, many non-governmental agencies are now involved in providing telecom assistance pegged to international deals with private sector agencies. Although, in the short term, this might seem reasonable, the long-term effects are debatable (given the nature of new and changing policies such as open standards/software),¹⁷⁷ and may be undesirable for policy. This is because in most cases governments are by then tied to a policy option for a given number of years.

Second, issues of USO and the implementation of a knowledge infrastructure are further heightened by the trends in the mobile telecom industry, where figures of use currently

¹⁷⁷ The open software/standards debate is currently ongoing. The EU leads the debate by recently concluding definitions of open software/standards. See <http://europa.eu.int/ida/> and <http://flosspols.org/conf/>.

exceed fixed-line telephony (Hamilton, 2003). Associated with such findings, is the fact that new ways of thinking and new forms of technology need to be considered in order not only to provide USO, but also to provide access to the Internet and to the various Value Added Services that result from this connection. It would be wise to revisit definitions of USO, because definitions require change and flexibility with the current advancements in the sector as evidenced in this study. Third, as noted through the discussion in chapter 7, regulatory issues for analysis have arisen in this study. How can regulatory institutions overcome 'regulatory capture'? As is evidenced in this study, it is possible to have a regulatory agency but still not conform to regulatory principles. These issues need to be further analysed. A comparison between countries may serve as a useful starting point in this endeavour.

Finally, the wider implications for policy from this study for Africa and other developing nations lie in the fact that telecom policy options and decision making processes influence the degree to which a nation can call itself an information/knowledge society. In this regard, policy analysts need to move African telecom research away from the current predominance of 'telecom outcome/output' research to robust, in-depth qualitative work, which begins to unpack the complexities of telecom policy making (Kerretts, 2004) as set out in this study. Such studies may serve to enlighten policy makers on the impact and influence of domestic political context and how best to overcome negative undesirable aspects of policy-making as evidenced in this study.

8.8 Closing remarks

Finally, the real insight of this study is that it largely confirms the difficulty in eliminating clientelist practises simply by changing policy regimes or by liberalising a sector. Granted, while the prospects of rent-seeking become harder with liberalisation, state agents seem to find ways to restore discretion over the reform process. Unless the liberalisation process is accompanied by political changes that increase the checks and balances on executive abuses of influence, rent-seeking activities will prove extremely resilient and the objectives of economic policy reform will be subverted. The Kenyan telecom reform process attests to this.

APPENDICES

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Appendix A: Position of Kenya relative to South Africa¹ and Sub-Saharan countries (2003)

(Source: Figures compiled from Telecommunications Development Bureau (BDT), International Telecommunications Union (ITU) Year end 2003 provisional estimates. Updated: 01.04.2004).

Telecom indicators

	Population 000s	Main telephone lines		Mobile subscribers		Internet users	
		000s	p. 100	000s	p. 100	000s	p. 100
Kenya	31'708	328	1	1'591	5	500	1.6
South Africa	46'365	4'800	10.4	16'860	36.4	3'300	7.1
Sub Saharan	601'735	4'898	0.8	17'047	2.8	5'086	0.8
Africa	648'101	9'697	1.5	33'907	5.2	8'386	1.3

IT access

	Hosts Total 2003	Hosts per 100 inhab. 2003	Users (000s) 2003	Users per 100 inhab.2003	Total (000s) 2003	Per 100 inhab. 2003
Kenya	8'325	0.03	400	1.27	204	0.65
South Africa	288'633	0.62	3'100	6.82	3'300	7.26
North	8'119	0.01	4'790	3.26	2'872	1.95
Sub Saharan	51'875	0.01	4'473	0.07	4'186	0.75
Africa	348'627	0.04	12'363	1.48	10'358	1.38

¹ South Africa is by far more advanced in its telecom infrastructure. In order to provide some comparison, it was necessary to exclude South Africa when comparing it to the rest of Sub-Saharan Africa.

Main telephone lines

	Main Telephone lines		Subscriber Lines	
	Total (000s) 2003	Per 100 Inhabitants 2003	Total (000s) 2002	Per 100 Inhabitants 2002
Kenya	328.4	1.04	321.5	1.02
South Africa	4'844.0	10.66	4'310.0	9.48
Sub- Saharan	6'216.5	0.96	5'586.5	0.88
Africa	25'129.8	3	22'488.1	2.74

Cellular Subscribers

	Mobile Cellular Subscribers		Prepaid Subscribers (%) 2003	Population Coverage (%) 2003	As % of Total Telephone Subscribers 2003
	Total (000s) 2003	Per 100 inhabitants 2003			
Kenya	1'591	5.02	97.8	n/a	82.9
South Africa	16'860	36.36	76	97.9	73.9
North Africa	16'577	11.24	89.9	91.7	54.1
Sub- Saharan	18'004	2.78	91.2	47.6	72.7
Africa	51'441	6.12	85.3	63.2	65.1

Appendix B: Kenya's Schedule of Specific Commitments (Source: GATS/SC/47/Suppl.2, 18th November 1999)¹.

Modes of supply: (1) Cross-border supply (2) Consumption abroad (3) Commercial presence (4) Presence of natural persons

Sector or subsector	Limitations on market access	Limitations on national treatment	Additional commitments
2.C. Telecommunications services (excludes video and audio broadcast services)			
For public use:			Kenya undertakes the obligation contained in the reference paper hereto.
(a) Voice telephone service (7521)	(1) None, except International call-back services are not permitted.	(1) None	
(b) Telex services (7523 **)	(2) None, except International call-back services are not permitted.	(2) None	
(c) Telegraph services (7522)	(3) Until 2003, monopoly on supply of services in Nairobi as well as on supply of	(3) None	
(d) Facsimile service (7521**, 7529**)	International gateway facilities services, and resale in monopoly areas only with		
(e) Private leased circuit services (7522**, 7523**)	permission of supplier of underlying services		

¹ Kenya's Schedule of Commitments is also available online via WTO GATS schedules database : <http://docsonline.wto.org-GATS/SC/4/Suppl.2>

Modes of supply: (1) Cross-border supply (2) Consumption abroad (3) Commercial presence (4) Presence of natural persons

Sector or subsector	Limitations on market access and facilities. Foreign investment is limited to 30 per cent maximum. (4) Unbound, except as indicated in the horizontal section.	Limitations on national treatment (4) Unbound, except as indicated in the horizontal section.	Additional commitments
<p>For public use</p> <p>(b) Packet - Switched data transmission services (7523**)</p> <p>(c) Circuit - Switched data transmission services (7523**)</p>	<p>(1) None</p> <p>(2) None</p> <p>(3) None, except Foreign investment is limited to 30 per cent maximum.</p> <p>4) Unbounded, except as indicated in the horizontal section.</p>	<p>(1) None</p> <p>(2) None</p> <p>(3) None</p> <p>4) Unbounded, except as indicated in the horizontal section.</p>	

Modes of supply: (1) Cross-border supply (2) Consumption abroad (3) Commercial presence (4) Presence of natural persons

Sector or subsector	Limitations on market access	Limitations on national treatment	Additional commitments
For non - public use:			
Services supplied to closed users group.	(1) None, except through the network of Telkom Kenya Ltd. Or monopoly. International call-back services are not permitted.	(1) None	
(a) Voice telephone services (7521)	(2) None, except through the network of licensed telecom operator. International call back services are not permitted.	(2) None	
(b) Packet - switched data transmission services (7523**)	(3) Only over facilities of licensed operators breakout and Resale of excess capacity are not permitted. Foreign investment limited to a maximum of 30 per cent.	(3) None	
(c) Circuit - switched data transmission services (7523**)	(4) Unbounded, except as indicated in the horizontal section.	(4) Unbounde	

Modes of supply: (1) Cross-border supply (2) Consumption abroad (3) Commercial presence (4) Presence of natural persons

Sector or subsector	Limitations on market access	Limitations on national treatment	Additional commitments
		d, except as indicated in the horizontal section.	
(d) Telex services (7523)**			
(e) Telegraph services (7522)			
(f) Facsimile services (7521**, 7529**)			
Value added services:			
(h) Electronic mail (7523**)	(1) None	(1) None	
(i) Voice mail (7523**)	(2) None	(2) None	
(j) On-line information and data base Retrieval (7523**)	(3) Only over facilities of licenced network operators. Foreign investment limited to maximum 30 per cent.	(3) None	
(k) Electronic data interchange (7523**)	(4) Unbound, except as indicated in	(4) Unbound,	

Modes of supply: (1) Cross-border supply (2) Consumption abroad (3) Commercial presence (4) Presence of natural persons

Sector or subsector	Limitations on market access the horizontal section.	Limitations on national treatment except as indicated in the horizontal section.	Additional commitments
(m) Code and protocol conversion			
(n) On-line information and/or data processing (including transaction processing) (843**)			
Other: - Internet and internet access services	(1) None (2) None (3) Only over facilities of licensed network operators. Foreign investment limited to maximum 30 per cent. (4) Unbound, except as indicated in the horizontal section.	(1) None (2) None (3) None (4) Unbound, except as indicated in the horizontal section.	

Modes of supply: (1) Cross-border supply (2) Consumption abroad (3) Commercial presence (4) Presence of natural persons

Sector or subsector	Limitations on market access	Limitations on national treatment	Additional commitments
Satellite based			
- Mobile Services	(1) None, except as provided for under GMPCS MOU.	(1) None	
- Cellular/mobile telephone	(2) None, except as provided for under GMPCS MOU.	(2) None	
- Mobile data services			
- Personal communications services	(3) None, except foreign investment is limited to 30 per cent maximum	(3) None	
- Paging	(4) Unbound, except as indicated in the horizontal section.	(4) Unbound, except as indicated in the horizontal section.	
Terrestrial based			
- Mobile Services	(1) Only through the network of Telkom Kenya Ltd. and subsequent licensed	(1) None	
- Cellular/mobile telephone services	International gateway operator. International		

Modes of supply: (1) Cross-border supply (2) Consumption abroad (3) Commercial presence (4) Presence of natural persons

Sector or subsector	Limitations on market access	Limitations on national treatment	Additional commitments
	call-back services are not permitted.		
- Mobile data services - Personal communications services	(2) Only through the network of Telkom Kenya Ltd. and subsequent licensed International gateway operator. International call-back services are not permitted.	(2) None	
- Paging	(3) Other than paging services and PCS, initially the services will be provided by Telkom Kenya Ltd. A second operator is to be licensed within one year.	(3) None	
	(4) Unbound except as indicated in the horizontal section.	(4) Unbound except as indicated in the horizontal section.	
- Fixed Satellite Services (for public use)	(1) Only through the network of Telkom Kenya and subsequent licensed international gateway operator.	(1) None	

Modes of supply: (1) Cross-border supply (2) Consumption abroad (3) Commercial presence (4) Presence of natural persons

Sector or subsector	Limitations on market access	Limitations on national treatment	Additional commitments
	(2) Only through the network of Telkom Kenya and subsequent licensed international gateway operator.	(2) None	
	(3) Foreign investment is limited to maximum 30 %. (4) Unbound, except as indicated in the horizontal section.	(3) None (4) Unbound, except as indicated in the horizontal section.	

Appendix C: Additional Commitments of Kenya on Regulatory Principles Reference Paper (attached to Kenya's Schedule of Specific Commitments)

Scope

The following are definitions and principles on the regulatory framework for the basic telecommunications services.

Definition

Users mean service consumers and service suppliers.

Essential facilities mean facilities of a public telecommunications transport network or service that:-

- (a) are exclusively or predominantly provided by a single or limited number of suppliers;
- (b) cannot feasibly be economically or technically substituted in order to provide a service.

A major supplier is a supplier which has the ability to materially affect the terms of participation (having regard to price and supply) in the relevant market for basic telecommunications services as a result of:-

- (a) control over essential facilities; or
- (b) user of its position in the market.

1. Competitive Safeguards

1.1 Prevention of anti-competitive practices in telecommunications

Appropriate measures shall be maintained for the purpose of preventing suppliers who, alone or together, are a major supplier from engaging in or continuing anti-competitive practices.

1.2 Safeguards

The anti-competitive practices referred to above shall include in particular:-

- (a) engaging in anti-competitive cross-subsidization;
- (b) using information obtained from competitors with anti-competitive results; and
- (c) not making available to other services suppliers on a timely basis technical information about essential facilities and commercially relevant information which are necessary for them to provide services.

2. Interconnection

2.1 This section applies to linking with suppliers providing public telecommunications transport networks or services in order to allow the users of one supplier to communicate with users of another supplier and to access services provided by another supplier, where specific commitments are undertaken.

2.2 Interconnection to be ensured

Interconnection with a major supplier will be ensured at any technically feasible point in the network. Such interconnection is provided.

(a) under non-discriminatory terms, conditions (including technical standards and specifications) and rates and of a quality no less favourable than that provided for its own like services or for like services of non-affiliated service suppliers or for its subsidiaries or other affiliates;

(b) in a timely fashion, on terms, conditions (including technical standards and specifications) and cost-oriented rates that are transparent, reasonable, having regard to economic feasibility, and sufficiently unbundled so that the supplier need not pay for network components or facilities that it does not require for the service to be provided; and

(c) upon request, at points in addition to the network termination points offered to the majority of users, subject to charges that reflect the cost of construction of necessary additional facilities.

2.3 Public availability of the procedures for interconnection negotiations

The procedures applicable for interconnection to a major supplier will be made publicly available.

2.4 Transparency of interconnection arrangements

It is ensured that a major supplier will make publicly available either its interconnection agreements or a reference interconnection offer.

2.5 Interconnection: dispute settlement

A service supplier requesting interconnection with a major supplier will have recourse, either:-

(a) at any time or

(b) after a reasonable period of time which has been made publicly known to an independent domestic body, which may be a regulatory body as referred to in paragraph 5 below, to resolve disputes regarding appropriate terms, conditions and rates for interconnection within a reasonable period of time, to the extent that these have not been established previously.

3. Universal Service

Any Member has the right to define the kind of universal service obligation it wishes to maintain. Such obligations will not be regarded as anti-competitive per se, provided they are administered in a transparent, non-discriminatory and competitively neutral manner and are not more burdensome than necessary for the kind of universal service defined by the Member.

4. Public availability of licensing criteria

Where a license is required, the following will be made publicly available:-

- (a) all the licensing criteria and the period of time normally required to reach a decision concerning an application for a license and
- (b) the terms and conditions of individual licenses.

The reasons for the denial of a license will be made known to the applicant upon request.

5. Independent Regulators

The regulatory body is separate from, and not accountable to any suppliers of basic telecommunications services. The decisions of and the procedures used by the regulators shall be impartial with respect to all market participants.

6. Allocation of Scarce Resources

Any procedures for the allocation and use of scarce resources, including frequencies, numbers and rights of way, will be carried out in an objective, timely, transparent and non-discriminatory manner. The current state of allocated frequency bands will be made publicly available but detailed identification of frequencies allocated for specific government users is not required

Appendix D: SUMMARY OF KENYA'S TELECOM SECTOR DEVELOPMENT			
Tool	Postal & Telecommunications Sector Policy Statement (1997)	Telecommunications & Postal Sector Policy Statement (1999)	Telecommunications & Postal Sector Policy Guidelines (2001)
Objective	Improve access to telephony services		
Strategies	<p>1) Restructure incumbent operator – Kenya Posts and Telecom Corporation to separate roles</p> <p>2) Privatise the incumbent telecommunications operator – Telkom Kenya Ltd</p> <p>3) Establish of new regulatory framework</p> <p>4) Introduce competition in a defined market structure</p> <p>5) Provide for universal service to cater for those disadvantaged by commercial market forces</p> <p>6) Enforce foreign equity restrictions to 30%</p> <p>Policy established of a policy advisory secretariat to advise on necessary policy changes</p>	<p>In addition to strategies of January 1997,</p> <ul style="list-style-type: none"> • Reversed foreign equity participation to a maximum of 60% • Determined that 26% equity stake of Telkom Kenya ltd to be sold to a strategic investor, later changed to 49% <p>Clarified</p> <ol style="list-style-type: none"> 1) Role of the regulator 2) Role of policy advisory secretariat 3) The market structure – provided for a five year exclusivity to incumbent on voice market <p>Recognised the provision of internet backbone</p>	<p>Gazetted the April 1999 policy statement to conform with the requirement of the Kenya Communications Act 1998</p> <p>Other policy actions defined in the strategy were:</p> <ol style="list-style-type: none"> 1) Exempt government agencies from frequency licensing fees and licensing conditions 2) Reverse foreign equity participation to maximum of 70% 3) Reverse equity to be sold strategic investor to that 49% in privatisation
Stakeholder involvement	Government only		
Regulatory evolution			
Legislation	<p>Enactment of Kenya Communications Act 1998 –Defined the mechanism to manage the sector</p> <p>Provided for establishment of;</p> <ol style="list-style-type: none"> 1) Regulator – Communications Commission of Kenya 2) Policy advisory secretariat _ national Communications Secretariat 3) Dispute resolution mechanism - Appeals Tribunal 		

	<p>4) Defined the mechanism to manage the sector Kenya Telecommunications Regulations 2001 Provided for operational guidelines on; fair competition, operator licensing, frequency licensing, interconnection, Type approval, numbering, tariff regulation and operator reporting</p>
Regulation	Licences issued in line with market structure defined the Policy guidelines. Enforced monopoly for five years in fixed line services
Consequences (as at end of 2005)	
Successful	<p>1) Cellular licence approximating USD 110 and Cellular infrastructure investment estimated at US\$ 600 M 2) Internet and data operators licensing (multiple)</p>
unsuccessful	<p>1) Privatisation of incumbent operator licence US\$ 350M and additional US\$ 500Million investment, offer postponed to be redone in 2006 2) Seven Regional Telecommunications Operator licences pledged at US\$ 38 M and US\$326 million in infrastructure investment over first three years of operation 3) Commercial Trunked Radio Operator licences not issued 4) Second National Operator not found 5) 3rd cellular operator – licence fee US\$27M and US\$75M immediate infrastructure investment on offer and now pending</p>
Market competition	<p>Monopoly in fixed line , and international services for five years Duopoly cellular operators Multiple players in internet service providers</p>
Growth and expansion indicators	<p>Fixed line penetration – 0.7% Mobile penetration - 12% Internet usage penetration 4.5%</p>
Affordability	<p>Internet dial-up US\$13 per month Mobile - total entry costs approximately US\$40 Fixed local – increase in local calls, decrease in other national and international call tariffs</p>

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¹⁷⁸ For uniformity, Australian English is used throughout entire thesis including Reference List.

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