Why Maysia Is Saying No: One Country's Opposition to an Agreement or Transparency in Government Procurement

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WHY MALAYSIA IS SAYING NO: ONE COUNTRY’S OPPOSITION TO AN AGREEMENT ON
TRANSPARENCY IN GOVERNMENT PROCUREMENT

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“I don’t want to mention any particular country, but I mean when I hear that transparency in government procurement would be a vehicle for having more market access, in fact my strong suspicion is that those that don’t want transparency in government procurement really want to protect certain practices like bribery and things like that.”

-Petros Sourmelis, Head of Trade Section at the European Commission to the United States.  

“The Developing countries do not want a repeat of earlier experiences where they had signed on to agreements such as Trade-related Investment Measures (TRIMS) and Trade-related Aspects of Intellectual Property Rights (TRIPS) which are seen as to be imbalanced as they restrict their ability to pursue development objectives. The price for developing countries to pay would be too high.” - YB Dato’Seri Rafidah Aziz, Malaysian Minister of International Trade and Industry.

I. INTRODUCTION

On December 16, 2003, meetings held to overcome the impasse of the Cancun Ministerial ended also in failure. Among the issues still dividing WTO Members was transparency on government procurement (TGP) and whether negotiations should begin on a multilateral agreement regarding it. As the Chairman of

1 Petros Sourmelis, Head of Trade Section at the European Commission to the United States in response to a question from the author posed at “What Can the World Trade Organization Do for Poor Countries,” a panel discussion held at the William Davidson Institute, Ann Arbor MI (Nov. 5, 2003) [streaming video recording available at http://www.wdi.bus.umich.edu/events/past_conferences.htm (last accessed June 5, 2004)].


4 See, id.
the General Council, presiding over the meetings, stated, frankly, the meetings had produced “little convergence among delegations” on this and the other Singapore Issues, over which Members had clashed during the Ministerial.5 Thus, the Chairman was forced to send the issue of TGP back, without recommendations, to the Working Group on Transparency in Government Procurement (WGTGP) where it has been debated with little real progress since 1997.6

Given continuing, forceful developing country Member opposition and language in the Doha Declaration, which appears to make negotiation of an agreement on inter alia TGP subject to explicit consensus by all Members, it seems quite possible that the initiative will, in fact, never leave the WGTGP.7 Indeed, the official position of a group

5 See, id. The “Singapore Issues” consist of in addition to TGP, trade and investment, trade and competition policy and trade facilitation. See, MITI Statement, supra note 2.

6 WTO News: 16 Dec. 2003, supra note 3; see, also, Note by the Secretariat, Report of the Meeting of 23 May 1997, WT/WGTGP/M/1 (describing the proceedings of the first meeting of the WGTGP) (July 15, 1997).

7 Doha Ministerial Declaration (adopted Nov. 14, 2001) WT/MIN(01)/DEC/1 ¶ 26 (Nov. 21, 2001) (“[W]e agree that negotiations will take place…on the basis of a decision to be taken, by explicit consensus, …on modalities of negotiations.”) [hereinafter Doha Declaration]. At the closing of the Doha Ministerial the conference chairman, Qatari Finance, Economy and Trade Minister Youssef Hussain Kamal stated inter alia “I would like to note that some delegations have requested clarification concerning paragraph[].…26…of the draft declaration. Let me say that with respect to the reference to an ‘explicit consensus’ being needed, in these paragraphs, for a decision to be taken at the Fifth Session of the Ministerial Conference, my understanding is that, at that session, decision would indeed need to be taken by explicit consensus, before negotiations on…the right to take a position on modalities that would prevent negotiations from proceeding after the Fifth Session of the Ministerial Conference until that member is prepared to join in an explicit consensus.” A Historic Moment: ‘May I take it that this is agreeable?’ Gavel, applause, congratulations..., WTO Ministerial-Doha 4th Ministerial-A historic moment, http://www.wto.org/english/thewto_e/minist_e/min01_e/min01__chair_speaking_e.htm (last accessed Apr. 4, 2004).
of developing countries (including *inter alia* Malaysia, India, Pakistan, and China), which refer to themselves collectively as the “LDC Group,” is that “all further work” on the subject “should be dropped.”

How an initiative, which to many appears so inherently uncontroversial and potentially beneficial to all involved, seems so unlikely now to succeed will hopefully be answered, in part, by the discussion which follows.

However, before getting to the substance of this examination, it is important to understand how the initiative came to be and its place in the broader history of WTO negotiations. The immediate source of the initiative was the United States Trade Representative (USTR).

The US Congress had ordered the USTR in Title VII of the 1988 Omnibus Trade and Competitiveness Act to *inter alia* report on, and take actions to combat, “discrimination in foreign government procurement.” On this basis, and noting persistent complaints by US businesses about the anti-competitive effects of corruption and non-transparency in foreign government procurement (GP), the USTR declared in the spring of 1996 a “three-prong strategy” to use the WTO to “combat bribery and corruption” in foreign GP.

The chief goal of this strategy was to “encourage additional

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8 Joint Communication for Bangladesh (on behalf of the LDC Group), Botswana, China, Egypt, India, Indonesia, Kenya, Malaysia, Nigeria, Philippines, Tanzania, Uganda, Venezuela, Zambia and Zimbabwe, Singapore Issues: The Way Forward, WT/GC/W/522 ¶ 6 (Dec. 12, 2003)


11 USTR Annual Report (1996), *supra* note 12, ¶ III.

WTO Members to accede to the current WTO GPA [Government Procurement Agreement].”\textsuperscript{13} The GPA, which grew out of the Tokyo Round Code on Government Procurement, did not “undergo the important change of status” from a plurilateral to a multilateral agreement that occurred for most Tokyo Round Codes, such as the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs), at the Uruguay Round;\textsuperscript{14} and in 1996 (as now) relatively few Members, and no developing country Members, were the parties to the GPA.\textsuperscript{15}

As an explicitly “interim” step, the USTR’s plan included “seeking a mandate at the first WTO Ministerial Conference in Singapore…to launch broader negotiations to develop an arrangement on transparency and due process in procurement of goods and services.”\textsuperscript{16} The way this mandate was sought was typical of negotiations at the GATT/WTO at this period and before.\textsuperscript{17} In the months preceding the Singapore Ministerial, the USTR’s plan included “seeking a mandate at the first WTO Ministerial Conference in Singapore…to launch broader negotiations to develop an arrangement on transparency and due process in procurement of goods and services.”\textsuperscript{16} The way this mandate was sought was typical of negotiations at the GATT/WTO at this period and before.\textsuperscript{17} In the months preceding the Singapore Ministerial, the USTR’s plan included “seeking a mandate at

\textsuperscript{13} Id.

\textsuperscript{14} TREBLICOCK & ROBERT HOWSE, THE REGULATION OF INTERNATIONAL TRADE, 202 (1999).


\textsuperscript{17} For discussion of traditional GATT/WTO negotiating strategies of developed countries see, e.g. John S. Odell, \textit{The Seattle Impasse and Its Implications}, \textit{in} THE POLITICAL ECONOMY OF INTERNATIONAL TRADE LAW, 400, 408-409 (Daniel L. Kennedy & James D. Southwick, Eds., 2002) (describing \textit{inter alia} the US and EU strategy during the 1980s to negotiate an agreement bilaterally prior to Ministerial meetings and then “progressively widen[] the process to encompass other parties.”); Sylvia Ostry, \textit{The Uruguay Round North-South Grand Bargain}, \textit{in} THE POLITICAL ECONOMY OF INTERNATIONAL TRADE LAW, \textit{supra} note 20, at 285, 288-89 (discussing \textit{inter alia} the domination of the Uruguay Round negotiations by the “so-called Quad,” and corollary lack of involvement by developing countries “until the final stages of negotiations.”) [hereinafter Ostry, \textit{Uruguay Round}]; Peter Litchenbaum, “Special Treatment” vs. “Equal Participation:” \textit{Striking a Balance in Doha Negotiations}, \textit{Am. U. INT’L L. REV} 1003,
Ministerial, the USTR did not bring the proposal to a broad-based grouping of Member
countries, which would ultimately be called on to agree to it (and which now appear
unwilling to do so),\textsuperscript{18} but rather to a meeting, in the words of the USTR, of “Trade
Ministers from the Quadrilateral Group of United States, EU, Japan and Canada.”\textsuperscript{19}
However, even among this group of presumably like-minded Members, the proposal was
not greeted with universal enthusiasm.\textsuperscript{20}

In particular, the EU representative, according to Kenneth Abbott on basis of
interviews with applicable officials, felt that further work in the area of GP at the WTO
“would only be meaningful if they promised increased concrete opportunities to
participate in foreign procurement projects by broadening the GPA and enlarging its
substantive coverage.”\textsuperscript{21} As the quoted statement of the USTR \textit{supra} makes clear, \textsuperscript{22} the

\begin{itemize}
\item \textsuperscript{18} \textit{See}, supra notes 3-8 and accompanying text.
\item \textsuperscript{19} USTR Annual Report (1996), supra note 12; \textit{see also} Abbott, \textit{supra} note 9, at 286.
\item \textsuperscript{20} Abbott, supra note 9, at 286.
\item \textsuperscript{21} \textit{Id}.
\item \textsuperscript{22} \textit{See} USTR Annual Report (1996), supra note 12.
\end{itemize}
“US shared these goals, but saw them as politically unattainable in the near term.”

Thus, it advocated before the group an incremental strategy whereby developing countries would be convinced to join an agreement on TGP first, after which developed country Members would “try to add market-access commitments over time.”

Ultimately, the US prevailed and the joint proposal issue to the Ministerial meeting dealt almost only with transparency issues, containing a single line that suggested future negotiations would take place regarding market access commitments.

When the proposal was finally presented to developing country Members, the reaction was “negative and harsh,” particularly from countries of in South and Southeast Asia including Malaysia. In part, this was the result of their (legitimate) suspicion that an agreement on TGP was meant to be “a stalking horse for the expansion of the GPA.” But it also reflected general developing country unhappiness with the possible expansion

23 Abbott, supra note 9, at 287.

24 Id.

25 Id.; see also USTR Annual Report (1996), supra note 12 (“Trade Ministers from the Quadrilateral Group of the United States, EU, Japan and Canada agreed on April 21 in Kobe, Japan, to pursue a common approach for achieving the second objective noted above, specifically calling for a mandate at the Singapore Ministerial to launch negotiations on an interim agreement. Quad Ministers specifically referred to the initiative as a means ‘to help reduce corruption as an impediment to trade.’”).

26 Abbott, supra note 9, at 287; see also Noorzita Samad, Compromises put WTO Firmly on the Right Track, NEW STRAIT TIMES, 25 (Dec. 16, 1996) (describing inter alia the “firm” stand of the Malaysian delegation on issues discriminatory to developing countries, including “transparency in government procurement procedures.”)

27 Abbott, supra note 9, at 287.
of “behind-the-border” rule-making, which TGP and companion initiatives on other Singapore Issues represented.\(^{28}\)

The Uruguay Round agreements had represented a departure from traditional international trade agreements. The latter, generally, contained only negative obligations related directly to the movement of goods across borders, such as the reduction of tariffs and duties.\(^{29}\) The Uruguay Round agreements, on the other hand, also contained positive regulatory obligations, particularly in the area of intellectual property rights.\(^{30}\) As former Canadian trade representative, Sylvia Ostry, noted, because these obligations “involve domestic regulatory structures embedded in the institutional infrastructure of the economy,” they not only were expensive for developing countries but they also intruded on sensitive areas of national sovereignty.\(^{31}\) By many accounts, developing (and possibly developed) country Members had not anticipated the scale of these impacts, and thus,

\(^{28}\) See Abbott, supra note 9, at 287.


\(^{30}\) See Ostry, supra note 20, at 286.

even by the time of the Singapore Ministerial, only two years after the conclusion of the Uruguay round, developing countries were becoming increasingly unhappy with them. 32

Thus, the idea of concluding an agreement that not only appeared on its face aimed at sneaking through the GPA, but which would also create additional positive regulatory obligations, was unpalatable to most developing country Members. 33 As a result, developed country Members were forced to compromise. 34 The sentence regarding a future agreement on market-access was dropped (though, as we will see, not forgotten); and rather than beginning the immediate negotiation of an agreement on TGP, Members agreed to establish the Working Group on Transparency in Government Procurement (WGTGP) which would study the issues involved and “taking into account national policies, and based on this study,…develop elements for inclusion in an appropriate agreement.” 35

The WGTGP’s initial meetings reflected the narrow constituency of the initiative’s original backers and the lack of enthusiasm for it among developing country Members. 36 Meeting reports from this period are almost devoid of developing country

32 See, e.g. Odell, supra note 20, at 403 (citing World Bank estimates that it would cost the least developed countries “as much as a full year’s development budget” to create the institutional infrastructure necessary to implement these agreements); Ostry, Uruguay Round, supra note 20, at 288-89;

33 See, Abbott, supra note 9, at 287.

34 Id.

35 Singapore Declaration, supra note 11, at ¶ 21; see also, Abbott, supra note 9, at 287.

36 See, WT/WGTGP/M/1, supra note 6; Note by Secretariat, Report of Meeting of 8-9 Oct. 1998, WT/WGTGP/M/6, ¶ 2 (Nov. 13, 1998); Note by the Secretariat, Report of the Meeting of 21 July 1997 WT/WGTGP/M/2 (Aug. 28, 1997); Note by the Secretariat, Report of the Meeting of 3-4 November1997, WT/WGTGP/M/3 (Jan. 9, 1998); Note by the Secretariat, Report of the Meeting of 19-20 February 1998, WT/WGTGP/M/4 (April
Member contributions, either orally at meetings or in the form of written submissions, but record significant developed country Members involvement in both forms, as well as strong involvement, at least initially, by delegations from UNCITRAL, the World Bank, and other WTO bodies, including the Committee on Government Procurement. However, in the run-up to the Seattle Ministerial meeting, these patterns dramatically shifted. Suddenly, as if awaken from a slumber, developing country Members together became engaged in the group’s discussions.

In part, this reflected a general coalescence of unprecedented developing country Member preparedness, assertiveness, and unity, which was aimed at making sure they

4, 1998); Note by the Secretariat, Report of the Meeting of 22 June 1998, WT/WGTGP/M/5 (July 31, 1998); Note by the Secretariat, Report of the Meeting of 24-25 February 1999, WT/WGTGP/M/8 (July 9, 1999).

37 See, supra note 40.

38 See, e.g. WT/WGTGP/M/1, supra note 6, ¶3; Statement by the Representative of the UNCITRAL at the Working Group’s Meeting of 23 May 1997, The UNCITRAL Model Law on the Procurement of Goods, Construction and Services, WT/WGTGP/W/1 (July 10, 1997); Statement by the Representative of the World Bank at the Working Group’s Meeting of 23 May 1997, World Bank Guidelines on Procurement, WT/WGTGP/W/2 (July 10, 1997); Note by the Secretariat, Synthesis of the Information Available on Transparency-Related Provisions in Existing International Instruments on Government Procurement Procedures and on National Practices, WT/WGTGP/W/6 (Oct. 14, 1997); See, also Factual Contribution from the European Communities, Transparency in Government Procurement, WT/WTGP/W/5 (July 21, 1997); Report (1997) to the General Council, WT/WGTGP/1 (Nov. 19, 1997) (referencing inter alia Job No. 4099, Canada’s submission, Job No. 4133, United States’ submission, Job No. 2860, Japan’s submission, and Job No. 5616, New Zealand’s submission).

39 See Note by the Secretariat, Transparency-Related Provisions in Existing International Instruments on Government Procurement Procedures and in WTO Agreements, WT/WGTGP/W/3 (July 9, 1997).

40 See, Note by the Secretariat, Report of the Meeting of 6 October 1999, WT/WGTGP/M/9 (Nov. 9, 1999).
wouldn’t be “‘rolled’ this time as they were in the Uruguay Round.”

Specifically, developing country Members felt that developed countries had failed to live up to their implied promises to liberalize trade in textiles and agriculture, while the positive regulatory obligations, which developing country Members had taken in exchange, had resulted in none of the promised gains and had proved expensive to implement both financially and in terms of lost development opportunities. In fact, according to World Bank estimates, creating the regulatory structure required by TRIPs had cost some developing country Members an entire year’s development budget. In addition, TRIPs, according to some, had actually restricted trade rather than increased it.

The more specific catalyst at the WGTGP was the submission (individually or in coalition with other countries) of draft agreements on TGP by Japan, Australia, the US, and the EU, and companion suggestions by those Members that negotiation of an agreement on the basis of these drafts should begin in earnest following the Ministerial

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41 Odell, supra note 20, at 418 (quoting World Trade Agenda, Nov. 8, 1999, at 19); see also, e.g., Litchenbaum, supra note 20, at 1020; Ostry, Reform, supra note 35, at 111; Pham, supra note 20, at 335.

42 See, e.g. Ambassador (Brazil) Celso L. N. Amorin, The WTO From the Perspective of a Developing Country, 24 FORDHAM INT’L L.J. 95, 96 (2000) (“Developing countries today, however, have a genuine feeling of disproportion between their efforts to liberalize and there efforts to subject their policies to internationally agreed upon rules (mostly inspired by developed countries) in areas such as intellectual property rights and the lack of commensurate measures on the part of their counterparts in the developed world. There still remains countless examples of tariff barriers and other obstacles applied by developed countries that affect precisely those products in which poor countries would have a chance to compete.”); see also Ostry, Reform, supra note 35, at 111; Litchenbaum, supra note 20, at 120; Odell, supra note 20, at 403-405.


44 Ostry, Uruguay Round, supra note 20, at 296.
meeting. In reaction to these moves, India, speaking for a number of countries, including Malaysia, which would form the nucleus of the LDC Group, strongly rejected the suggestion that it was appropriate to begin negotiating an agreement in earnest and that the submitted drafts were an appropriate basis from which to start:

Rather than reflecting a common view, the proposed texts reflected the transparency elements as understood by the delegates that had advanced the proposals. In the absence of consensus among Members regarding the basic elements that should be part of an agreement on transparency, it would be premature to move on to discussions of the proposed texts.

In addition, the EU’s submission contained comments, suggesting that once an agreement on TGP was concluded, that work should begin on an agreement that would guaranteed greater market access for foreign providers. Predictably, this reignited suspicions of developing country Members that developed country Members intended “an agreement on transparency in government procurement [to be] merely a building block towards the


46 WT/WGTGP/M/9, supra note 44, ¶ 8 (relating statement by India joined by Brazil, Egypt, Cuba, Honduras, Indonesia, Malaysia, Pakistan, Thailand, and Turkey) [emphasis added].

47 The term “provider” is used rather than “supplier” because of the manner in which Malaysian government procurement (GP) preferences are organized. In the context of Bumiputera preferences, different preferences depending on whether the recipient is producer/manufacturer of goods/materials or a suppliers, of goods/materials. See, infra notes 235-36 et seq. and accompanying text. “Provider” is therefore used in this general sense rather than “supplier,” to avoid any confusion.
establishment of a multilateral framework for government procurement...containing rules on market access,” something which developing country Members were loath to accept.48

According to one commentator, at the Seattle meeting itself, a deal on TGP was almost concluded.49 Given the comments of the Indian delegation above and of the general tenor the last WGTGP meeting prior to Seattle, that seems unlikely.50 In any event, as is well-known, the meeting collapsed with no agreements reached on any subject, including TGP, and the issue was sent back to the WGTGP.51

The tenor of the WGTGP meetings which followed reflected both the sour tone of its last meeting prior to Seattle, as well as the general increase in North-South divisiveness that many have noted in WTO discussion post-Seattle.52 As one commentator put it, work at the group after-Seattle consisted “largely of the recitation of opposing positions” with lines well drawn between developed and developing country delegations.53

At the Doha Ministerial, developed country Members tried to get the work back on track by explicitly removing the issue of “preferences to domestic supplies and

48 WT/WGTGP/M/9, supra note 44, ¶ 11 (statement by Pakistan joined by Egypt, India, Indonesia and Malaysia); See, EU Draft Agreement, supra note 49, introductory note, prfc., art. 14(3).

49 See, Odell, supra note 20, at 423.

50 See, WT/WGTGP/M/9, supra note 44, ¶ 11

51 See, Odell, supra note 400-01.

52 See, e.g. Abbott, supra note 9, at 292 (discussing the situation post-Seattle, “[b]y all accounts, WTO discussions took on the divisive tone of North-South disputes in the UN.”); Ostry, Reform, supra note 35, at 112 (“There are two significant consequences to the Grand Bargain (or Bum Deal). One is a serious North-South divide in the WTO.”).

53 Abbott, supra note 9, at 292.
suppliers,” which had been of concern to developing country Members, promising that the scope of the discussion would be limited to “transparency aspects.” In discussions of the working group that followed, consensus (or, at least, grudging acceptance) emerged on some issues, but on the key points of domestic review procedures (DRPs) and linkage to the WTO’s Dispute Settlement Understanding (DSU), the developing and developed country Members remained far apart. As far as the former was concerned the two issues had nothing to do with transparency, while the latter claimed an agreement which did not provide for them would be meaningless. In the months preceding the Cancun Ministerial, little progress was made in this regard, and the Malaysian representative stated prophetically, “[a]s long as those two elements were on the table,

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54 Doha Declaration, supra note 7, ¶ 26.

55 Report of the Meeting of 10-11 Oct. 2002, Working Group on Transparency, WT/WGTGP/M/15 ¶ 13 (relating statement by Malaysian representative, “Developing countries ha[ve] difficulties with essentially two elements, namely domestic review procedures and the application of WTO dispute settlement procedures. Although the details of some other elements might also cause some difficulties, by and large, they were acceptable.”) (Jan. 9, 2003).

56 See, e.g., Note by Secretariat, Report of the Meeting of 18 June 2003, WT/WGTGP/M/18 ¶ 12 (relating comments by the Malaysian representative “In addition there were two elements that his delegation-together with those of other developing countries-had repeatedly emphasized, namely domestic review procedures as well as linkage to the WTO’s DSU. In his view, these elements were not concerned with transparency and should never be a part of an agreement on transparency in government procurement.”) (July 7, 2003); Report of the Meeting of 7 Feb. 2003, Working Group on Transparency, WT/WGTGP/M/17 ¶ 65 (relating comments by the US representative: “Without a link to the DSU, an agreement could not be effective.”) (April 15, 2003); WT/WGTGP/M/15, supra note 59, ¶ 42 (relating comments by the Singapore representative: “…a bid challenge mechanism was an integral part of national procurement systems.”).
there would be no consensus at the Cancun Ministerial to negotiate an agreement in this area.\textsuperscript{57}

At Cancun, the first draft Ministerial text (which according to the LDC group, reflected only developed country concerns)\textsuperscript{58} stated that, if negotiations on a TGP agreement began in the next Ministerial cycle, they would “build on the progress made in the Working Group on Transparency in Government Procurement, in particular the 12 issues identified by the chair,” leaving everything on the table, including DRPs and linkage to the DSU.\textsuperscript{59} Responding to the concerted and coordinated opposition of developing country Members, the second draft text was more responsive to developing country Member concerns, but linkage to the DSU remained firmly on the table, with only a slight limitation to its scope, while the issue of DRPs, though more significantly limited, also remained an issue for negotiation.\textsuperscript{60} This proposal was also rejected by

\textsuperscript{57} WT/WGTGP/M/17, supra note 60, ¶ 23.

\textsuperscript{58} Communication from Bangladesh (on behalf of LDC Group), Botswana, China, Cuba, Egypt, India, Indonesia, Kenya, Malaysia, Nigeria, Philippines, Tanzania Uganda, Venezuela, Zambia and Zimbabwe, Paragraphs 13, 14, 15 & 16, Dealing With Singapore Issues of the Draft Cancun Ministerial Text Contained in Document JOB(03)/150/Rev.1, WT/MIN(03)/W/4, p. 1 (Sep. 4, 2003) (“However, the Annexes D, E, F and G to the Draft Ministerial text, that reflect the view of proponents on the modalities, gives a distorted view, that the Annexes have been discussed by Members.

\textsuperscript{59} See, Preparations for the Fifth Session of the Ministerial Conference, Draft Cancun Ministerial Text, First Revision, JOB(03)/150/Rev.1 Annex F ¶ 1 available at http://www.wto.org/english/thewto_e/minist_e/min03_e/draft_decl_annex_e.htm (last accessed Mar. 5, 2004) [hereinafter First Draft Cancun Text].

\textsuperscript{60} See, Preparations for the Fifth Session of the Ministerial Conference, Draft Cancun Ministerial Text (Second Revision), JOB(03)/150/Rev.2 Annex D ¶ 2 (“The issue of the applicability of the DSU is also not prejudged, with the exception that individual contract awards shall not be subject to challenge or recommendations under the WTO dispute settlement system. In regard to domestic review mechanisms, the agreement will address the transparency of such mechanisms, but not otherwise prescribe their characteristics.”); (Sep. 13, 2003) [hereinafter Second Draft Cancun Text].
developing country Members, and so how to proceed regarding the issue of TGP was left for follow-up meetings in December.61 There, Members also failed to agree, leaving the ultimate fate of an agreement on TGP uncertain.62

With the exception of a study by Kenneth Abbott, based on interviews with mainly developed country Member officials and WTO Secretariat personnel, focused principally on the impact of institutional factors at the WTO, there does not appear to have been an attempt to understand why efforts to negotiate an agreement on TGP seem likely now to end in failure.63 Even Abbott’s analysis leaves unanswered (and in some ways tends to obscure) questions about the variety of factors which might lead developing country Members to oppose an agreement on TGP. In fact, Abbott shares the assumption voiced by others that an agreement on TGP would inevitably be only beneficial for developing nations.64 However, as the statement by Malaysia’s MITI

61 WT/GC/W/522, supra note 8, ¶ 3 (“The revised text on Singapore issues, however, did not address the concerns of the majority of Members, who expressed their strong opposition to it. As a consequence, no decision was taken at the Cancún Ministerial Conference by explicit consensus on the modalities of negotiations on any of the four Singapore issues.”)


63 See, e.g. Abbott, supra note 9, at 293-95 (describing inter alia the tendency of members to engage in mercantile like negotiation of concessions, the overtly technical manner in which issues are dealt with, the influence of “single undertaking thinking, and “member-driven” nature of the institution), Annex 1 (listing the individuals interviewed for the study).

64 See, e.g., Id. at 293 (“Developing countries will not even consider negotiating on TGP, in spite of its obvious benefits, without a the promised of concreted concession on implementation or market access.”); see also, generally, Larson, supra note 9, at 1169 (“Proponents of the Singapore Issues had good reason to believe that the members would eventually agree to bring the new areas within the scope of the WTO: doing so makes sound economic sense.”); In conversations about generally held perceptions regarding TGP, Prof. Robert Howse commented on the fact that to many “TGP is like apple pie,” and thus very difficult why a country would oppose it. Prof. Robert Howse, Personal
minister \textit{supra} demonstrates, not all developing country Members share this opinion; rather, they believe that joining an agreement on TGP would come at a “price for developing countries…[that] would be too high” to pay.\footnote{MITI Statement, \textit{supra} note 2.}

This paper attempts to fill in this gap in a small way by calculating what “price” Malaysia could pay if it joined an agreement on TGP and, thus, to show why one developing country Member, Malaysia, might be opposed to it.

Due to the divisiveness of the work at the WGTGP there is no negotiating text, but only a “List of Issues and Points Raised,” the ambiguous name of which reflects its amorphous contents.\footnote{See, Note by the Secretariat, Work of the Working Group on the Matters Related to the Items I-V of the List of Issues Raised and Points Made, WT/WGTGP/W/32 (May 23, 2002); Note by the Secretariat, Work of the Working Group on the Matters Related to the Items VI-XII of the List of Issues Raised and Points Made, WT/WGTGP/W/33 (Oct. 3, 2002); \textit{see also} Abbott, supra note 9, at 289 (noting the passively named “List of the Issues Raised and Points Made”).}

Thus, the paper instead will use the draft agreements respectively submitted by the EU (EU draft agreement) and a coalition of countries led by the US (US draft agreement).\footnote{See \textit{EU Draft Agreement, supra} note 49; US Draft Agreement, \textit{supra} note 49.} This is done not simply out of expediency. Rather, the instrumental role, which the US and EU have played both in the initiation of the process and throughout the work of WGTGP, has given their proposals an added level of prominence for attackers and proponents alike. Therefore, the two draft agreements provide a useful
basis for examining not only what an agreement on TGP might look like but also the sort of proposals which Malaysia and other developing country Members are opposed.68

In examining the price or impact, which the respective provisions of these two draft agreements could have on the Malaysian system of GP, three basic categories of issues are examined. The first examined is the extent to which Malaysia would need to modify its existing structure of GP regulation and administration to comply with the draft agreements’ provisions. The second is risks that provisions of the draft agreements could pose to Malaysia’s ability to implement preference programs for Bumiputera and other domestic providers in GP.69 The potential threat that an agreement on TGP could pose to such programs has consistently been one of the reasons most frequently vocalized by developing country Members in their opposition to an agreement on TGP.70 However, such concerns are particularly relevant for Malaysia, where preferences are part of a government program to reshape the ethno-economic composition of Malaysian society, which has dominated its economic and social policies since ethno-economic riots erupted there in 1969.71

68 See, e.g. WT/WTGP/M/9, supra note 44 (draft agreements were also submitted by Japan and Australia, the almost exclusive focus of opponent Member attacks was the draft agreements submitted respectively by the EU and the US coalition.)

69 Datuk Seri Dr. Mahathir Bin Mohamad (then Prime Minister of Malaysia) The 2004 Budget Speech ¶ 99 (Sept. 12, 2003 at Dewan Rakyat) [official translation] [hereinafter Mahathir Budget Speech].

70 See, e.g., Report of the Meeting of 7 June 2000, Working Group on Transparency, WT/WGTGP/M/10 ¶28 (relating comments of India: “[I]n addition to the general exceptions provisions contained in GATT relating to security and other matters, Members should have the freedom to indicate additional exceptions such as…procurement for achieving social and development objectives.”) (Aug. 1, 2000).

71 See infra notes 206 et seq. and accompanying text.
Finally, the paper examines the potential impact, which provisions of these agreements could have on the distribution of power within the Malaysian political system, and to an extent without it. In doing so the inquiry goes beyond what Abbott refers to as “sovereignty costs,” to look not just at the extent that these provisions could limit the authority of the Malaysian government *in general*, but also at how they could effect intra-governmental transfers of authority. The noted expert on Malaysian administrative law, M.P. Jain, has stated in regards to the Malaysian system, “[t]he truth is that the hegemony of the executive is now an accomplished fact,” and GP is no exception. Thus, the extent to which an agreement on TGP could change that is particularly important to understanding reasons Malaysia trade officials (also members of the executive) might be against it.

For obvious reasons, it is necessary in order to reach this discussion to first describe in substantial detail the Malaysian GP system. In particular three areas, correlating with the three categories of analysis described *supra*, are examined: 1) the generally applicable regulatory structure of Malaysian GP, including a description of relevant laws and regulations and the distributions of authority they effect; 2) the structure, operation, and objectives of preferences in GP for Bumiputera and other domestic providers; and 3) the current distribution of control authority among the

72 Abbott, *supra* note 9, at 285.


74 “Bumiputera” in Bahasa Malaysia, mean literally “sons of the earth.” It refers to members of the population that are ethnic Malay or otherwise considered indigenous. It is an label that in some ways is best understood by what it excludes, namely the ethnically Indian, Chinese or otherwise “foreign” members of the Malaysian populace. See, S. Jaysankaran, *Identity Crisis: Who exactly is a bumiputra?*, FAR EASTERN ECONOMIC
various parties in the system. Much of this section is based on translations by the author of government regulations (some of which are reproduced in the appendix), and represents one of the only (if not the only) English language explications of the regulatory structure which governs GP in Malaysia. It, therefore, errs on the side of comprehensiveness, hoping, in addition to providing the basis for discussions which follow, to provide a resource for others working in the area.

While it is hoped that this study may clarify some issues related to Malaysia’s position vis-à-vis a possible agreement on TGP and so the larger question why developing country Members have been so opposed to it, it in no way purports to be comprehensive in this regard. Particularly, it does not attempt to evaluate whether Malaysia’s GP preference policies have been effective in accomplishing their assigned goals, which while interesting and relevant to question of price is beyond the scope of this paper. It also does not look deeply into the connection between GP in Malaysia and patronage politics and corruption. While, such an examination would likely be very fruitful in this context, for the sake of manageability, it cannot be dealt with in depth. Finally, as some have argued more generally, it is not unlikely that implementation of some of the provisions contained in the two draft agreements could have beneficial results for Malaysia domestically, absent any mercantile advantage.75 However, as the current effort is meant not to explain why Malaysia should support such an agreement but rather to explain why it is opposing it, such an examination is not relevant.

75 See, e.g., Abbott, supra note 9, at 283.
The paper finishes with a short examination of the possibilities for compromise, which might exist for conclusion of an agreement, particularly efforts made by developed countries at the end of Cancun Ministerial and the instillation of a new administration in Malaysia. However, in both cases it concludes that the effect these two factors will likely not be sufficient to lead to the ultimate conclusion of an agreement. Rather it advocates, as the Cancun Ministerial Chairperson Luis Derbez did at the end of the Ministerial, for a reassessment of the way rule-making initiatives are pursued at the WTO. It suggest that, rather than dismissing developing country opposition to such initiatives as uninformed or worse, developed country Members could benefit from a reasoned examination of many factors which might lead to that opposition and a respectful attempt to address them.

II. MALAYSIAN GOVERNMENT PROCUREMENT


77 This figure was reached by adding the total federal government expenditure for supplies and services with the development expenditure of local governments, state governments, statutory bodies and “non-financial public enterprises,” the government’s term for government-owned companies not involved in banking or other financial business. Finance Ministry, Economic Report 2003/2004, Annex Tables 2.2, 4.4, 4.6, 4.10, 4.11, 4.12 4.13 available at http://www.treasury.gov.my/er2004/er-04.htm (last visited Dec. 21, 2003). For a analogously based analysis of Malaysian government procurement expenditure See, , Report by the Secretariat, Trade Policy Review-MalaysiaWT/TPR/S/92, tbl. 111-4 (Nov. 5, 20001) [hereinafter Malaysia TPR (2001)]. As the figures quoted do not include the procurement of supplies and services by governmental bodies other than the Federal Government, the total true figure including
through price preferences and set-asides to Bumiputera providers, in the first place, and other domestic providers, in the second place. At all stages in the procurement process, including the administration of preferences, the Finance Ministry and, to a lesser extent, the Contractor Service Center (CSC) of the Ministry Entrepreneurial Development, maintain firm control. Further, this power is wielded virtually free from accountability to other entities in the federal or state governments, aggrieved providers, or interested citizens.

The first section of this part, describes the way in which government procurement in Malaysia is conducted in general, noting in particular the distribution of power within the system. The second section describes the operation of preferences for Bumiputera and other domestic providers in the system, paying particular attention to their respective relationships to broader government development policy goals. The third and final section examines the way in which the various governmental entities involved in the process are held accountable. In doing so, it looks at how the Finance Ministry ensures these elements would be significantly higher. See, infra notes 100 et seq. and accompanying text (discussing the jurisdiction of federal rules governing GP).

that other governmental entities follow applicable rules, the ways in which providers and other citizens can (or cannot) hold accountable the Finance Ministry and other governmental entities involved in the process, and finally, the existence (or lack) of other governmental processes which hold these entities accountable for actions taken in the context of GP.

A. Legal Structure of Malaysian Government Procurement

Following ethno-economic riots, which rocked Malaysia’s capital, Kuala Lumpur, on May 13, 1969, a process was begun whereby power and authority was increasingly concentrated in the executive branch, free from judicial and legislative control. According to one observer, during this period the power of the executive “escalated in leaps and bounds” and came to thoroughly dominate the other branches of government. Indeed, even by the mid-1980s “the hegemony of the executive” was being described as “an accomplished fact.”

The general system of GP in Malaysia is no exception. As is described infra, the Treasury Division of the Finance Ministry enjoys almost complete discretion to make rules, which govern GP by all federal, state, and local governmental entities. These
rules delegate some authority to procuring entities at various stages of the process and to the Contractor Service Center of the Ministry of Entrepreneur Development in specific instances. However, the Finance Ministry retains varying levels of authority at different stages of the process that, in combination with the absence of effective accountability mechanisms discussed *infra*, leave it free to conduct much of the process as it sees fit.

1. *Malaysian Government Procurement Rules - Basic Background*

The Treasury division of the Malaysian Finance Ministry has claimed the primary authority to issue rules governing GP activities in Malaysia under Section 4 of the Financial Procedure Act, 1957 (FPA), which states:

> Every accounting officer shall be subject to this Act and shall perform such duties, keep such books and render such accounts as may be prescribed by or under this Act or by instructions issued by the Treasury in matters of financial and accounting procedure not inconsistent therewith.

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79 Id.

80 Sudah CKG Pillay, *The Emerging Doctrine of Substantive Fairness-A Permissible Challenge to the Exercise of Administrative Discretion*, 3 MALAYAN L. J. i, xx (2001); *see, also, id.*, at xxii (stating that the executive “exerts a tremendous control over Parliament…[that] invariably…is unable to serve as an adequate check on government.”).

81 Jain, *supra* note 77, at 214. It should be noted that in recent years, some have observed “a heartening surge in judicial activism” vis-à-vis the most outrageous abuses of power by the executive. Sudha CKG Pillay, *The Changing Faces of Administrative Law in Malaysia*, 1 MALAYAN L.J. cxi, cxli (1999); *See, also M. P. JAIN, ADMINISTRATIVE LAW OF MALAYSIA AND SINGAPORE*, 255 (3rd. Ed., 1997) (noting in relation to developments in India and the U.K. that “[t]he case-law in Malaysia…on the question as to when a person can claim a right of hearing also shows a liberal trend.”).

82 *See, Financial Procedures Act, 1957 (Act 61 amended 1972) § 4; see infra* notes 100 et seq. and accompanying text (discussing jurisdiction of Treasury-issued GP rules).

83 Financial Procedures Act, 1957 (Act 61 amended 1972) § 4 [emphasis added]; *see also* Arahan Perbendaharaan [Treas. Instr.] Nos. 3, 4 (1997); *but see* States have secondary and explicitly subsidiary, G.P. rule-making authority. *See, Financial Procedures Act, 1957 (Act 61 amended 1972) § 4* (“A State accounting officer shall, in addition provisions of the Act and issued by the Treasury on its basis, be subject to any
With the exception of surcharge procedures for financial losses the FPA contains no language which could directly apply to GP, leaving the Treasury, as a practical matter, free to issue any rules on the subject that it sees fit.84

The Finance Ministry exercises this broad grant of rule-making authority through Treasury regulations in two basic forms Arahan Perbendaharaan, Treasury Instructions (TIs), and Surat Pekeliling Perbendaharaan, Treasury Circular Letters (TCLs).85 The first in this list, TIs, are issued infrequently (only twice since 1972), and are compiled in instructions of the State financial authority not inconsistent with the foregoing.”); see also Arahan Perbendaharaan [Treas. Instr.] No. 4 (1997) (making the issuance of such rules subject to prior Finance Ministry approval). While both of these instruments appear to limit the applicability of state-issued rules to state governmental entities, in at least one instance discovered by the author, officials in companies owned by the federal government made statements which implied that they were subject to such rules See, Bank Submits List of Errant Staff, NEW STRAIT TIMES, 4 (Mar. 22, 2000) (discussing statements by Telekom and Pretronas, indicating that they would comply with the an order issued by Chief Minister of the state of Malacca requiring that governmental entities not give contracts to individuals and firms which supported opposition candidates in the 2000 elections).

84 See, Financial Procedures Act, 1957 (Act 61 amended 1972) §§ 18-21; see, infra notes 460 et seq. and accompanying text for a complete discussion of delegation of GP rule-making authority to the Treasury including a discussion of the implications of the Treasury’s choice to issue GP rules under FPA § 4, rather FPA § 36 (“Regulations”).

a volume that details a wide-range of procedures that governmental entities must follow in their financial activities.\textsuperscript{86} The other type of regulations, TCLs, are issued much more frequently (usually many times per year), and address more specific issues.\textsuperscript{87}

Indeed, though many TIs articulate specific, detailed rules that must be obeyed by governmental entities in certain contexts,\textsuperscript{88} others in some ways fill the void left by the generality of the FPA’s grant of authority; they describe, somewhat paradoxically, the scope of rule-making authority which the Finance Ministry has granted itself in various contexts, including GP.\textsuperscript{89} Thus, in a sense, the various TCLs and TIs, which describe the specific procedures that governmental entities must follow in GP are issued pursuant to this authority rather than a grant of authority from parliament.\textsuperscript{90}

\begin{footnotesize}
\begin{enumerate}
\item See, Arah\textsuperscript{an} Perbendaharaan [Treas. Instr.] No. 2 (1997).
\item For a sense of the frequency of TCLs and their specificity of subject matter, visit the site of their online publication \url{http://www.treasury.gov.my/englishversionbaru/b_pekeliling.htm}.
\item See, \textit{e.g.}, Arah\textsuperscript{an} Perbendaharaan [Treas. Instr.] No. 175.1(a) (1997) (detailing the specific amounts which tenders must deposit depending on the value of the contract).
\item Thus, at the beginning of the section, which contains rules governing GP, the instructions state: “Treasury is the section that empowered as the center for government procurement (Supplies, Services, and Work) in Malaysia or abroad in terms of initiation, enforcement, supervision, coordination, usage, dispensation, storage, shifting between departments and write-off of goods.” Arah\textsuperscript{an} Perbendaharaan [Treas. Instr.] No. 166.1 (1997) [unofficial translation by author]. The next sub-section enumerates, without prejudice to this generalized grant of authority, specific areas in which the Treasury has rule-making authority regarding GP, including \textit{inter alia}: “(i) establishment of registration criteria, conditions and registration of individuals, firms, companies or organizations and registration to allow them to conduct trade with the government…(iv) promulgation of instructions to departments for initiation, inspection, and coordination of activities that necessarily relate to procurement.” Arah\textsuperscript{an} Perbendaharaan [Treas. Instr.] No. 166.2(i), 166.2(vi) (1997) [unofficial translation by author].
\item See, \textit{e.g.} Arah\textsuperscript{an} Perbendaharaan [Treas. Instr.] Nos. 167 et seq. (1997); Surat Pekeliling Perbendaharaan Bil. 7 Thn. 2002 [Treas. Circ. Let. No. 7/2002], Penggunaan Bahan/Barangan/Perkhidmatan Tempatan Dalam Perolehan Kerajaan [Use of Domestic
\end{enumerate}
\end{footnotesize}
subsidiary quality of TCLs and some TIs, does not make them legally subordinate; all TIs and TCLs are issued by the Treasury, have the same legal authority, and so can amend or even cancel any previously Treasury-issued regulation of either type.\textsuperscript{91}

The other major division of Treasury-issued regulations applicable to GP is their separation into three categories according to the nature of the “thing” procured: works, goods, or services.\textsuperscript{92} This division is mainly significant in the context of rules that govern registration requirements and in the context of preferences.\textsuperscript{93} In the former case, the distinctions made appear to relate mainly to the sharing of authority between the Finance

\textsuperscript{91} See, \textit{e.g.} Surat Pekeliling Perbendaharaan Bil. 7 Thn. 2002 [Treas. Circ. Let. No. 7/2002], Penggunaan Bahan/Barangan/Perkhidmatan Tempatan Dalam Perolehan Kerajaan [Use of Domestic Materials/Goods/Services in Government Procurement] § 2 (June 5, 2002) (amending TI No. 169.2(a) and abrogating TI No. 169.2(b)); \textit{See, generally,} Jain, \textit{supra} note 77, at 217.

\textsuperscript{92} See, Arahan Perbendaharaan [Treas. Instr.] No. 166.1 (1997). According to TCL No. 7/1974, these terms describe the following categories: “Works...are construction works such as construction of buildings, excavation of ditches, construction of airports, construction of area foundations, construction of dams and other things. This includes all civil, mechanical and electrical works. . . . Goods . . . are materials and things such as construction materials, food, clothes, and other things. . . . Services are defined as services that are performed by humans through manual or skilled labor for the receipt of wages and which are done regularly or on a one off basis after a tender or price quotation has been invited. For example, cleaning office buildings, printing, maintaining and fixing office machines and transportation.”


\textsuperscript{93} \textit{See, infra} notes 125 et seq., 206 et seq. and accompanying text.
Ministry and CSC in the area of works.\textsuperscript{94} In the case of preferences, they relate mainly to the different purposes to which different types of preferences are put, allowing the preferences to be structured in a more focused way.\textsuperscript{95}

One of the more confusing issues related to Treasury-issued GP rules is their jurisdictional reach. These rules are clearly applicable to the GP activities of all traditional Malaysian governmental entities, federal, state or local. The Federal Constitution gives the federal government exclusive authority to make laws regulating “[f]inancial and accounting procedures...of the Federation and of the States,” subject to its decision to delegate part of that authority to the states.\textsuperscript{96} The FPA, enacted pursuant to this authority, states that it and any regulations issued under it are binding on \textit{inter alia} “every public officer” engaged in, and/or responsible for, purchases made using public funds.\textsuperscript{97} TI No. 4 states, as well, that Treasury-issued rules regarding \textit{inter alia} GP “are applicable throughout the whole of Malaysia.”\textsuperscript{98} What is unclear, however, is whether

\begin{itemize}
\item \textsuperscript{94} See, \textit{infra} notes 125 et seq. and accompanying text.
\item \textsuperscript{95} See, \textit{infra} notes 206 et seq. and accompanying text.
\item \textsuperscript{96} Federal Constitution Art. 74(1), Appendix 19 (List 1 Item 7(f)). As discussed more \textit{infra}, it should be noted that, while this authority is granted to the federal government, it is required by Article 108(4) of the Federal Constitution to consult with the National Financial Council, a body consisting \textit{inter alia} state officials before issuance of any laws or regulation related to things included \textit{inter alia} in Item 7(f). However, it appears that in the case of most regulations issued by the Treasury under this authority, including in regards to GP, this is not done. See \textit{infra} notes 535 et seq. and accompanying text.
\item \textsuperscript{97} Financial Procedures Act, 1957 (Act 61 amended 1972) § 4.
\item \textsuperscript{98} Arahan Perbendaharaan [Treas. Instr.] No. 4 (1997) [unofficial translation by author].
\end{itemize}
this includes the several, and very economically important, government-owned companies which exist in Malaysia.  

In addition to the broad language of the provisions, quoted immediately supra, that strongly suggests that these companies (which, as government-owned companies, make purchases using public funds) are subject to Treasury-issued GP rules, several other factors point in that direction.  

First, Treasury-issued GP rules in the form of TCLs seem facially to apply to government-owned companies. Each includes, in its respective salutation, head executive officials of government-owned companies and heads of federal statutory bodies.  

Further, several TCLs, which require that certain types of services be

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99 Government-owned companies come in the form of both statutory bodies, which are created by statutes enacted by Parliament, and government-owned corporations, which are registered like any other corporation but are owned, wholly or in majority, by the government. Jain, supra note 84, at 834-35. According to the Federal Government definition of the most important type of government-owned firm, Non-Financial Public Enterprises (NFPEs), which requires that at least 51% of their equity be held by the government and that they have an annual turnover of at least RM 100 mil. of otherwise have a significant impact on the economy, there were 35 NFPEs in 2003. Mid-Term Review of the Eighth Malaysia Plan 2001-2005 § 5.28, table 5-5 (Oct. 30, 2003). According to Edmund Gomez, government-owned companies include at least 19 of the top 50 firms in country, including the no. 1 firm (Telekom Malaysia), no. 2 (Malaysian Banking), no. 3 (Tenaga Nasional), no. 4 (Petronas Gas), no. 6 (Malaysia National Shipping Corporation), no. 7 (Sime Darby), and no. 8 (Commerce Asset-Holding). Further he states, in the wake of Finance Minister Daim’s recent fall, seven of the Bumiputera-owned firms in the top 50 are the process of being taken over by the federal government. Edmund Terence Gomez, Capital Development in Malaysia [hereinafter Gomez(2003)] in SUSTAINING GROWTH, ENHANCING DISTRIBUTION: THE NEP AND NDP REVISITED (PROCEEDINGS OF CEDER CONFERENCE), 71, 83-84, 89-90 (Jahara Yahaya et al. Eds., 2003) [hereinafter SUSTAINING GROWTH].

100 Financial Procedures Act, 1957 (Act 61 amended 1972) § 4; Arahan Perbendaharaan [Treas. Instr.] No. 4 (1997); see, also, supra notes 99-102 and accompanying text.

procured from specific providers, include not only similarly addressed salutations, but also text in their respective bodies that explicitly demands compliance by *inter alia* 4/1995] salut.; Surat Pekeliling Perbendaharaan Bil. 2 Thn. 1995 [Treas. Circ. Let. No. 2/1995] salut.. Several structural and extrinsic factors support the conclusion that governmental entities, which fit in the categories listed in the salut. of a TCL are subject to its provisions. First when the Treasury has issued rules which explicitly limited their application to, for example, primary branches of the federal government, they have addressed the salut. to only officials within that category. See, *e.g.*, Surat Pekeliling Perbendaharaan Bil. 7 Thn. 1984 [Treas. Circ. Let. 7/1984] Rules for Implementation of Article 7], Peraturan-Peraturan Untuk Melaksanakan Artikal 7, Perjanjian Istimewa Perdagangan Di Kalangan Negara-Negara ASEAN: Indonesia, Filipina, Singapura, Thailand, Brunei dan Malaysia [Special Trading Provisions for ASEAN Nations: Indonesia, Philippines, Singapore, Thailand, Brunei and Malaysia] salut. (listing only federal ministerial secretary heads, federal department heads), § 1.2 (stating that the provisions of the ASEAN Preferential Trading Arrangement only applied to the “Central Government,” and therefore only Ministries and Federal Departments were required to follow them), lampiran [attachment] A Rule 1(i)(a) (same) (Dec. 19, 1984). Second, TCLs include an “s/k” section, equivalent to a *cc* section which list governmental entities, such as the national accounting authority, which are not necessarily subject to the rules but need be made aware of them. See, *e.g.*, Treas. Circ. Let. No. 7/2002 s/k; Treas. Circ. Let. No. 4/1995 s/k; Treas. Circ. Let. No. 2/1995 s/k. If the inclusion of a government entity in the salut. did not mean that that entity was subject to its instructions but merely should be aware of its contents, the inclusion of the “s/k” section would become superfluous. Finally, the timing of the decision to include government-owned companies in the salutations of TCLs related to GP supports the conclusion that in so doing the Treasury intended to make them subject to those rules. Beginning in the late 1980s and proceeding into the 1990s, Malaysia began a series of limited privatizations, with the government retaining significant ownership interests. See, *Gomez*(2003), supra note 102, at 78-80. Unlike the salutations of TCLs related to GP issued in the years preceding this period, the salutations of analogous TCLs issued during and after this period include references to government-owned companies. Compare, *e.g.*, Surat Pekeliling Perbendaharaan Bil. 17 Thn. 1981 [Treas. Circ. Let. No. 17/1981], Lanjutan Masa Sehingga 3 Bulan Bagi Kontrak-Kontrak Kerja yang Dikendalikan oleh Pemborong-Pemborong Bumiputera Melalui Semua Kementerian/Jabatan/Badan Berkanun [Extension of Time by 3 Months for Work Contracts that are Managed by Bumiputera Contractors Through all Ministries/Departments/Statutory Bodies] salut. (Aug. 13, 1981), and Surat Pekeliling Perbendaharaan Bil. 17 Thn. 1981 [Treas. Circ. Let. No. 17/1981], and Surat Pekeliling Perbendaharaan Bil. 4 Thn. 1995 [Treas. Circ. Let. No. 4/1995], Dasar dan Keutamaan Kepada Syarikat Bumiputera Dalam Perolehan Kerajaan [Policy and Preferences for Bumiputera Firms in the Context of Government Procurement] (April 12, 1995).
government-owned companies. Finally, statements by management officials of government-owned companies made in various context regarding their responsibility to obey government GP rules, strongly suggest they are subject to them.

That said, other factors point in the opposite or in different directions. First, reports on Malaysian GP produced by Asian-Pacific Economic Cooperation (APEC) and the WTO each reach different conclusions on the subject. Specifically, the APEC report, which in other ways appears to conform to the substance of Treasury GP rules, states without citation that “government-owned companies are not bound by the government procurement procedures.” The WTO report (included in a larger review of

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103 See, e.g. Jennifer Jacobs, BUSINESS TIMES, 1 (“The cost of upgrading the local exchanges and effecting software patches to facilitate carrier pre-selection has also been affected by the Government’s procurement rules that Telekom [a government-owned company] is subject to, it said”) (Jan. 18, 2001) Bank Submits List of Errant Staff, supra note 87, at 4 (stating that they would obey a state government-issued directive, blacklisting certain contractors)


105 APEC Report, supra note 108.
Malaysian trade policy), on the other hand, states without citation either that only “the three largest non-financial public enterprises” are subject to Treasury GP rules. Finally, while elements of the TCLs’ texts (especially reference to government-own company head executives in their salutations) strongly signal that they are applicable to government-owned companies. Other textual factors, such as the different ways in which some of the same texts refer in their bodies to the entities that are subject to their respective rules, arguably weakens this conclusion.

106 Malaysia TPR (2001), supra note 80, p. 42 ¶ 51; see also Id., p 42 fn. 18 (further claiming without citation that purchases by these three entities of “[i]tems with a value of more than RM 50 mil....must be referred to the Finance Ministry,” which is inconsistent with the generally applicable rules described infra notes 169 et seq. and accompanying text.). Oddly, elsewhere the TPR cites the APEC Report, Id., p. 43 fn. 41, but never any Malaysian legal authority regarding GP.

107 See, supra notes 103-05 and accompanying text.

108 Section 1 of TCL 7/2002, which establishes preferences for domestic providers of goods and services, states simply that all “agencies” (“agensi”) are required to obey the rules which it describes (“Semua agensi adalah dikehendaki mematuhi sepenuhnya peraturan...”), but nowhere is “agensi” defined. Surat Pekeliling Perbendaharaan Bil. 7 Thn. 2002 [Treas. Circ. Let. No. 7/2002] §1. Two prior TCLs, which TCL No. 7/2002 replaced, more explicitly designated which governmental entities were subject to their respective rules, each stating in the body of their respective texts that ministries, departments, statutory bodies and government-owned companies must obey their respective provisions. However, both also appear to use, the term “agensi” as a shorthand for the listed government bodies other than government-owned companies. See, Surat Pekeliling Perbendaharaan Bil. 6 Thn. 1997 [Treas. Circ. Let. No. 6/1997], Dasar Perolehan Kerajaan Mengenai Barang Impor dan Penggunaan Perkhidmatan Asing [Government Procurement Policy Regarding Imported Goods and Foreign Services] §§ 1.1, 1.2 (Sep. 22, 1997); Surat Pekeliling Perbendaharaan Bil. 4 Thn. 1996 [Treas. Circ. Let. No. 4/1996] § 1.1 (Apr. 12, 1996). More confusing still, TCL No. 11/2000 (which was not cancelled by TCL No. 7/2002 but to which, in fact, TCL No. 7/2002 refers in a section regarding monitoring) also makes its respective provisions explicitly applicable to inter alia government-owned companies but uses “agensi” as a shorthand for all the governmental entities to which it applies, including government-owned companies. See, Surat Pekeliling Perbendaharaan Bil. 7 Thn. 2000 [Treas. Circ. Let. No. 11/2000], Pemantauan ke atas Penggunaan Barang Buatan Tempatan dalam Perolehan Kerajaan [Monitoring of the Use of Domestically Made Goods in Government Procurement] § 1 (Dec. 20, 2000). The TCL, which promulgates preferences for Bumiputera providers, and
Without a study that beyond the scope of this paper, it may not be possible to determine whether government-owned firms are subject to generally applicable GP rules. Indeed, it may be that it is impossible to provide one answer which captures the situation for every government-owned company. While TI No. 4 states that Treasury-issued rules are “applicable throughout the whole of Malaysia,” it also provides the possibility for flexibility in the application of those rules subject to Treasury approval.\textsuperscript{109} Statements by M.P. Jain and others strongly suggest that this flexibility is particularly applicable in the context of government-owned firms.\textsuperscript{110} It seems likely that, especially in the context of purchasing which could easily implicate core business decisions, government-owned that which describes preferences for domestic providers of works and general rules of procedure for GP, are no less confusing. While their respective salutations include the heads of government-owned companies, the provisions within their bodies are addressed only to ministries, departments and statutory bodies (“Kementerian/Jabatan/Badan Berkanun”), to which the shorthand “agensi” is applied. See, Surat Pekeliling Perbendaharaan Bil. 4 Thn. 1995 [Treas. Circ. Let. No. 4/1995] salut., § 1.1; Surat Pekeliling Perbendaharaan Bil. 2 Thn. 1995 [Treas. Circ. Let. No. 2/1995], salut. § 1.1. In TIs, which according to TI No. 4 are applicable to every governmental entity (state or federal) in Malaysia, “jabatan” is used as shorthand to refer all of those entities. See, Arahan Perbendaharaan [Treas. Instr.] No. 4 (1997); Arahan Perbendaharaan [Treas. Instr.] Nos. 166 et seq. (1997).

\textsuperscript{109} Arahan Perbendaharaan [Treas. Instr.] No. 4 (1997) ([“where it is felt necessary for Departments or State Governments to issue supplementary instructions to explain or amplify the Instructions in this volume for the benefit of their officers, they may do so provided they get clearance from Treasury in order to ensure that the supplementary instructions are not inconsistent with these Instructions.”] [unofficial translation based on official translation of Arahan Perbendaharaan [Treas. Instr.] No. 4 (1970)].

\textsuperscript{110} See, e.g., JAIN, supra note 84, at 844 (describing government control over government-owned companies as mainly “informal,” and of a type that “is difficult to articulate”); also Michael B. Likosky, \textit{Infrastructure for Commerce}, 22 NW. J. INT’L. L. & BUS. 1, 18-20 (discussing the general absence of formal controls which effectively limit the freedom of public enterprises); \textit{see, also}, Malaysia TPR (2001), supra note 80, p. 42 ¶ 51 (describing the “flexibility in adopting and adapting the financial regulations” which the Treasury may grant governmental entities.); \textit{see, generally}, Eighth Malaysia Plan, 2001-2005 ¶ 3.69 (2001) (“Government-owned companies will develop special programmes to create and nurture Bumiputera middle-class entrepreneurs.”)}
firms have been granted this flexibility, which would make it impossible to conclude the extent to which they are subject as a group to generally applicable Treasury-issued rules.

2. **Malaysian Government Procurement - General Rules Governing Processes and Distribution of Authority**

Several TIs and TCLs together detail a series of different processes, which governmental entities must follow at various stages of the GP process, and designate who has the authority to make the decisions required.\(^\text{111}\) When the contract value is small and does not involve negotiator services, procuring entities are given a significant measure of autonomy in the manner in which they conduct the tendering process and award the contract.\(^\text{112}\) As the contract value increases the distribution of authority becomes more complex. Middle-size contracts, not involving negotiator services, are decided by procurement boards.\(^\text{113}\) The respective constitution of these boards, and by extension the extent of Finance Ministry control, and the upper limit of their respective authority depends primarily on whether a state or federal governmental entity is involved, and secondarily on what category of thing (works, services, or goods/materials) is being procured.\(^\text{114}\) When the value of a contract rises above the limit established for the respectively applicable procurement board, the board is not able to reach a unanimous decision, or the procuring entity does not have a procurement board, control of the

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\(^\text{112}\) _See_, infra notes 186 et seq. and accompanying text.

\(^\text{113}\) _See_, infra notes 197 et seq. and accompanying text.

\(^\text{114}\) _See_, id.
contract-award process reverts completely to the Finance Ministry. Additionally, the Finance Ministry retains the authority to grant general exemptions to the rules (for apparently any reason that it sees fit), review decisions by procuring entities to ignore generally applicable rules in emergencies, and with the CSC make provider registration decisions.

115 See, infra notes 209 et seq. and accompanying text.

116 See, infra notes 216 et seq. and accompanying text.


to the rules this determination is to be reached by taking into account quality, price, use of the thing, and other related factors.\footnote{Arahan Perbendaharaan [Treas. Instr.] No. 169.1. (1997).}

While the latter requirement applies to all GP decisions regardless of the type of thing procured,\footnote{Arahan Perbendaharaan [Treas. Instr.] No. 169.1. (1997).} registration rules differ depending on the type of thing which a provider seeks to supply, as well as in some cases the location of the provider.\footnote{Surat Pekeliling Perbendaharaan Bil. 2 Thn. 1995 [Treas. Circ. Let. No. 2/1995] § 2.3.} Registration of services and goods providers is handled by the Finance Ministry, but with a division of authority between Ministry offices, depending on whether the procuring entity is located in peninsular or Borenian Malaysia.\footnote{Arahan Perbendaharaan [Treas. Instr.] Nos. 184.2 (requiring governmental entities in peninsular Malaysia to use only providers registered with the Government Procurement Division of the Finance Ministry), 184.3 (requiring government entitled in both peninsular and Bornean Malaysia to use only negotiators registered with the Finance Ministry), 184.4 (requiring governmental entities in the Bornean States of Sabah and Sarawak to use providers registered with the respective state office of the federal Treasury (1997)} For works contracts, governmental entities in both peninsular and Borenian Malaysia must use providers registered with the CSC.\footnote{Arahan Perbendaharaan [Treas. Instr.] No. 184.1 (1997). The WTO Malaysian Trade Policy Review 2001 states that works contractors must also be registered with the Construction Industry Development Board. WT/TPR/S/92, III, ¶ 57.}

As in others cases where the decision is left to the Finance Ministry, the rules do not indicate what criteria is applied in decisions regarding services and goods provider

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registration, nor what information is included in registration listings. In the case of works provider registration decisions, however, which notably are made by a different governmental entity (the CSC) the rules are more detailed in this regard. Providers are broken up into eight categories for general works and six categories for electrical works; in both cases these categories are non-exclusive and are based upon the value of the contracts which the provider is capable of performing. The CSC, additionally, is required to include in each contractor’s registration listing a record of its past performance of government contracts and financial position, which is to be used in contract-award process.

b. Tendering and Contract-award Processes

When the value of the thing to be procured is low, procuring entities are given significant autonomy, regarding both how they conduct the tendering process and how they ultimately make the decision to award the contract. However, as the value increases and/or other criteria are fulfilled that autonomy diminishes until, finally, the decision rests with the Finance Ministry, itself.


128 See, infra notes 134 et seq. and accompanying text.

129 See, infra notes 139 et seq. and accompanying text.
i) Contracts Valued at Not More Than RM 20,000 (~US$ 5,200) Per Year

If the value of the thing to be procured is not more than RM 20,000 (~US$ 5,200) per year, the procuring entity is allowed, with some restrictions, to purchase directly from a provider without competitive tendering.\textsuperscript{130} In the case of goods and services other than for negotiation, the head of the governmental entity is allowed to make a “retail” purchase with a registered provider with whom a “fair price” has been reached.\textsuperscript{131} Similarly, for works contracts valued at this level, the government entity may “appoint” any provider, which is registered to complete such low value contracts.\textsuperscript{132} It should be kept in mind that while these rules do allow for significant discretion by procuring entities, it is limited by both the baseline rules, discussed \textit{supra},\textsuperscript{133} and rules, which mandate the procurement of domestic goods, services and works, and reserve low-value contracts for Bumiputera providers, discussed \textit{infra}.\textsuperscript{134}

\begin{quote}
\textit{ii) Contracts Valued Between RM20,000 (~US$5,200) and RM50,000 (~US$13,000) Per Year}
\end{quote}

As the value of the thing to be procured rises above RM 20,000 (US$ 5,200) per year the discretion of the procuring entity begins to be limited; however, as long as the value does not exceed RM 50,000 (~US$ 13,000), procuring entities retain significant

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\textsuperscript{130} Arahan Perbendaharaan [Treas. Instr.] Nos. 173.1, 180.1, 190(a) (1997).
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\textsuperscript{131} Arahan Perbendaharaan [Treas. Instr.] No. 173.1, 190(a) (1997) [unofficial translation by author].
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\textsuperscript{132} Arahan Perbendaharaan [Treas. Instr.] No. 180.1 (1997) (the applicable class is class F.) [unofficial translation by author].
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\textsuperscript{133} \textit{See, supra} notes and accompanying text.
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\textsuperscript{134} \textit{See, infra} notes 225, 358 et seq. and accompanying text.
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authority, especially in the tendering process. Except in two cases discussed infra procure
ing entities are allowed to conduct limited tendering, whereby they invite bids
directly from five or more appropriately registered providers of their choice. Contract-
award decisions at this level, however, are not left to the similar discretion procuring
entity. Rather, that authority is given to a three person committee composed either of
officials included in a Treasury prepared list or whom, in the case of federal governmental
bodies, are chosen by the Finance Ministry designee or in the case of state governmental
bodies, are chosen by state financial officials.

This committee is free to chose the offer of an appropriately registered provider
that best fulfills the entity’s needs according to price, quality, and certainty of offered
price. However, if it accepts a bid other than the lowest priced one, it must explain that
decision within its award. Additionally, regardless of whether the lowest priced bid was
accepted, it must keep a complete record of its decision and the process by which it was
reached for later auditing.

135 See Arahan Perbendaharaan [Treas. Instr.] Nos. 170.3(a), 170.1, 180.1, 180.2, 190(a)
(1997).


139 Arahan Perbendaharaan [Treas. Instr.] No. 170.3(a) (1997); see, also, supra notes 121
et seq. and accompanying text (discussing baseline contract award-decision rules).


141 Arahan Perbendaharaan [Treas. Instr.] No. 170.3(b) (1997).
The exceptions to this process are negotiator services and “requisition” works contracts. 142 In the former case, discussed infra, special processes are applicable, regardless of the value of the contract, which greatly limit procuring entities’ discretion. 143 In the latter case, which includes things like minor repairs of existing projects, on the other hand, the rules grant procuring entities additional discretion in both the tendering and award processes. 144 In fact, the rules only require that contracts for requisition works be granted in a “fair” way, such as through a “lottery” or by “rotation” among providers. 145

*iii) Contracts Between RM50,000 (~US$13,000) Per Year and Applicable Cutoff*

Procuring entities lose almost all discretionary authority as the value of the thing sought rises above RM 50,000 (~US$ 13,000) in a year, but at least remain partially involved in the process as long as the value remains under variously applicable cut-off level. 146 Bids for contracts above this level must be sought through an open-tendering process, including (except possibly in the case of services) sufficient advertisement, unless the Head of the Treasury or a state finance official (in the cases of state entity procurement) grants specific an exception. 147 Decisions on contract-awards at this level are made by, what are known as “Procurement boards” (PB), whose composition and


143 See infra notes 183-86 and accompanying text.


upper limit of authority depend primarily on what type of governmental entity is involved and secondarily the category of the thing sought.\textsuperscript{148}

The Finance Ministry fairly well dominates PBs organized for federal government entity procurement.\textsuperscript{149} The Finance Minister appoints the members of such PBs from a group composed of the head of the procuring entity, which acts as the its chairman, the head of the Treasury or his/her representative, and an upper level official from another governmental entity, “who has the knowledge and experience needed to give supervision to the work of the PB.”\textsuperscript{150} The upper limit of these PBs’ authority depends on whether works or goods/services are sought; in the former case the upper limit is RM 15 million (\textasciitilde US$ 4 million), while in the latter it is RM 7 million (\textasciitilde US$ 1.8 million).\textsuperscript{151}

When the federal government conducts procurement on behalf of states, control by the Finance Ministry is in some senses increased, while in others it is decreased.\textsuperscript{152} In these cases, the contract-award authority of a PB extends only to works contracts and is capped at RM 5 million (\textasciitilde US$ 1.3 million), leaving decisions for goods and services worth than RM 50,000 (\textasciitilde US$ 13,000) and works worth more than RM 5 million (\textasciitilde US$ 1.3 million), in the hands of the Finance Ministry.\textsuperscript{153} However, when such a PB is organized, the state’s Chief Minister or Procurement Minister is given the authority to


\textsuperscript{150} Arahan Perbendaharaan [Treas. Instr.] No. 192.1, 192.2 (1997) [unofficial translation by author].

\textsuperscript{151} Arahan Perbendaharaan [Treas. Instr.] No. 198.1(a) (1997).


\textsuperscript{153} Arahan Perbendaharaan [Treas. Instr.] No. 198.1(b) (1997).
appoint its members, and most of those individuals can, or must, come from that state’s
government.\textsuperscript{154} The chairman of such a PB may be either an official from the state’s
Development Department, the state’s Progress Department, or the federal Finance
Ministry.\textsuperscript{155} Lower level positions are filled by the state’s Director of Works and the
state’s Director of Irrigation and Drainage or their respective representatives, and an
official from another governmental entity, “who has the knowledge and experience
needed to give supervision to the work of the PB.”\textsuperscript{156}

When a state governmental entity seeks to conduct procurement on its own
behalf, direct Finance Ministry involvement in the work of the PB disappears, leaving the
authority solely in the hands of state officials, but vague wording in the rules makes it
unclear where the upper limit of this authority lies.\textsuperscript{157} The structure of PBs in this context
and distribution of authority regarding appointments to it are the same as those applicable
to federal procurement on behalf of states, described \textit{supra}, except there is no analogous
provisions for the possible involvement of Ministry of Finance officials.\textsuperscript{158} However, the
limit of these PBs’ authority is unclear; the applicable TI states only that in this context a

\textsuperscript{154} See, Arahan Perbendaharaan [Treas. Instr.] Nos. 192.1, 192.3 (1997). In the case the
state of Sarawak different officials are eligible for membership in applicable PBs,
reflecting the state’s unique government structure and relationship to the federal

\textsuperscript{155} Arahan Perbendaharaan [Treas. Instr.] No. 192.3(i) (1997).

\textsuperscript{156} Arahan Perbendaharaan [Treas. Instr.] Nos. 192.3(ii)-(iv) (1997) [unofficial translation
by author]. No indication is given in the latter case whether the official need come from a
state of federal governmental entity.


\textsuperscript{158} Arahan Perbendaharaan [Treas. Instr.] No. 192.4 (1997); \textit{see, supra} notes 153 et seq.
and accompanying text.
PB’s authority is “limited by the representative authority that is given to it by the division in charge from time to time.”159 No other provisions in this TI or in any other TI or TCL located by the author clarify what this means.

All PBs, irrespective of their composition or limitations of authority, are subject to the same rules regarding contract-award decision-making.160 As a baseline, decisions must be reach unanimously and should be based on considerations such as value for price, quantity, quality, time for completion, the capability and financial position of the appropriately registered providers, and other related factors.161 As in the case of the more informal committees for lower value GP contracts discussed supra, the PBs are required to record their decisions and the processes by which they were reached for later auditing, but, unlike the former, no special provisions are applicable when the lowest priced bid is not accepted.162 Additionally, the rules empower PBs to monitor the tendering process and recommend it be redone or that a different process be used when it appears that applicable rules have been broken.163 Further, the rules require that any member of a PB, which has a conflict of interests defined as an individual or shared interest in a tender, must notify the PB of that conflict and recuse him or herself in manner which is recorded in the board’s minutes.164

162 Arahan Perbendaharaan [Treas. Instr.] No. 198.3 (1997); see, supra notes 143-45 and accompanying text.
iv) Reversion to Finance Ministry or State Financial Officials

The authority to make GP contract-award-decisions reverts to the Finance Ministry and/or state financial officials in three basic circumstances: 1) when a decision by a PB is not available;165 2) if the contract is for negotiator services;166 or 3) if the Finance Ministry conducts bulk contracting on behalf of other governmental entities.167

The conditions giving rise to the first circumstance, unavailability of a PB, vary depending on the identity of procurement involved: purely federal, federal on behalf of states, or purely state.168 In purely federal procurement, it occurs in three instances: 1) the value of the contract exceeds, respectively, RM 15 million (~US$ 4 million) or RM 7 million (~US$ 1.8 million) for works or goods/services;169 2) the applicable PB is not able to reach a unanimous decision;170 or 3) the procuring government entity does not have a qualified PB.171 In the case of federal procurement on behalf of states, the same conditions apply, except that the PB’s authority is limited at a lower price level in the case of works, RM 5 million (~US$ 1.3 million) and is non-existent in the case of goods/services, causing the authority to revert to the Finance Ministry in both cases.172

For purely state procurement, it is somewhat unclear exactly when authority reverts and to whom. Provisions, which speak of the PB authority in this context, state only that it is limited according to the decision made by the division, which has the authority to do so, from time to time.\footnote{Arahan Perbendaharaan [Treas. Instr.] No. 198.2 (1997).} It does not indicate how this decision is to be made or to whom exactly contract-award decision-making authority reverts when the applicable threshold is reached.\footnote{See, Arahan Perbendaharaan [Treas. Instr.] No. 198.2 (1997).} However, it seems likely in light of other provisions, especially those which give state financial officials the authority to grant state governmental entities general exceptions to applicable GP rules, that the authority reverts to state financial officials in these cases.\footnote{See, infra note 193 and accompanying text.} If state financial officials have the authority to allow other state entities to ignore generally applicable GP rules, it would follow that they have the ultimate authority to make procurement decisions when such entities’ PB’s authority, set by state finance officials, is exceeded.\footnote{Id.} They are the ultimate authority in such cases. In regards to the effect of a non-unanimous decision by a state entities PB, the provisions are equally quiet.\footnote{See, Arahan Perbendaharaan [Treas. Instr.] No. 193(e) (1997).} However, given the applicability of the unanimous decision requirement to state PBs and the default character of state finance officials’ power in this context, it seems likely that when a unanimous decision cannot be reached, the authority reverts to those officials.\footnote{See, Arahan Perbendaharaan [Treas. Instr.] No. 198.2 (1997).}
The Finance Ministry or state finance officials also insert themselves directly into the GP process when either the services contracted for are those of a negotiator, or when things are contracted on behalf of all other government entities. In the former case, the choice of negotiator must be approved by the Finance Ministry, if any federal monies are involved, and by state financial officials if only state monies are involved. Additionally, procuring entities are required to show that neither they nor another department in the government could perform the necessary service before such approval will be granted.

Centralized contracting generally involves bulk purchases items used by all offices, such as writing utensils, office furniture, paper and printing, but sometimes can also include things as varied as geological services. In all of these cases government entities are required to procure the thing from the provider with whom the Finance Ministry has contracted and on the terms, to which it has agreed. Only in special circumstances and with prior approval, may an entity do otherwise. It does not appear that similar provisions exist regarding analogous contracting by state finance officials.


183 See, e.g., Arahan Perbendaharaan [Treas. Instr.] Nos. 286-300 (1997); [cite]

184 See, id.
In all of these cases, where the ultimate decision making authority reverts to the Finance Ministry or state finance officials, it is not completely clear what rules are applicable to the process. Unlike the other circumstances, described supra, there are no provisions, which lay out specific procedures which must be followed in either the tendering or contract-award-decision processes in this context. However, it does appear that both baseline rules, regarding best value and contractor registration, as well as open-tendering requirements, still apply. That said, there do not appear to be any applicable reporting requirements in this context, and, as discussed infra, the generally applicable open-tendering requirements are subject to waiver by the Treasury Head or state finance officials, constituents of the same entities which, in this case, are running the tender. Thus, the Finance Ministry or state financial officials, as is applicable, enjoy complete de facto discretion over how they conduct tenders and award contracts under this authority, reinforced by the absence of review procedures discussed infra.

c) General and Special Exceptions

Exceptions from a number of the requirements supra are available generally upon the approval of the Head of the Treasury or state financial officials as applicable, and in emergencies. While the conditions required for an emergency waiver are fairly explicit and include provisions for their enforcement, the same is not true for general exceptions,


186 See, supra notes 121 et seq. and accompanying text.


188 See infra notes 388 et seq. and accompanying text.


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apparently giving the Head of the Treasury or state financial official, as is applicable, almost unlimited discretion in this regard.\textsuperscript{190}

The Finance Ministry or state financial officials, depending on whether a state or federal governmental entity is involved, are empowered to grant entities a general exception from the requirement of open-tendering, which applies to GP worth over RM50,000 (~US$13,000), apparently allowing them to conduct the tender and contract-award processes in any manner they see fit.\textsuperscript{191} The rules mention no conditions or circumstances under which such a waiver will be granted, and there are no extraordinary reporting requirements.\textsuperscript{192} In fact it appears that the waiver exempts them from general reporting requirement, which would otherwise be applicable.\textsuperscript{193} Publicity requirements, applicable in most open-tendering processes, may also be waived but only when less than five eligible providers for the required goods or works are known to exist and, apparently, never in the context of service contracts.\textsuperscript{194}

In cases of emergency, governmental entities are exempted from the various respectively applicable provisions regarding open-tendering and price quotation processes described \textit{supra}, without any requirement of prior approval.\textsuperscript{195} However, the use of this exception is limited to situations where there is an immediate need for the

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\textsuperscript{190} \textit{See, Arahan Perbendaharaan [Treas. Instr.]} Nos. 171.1, 172.1(c), 173.2 181 (1997).
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\textsuperscript{191} Arahan Perbendaharaan [Treas. Instr.] No. 171.1, 181, 190 (1997).
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\textsuperscript{192} \textit{See, Arahan Perbendaharaan [Treas. Instr.]} No. 171.1, 181, 190 (1997).
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\textsuperscript{193} \textit{See, Arahan Perbendaharaan [Treas. Instr.]} No. 171.1, 181, 190 (1997).
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goods or works (again services appear excluded) or where the use of otherwise applicable procurement processes will endanger basic services and fundamental interests.\textsuperscript{196} In addition, the quantity procured must be limited to only that immediately needed, and the procuring entity is required to submit a report within a month of the emergency procurement for audit by the Ministry or Finance or state finance officials as is applicable.\textsuperscript{197}

\textit{B. Rules Governing Preferences for Bumiputra and other Domestic Providers in Government Procurement}

In addition to delivering to government entities the best possible goods, services, and works projects at the best possible price,\textsuperscript{198} GP rules in Malaysia are equally (or, arguably, more) focused on delivering policy goals. Specifically, preferential policies favoring, in the first instance, Bumiputera providers and in the second instance, domestic providers have been increasingly used by the government to achieve its goal of strong but \textit{ethnically balanced} economic growth, which has been the focal point of its development policy since the initiation of the New Economic Policy (NEP) in 1971 through to the present day.\textsuperscript{199}

As these programs have matured, they have changed to reflect both more precise policy goals, and the problems, which have been encountered in their operation. As a result, Bumiputera preferences have developed into complex arrangement of set-asides


\textsuperscript{197} Arahan Perbendaharaan [Treas. Instr.] No. 173.2 (1997).

\textsuperscript{198} See, supra notes 120 et seq. and accompanying text.

and price preferences that vary in form and size depending on a number of factors, and reflect the government’s efforts to both increase their effectiveness in delivering the specific policy goals as well as decrease their well-documented abuse. Preferences for other domestic providers, on the other hand, consist of relatively straightforward set-asides that operate, in most cases, to limit procurement to domestic sources unless one is not available, reflecting of the relatively straightforward (but related) purposes to which they are put.

1. Preferences for Bumiputera Providers

Preferences for Bumiputera providers in GP grew directly out of the ethno-economic riots, which rocked the Malaysia’s capital, Kuala Lumpur, on May 13, 1969. When the Federal Constitution was drafted with the help of British officials in 1957, provisions (based on similar provisions in the Indian constitution) were included that

200 See, Surat Pekeliling Perbendaharaan Bil. 4 Thn. 1995 [Treas. Circ. Let. No. 4/1995] Dasar dan Keutamaan Kepada Syarikat Bumiputera Dalam Perolehan Kerajaan [Policy and Preferences for Bumiputera Firms in the Context of Government Procurement] §§ 5.1-.5, 6-7 (April 12, 1995); see also, Midterm Review of the Eighth Malaysia Plan § 1.57 (Oct. 30, 2003); Third Malaysia Plan 1976-1980 §§ 599-600 (July 5, 1976). In the Mid-Term Review of the current five-year development plan, the federal government announced it would issue regulations requiring that 60% of all government procurement contracts be allocated to Bumiputera providers Mid-Term Review of Eighth Malaysia 2001-2005 § 3.53 (Oct. 30, 2003). However, as of the writing of this paper such a policy has not been enacted in law.


recognized the “the special position” of Bumiputera and the duty of the government to protect them.  

However, apparently little was actually done in this regard; thirteen years later the situation of Bumiputera, both relative to that of other members of the population and in absolute terms, was extremely poor: 65 % lived in poverty, and though they represented 62% of the population, they owned only 2.3 % of nation’s commercial equity. The Chinese, on the other hand, had poverty rates of comparatively low 26%; and, though they represented just 27% of the population, held 22.8 % of its corporate equity. The bulk of the remaining commercial equity, 63.3 %, was owned by foreign interests, who with the Chinese continued to “control large-scale commercial agriculture and all forms of non-agricultural enterprises” as they had during colonial times.


206 Chua, supra note 207, at fn. 351 (citing Ganguly, supra note 66, at 234 (citing 1995 Malaysian Government Census figures)).


209 Chua, supra note 207, at 351 (quoting Ganguly, supra note 207, at 261); See, also Second Malaysia Plan, 1971-1975 § 129 (June 25, 1971). During the colonial period the British discouraged involvement by the Bumiputera majority in the emerging capitalist economy, preferring instead that they remain in food production sector, and, in fact, actively blocked attempts by Bumiputera farmers to challenge the monopoly of colonial
On May 13, 1969, the pressures created by the intersection of disparities of wealth and ethnicity exploded. Following elections, in which political parties allied with ethnic Chinese made unprecedented gains, violence erupted between Malaysia’s market-dominant ethnic Chinese minority and Bumiputera majority. By the time police and military finally regained control three days later, at least 196 were dead (123 Chinese), 439 injured and over 9,000 arrested. Though exact financial costs are unavailable, “hundreds of buildings were raised” in Malaysia’s political and financial capital, countless vehicles were destroyed, and significant stores were lost to looting and fire, not mention the losses caused by the virtual paralysis of business while the police attempted

planters. See Gomez(2003), supra note 102, at 75; See, also, Second Malaysia Plan 1971-1975, § 132 (“The economic imbalances...particularly those between the Malays and other indigenous people and non-Malays, are a heritage of centuries of colonial policies and the result of the pattern of economic development during the colonial era.”) (June 25, 1971). Upon independence, the ruling UMNO controlled by the Bumiputera aristocratic elite did little or nothing to challenge the status quo, but rather continued colonial policies which perpetuated, a system in which most large enterprises were foreign owned, the smaller enterprises were Chinese dominated, while political power rested with the Bumiputera elite. EDmund Terence Gomez, Political Business: Corporate Involvement of Malaysian Political Parties, 1-2 (1994) [hereinafter Gomez (1994)].

See, Hiebert & Jaysankaran, supra note 205, at 45; The National Operations Council, supra note 205, at ix (1969); According to a contemporaneous Malaysian government report, the immediate seeds for the riots were planted in the preceding election campaign where “several irresponsible candidates took racist lines. Blatant incitement of racial feelings was evident in their speeches as they courted support on racial grounds. The opportunists ranged from one extreme, those who attacked Article 153 of the Constitution [establishing Bumiputera’s special status], to the other, that exploited fears among the Malays that they would be overwhelmed by non-Malays.” Id., at 21. Following the election “‘victory’ marches” were held by both sides, during which conflict between the two populations quickly escalated from vicious insulting (e.g. “Death to the Malays, aborigines go back to the jungle!”) to violent, gossip-fueled, attacks by both sides on another with sharpened sticks, knives and guns, and arson that quickly ballooned into full-scale inter-ethnic rioting. Id., at 29-45.

Id., at 88-91. See, also Hiebert & Jaysankaran, supra note 205, at 45.
to gain control. It was, in many ways, a textbook example of what Amy Chua has identified as “the conflict between markets and democracy in the developing world,” which is particularly “combustible and sometimes lethal” in nations where a more prosperous, market-dominant, ethnic minority can quickly and easily become the focus of the less well-off majority’s violent dissatisfaction.

The Federal Government reacted to the rioting in a manner intended not only to “restore law and order, and ensure the smooth administration of the country,” but also to “restore harmony and mutual trust among the various races.” On the political front, several actions were taken, including placing limits on democratic control and freedom of expression, and a further concentrating power in the already strong executive.

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212 See, Hiebert & Jaysankaran, supra note 205, at 45.

213 Chua, supra note 207, 378. According to Chua, while there is always an inherent conflict between free market capitalism and democracy, the latter inevitably concentrating wealth in the few while the latter concentrates political power in the many, id. at 287-88, it is exacerbated in developing countries with a market-dominant minority in several ways. Id., at 318-320, 340. First, increasing marketization “will tend to benefit the market-dominant minority,” which is better positioned to take advantage of the increased opportunities that it offers, leading to increased wealth disparities and resentment. Id. at 319-320. At the same time, increasing democratization, creates the incentive among politicians to transform this resent into a “ethnonationalist movement,” which blames the “foreign,” market-dominant minority for the economic conditions of the majority. Id. at 319. Second, while developed countries have, generally, been able to employ economic, ideological, and political strategies to mitigate analogous tensions, such strategies are usually unavailable to developing countries, their depressed financial reality making the former unaffordable, the second (such as ideologies of upward mobility) untenable, while the latter (such as limitations on suffrage) are no longer acceptable. Id., at 290.

214 The National Operations Council, supra note, 205, at 77.

215 William Case, Politics in Southeast Asia: Democracy or Less, 108-11 (2002). In the short term a state of emergency was declared, during which parliamentary democracy was suspended, control of the country was vested in the National Operations Council, and police were given the power to detain without cause and without access to courts those believed to be endangering the peace. see Id.; The National Operations
economic and, to some extent, ideological front, an ambitious project was launched which aimed “to minimize, if not obliterate, ethnic animosities which were perceived to be the direct result of gross ethnic inequalities between groups.”

This project, which became known as the NEP (the main tenants of which have continue to guide Malaysia domestic policy to this day), was self-consciously “shaped by the over-riding need to promote national unity” as a prerequisite for economic growth and guided by the understanding that “[n]ational unity is unattainable without greater equity and balance among Malaysia’s social and ethnic groups.”

Council, supra note 205, at 77. Additionally and with more far reaching effects, the Sedition Law was amended to forbid the questioning of “the Special Privileges of…the Bumiputera, the citizen rights of non-Bumiputera and the status of Malay Rulers.” Abu Hassan Othman et al., Social Change and National Integration, in SUSTAINING GROWTH, supra note 103, 141, 145 (stating further, “The logic of the exercise is simple enough: if the questioning of these ‘sensitive issues’ had led or paved the way to serious social discord, its prohibition could help ensure, if not guarantee, societal harmony.”); See, Sedition Act, 1948 (Act 15 amended 1969) § 3(1) (amended 1969). Many of the structures put in place at that time have remained in place and have played an important role in the defending subsequent regimes from political attack. These included the power to arrest suspects under the Internal Security Act without warrant or showing of cause and without the provision of remedy for challenge of the detention by the arrestee, as well as significant restrictions on the press. See, Internal Security Act, 1960 (Act 82) § 8; Official Secrets Act, 1972 (Act 88) §§ 2(1), 8 (Sep. 26, 1972); Printing Press and Publications Act, 1984 (Act 301) §§ 3(3), 7, 13A, 13B, 24, (giving the government the right to suspend printing and publishing permits, without an opportunity for appeal), 8A (allowing government to fine or jail writers, editors printers, and publishers for spreading “false news”), 20 (“Arrest Without Warrant”); GOMEZ (1994), supra note 212, at 53; Steve Gan, Virtual Democracy (April 17, 2000), at http://www.oneworld.org/index_oc/news/malaysia170400.html (last accessed April 2, 2004); See, also After Mahathir, ECONOMIST, 4 (OCT. 30, 2003); Committee to Protect Journalists, Attacks on the Press 2003: Asia: Malaysia available at http://www.cpj.org/attacks03/asia03/malay.html (last access April 2, 2004).

Othman et al., supra note 219, at 145 See, also, GOMEZ (1994), supra note 212, at 3.

Second Malaysia Plan 1971-1975, foreword, § 1.3 (June 25, 1971); see, also, Third Perspective Plan, 2001-2010 foreword (stating that during the National Vision Plan period the fundamental policies of the NEP would be continued), § 1.16 (“National unity continues to be the goal of socioeconomic development given the multi-ethnic, multi-
departed from its predecessors, which had focused “merely [on] a high rate of economic growth.” It recognized the “need to ensure at the same time that there is social justice, equitable sharing of income growth and increasing opportunities for employment.”

However, the plan consisted not simply of a “buy-off” of the poor, Bumiputera majority through an economically redistributive strategies of a Habermas-style “‘welfare state compromise.’” It was far more ambitious, describing a “two prong objective of eradicating poverty, irrespective of race and restructuring Malaysian society to reduce and eventually eliminate the identification of race with economic function.”

Thus, the plan not only mandated increased government allocations for programs meant to increase the welfare of poor (overwhelming Bumiputera) Malaysians, such as improved education, health care, electrification, and housing. It also outlined programs, including affirmative action and subsidization in higher education admissions, affirmative action in hiring and promotions, corporate equity set-asides, and the creation of Bumiputera trust organizations and government-owned firms, all of which were wholly or partially aimed

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221 Second Malaysia Plan 1971-1975, § 15(iii) (June 25, 1971); see, supra notes 208 et seq. and accompany text (discussing relative levels of poverty at the time of the NEP’s initiation).
at creating a viable Bumiputera Commercial Industrial Community (BCIC), so “that within one generation [Bumiputera] can be full partners in the economic life of the nation.”  

Preferences for Bumiputera providers in GP, while secondarily aimed at contributing to the NEP’s poverty eradication goals, have been and continue to be focused principally on contributing to the restructuring Malaysian society through the creation of a viable BCIC, and in particular the development of Bumiputera-owned small and medium-sized enterprises (SMEs). The first modern TCL to describe such preferences states:

The goal of the [preferences] is to give a push to, and encourage, Bumiputera providers so that they are active in the supply and service sectors and to encourage the development of their businesses.

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222 Second Malaysia Plan 1971-1975, § 25 (June 25, 1971); see, also, e.g., Id., foreword, §§ 20, 26-27, 126, 135, 147, 149, 155(1) 155 (iv); EDMUND TERENCE GOMEZ & JOMO K.S., MALAYSIA’S POLITICAL ECONOMY, 29-32 (1999); Othman et al., supra note 219, at 145; Chua, supra note 207, at 357.

223 The first explicit mention of preferences for Bumiputera providers and their relationship to the NEP goal of building a viable BCIC in a government development plan came in the Third Malaysia Plan issued in 1976. Third Malaysia Plan 1976-1980, § 590, 599-60 (July 5, 1976). The plan announced a detailed structure of “mutually supportive programs” aimed at “the systematic development of those facilities which promote [Bumiputera] entrepreneurial participation in commerce and industry.” Id., § 590 (calling this objective “[f]ar more significant” than “quantified capital targets”). These programs were divided in four main basic categories, including “the implementation of administrative measures designed to induce entrepreneurs among [Bumiputera] to participate in the commercial and industrial sector,” Id., which, in turn, included preferences for Bumiputera providers in GP. Id., ¶¶ 599-600. See, also, e.g., Midterm Review of the Eighth Malaysia Plan § 1.57 (announcing that an increased allocation of government contracts to Bumiputera providers was “in line with efforts to restructure society”) (Oct. 30, 2003); Sixth Malaysia Plan, 1991-1995 §§ 1.108, 4.02, 439 (July 10, 1991); Second Malaysia Plan 1971-1975 § 155(iv) (June 25, 1971).

224 Surat Pekeliling Perbendaharaan Bil. 3 Thn. 1974 [Treas. Circ. Let. No. 3/1974], Pelaksanaan Usul-Usul Seminar Ekonomi Bumiputra [Implementation of Proposals of the Bumiputera Economic Seminar] § 3 (Jan. 30, 1974) (noting further that “implementation of the these proposals is also in conformity with the government’s New
Over the years, this focus has been maintained with preferences consistently concentrated in lower value tenders where small and medium scale Bumiputera business can best compete, changing somewhat over time to reflect an increased government focus on increasing Bumiputera participation in manufacturing, where their absence has been particularly noted. In addition, the current system of preferences subsequently described, and in particular the qualification criteria for Bumiputera firms, reflects government efforts to control abuse of the system by unscrupulous Bumiputera acting as front-men for non-Bumiputera businesses, as well furthering as the preference’s secondary purposes related to poverty alleviation and more general social restructuring. The latter include encouraging the movement of Bumiputera into the upper levels of company hierarchies and creating opportunities for Bumiputera to shift

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from low-paying rural, agricultural, low-skilled jobs to higher-paying urban, industrial, semi-skilled jobs, and, arguably, indirectly reducing poverty by increasing the money circulating within Bumiputera communities.

*a. Basic Framework of Preferences*

The current organization of preferences for Bumiputera providers differs slightly from the general organization of Malaysian GP (and, for the most part, Bumiputera provider preferences prior to 1995). The system established by TCL No. 4/1995 roughly divides into five categories: 1) generally applicable preferences for Bumiputera suppliers of goods and services; 2) generally applicable preferences for Bumiputera producers of goods; 3) general applicable preferences for Bumiputera works providers, 4) special preferences for Bumiputera providers administered by the Finance Ministry and/or state financial officials; and 5) special preferences for members of the Malay Chamber of Commerce of Malaysia (MCCM).

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While TCL No. 4/1995 provides specific details in regards to the first three categories, the fourth is stated in only the most general of terms. In some ways, this situation appears part of a general trend in Malaysian GP regulations, which generally do not provide detailed rules regarding decisions that are made directly by the Finance Ministry and/or state financial officials, allowing them broad discretion in such preferences was mandated by the Agreement on ASEAN Preferential Trading Arrangements (PTA), which is still in force, thus it would appear that by canceling this preference Malaysia is in facial violation of its terms. See, Agreement on Association of Southeast Asian Nations Preferential Trading Arrangements (PTA) initialed Feb. 16, 1977, Indon.-Malay.-Phil.-Sing.-Thail., reprinted in TRADING ARRANGEMENTS IN THE PACIFIC RIM: ASEAN AND APEC, 451[?] (Paul Davidson, ed., 1995) arts. 7 (mandating inter alia price preference of 2.5% for ASEAN providers in international tenders for “goods and auxiliary services from united loans submitted by ASEAN countries vis-à-vis non ASEAN countries), 11 (stating that parties “shall not diminish or nullify any of the concessions agreed upon through the application of any new charge or measure restricting trade, except in cases provided for in this agreement.”) (hereinafter PTA). However, the PTA, includes very broad exception provisions, which essentially allow its signators to ignore its terms whenever they deem it in their national interest to do so, likely allowing Malaysia to justify the cancellation if challenged regarding it. Id., art. 16 (“Nothing in this Agreement shall prevent any Contracting state, from taking action and adopting measures which it considers necessary for” protection of national security, public morality, human, animal plant life and health, and articles of artistic, historic, archeological value.”) (emphasis added). Further, there are no effective enforcement mechanisms in the PTA, greatly reducing the chances that such a challenge would occur. Id., art. 14 Currently if a party fails grant another concessions promised, the aggrieved party has the right to submit its complaint to the party alleged to be in violation, which the latter is obliged to consider. If a mutually agreeable situation is not reached, the aggrieved party may submit the dispute to the Committee on Trade of Tourism at ASEAN for assistance in reaching a resolution. In the interim the aggrieved party is free to “suspend the application of the concession.” Id. Severely, acknowledging the impotence of this procedure, ASEAN Leaders Agreed in the Bangkok declaration to create more formal Dispute Settlement Mechanism where all disputes arising out of any of the economic arrangements will be adjudicated. Association of Southeast Asian Nations: Bangkok Summit Declaration on the Progress of ASEAN, Vietnam’s Membership, Greater Economic Cooperation and Closer Cooperation in International Fora, done at Bangkok on Dec. 15, 1995, 35 ILM 1063, 1065 (1996).


decisions.\textsuperscript{235} However, this trend is in some ways bucked by other provisions in the TCL itself, such as preferences for high value contracts which, even though they are awarded directly by the Finance Ministry or state financial officials, are explicitly described,\textsuperscript{236} and may, at least partially, relate to the practicalities of their administration. The somewhat anomalous preference for members of the MCCM is simple in its application but somewhat more difficult to explain.\textsuperscript{237} While it appears that they may be part of a wider strategy to encourage the creation of a viable BCIC,\textsuperscript{238} their existence also could, arguably, be explained with reference to patronage style politics.\textsuperscript{239}

\textit{b. Generally Applicable Preferences for Bumiputera Producers and Ship Owners}

In the last decade the government has placed an increased significance on encouraging the participation of Bumiputera in manufacturing where they are notably absent in comparison with other economic sectors such as construction.\textsuperscript{240} The introduction in 1995 of separate category of preferences for Bumiputera producers of goods and ship owners, which are significantly larger than those for any other type of

\textsuperscript{235} See, e.g., \textit{supra} notes 289-92 and accompanying text (discussing contract award decisions made directly by the Finance Ministry.).


\textsuperscript{238} See, \textit{supra} notes 224-26 and accompanying text.

\textsuperscript{239} See, \textit{infra} notes 907 et seq. and accompanying text.

Bumiputera provider reflects this. The rules create a semi-discretionary, complete set-aside for Bumiputera producers and very large price preferences, when the set-aside is not applied. When more than one Bumiputera producer of the required good exists, the procuring entity is required to limit the tender to such companies. Even when only one Bumiputera producer exists the procuring entity is allowed, but not required, to initiate a closed tendering process of direct negotiations with that company.

The Finance Ministry, however, exercises increased control over the application of this preference at two instances in the process. First, Section 5.3.1 of TCL No. 4/1995 requires companies wishing to qualify as Bumiputera producers to pass an additional test beyond that required to qualify as Bumiputera company discussed infra. Notably, while the latter explicitly describes the criteria which must be met to qualify as a Bumiputera company, Section 5.3.1 states only that: “Producer status is given by the


245 See, Surat Pekeliling Perbendaharaan Bil. 4 Thn. 1995 [Treas. Circ. Let. No. 4/1995] § 5.3.1; See, also infra notes 340 et seq., and accompanying text.
Finance Ministry to companies which qualify.\footnote{Surat Pekeliling Perbendaharaan Bil. 4 Thn. 1995 [Treas. Circ. Let. No. 4/1995] § 5.3.1 [unofficial translation by author]; compare, infra notes 339 et seq. and accompanying text.} This appears to give the Finance Ministry unfettered discretion over whether a company will qualify as member of this class and, thus, for these extraordinary preferences.\footnote{Surat Pekeliling Perbendaharaan Bil. 4 Thn. 1995 [Treas. Circ. Let. No. 4/1995] § 5.3.1. Thus, it would be free to qualify, for example, a joint venture between a Bumiputera and foreign firm, if it believed that the operation of the joint venture would contribute to the development of the Bumiputera firm involved. On the other hand, it would also allow the Finance Ministry to qualify a firm controlled by political allies of the Finance Ministry, who may or may not be Bumiputera.} Additionally, whether a government entity is allowed to conduct direct, negotiated tenders, when only a single qualified Bumiputera producer exists is ultimately left to the Finance Ministry.\footnote{Surat Pekeliling Perbendaharaan Bil. 4 Thn. 1995 [Treas. Circ. Let. No. 4/1995] § 5.3.2; see, supra notes 193-98 and accompanying text.} While Section 5.3.2 appears to leave this decision to government entities, it “reminds” governmental entities that they must first “seek approval from the Finance Ministry” as required by generally applicable TIs, regarding exceptions, discussed supra.\footnote{See, Surat Pekeliling Perbendaharaan Bil. 4 Thn. 1995 [Treas. Circ. Let. No. 4/1995] §§ 5.3.2-5.3.3. It is interesting to note that these provisions refer to a tendering process “open to the circle of domestic producers” rather than just generally open. Surat Pekeliling Perbendaharaan Bil. 4 Thn. 1995 [Treas. Circ. Let. No. 4/1995] § 5.3.3. Given the current limitation of GP to domestically produced goods, this provision is not important. See, Surat Pekeliling Perbendaharaan Bil. 7 Thn. 2002 [Treas. Circ. Let. No. 7/2002] § 2. However, at the time of the promulgation of TCL No. 4/1995, only a price preferences apply.} However if because the Finance Ministry withholds such approval or the procuring entity itself decides not to enter into direct negotiations with the singular Bumiputera producer available, very large price preferences apply.\footnote{See, Surat Pekeliling Perbendaharaan Bil. 4 Thn. 1995 [Treas. Circ. Let. No. 4/1995] §§ 5.3.2-5.3.3. It is interesting to note that these provisions refer to a tendering process “open to the circle of domestic producers” rather than just generally open. Surat Pekeliling Perbendaharaan Bil. 4 Thn. 1995 [Treas. Circ. Let. No. 4/1995] § 5.3.3. Given the current limitation of GP to domestically produced goods, this provision is not important. See, Surat Pekeliling Perbendaharaan Bil. 7 Thn. 2002 [Treas. Circ. Let. No. 7/2002] § 2. However, at the time of the promulgation of TCL No. 4/1995, only a price preferences apply.} Again reflecting the
importance placed on increasing Bumiputera participation in manufacturing, the price preferences granted to Bumiputera producers are many times larger than those applicable to Bumiputera suppliers of goods and services. For contracts worth not more than RM 10 million (~US$ 2.63 million) Bumiputera producers are given a 10% price preferences, and thus a price advantage of up to RM 1 million (~US$ 263,000) over the lowest bid of a non-qualified tenderer. The price preference decreases after the value of the contract exceeds RM 10 million (~US$ 2.63 million), dropping to 5% for contracts between RM 10 million and RM 100 million (~US$ 2.63 million and ~US$ 26.3 million) and 3% for contracts over RM 100 million (~US$ 26.3 million). However, even at this reduced percentage, the price preference granted for tenders in the former category could be as much as RM 5 million (~US$ 1.316 million) and unlimited for tenders in the latter.

It should be noted that once the price of the goods exceeds RM 10 million, if a federal government entity is conducting the procurement, either on its own behalf or on preference applied to domestically produced goods, thus some ambiguity was likely created by this provision. See, Surat Pekeliling Perbendaharaan Bil. 13 Thn. 1989 [Treas. Circ. Let. No. 13/1989] Peraturan dan Peratusan Keutamaan Bagi Meningkatkan Penggunaan Barang-Barang Buatan Tempatan [Preferences Rules and Percentages for Elevating the Use of Goods Made Domestically] § 2.2 (Nov. 2, 1989).


behalf of a state, the contract-award decision will be made by the Finance Ministry, and if only a state governmental entity is involved, likely by state financial officials.\textsuperscript{255} Thus, the price preferences at this level, and indeed the choice whether or not to simply conduct a direct negotiated tender with the singular Bumiputera tenderer, would be left in their hands, rather than those of the procuring entity.

c. General Preferences for Bumiputera Suppliers of Goods and Services

General preferences for Bumiputera suppliers of goods and services are modest compared to those for Bumiputera producers, but still quite large in both absolute terms and in comparison to the level of analogous preferences in force prior to 1995.\textsuperscript{256} Like preference for Bumiputera producers, they involve both set asides and price preferences.\textsuperscript{257} However, set asides for suppliers are limited by the value of the contract in question; only contracts worth not more than RM 100,000 (~US$ 26,000) are reserved for Bumiputera suppliers.\textsuperscript{258} Similarly, the price preferences granted to Bumiputera suppliers are much lower than those granted to Bumiputera producers and are ultimately capped at contracts worth RM 15 million (~US$ 4 million).\textsuperscript{259}

\textsuperscript{255} See Arahan Perbendaharaan [Treas. Instr.] Nos. 198.1(a)-(b); 198.2 (1997).


\textsuperscript{257} Surat Pekeliling Perbendaharaan Bil. 4 Thn. 1995 [Treas. Circ. Let. No. 4/1995] §§ 5.1.1-5.2.1; See, supra notes 244-69 and accompanying text.


\textsuperscript{259} For contracts in the following ranges Bumiputera suppliers of goods and services are respectively given price preferences worth 10\%, 7\%, 5\%, 3\% and 2.5\%: RM 100,000 to
While these preferences are significantly less than those granted to Bumiputera producers of goods, they represent a significant increase over those priorly applicable. Preferences for Bumiputera providers of goods and services (which included producers as well as suppliers) from their initiation in 1974 until 1995, included no set asides for Bumiputera providers, tied price preferences to a significantly lower contract value range, and capped those price preferences at a much lower maximum. This increase appears to reflect the government’s increased focus in the 1990s on the need to development Bumiputera SMEs, rather than an attempt to adjust for inflation. Both the ten and five year development plans, which cover the period when the new preferences were issued, speak repeatedly about such a need, while inflation during the period between 1974 to 1995 was consistently low.

RM 500,000 (~US$ 26,000 to ~US$132,000); RM 500,000 to RM 1.5 mil. (~US$132,000 to ~US$ 395, 000); RM 1.5 mil. to RM 5 mil. (~US$ 395, 000 to ~US$ 1.316 mil.); RM 5 mil. to RM 10 mil. (~US$ 1.316 mil. ~US$ 2.362 mil.); RM 10 mil. to RM 15 mil. (~US$ 2.362 mil. to ~US$ 3.678 mil.). Surat Pekeliling Perbendaharaan Bil. 4 Thn. 1995 [Treas. Circ. Let. No. 4/1995] § 5.2.1.

Surat Pekeliling Perbendaharaan Bil. 7 Thn. 1974 [Treas. Circ. Let. No. 7/1974] § 1(iii) (under RM 50,000 (~US$ 13,000) – 10%; RM 50,000 (~US$ 13,000) to RM 100,000 (~US$ 26,000) – 7.5%; RM 100,000 (~US$ 26,000) to RM 1 mil. (~US$ 263,000) – 5%; RM 1 mil. (~US$ 263,000) to RM 5 mil. (~US$ 1.316 mil.) – 2%; over RM 5 mil. (~US$ 1.316 mil.) – no price preference).


Measured in terms of consumer price index inflation in Malaysia averaged only 1.6% in the 1970s, 1.9% in the 1980s, and 3.9% in the 1990s See, International Bank For Reconstruction and Development, World Economic Indicators 2002, tbl. 4.14; Mohd. Arif Abu Bakar, Principal Assistant Secretary, Ministry of Rural Development (Malaysia), Poverty Reduction in Malaysia, 1971-1995: Some Lessons, 77 (presented at the Regional Expert Meeting on Capacity-Building to Alleviate Rural Poverty held by the UNESCAP in Beijing in 1997) available at www.unescap.org/rural/doc/beijing_march97/malaysia.PDF.
**d. General Preferences for Bumiputera Works Providers**

General preferences for Bumiputera providers of works are the oldest of the various categories of preferences for Bumiputera providers and in many ways the least changed. The first preferences for Bumiputera works providers were promulgated in 1968 and provided for a set-aside of all contracts falling within the lowest value category of works and decreasing price preferences in contracts above that level, in a manner analogous to the current system of preferences for Bumiputera suppliers of goods and services. In 1974, in the first TCL to formalize Bumiputera preferences in all three sectors of GP, the set-aside for Bumiputera providers was raised to include all contracts up to RM 25,000 (~US$ 6,600) and the price preference was scrapped in favor of an additional set aside of 30% of the total value of works procured by each governmental entity in a year.

The current preferences maintain the set-aside of small contracts, but doubles the threshold value to RM 50,000 (~US$ 13,000) and coordinates it with schedule-based contracting rules. In addition, every governmental entity must still set-aside 30% of the

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total value of its works contracts per year for Bumiputera providers, but clarifies that this 30% is to be calculated exclusive of the small contracts already set-aside for them.\textsuperscript{267} As in the case of the 1974 rules, Bumiputera providers are still allowed to compete for the remaining 70% but on equal footing with all other providers.\textsuperscript{268} The only significant addition is the set-aside for Bumiputera providers of 50% of contracts worth between RM50,000 (~US$13,000) and RM350,000 (~US$92,000).\textsuperscript{269}

The relative stasis of preferences for Bumiputera providers of works likely relates to both the ultimate aims of the Malaysian development policies and issues connected to the division of authority among the entities in the federal government. First, according to government development plans, Bumiputera enterprises have over the years become over-concentrated in the construction sector, \textsuperscript{270} making increased incentives for their movement into the sector contrary to the preferences fundamental goal of “creating more

\begin{itemize}
\item \textsuperscript{267} Surat Pekeliling Perbendaharaan Bil. 4 Thn. 1995 [Treas. Circ. Let. No. 4/1995] §§ 6.1, 6.3.
\item \textsuperscript{269} Surat Pekeliling Perbendaharaan Bil. 4 Thn. 1995 [Treas. Circ. Let. No. 4/1995] §§ 6.4. Other than that the changes are mainly administrative. The 1995 rules require that preferences for Bumiputera providers in the context of contracts for “price cost sum” [sic], mechanical or expert work be calculate according to the preferences applicable to suppliers of goods and services, thus effectively transforming these sorts of things from works to services in the case of Bumiputera preferences. Surat Pekeliling Perbendaharaan Bil. 4 Thn. 1995 [Treas. Circ. Let. No. 4/1995] § 7.1. In addition, various supposedly explanatory sections regarding implementation of preferences in works projects are omitted greatly increasing clarity of the provisions. Surat Pekeliling Perbendaharaan Bil. 7 Thn. 1974 [Treas. Circ. Let. No. 7/1974] § 6.
\item \textsuperscript{270} Third Outline Perspective Plan, 2001-2010 §2.39 (April 3, 2001).
\end{itemize}
sustainable, self-reliant world-class Bumiputera entrepreneurs.” 271 Second, compared to manufacturing and even goods and services supplying, works enterprises contribute little to the goal of creating higher wage jobs for Bumiputera. 272 Most of the jobs created by works projects are manual in nature and thus not the types of jobs into which the government has desired Bumiputera move. 273 In addition, even where such preferences were successful in encouraging the creation of Bumiputera construction enterprises, it seems unlikely that such companies would be capable of competing in the “global environment” (a goal of the program) with the likes of giants such as Bechtel and Halliburton. 274

Their relatively flat growth, however, might also be traceable to the shared, rather than exclusive, authority which the Finance Ministry has over works projects. Unlike goods and services procurement where the Finance Ministry enjoys almost complete omnipotence, it must share authority over the administration of works projects with the Contractor Services Center in the Ministry of Entrepreneurial Development. 275 It could be that the Finance Ministry is disinclined to expand a system of benefits, which it does not exclusively control, for both legitimate concerns, regarding their potential abuse by


273 See, id.

274 MITI Statement, supra note 2 (discussing the role of preferences in GP in efforts to make domestic enterprises more competitive in “global environment.”)

other governmental agencies, and/or less legitimate desires to concentrate in itself access to benefits useful in patronage style politics.

*e. Preferences Administered Directly by Finance Ministry*

In addition to the generally applicable preferences, described *infra*, the TCL No. 4/1995 also notes, but does not describe, preferences granted by the Finance Ministry to Bumiputera providers in its administration of procurement under the “umbrella concept” and through central contracting activities. However, it gives no indication of their extent or form, but rather states simply: “Procurement under Central Contracting and the Umbrella Concept that is currently done will continue and preferences will be given to Bumiputera companies.” While this silence as to details is in line with other situations where the Finance Ministry retains for itself decision-making authority, such as Bumiputera producer qualification decisions and award decisions for high value contracts, in at least the case of “umbrella concept,” it may be born of necessity.

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276 See, generally Second Outline Perspective Plan, 1991-2000 § 1.67 (June 17, 1991) (“The role of public sector agencies and statutory bodies will be closely monitored to make them more accountable for their activities as well as to increase efficiency in the management and utilization of Government Resources.”).

277 For a discussion of the relationship between GP and patronage style politics in Malaysia see, e.g., *CASE, supra* note 218, at 111-14; *GOMEZ*(1994), *supra* note 212, at 6-26, 35, 60-61; *DONALD HOROWITZ, ETHNIC GROUPS IN CONFLICT* 666-669 (1985); *Gomez*(2003), supra note 102, at 77-80.


280 See, *supra* notes 209-12 and accompanying text (discussing contract award decisions by the Finance Ministry); *supra* notes 249-51 and accompanying text (discussing Bumiputera producer qualification decisions made by the Finance Ministry).
The “umbrella concept” is a government administered program that seeks to “increase Bumiputera participation in all sectors, including the manufacturing sector” by linking up smaller companies, which alone could not fulfill the product needs of mainly public (but also some private) institutions, but which in concert with one another could do so.\textsuperscript{281} It, thus, involves the coordination of a wide range of SMEs, which together have the right combination of capabilities necessary to produce the required product.\textsuperscript{282} The system is, therefore, by nature situational; the exact composition of companies for each project initiated under it will depend on what type of thing is needed as well as which firms are positioned to contribute to its production. In this context, it would arguably be difficult, if not impossible to establish preset price preferences and/or set-asides for Bumiputera providers.\textsuperscript{283}

However, analogous structural factors do not so easily explain the absence of specific information regarding preferences for Bumiputera providers in the context of central contracting.\textsuperscript{284} Central contracting involves the bulk contracting and/or purchasing by the Finance Ministry of items on behalf of all the various entities, making up the government.\textsuperscript{285} Generally the items involve are those used by all government offices,

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\textsuperscript{281} Sixth Malaysia Plan 1991-1995 § 4.54 (July 10, 1991); \textit{See, also id.}, §§ 4.02, 4.37, 4.39.

\textsuperscript{282} \textit{Id.}


\textsuperscript{284} \textit{See, Surat Pekeliling Perbendaharaan Bil. 4 Thn. 1995 [Treas. Circ. Let. No. 4/1995]} § 5.5.1.

such as office furniture and printing services, but also have included things like “Forensic (Geological) Engineering” services.\textsuperscript{286} When the Finance Ministry concludes a single contract on behalf of other governmental entities in this context, it merely takes the place of those governmental entities in the contracting process. Thus, nothing makes the description of preferences granted in this context more impractical than in any other.\textsuperscript{287}

\textit{f. Additional Preference for Malay Chamber of Commerce of Malaysia Members}

In addition to the preferences described \textit{supra}, which are available to all companies that qualify as Bumiputera companies under the criteria \textit{infra} (and in the case of producer preferences, the additional criteria set by the Finance Ministry),\textsuperscript{288} an additional preference, in place since 1982,\textsuperscript{289} is mandated for Bumiputera providers who are members of the MCCM.\textsuperscript{290} It establishes that, if all other things are equal between the bid of a Bumiputera tenderer, which is a MCCM member, and the bid of a Bumiputera


\textsuperscript{287} See, Arahan Perbendaharaan [Treas. Instr.] Nos. 286-300 (1997); See, also, e.g. Surat Pekeliling Perbendaharaan Bil. 8 Thn. 2002 [Treas. Circ. Let. No. 8/2002] Penggunaan Perkhidmatan yang Ditawarkan oleh Kumpulan Ikram Sdn Bhd. Use of Services that are Offered by Ikram Group Sdn. Bhd.] (July 1, 2002).

\textsuperscript{288} See, \textit{supra} notes 249-51 and accompanying text; \textit{infra} notes 314 et seq. and accompanying text.


tenderer, which is not, the member should be awarded the contract over the non-
member.291

The most legitimate explanation for the MCCM preferences relates to efforts by
the government (as part of a larger initiative known as “Malaysia Inc.”) to use
organizations such as the MCCM to further its aim of creating a viable BCIC.292 In this
regard, the Sixth Malaysia Plan, 1991-1995, states:

Another important measure that will be implemented during the Plan is the
development of a complementary and effective linkage between the role of
Bumiputera and industrial associations with that of government
institutions and trust agencies. The linkage will enable greater
coordination of commercial activities...and developing potential for more
strategic participation by Bumiputera in the modern sectors of society.293

While it is difficult how to see exactly how preferences for MCCM members would
directly contribute to these goals, it is arguable that they could do so indirectly by
encouraging the participation of Bumiputera in the MCCM, which in turn would make it
more representative of Bumiputera and thus a more effective partner for the
government.294


292 See, Likosky, supra note 113, at 16 (describing the close connections between the
private and public sectors which was part of this program). It is interesting to note that
this Malaysia Inc. was launched in 1983 and the preference for MCCM members was
established in 1982. Id.; Surat Pekeliling Perbendaharaan Bil. 3 Thn. 1982 [Treas. Circ.
Let. No. 3/1982].

293 Sixth Malaysia Plan 1991-1995 § 1.99 (July 10, 1991); See, also, e.g., Eighth
Malaysia Plan 2001-2005 § 3.72 (Apr. 23, 2001) (chambers of commerce “required” to
initiate programs to help Bumiputera); Second Outline Perspective Plan 1991-2000 §
4.29 (June 17, 1991).

A less legitimate (possible) explanation for this preference is that it is essentially a pay off to the MCCM for its participation in these programs and/or its political support of the ruling party. The connections between the Malay Chamber of Commerce and the ruling party have historically been quite strong with many individuals occupying positions in both.\textsuperscript{295} Thus, the preferences for MCCM may be a case of \textit{taking care of one’s own} and/or an attempt by the ruling members of the UMNO to increase their support among MCCM members.\textsuperscript{296} The latter possibility is supported by the fact that these preferences were first issued very soon after Mahathir took power and was engaged in efforts to consolidate his authority.\textsuperscript{297}

Somewhat less dastardly, MCCM preferences might also have been created as way to implement what Edmund Gomez has termed, Mahathir’s “pick a winner” strategy.\textsuperscript{298} This strategy involved a self-conscious favoritism, whereby Mahathir and/or other top officials individually chose to bestow advantages upon only those Bumiputera entrepreneurs, which in their minds, were most promising and thus most capable of using the advantages to their benefit.\textsuperscript{299} Indeed, while the Sixth Malaysia announced the

\textsuperscript{295} See, e.g., \textit{Horowitz, supra} note 280, at 668 (describing a power struggle involving allocation of special benefits that erupted between the head of government body and another ruling party politician who was also president of the MCCM) (1985); Fariq Rahman, \textit{Elyas Joins the Fight}, \textit{Malay Mail}, 62 (Apr. 17, 2003) (reporting the possible vice-presidential nomination of the Chairman of the MCCM).

\textsuperscript{296} It is interesting to note in this regard the actual award of contracts to MCCM branches which sometimes occurs. See, e.g. \textit{MCCM Labuan Gets Port Concession, New Strait Times}, 24 (Nov. 13, 1998); see, also, \textit{infra} notes 642 et seq. and accompanying text (discussing relationship between GP and patronage-style politics)

\textsuperscript{297} See, \textit{Case, supra} note 218, at 115-16.

\textsuperscript{298} Gomez(2003), supra note 102, at 81;

\textsuperscript{299} Gomez(2003), supra note 102, at 81;
government’s intention to “continue to make available the necessary institutional and financial resources to further support the development of BCIC,” it made clear:

    The support, however, will be designed and managed to encourage only the more enterprising individuals and businesses in order to promote viable Bumiputera interests and increase their presence in the economy.  

Possibly, it was assumed that membership in the MCCM would correlated with such a quality. However, even if it was this strategy which informed the granting of preferences to members of the MCCM, as Gomez has pointed out, it is often difficult to distinguish the strategy from what is traditionally understood as patronage-style politics.  

g. Qualification Criteria

    TCL No. 4/1995 describes three different qualification criteria: 1) for Bumiputera companies; 2) for joint ventures between domestic and foreign constituents; and 3) for joint ventures between Bumiputera and foreign constituents. However, while qualification under the first criteria clearly entitles an entity to the preferences described supra (either directly or as an initial condition), it is not completely clear what role the latter two criteria play. All of the provisions in TCL No. 4/1995, which describe preferences for Bumiputera providers in GP, refer to their respective recipients as either

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300 Sixth Malaysia Plan 1991-1995 § 1.97 (July 10, 1991) [emphasis added]; see, also, Eighth Malaysia Plan 2001-2005, § 3.51 (Apr. 23, 2001) (“opportunities will continue to be provided to Bumiputera individuals and companies with potential “); Mid-Term Review of the Eighth Malaysia Plan 2001-2005 § 1.57 (stating that contracts allocated to Bumiputera under the proposed 60% set-aside “will only be allocated to credible, competent Bumiputera entrepreneurs “)(Oct. 30, 2003).

301 See, Gomez(2003), supra note 102, at 81


“Bumiputera” or “Bumiputera companies.”\textsuperscript{305} Nowhere does it describe any preferences, for which companies qualifying under either joint venture criteria are specifically eligible.\textsuperscript{306} Further, the definition section explicitly distinguishes between entities, which qualify as Bumiputera companies, and those, which qualify as domestic/foreign joint ventures or Bumiputera/foreign joint ventures.\textsuperscript{307} Finally, the respective criteria for both types of joint ventures are less demanding, in terms of Bumiputera participation, than the criteria for a Bumiputera company.\textsuperscript{308} Thus, it appears that the two joint venture criteria do not immediately relate to rest of the provisions contained in the TCL, but rather, were included in it for reasons of administrative expediency.\textsuperscript{309} However, this cannot be stated with certainty.

\textit{i) Definition of Bumiputera Companies}

Two basic types of entities qualify as Bumiputera companies: 1) Bumiputera Trust Agencies, and, conditionally, their subsidiaries;\textsuperscript{310} and 2) companies which fulfill six criteria, the substance of which reflect not only their primary and secondary policy


\textsuperscript{306} Surat Pekeliling Perbendaharaan Bil. 4 Thn. 1995 [Treas. Circ. Let. No. 4/1995].


\textsuperscript{308} Surat Pekeliling Perbendaharaan Bil. 4 Thn. 1995 [Treas. Circ. Let. No. 4/1995] §§ 2.1, 2.2, 2.3.

\textsuperscript{309} Analogous provisions are contained in Section 10, which cancels several older TCLs, including many that had nothing to do with preferences for Bumiputera providers in GP. See, Surat Pekeliling Perbendaharaan Bil. 4 Thn. 1995 [Treas. Circ. Let. No. 4/1995] § 10.

purposes, but also efforts by the government to stem their abuse. These criteria are: 1) at least 51% of the company’s equity must be in the hands of Bumiputera, with individual Bumiputera share ownership greater than that of non-Bumiputera; 2) the company’s Head Executive, Management Director or Head Manager, and other “key post”[sic] must be held by Bumiputera; 3) at least 51% of the company’s workers must be Bumiputera; 4) at least 51% of the company’s board of directors must be Bumiputera; 5) financial management must be controlled by Bumiputera; and 6) organizational and firm management charts must fully indicate Bumiputera control.

The first three criteria of this list, with some slight differences, are the same as those included in the first comprehensive instrument promulgating preferences for Bumiputera providers in GP. Their substance, in large part, reflects the primary purpose to which these preferences have been and continues to be put, viz. creating a viable BCIC.

The equity requirements aim to ensure that the program will contribute to correcting inequities in the distribution of corporate equity, hopefully both encouraging some non-Bumiputera-owned companies to increase the shares of Bumiputera ownership

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as well as encouraging the growth of Bumiputera owned companies that already meet this standard.\textsuperscript{315} The management positions requirement reflect \textit{inter alia} the government’s desire to restructure labor patterns to correct Bumiputera under-representation in the upper levels of firm hierarchies.\textsuperscript{316} Finally, even the general labor requirements reflect the program’s social restructuring purpose, by encouraging the creation of opportunities for poor Bumiputera rural manual laborers to shift into the more lucrative and respected urban/industrial sector, an explicit part of the social restructuring objective.\textsuperscript{317} By requiring companies, which seek to benefit from the preferences described \textit{supra}, to fulfill these conditions, the government has employed, and continues to employ, preferential purchasing in GP as means to create a class of prosperous, successful Bumiputera, as owners, managers, and urban workers, whose existence debunks stereotypes “of race...[and] economic function.”\textsuperscript{318}

Secondarily, these criteria, particularly those regarding employment, reflect an effort by the government to use the preferences as a tool in poverty eradication efforts.\textsuperscript{319} Increasing opportunities for Bumiputera workers in the urban/industrial sector, not only lessens the identification of Bumiputera with lower rung rural economic activities, but

\begin{footnotes}


\item[318] Second Malaysia Plan, 1971-1975 frwrd. (June 25, 1971); \textit{see, also}, Chua, \textit{supra} note 207, at 357 (discussing the importance of creating Bumiputera tycoons).

\end{footnotes}
also raises the economic position of those workers and those who depend on them.\textsuperscript{320} Further, even the other two factors, while much more clearly focused on social restructuring objectives, \textsuperscript{321} arguably indirectly contribute to poverty eradication efforts, encouraging the development of a wealthy class of Bumiputera, arguably, increases the likelihood that money will circulate through the community through, for example, formal and informal family networks.

The three novel criteria, while marginally relate directly to the social restructuring objectives just described, more clearly relate \textit{indirectly} to these objectives, by aiming to prevent abuse of the system to ensure actual control over recipient companies rests in the hands of Bumiputera.\textsuperscript{322} Over the years in Malaysia, there has developed a phenomenon, described widely by the somewhat offensive term, “ali baba,” wherein a Bumiputera shell company is formed as a front to take advantage of government preferences, while sub-contracting all of the work to a Chinese-owned company, leaving the Bumiputera participants with “no role beyond collecting a fee for the use of their name.”\textsuperscript{323} Analogously, a number of companies have been created in which “the functional company directors were still predominantly Chinese, whereas Bumiputeras [sic] merely


\textsuperscript{323} \textit{See}, e.g., HOROWITZ, \textit{supra} note 280, at 666 (explaining further that “ali” representing the Bumiputera component and “baba” representing the Chinese); \textit{see, also, e.g.,}, Chua, supra note 207, at 352; GOMEZ(1994), \textit{supra} note 212, at 8.
functioned in symbolic capacities.” According to Edmund Gomez, upon taking office, Mahathir recognized the danger these phenomena posed to the government’s long-term goal of developing an independent, viable, and entrepreneurial BCIC, and so committed himself to addressing the issue. The novel three criteria, as well as changing the qualification process to take back from individual procuring entities the authority to make individual Bumiputera qualification decisions, discussed infra, appear to be part of this effort.

While elements of the original criteria, provided some obstacles to the establishment of these sorts of arrangements, the novel three provide considerably more. As a first step, requiring the majority of a company’s board of directors to be Bumiputera addresses the most blatant sorts of strategies, whereby the equity and management requirements listed supra are nominally fulfilled, but true control over the company remains in the hands of non-Bumiputera directors. Requiring financial

324 GOMEZ(1994), supra note 212, at 8, see, also, generally, Chua, supra note 207, at 352.
325 GOMEZ(1994), supra note 212, at 8, see, also, generally, Chua, supra note 207, at 352.
326 See, infra notes 441 et seq. and accompanying text.
330 See, supra notes 317 et seq. and accompanying text.
control to rest in the hands a Bumiputera reinforce this step by making the formalistic satisfaction of it by, for example, packing the board with Bumiputera that lack real authority, less possible.\textsuperscript{332} The final novel requirement, that company management and organizational charts reflect Bumiputera authority, allows the Finance Ministry or, in the case of works, the CSC, to easily evaluate whether the other requirements, described \textit{supra}, are properly fulfilled.\textsuperscript{333} As a secondary matter these novel criteria further the goal of eliminating “stereotypes of races and economic function,” by ensuring that Bumiputera are elevated in more than a formal manner into positions of authority.\textsuperscript{334} More fundamentally, however, they seek to ensure that the companies, which are given these large preferences, are owned and controlled by Bumiputera, and so contribute to the goal of creating a genuine class of independent, Bumiputera entrepreneurs.\textsuperscript{335}

The other entities that qualify under TCL 4/1995 (as under prior TCLs) for Bumiputera GP preferences, are Bumiputera Trust Agencies, which have been created by

\textsuperscript{332} See, Surat Pekeliling Perbendaharaan Bil. 4 Thn. 1995 [Treas. Circ. Let. No. 4/1995] § 2.1.1.5; see, also, GOMEZ(1994), \textit{supra} note 212, at 8.


\textsuperscript{334} See, Surat Pekeliling Perbendaharaan Bil. 4 Thn. 1995 [Treas. Circ. Let. No. 4/1995] §§ 2.1.1.2, 2.1.1.5, 2.1.1.6. While this paper does not seek to evaluate effectiveness of the preference system, in part or in whole, it is interesting to note that, according to at least one commentator, these sorts of abuses of the Bumiputera preference system have largely been controlled through government efforts in recent years. Chua, supra note 207, at 352.

\textsuperscript{335} See, Surat Pekeliling Perbendaharaan Bil. 4 Thn. 1995 [Treas. Circ. Let. No. 4/1995] §§ 2.1.1.2, 2.1.1.5, 2.1.1.6; Sixth Malaysia Plan 1991-1995 §§ 1.109, 1.99 (July 10, 2001); See, also Second Outline Perspective Plan, 1991-2000 §§ 1.52 (“[I]mplementation of [the Bumiputera preference] system will be improved to ensure that only Bumiputera with potential, commitment and a good track records will be given assistance so that the objectives of creating a viable and resilient BCIC under the NDP are achieved.”), 4.53 (June 17, 1991).
the state or federal government in the form of either statutory bodies or government-owned companies to increase Bumiputera participation in business. Edmund Gomez and Jomo K.S. define these entities as “public enterprises...ostensibly [created to] accumulate wealth on behalf of the entire [Bumiputera] community, …advancing the Bumiputera share of corporate equity by purchasing and holding shares on behalf of the community.” As this definition suggests, Bumiputera Trust Agencies operate mainly in the form of holding companies, and thus are unlikely to be directly involved in the provision of goods or services, which could be procured by a governmental entity.

However, in many instances these entities’ subsidiaries are involved in industries, especially manufacturing, which produce products that governmental entities might procure. One of the, albeit secondary, roles of these subsidiaries is to “provide human resource development and transfer technology to Bumiputeras [sic].” However the large majority of these companies are only partially owned by a trust agency and in many instance likely do not meet the criteria applicable for qualification as Bumiputera

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337 GOMEZ & JOMO, supra note 226, at 30.

338 *Id.*, at 30-32.

339 *Id.*, at 29-39.

340 *Id.*, at 32.
companies described *supra*. Thus, in light of the preferences’ principal purpose of creating a viable BCIC, and the advantage, which such subsidiaries could likely have over a traditional Bumiputera company in terms of financing and connections, the advisability of granting these subsidiaries preferences that put them in even competition with the latter seems questionable.

In the original TCL formalizing Bumiputera preferences in GP, this issue of Bumiputera trust agency subsidiary qualifications was left unclear. TCL 4/1995, however, appears to recognize the problem somewhat, providing that requests that Bumiputera status be given to these subsidiaries be dealt with “on case by case basis.” However, it is not completely clear who makes this determination regarding status, the procuring government entity itself, the Finance Ministry or in the case of works, the CSC, nor what criteria is involved. Whoever has this authority, significant issues of conflict

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341 *Id.*, at 30-39; *See, supra* notes 314 et seq. and accompanying text for discussion of Bumiputera company qualification criteria.

342 *See, supra* notes 224 et seq. and accompanying text.

343 *See, generally, JAIN, supra* note 84, 833-35 (discussing organization and control trust agencies and their subsidiaries and their relationships with controlling governmental entities).


346 *See, Surat Pekeliling Perbendaharaan Bil. 4 Thn. 1995 [Treas. Circ. Let. No. 4/1995]§ 4.2. While the strong language of Section 3.1, discussed *infra*, suggests that this authority to make this decision resides with the Finance Ministry or Contractor Service Center, the language of Section 4.2, arguable suggests it is granted to procuring entities in the context of individual procurement decisions. Surat Pekeliling Perbendaharaan Bil. 4 Thn. 1995 [Treas. Circ. Let. No. 4/1995]§ 4.2 (“For the subsidiaries of Trust Agency requests for Bumiputera status should be dealt with on a case by case basis.”) [unofficial translation by author]. In addition, assuming the argument made *infra* that retention of
of interest could be raised, since these Ministries often control the parent entities of these subsidiaries, which in either case, could be that which is deciding whether the subsidiary is granted Bumiputera status.\textsuperscript{347}

\textit{ii) Joint-Venture Definitions}

Provisions in TCL No. 4/1995 also define joint ventures between domestic and foreign companies, and between Bumiputera and foreign companies.\textsuperscript{348} As discussed \textit{supra}, it does not appear that qualification under either of these criteria automatically entitles an entity to the preferences, which TCL No. 4/1995 describes.\textsuperscript{349} Rather, it seems they are part of a different but related effort, announced in the Sixth Malaysia Plan, to “encourage the establishment of genuine joint-ventures between Bumiputera and non-Bumiputera or foreigners.”\textsuperscript{350} In regards to their substance, the criteria for a domestic/foreign joint venture require that: 1) it be formed in Malaysia; 2) foreign equity qualification decision authority was motivate by the executive’s desire to control ali baba and analogous abuses, there is little reason for a similar retention of authority in this context.

\textsuperscript{347} See, JAIN, \textit{supra} note 84, at 450-51 (discussing the authority structure of trusts and their subsidiaries). For example Pernas, one of the largest of these entities “is controlled by the Finance Ministry Inc., the Treasury’s holding company.” GOMEZ & JOMO, \textit{supra} note 226, at 32.


\textsuperscript{349} See, \textit{supra} notes 244 et seq. and accompanying text.

\textsuperscript{350} Sixth Malaysia Plan 1991-1995 § 1.99 (July 10, 2001). Bumiputera companies are eligible for a number privileges in addition to preferences in GP, in which these criteria might be more directly relevant. \textit{see, e.g.} Eighth Malaysia Plan 2001-2005 § 3.51 (preferences for Bumiputera in privatizations), 3.22 (preferences form Bumiputera in vendor programs), 3.33 (preferences for Bumiputera in franchise development program and venture capital schemes). Further, it is very possible that these provisions are invoked in negotiations between the government foreign and non-Bumiputera firms for the fulfillment of contracts, which a Bumiputera is not able to fulfill on its own to fulfill.
be not more than 30%; 3) Bumiputera equity be not less than 30%; and 4) the makeup of
the joint venture company’s board of directors, management and work force reflect
equity ownership patterns. The definition for Bumiputera/foreign joint ventures
requires that: 1) the joint venture company be formed in Malaysia; 2) Bumiputera citizens
own at least 51% of the joint venture’s equity; and 3) the composition of the joint
venture’s board of directors, management and labor force reflect ownership patterns.

2. Preferences for Domestic Providers

The other major preference program in Malaysian GP is one which favors
domestic (defined broadly) providers. For many years, the program focused mainly on
aiding the development of domestic SMEs, by concentrating preferences in lower-value
contracts where SMEs could best compete. While this focus is some ways analogous to
preference programs favoring domestic SMEs in GP, which have operated for many
years in a wide-ranging number of countries (including in some such as the U.S., which
has demanded an exception from the GPA’s MFN obligations in order to continue the

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351 Surat Pekeliling Perbendaharaan Bil. 4 Thn. 1995 [Treas. Circ. Let. No. 4/1995] § 2.2.1.1

352 Surat Pekeliling Perbendaharaan Bil. 4 Thn. 1995 [Treas. Circ. Let. No. 4/1995] §§ 2.3.1.1, 2.3.1.2.


program),\textsuperscript{355} it has a particular importance in light of the NEP’s underlying goal of creating national unity.\textsuperscript{356}

While the two major prongs of the NEP’s strategy to achieve national unity focus on improving the socioeconomic position of the Bumiputera majority, the government has recognized that to be successful in creating unity they must be “implemented in such a manner that no one [is] deprived of his rights, privileges, income, job, or opportunity.”\textsuperscript{357} Thus, the NEP and its successors have always predicated their distributive strategies on “increasing opportunities for \textit{all} Malaysians,” from which an increased portion could be allocated to Bumiputera without a corollary decrease in the welfare of other groups.\textsuperscript{358} Chief among the strategies for achieving this predicate condition is a “rapidly expanding economy” made possible by the peace and stability bought by the NEP’s two prong distributive strategy.\textsuperscript{359} However, programs, like preferences for \textit{all} domestic providers, also play a role, first, by mitigating some of the negative impact of Bumiputera preferences on other domestic providers and, second, if

\textsuperscript{355} See Agreement on Government Procurement, April 15, 1994, WTO Agreement, Annex WTO Agreement, Annex 4, United States Annex to Appendix 1, General Notes, Note1 [herein after GPA]; See CHRISTOPHER MCCRUDDEN, \textit{Buying Social Justice}, chap. 8, p. 27 (forthcoming 2004).


\textsuperscript{357} Second Malaysia Plan 1971-1976, § 3 (June 25, 1971).

\textsuperscript{358} Second Malaysia Plan 1971-1976, § 3 (June 25, 1971) (emphasis added); See, \textit{also} Second Malaysia Plan 1971-1976, §§ 20, 140 (“The strategy is founded on the philosophy of active participation not on disruptive redistribution.”) (June 25, 1971)

\textsuperscript{359} Second Malaysia Plan 1971-1976, § 3 (June 25, 1971) (emphasis added).
successful in their stated goal, by “promot[ing] of domestic industry,” which would benefit all Malaysians.\footnote{Mahathir Budget Speech, supra note 73, ¶ 99.}

In 1995-96, the purposes behind preferences for domestic providers in GP was expanded to include the addressing of the balance of payments (BoP) concerns, and thus the trend towards reduction of these preferences was reversed.\footnote{See, Surat Pekeliling Perbendaharaan Bil. 4 Thn. 1996 [Treas. Circ. Let. No. 4/1996], Penggunaan Barang-barang Buatan Tempatan Dalam Perolehan Kerajaan [Use of Domestically Made Goods in Government Procurement] (Apr. 12, 1996); Surat Pekeliling Perbendaharaan Bil. 2 Thn. 1995 [Treas. Circ. Let. No. 2/1995], Tatacara Penyediaan, Peniliaan dan Penerimaan Tender [Tender Preparation, Evaluation and Acceptance] §4.1.1 April 10, 1995). Though, a direct relationship is difficult to establish, it is interesting to note that this escalation in domestic preference levels correlated with the initiation of work on the possibility of a TGP agreement. See, supra notes 3 et seq. and accompanying text.}

The last major applicable TCL issued prior to 1995 had cut the price preference granted to domestically produced goods by half, stating that the Finance ministry had determined that the current price preferences were “too high.”\footnote{See, Surat Pekeliling Perbendaharaan Bil. 13 Thn. 1989 [Treas. Circ. Let. No. 13/1989] Peraturan dan Peratusan Keutamaan Bagi Meningkatkan Penggunaan Barang-Barang Tempatan [Preference Rules and Percentages for Elevating the Use of Domestic Goods] §§ 1, 2 (Nov. 11, 1989) [unofficial translation by author].} However, in line with the conclusions of an assembly of Ministers in September, 1995 that the use of domestically made goods by the construction industry would “lessen the balance of payments deficit,” and so preferences should be increased in order to encourage this.\footnote{Surat Pekeliling Perbendaharaan Bil. 4 Thn. 1996 [Treas. Circ. Let. No. 4/1996] § 2 [unofficial translation by author].} In the midst of the Asian currency crisis of 1996-97 that soon followed, and in which BoP issues played a major role, the
preferences were further increased, with BoP concerns listed among the primary motivations for the change.\textsuperscript{364}

\textit{a. Current Level and Structure of Preferences}

The current level and structure of domestic provider preferences reflect these broader purposes, to which they are now put. As of June of 2002, except in limited circumstances, all governmental entities and their contractors must use domestic service providers and domestically produced goods in GP,\textsuperscript{365} and must employ only domestic works contractors.\textsuperscript{366} Foreign alternatives, in all cases, can only be used when a domestic source is unavailable.\textsuperscript{367}

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\textsuperscript{365} See, Surat Pekeliling Perbendaharaan Bil. 7 Thn. 2002 [Treas. Circ. Let. No. 7/2002] § 2 (amending TI 169.2(a) to read: “Domestic Materials/Goods/Services should be fully used by agencies in the context of every government procurement. Procurement via importation will only be considered after it is certain that it cannot be procured in a domestic manner.”). In doing so, the Treasury resolved an apparent contradiction it had created in 1997, when it simultaneously released TI 169.2(a), which purported to effect price preferences for domestic providers inversely related to the valued of the contract, and TCL No. 6/1997, which purported to restrict international tendering to instances where domestic sources were unavailable. See, Arahan Perbendaharaan [Treas. Instr.] No. 169.2(a) (1997); Surat Pekeliling Perbendaharaan Bil. 6 Thn. 1997 [Treas. Circ. Let. No. 6/1997], Dasar Perolehan Kerajaan Mengenai Barang Import Dan Penggunaan Perkhidmatan Asing [Government Procurement Policy Concerning Imported Goods and the Use of Foreign Services] § 4.1 (Sep. 22, 1997).
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\textsuperscript{366} Surat Pekeliling Perbendaharaan Bil. 2 Thn. 1995 [Treas. Circ. Let. No. 2/1995] § 4.1 (“All work tenders should be invited domestically except for situations like that described in paragraph 4.1.3.”).
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In the case of goods,\textsuperscript{368} unavailability is defined in fairly narrow terms, only when: either (i) there are no domestically made goods of the required class/grade; (ii) the required goods cannot be replaced with domestically produced goods; or (iii) there is a national shortage of the required goods.\textsuperscript{369} Should an entity decide that because of the existence of one or more of these conditions, it must procure foreign-made goods, and those goods’ value is more than RM50,000 (~US$13,000), it must get prior approval.\textsuperscript{370} However, in line with BOP concerns, the governmental entity from whom it must seek approval depends on whether the good already exists in the country or must be imported for the benefit of the procuring entity. In the former case, like most cases where exceptions to GP rules are sought,\textsuperscript{371} Finance Ministry approval is necessary, whereas in the latter case, it is necessary to seek approval by the Ministry of International Trade and Industry (MITI), the Ministry in charge of \textit{inter alia} dealing with BOP of issues.\textsuperscript{372}

In the case of works, the rules do not supply similarly detailed criteria for unavailability.\textsuperscript{373} However, the rules take a pragmatic approach when there is no

\textsuperscript{368} Notably, the rules do not define unavailability in the case of services. See, Surat Pekeliling Perbendaharaan Bil. 7 Thn. 2002 [Treas. Circ. Let. No. 7/2002].


\textsuperscript{371} See, \textit{supra} notes 195-201 and accompanying text (discussing general exception procedures from GP tendering and contract award rules).


domestic provider that has the capacity to fulfill the contract. In such cases, the government entity is required to first attempt to award the contract to a joint foreign/domestic venture, the rules noting the benefits in terms of technology transfers, etc. which such joint ventures often produce. But if there is no domestic provider capable of completing the work alone and the implementation of the project through a joint venture arrangement would “difficult,” the entity may award the contract to a foreign company.

b. Pragmatic Definition of “Domestic”

The pragmatic approach taken in regards to situations where a domestic works provider is not capable of fulfilling the contract is continued in the respective definitions of “domestic” in the cases of both works and goods/services. Malaysia has long recognized the role foreign investment, directly or through joint venture arrangements, could play in its development of a domestic industrial base, especially in the area of high-tech manufacturing. Definitions of “domestic” in the context of GP reflect this.

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375 Surat Pekeliling Perbendaharaan Bil. 2 Thn. 1995 [Treas. Circ. Let. No. 2/1995] § 4.1.2 (“For the goal of encouraging technology transfers and participation of local contractors in work where the local contractor does not have the expertise or capacity, such work tenders should be invited from joint ventures between local firms and international firms.”) [unofficial translation by author].


378 See, e.g., Third Outline Perspective Plan, 2001-2010 §§ 5.39, 5.45, 7.05 (discussing the role, and encouragement, of transfers of “new and emergent technologies” in
In the case of works projects, the definition of a “domestic” provider depends explicitly on the value of the contract, the required amount of Malaysian citizen involvement decreasing inversely with the value of the project.\textsuperscript{380} Contracts for works valued at less than RM 10 million (~US$ 2.63 million) are strictly limited to companies 100% owned by Malaysian citizens, except when one is not capable of performing it alone as discussed \textit{supra}.\textsuperscript{381} As the value of the contract increases, however, those requirements loosen until, in the case of contracts valued at over RM25 million (~US$6.58 million), any company listed on the Kuala Lumpur Stock Exchange (KLSE) and/or formed in Malaysia as a joint venture, where foreign owned equity does not exceed 49% and the majority of the directors are Malaysia citizens, would qualify.\textsuperscript{382} Given recently announced plans to eliminate the requirement that every company listed on KSLE allocate 30% of its shares to Bumiputera, and in the absence of any other generally applicable domestic ownership requirements, this provision would appear to allow even wholly foreign-owned, independent companies or subsidiaries to qualify for


\textsuperscript{381} Surat Pekeliling Perbendaharaan Bil. 2 Thn. 1995 [Treas. Circ. Let. No. 2/1995] § 4.4.1.1; \textit{see, supra} notes 378-80 and accompanying text.

domestic preference at this level.\(^{383}\) Of course, it should be noted that, as in the case of preferences for Bumiputera producers which are applicable in the context of high value tenders, as a result of the general distribution of contract-award decision-making authority, only the Finance Ministry and/or state finance officials would generally, enjoy the flexibility of these rules.\(^{384}\)

In the context of goods/materials and services, the qualification criteria in some ways exclude even less foreign participation.\(^{385}\) While government entities and their contractors are required to procure only goods/materials produced in Malaysia, unless unavailable, even products, which were only assembled in Malaysia qualify.\(^{386}\) Further, in order to qualify as a domestic producer, the only requirement is that the company be registered under the Companies Act.\(^{387}\) The Companies Act, basically, only requires establishment formalities in Malaysia, and allows for the registration of both branches and wholly owned subsidiaries of foreign companies\(^{388}\) (though, according to at least one source, there are often more informal obstacles placed in regards to the former than the


\(^{384}\) See, supra notes 239 and accompanying text.


\(^{388}\) See, Companies Act 1965 (Act 125) §§ 119, 329 et seq. It should be noted here, as well, should a foreign-owned provider decide to establish itself independently in Malaysia and list its shares on the KLSE, it likely soon would not be required to allocate any portion of its shares to Bumiputera shareholders. See, Jaysankaran, *supra* note 387, at 44.
latter).\(^{389}\) Thus, even a branch or wholly owned subsidiary of a foreign company, which assembled in Malaysia parts that it made elsewhere would qualify for this preference.\(^{390}\)

While the approaches just discussed evidence a pragmatic approach towards the desires to both protect domestic industry and encourage foreign investment, they should not be misinterpreted as evidence of the lack of importance placed by the Malaysian government on domestic-provider preference policies and the objectives to which they are directed. As described below, these rules are enforced in extraordinarily strict manner, which rather demonstrates the opposite.\(^{391}\)

**D. Control – Finance Ministry, Provider, Citizen**

At a meeting of WGTGP in 2001, the Malaysian representative stated, “a government can be accountable to its citizens without being accountable to the world.”\(^{392}\)

Setting aside the arguments about sovereignty necessarily implied by the statement and whether it is, in fact possible, it does not describe the current situation of GP in Malaysia. Significant mechanisms exist, which allow the Finance Ministry to monitor and control the GP activities of other governmental entities to ensure that they obey Treasury issued GP regulations issued. However, remedies for aggrieved tenders who believe that the Finance Ministry or another governmental entity has wronged them at any of the various stages of the tendering process (registration, tendering, award), are practically non-


\(^{391}\) See, infra.

\(^{392}\) See, e.g. Report on the Meeting of 4 May 2001, Note by Secretariat, WT/WGTGP/M/12 § 22 (June 18, 2001).
existent. Further, the more general controls, which ensure in a liberal democracy that the actions of an administrative agency will be contained within bounds of the prerogatives granted to it by democratically elected bodies, are similarly absent. Thus, the Finance Ministry is practically free to rule GP in Malaysia as it sees fit and the GP activities of other governmental entities are subject, for the most part, only to its control.\textsuperscript{393}

1. Control by the Finance Ministry

Finance Ministry control over the GP system can be broken into three basic categories. First is control as rule-maker, issuing rules which must be followed by all governmental entities in Malaysia (except possibly government-owned firms) in the context of GP, including the application of preferences for Bumiputera and other domestic providers.\textsuperscript{394} Second is control as decision-maker: making provider registration decisions, both, generally, and in regards to preference qualification;\textsuperscript{395} directly awarding contracts for high value tenders and, where no appropriate PB exists or no PB consensus decision can be reached, middle-sized contracts;\textsuperscript{396} approving negotiator services awards;\textsuperscript{397} and directly or indirectly shaping the composition of PBs and procurement

\textsuperscript{393} The minor exception is the monitoring role of PBs, which itself is significantly controlled by the Finance Ministry. See, supra notes 153-64 and accompanying text.


\textsuperscript{396} Arahan Perbendaharaan [Treas. Instr.] No. 198.1(c) (1997).

\textsuperscript{397} Arahan Perbendaharaan [Treas. Instr.] No. 186 (1997).
The third type of control, and the subject of this section, is control as enforcer. Through a series of rules and processes the Finance Ministry ensures that those in charge of the GP follow Finance Ministry rules, and in the context of Bumiputera preferences, that the recipients do not abuse the system.

This must be qualified as presumably the case, because information on the specific actions taken by the Finance Ministry in this regard is essentially only available if the Finance Ministry decides to release it. Malaysia has no law similar to the U.S. Freedom of Information Act. Rather, the most important law in Malaysia, dealing with government information, the Official Secrets Act (OSA), (inherited from Malaysia’s English colonial master) works in the opposite direction. The OSA gives Ministers essentially unlimited discretion to designate any information they choose “secret,” directly or through delegation to any public officer (including those in quasi-private institutions, such as government-owned companies). Once classified as secret, its

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398 Arahan Perbendaharaan [Treas. Instr.] Nos. 170.3(c); 192.2, 192.3 (1997).

399 See, generally Second Outline Perspective Plan, 1991-2000 § 1.67 (“The role of public sector agencies and statutory bodies will be closely monitored to make them more accountable for their activities as well as to increase efficiency in the management and utilization of Government Resources”), p. 107 (discussing a change in policy away from simply encouraging the participation of Bumiputera in business to promoting “quality of participation.”) (June 17, 1991).

400 JAIN, supra note 84, at 623.


402 Official Secrets Act, 1972 (Act 88) § 2(1) (defining “official secrets” to include inter alia “Cabinet documents, records of decisions and deliberations including those of Cabinet committees” and “any other official document, information and materials as may be classified as ‘Top Secret’, ‘Secret’, ‘Confidential’ or ‘Restricted’ as the case may be, by a Minister...or such public officer appointed under section 2B.”) (Sep. 26, 1972). See, also JAIN, supra note 84, at 611-619 (discussing inter alia the following case which upheld designation as secret purely administrative material: Lim Kit Siang v. Public
unauthorized distribution (even inadvertent) or knowing receipt is punishable by a prison sentence of one to seven years. ⁴⁰³ According to K.S. Jomo, in operation this has meant that “[a]lmost everything has become confidential. As far as the government is concerned when in doubt, chop it as secret.” ⁴⁰⁴ As will be discussed infra, the effect of this law extends far beyond efforts to investigate the Finance Ministry’s monitoring activities into all efforts by providers and citizens to hold officials in the Finance Ministry and other governmental entities accountable for their actions in GP. ⁴⁰⁵

a. Enforcement of Generally Applicable GP Rules

The principle means by which the Finance Ministry ensures that government entities and their delegatee obey GP rules is to require them to submit reports of contract-award decisions, including the process by which they were reached; the reports are then subject to audit. ⁴⁰⁶ Additionally, in the case of contracts valued between RM 20,000 and RM 50,000 (~US$ 5,200 and ~US$ 13,000) (which are decided by procurement committees), if the committee awards

Prosecutor [1979] 2MJL 37, 37 (“Broadly speaking, it may be said that secret official information within the meaning of section 8 of the Act is really the government information the confidentiality and secrecy of which depends upon the manner in which the government treats the information.”), and already public information: Datuk Haji Dzulkifli v. Public Prosecutor [1981] 1 MJL 112, 113 (“[A] document does not lose its status as a secret document merely because…[it] happens to contain information which is already known to the public.”).


⁴⁰⁵ See, infra.

⁴⁰⁶ Arahan Perbendaharaan [Treas. Instr.] Nos. 170.3(b), 189.3 (1997).
the contract to any but the lowest bid, it must explain its reasons for doing so in
the body of the award.407

However, Finance ministry control is also effected through provisions in
both the Financial Procedure Act (FPA) and TI No. 167, which make government
employees pecuniary responsible for losses incurred through their improprieties in
the GP process.408 Article 18 of the FPA states *inter alia* that “any person who is
or was in the employment of the federal Government or the Government of the
State” is responsible for the reimbursement of any losses incurred as the result of
his or her failure to collect monies owed to the government, his or her improper
payment of government monies, his or her failure to keep appropriate records, or
his or her failure to make, or delay in making, any payment owed by the
government.409 The authority to determine that such an offence has been
committed and the amount, which must be reimbursed, is left to the Public
Service Commission,410 an executive agency established under Article 144(1) of
the Federal Constitution.411


408 See, Financial Procedures Act, 1957 (Act 61 amended 1972) §§ 18-21; Arahān


411 Federal Constitution Article 144(1).
In addition, TI No. 167.1 makes the Controlling Official in each governmental entity personally responsible for reimbursing any losses incurred in relation his or her supervision, guarding, and control of goods, services, and works procured by a government agency.\textsuperscript{412} TI 167 does not describe how the existence of such a loss is to be determined or by whom, but it is likely that the determination is pursuant to the auditing report described supra and is made by the Finance Ministry.\textsuperscript{413} Notably, while the FPA allows for an accused official to offer a “satisfactory explanation” for any losses he with which he is charged,\textsuperscript{414} TI No. 167 appears to hold the Controlling Officer strictly liable.\textsuperscript{415}

b. Enforcement of Preference Rules

Enforcement mechanisms respectively applicable to rules that mandate preferences for Bumiputera and for other domestic providers differ somewhat from the mechanisms applicable to general GP rules as well as from one another. In both preference systems, compliance with applicable rules is guaranteed, in large part, by removing the most significant decision-making authority in each case, i.e. that regarding qualification, from individual procuring entities.\textsuperscript{416} However, while the system of preferences for domestic providers reinforces these provisions with explicit penalty provisions for non-compliance,\textsuperscript{417} the Bumiputera

\begin{footnotes}
\item[413] See Arahan Perbendaharaan [Treas. Instr.] No. 167.1 (1997); supra notes 410-11 and accompanying text.
\item[414] Financial Procedures Act, 1957 (Act 61 amended 1972) art. 18 [official translation].
\end{footnotes}
system contains only reporting requirements and provisions giving head officials responsibility for compliance with its provision analogous to those generally applicable to GP discussed immediately *supra*.\(^{418}\) This difference in processes reflects the difference in problems, about which the Finance Ministry is respectively concerned in the contest of each program. In the domestic preference problem, the problem has been compliance by procuring entities,\(^{419}\) while in the context of Bumiputera preference system, the problem has been mainly abuse by unscrupulous recipients and colluding procuring entity officials.\(^{420}\)

\(i\) *Domestic Provider Preference Rules*

In 1998, the treasury released a TCL, which stated *inter alia* that domestic provider preference rules were not being obeyed by half of all government entities in their own GP activities and by contractors acting on their behalf and promulgated rules intended to correct the situation.\(^{421}\) Apparently, the new rules were inadequate, and so they were significantly strengthened four years later in TCL No. 7/2002.\(^{422}\) First, TCL 7/2002 removed completely the authority of individual government entities to determine

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\(^{418}\) *Surat Pekeliling Perbendaharaan Bil. 4 Thn. 1995* [Treas. Circ. Let. No. 4/1995] § 9; *See, supra* notes 410-19 and accompanying text.

\(^{419}\) *See, infra* notes 425 et seq. and accompanying text.

\(^{420}\) *See, supra* notes 326-31 and accompanying text.


\(^{422}\) *Surat Pekeliling Perbendaharaan Bil. 7 Thn. 2002* [Treas. Circ. Let. No. 7/2002], § 2, lampiran (attachment) A §5-10.
whether or not a good was made domestically. The TCL, instead, gives two
government-owned businesses, IKRAM QA Services Sdn. Bhd. (IKRAM QA) and
SIRIM QA Services Sdn. (SIRIM QA), the authority to inspect and certify that various
goods and materials are domestically made/produced. Governmental entities and their
works contractors are required to use only goods and materials which have been certified
by IKRAM QA or SIRIM QA as having been made/produced in Malaysia. While no
analogous third party certification provisions exist regarding procurement of services,
only those service providers listed with the Finance Ministry may be used. As
mentioned supra, foreign sourced products can only be procured when domestic
alternatives are not available and if worth more than RM 50,000 (~US$13,000), must be
accompanied by MITI or Finance Ministry approval as is applicable.

\[423\] Surat Pekeliling Perbendaharaan Bil. 7 Thn. 2002 [Treas. Circ. Let. No. 7/2002],
lampiran (attachment) A §5.

\[424\] See, Surat Pekeliling Perbendaharaan Bil. 7 Thn. 2002 [Treas. Circ. Let. No. 7/2002],
lampiran (attachment) A §5. (IKRAM QA Services Sdn Bhd. a division of Kumpulan
IKRAM Sdn. Bhd., the private successor entity to the former Public Works Department’s
Research and Training Unit; SIRIM QA Services Sdn. (SIRIM QA) is a fully owned
subsidiary or SIRIM Bhd., the private successor entity to the former Standards and
Industrial Research Institute of Malaysia).


lampiran [attachment] § 2.
Additionally, a number of exceptional enforcement provisions are written into the regulation in order to ensure that these requirements are obeyed.\(^{428}\) Article 2 of TCL 7/2002 states that governmental entities, which do not obey the rules, will have “appropriate steps taken against them,” and the responsible officials may be subject to fines.\(^{429}\) Negotiators, who were responsible for the implementation of projects which failed to follow these rules, will be “black listed.”\(^{430}\) Further, provisions are to be included in all works tendering documents, including international tendering documents where applicable, making clear the domestic materials and goods requirement, and clauses included in works contracts which make providers subject to penalties and/or rejection by the procuring entity, if the works provider fails to obey these rules.\(^{431}\) Finally, governmental entities are required to make sure that works providers obey these requirements through either direct inspection by their own personnel or IKRAM QA.\(^{432}\)


Similarly complex monitoring and enforcement provisions do not apply to works projects. Rather, the enforcement and monitoring of domestic preference compliance in this context appears to be handled through the registration requirements applicable to all procurement. As discussed supra, the definition of “domestic,” and thus the identity of companies with whom a governmental entity is allowed to contract, shifts as the value of the contract increases. In the contract-award decision report, which is required for all procurement decisions, it would, thus, be readily apparent to auditors whether or not the provider awarded the contract was registered in the respectively applicable category.

**ii) Bumiputera Provider Preference Rules**

Similar to the control mechanisms applicable to preferences for domestic works providers, control over preferences for Bumiputera providers in GP is effected principally through control over qualification decisions. As described supra, TCL 4/1995 increased the number of criteria, which companies must fulfill in order to qualify for Bumiputera preferences in order, to ensure that only those companies that were in

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436 See, supra notes 410-11 and accompanying text (discussing contract-award decision reporting requirements).

actuality owned and controlled by Bumiputera would qualify.\textsuperscript{438} Simultaneously, TCL 4/1995 transferred to the Finance Ministry (in the case of goods and services) and the CSC (in the case of works) the authority make Bumiputera qualification decisions, which before was implicitly left to each governmental entity to make in the context of individual procurement decisions.\textsuperscript{439}

It appears this drawback of authority was part of the federal government’s plan to reign in abuses of the system by \textit{directly} “monitor[ing] the performance of the beneficiaries” so that the federal executive could limit preferences to “only the more enterprising individuals and businesses.”\textsuperscript{440} It seems also motivated by the suspicion that some officials in procuring governmental entities were, in exchange for cash or political support, certifying as Bumiputera companies that did not meet the standard.\textsuperscript{441} Of course, vesting the authority in the federal executive is no guarantee that patronage-style abuses will no longer happen. Indeed the given influence of the executive, the large discretionary power it is granted, and the corollary weakness of citizen control mechanisms, it is arguable that this concentration of power leaves the system open to abuse of a larger order.\textsuperscript{442}

\textsuperscript{438} \textit{See, supra} notes 314 et seq. and accompanying text.


\textsuperscript{441} \textit{See, e.g.} Second Outline Perspective Plan, 1991-2000 § 1.67 (June 17, 1991).

\textsuperscript{442} \textit{See, generally, infra} notes 907 et seq. and accompanying text.
2. Control by Aggrieved Providers and Other Interested Citizens

The title of this section is almost a misnomer; there are virtually no means for an aggrieved provider or other interested citizen to challenge either Treasury rules governing GP or specific decisions made under those rules, whether by the Finance Ministry or another governmental entity. First, there are no complaint procedures established specifically to deal with problems that arise in the context of GP, generally, or applicable preference systems, specifically, and the only generally available mechanism for non-judicial resolution of complaints lacks teeth and is of questionable independence. Second, judicial challenge of both Treasury GP rules and actions taken pursuant to them are all but impossible, except possibly in situations like registration and preference qualification decisions, which involve the status of a provider.

a. Administrative Remedies

The principle instruments, which govern general GP procedures and both types of applicable preferences, contain no provisions that provide procedures for aggrieved providers, who believe that they have been wronged at any point in the GP process to seek remedy for that alleged wrong, nor is there a specialized administrative tribunal which would otherwise have jurisdiction over such claims.\(^{443}\) Thus, the only possible

avenue for an administrative remedy in such a case is to bring a complaint to the Public
Complaints Bureau (PCB). According to a Circular issued in 1992 and summarized by
M.P. Jain:

[T]he public may complain [to the PCB] if they are dissatisfied with any
administrative action of the government which is unjust, is not in
accordance with existing law and regulations, or suffers from abuse of
power, maladministration and the like.

Excluded from permissible complaints are those which touch upon an area dealt with by
another agency, such as the Anti-Corruption Agency.

However, as Jain further notes, “the Bureau is a part of the executive,” and thus
lacks the true independence necessary to effectively discipline other parts of that
branch. Further, he states:

It has no legal power to investigate into alleged cases of maladministration
or to enforce its recommendations. Its functioning depends on the co-
operation of the various government departments and agencies…Further,…the Bureau has no access to Parliament and does not
send its reports to parliament.

Thus, whether an aggrieved provider (or any citizen given the apparently liberal standing
rules which apply) receives a remedy through this process for an alleged wrong, which
occurred in the context of GP, would depend on the willingness of the government entity
involved to 1) provide the PCB with the information needed and 2) act on any

444 JAIN, supra note 84, at 824.
445 Id., at 825.
446 Id.
447 Id., at 825-26.
448 Id., at 826.
recommendations the PCB produced. Especially when the decision challenged was made by Finance Ministry officials (not unlikely given their significant involvement at all levels of the process), considered by many to be the most powerful section of the executive after the prime minister’s office, the chances of an aggrieved provider receiving an adequate remedy through this process seem uncertain at best.

b. Judicial Remedies

Potential judicial remedies for aggrieved providers or other interested citizens suffers from the opposite affliction; while possible judicial remedies have teeth, their actual availability in the context of GP is extremely limited. First, the broad grant of power, under which the Treasury issues GP rules, in combination with other elements of the Malaysian legal system make challenging the legality of GP rules almost impossible and, in the case rules applicable to Bumiputera preferences, actually dangerous to one’s freedom. Second, neither interested citizens nor participating providers appear to have access to courts to challenge specific contract decisions. Third, in grievances based on status decisions, such as general sector registration and preference related registrations, the grounds for challenge are extremely limited, there are significant obstacles to compiling the necessary information to prevail, and the court’s decision whether to grant

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449 The inadequacy of this remedy is accentuated by prohibition of complaints which allege corruption. See, id., at 825-26

450 It is notable in this regard, that the current Prime Minister, Batawi, has reserved for himself the office of Finance Minister. [cite]; see, also, generally, Gomez(2003), supra note 102, at 75-84.

451 See, infra notes 460 et seq. and accompanying text.

452 See, infra notes 480 and accompanying text.
any remedy is discretionary.\textsuperscript{453} Finally (though not discussed in detail here), while there may have been recently “a heartening surge in judicial activism,”\textsuperscript{454} there are still questions about how truly independent the judiciary is, especially in situations where it is up against a powerful element of the executive like the Finance Ministry.\textsuperscript{455}

\textit{i) Obstacles to Challenging Legality of Treasury Issued GP Rules}

The primary obstacle to challenging Treasury issued GP rules is the extremely broad grant of authority, under which the Finance Ministry has chosen to issue them.\textsuperscript{456} According to TI No. 4, the Finance Ministry’s authority to issue rules relating to \textit{inter alia} GP flows from Section 4 of the Financial Procedure Act (FPA), which states:

\begin{quote}
Every accounting officer shall be subject to this Act and shall perform such duties, keep such books and render such accounts as may be prescribed by or under this Act or by instructions issued by the Treasury in matters of financial and accounting procedure not inconsistent therewith.\textsuperscript{457}
\end{quote}

\textsuperscript{453} See, infra notes 487 et seq. and accompanying text.

\textsuperscript{454} Pillay, supra note 84, at cxli (1999); See, also, JAIN, supra note 84, at 255.

\textsuperscript{455} The dangers posed for judges who take on the executive was powerfully demonstrated in 1988, when a High Court ruling that nullified for registration irregularities UMNO party elections which had narrowly left Mahathir in power, precipitated the removal of, first, the Lord President of Supreme Court (principally for criticizing moves by Mahathir to consolidate the executive’s power against the judiciary), and then five other Supreme Court judges, who rose to the Lord President’s defense. See, Gomez(1994), supra note 212, at 62-63; Ken Marks, \textit{Judicial Independence}, 68 AUST. L. J 173, 177-79 (stating \textit{inter alia} that these events “resulted in a judiciary stripped of whatever independence it formerly had.”); CASE, supra note 218, at 116-17.


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Setting aside for now the question, whether issuing Financial regulations under Section 4 of the FPA rather Section 36 violates constitutional provisions, discussed infra,\(^{458}\) the grant of authority in Section 4 of the FPA is worded so broadly that there is little chance a regulation issued under it could be found *ultra vires*, viz. beyond that grant of authority.\(^{459}\)

Additionally while the FPA is not, as a whole, the type of statute, which M.P. Jain has termed “skeletal” (in the sense that they contain only a broad grant of power with no substantive regulating provisions),\(^{460}\) in the limited context of GP the skeletal label is appropriate, and thus there is little chance that any Treasury-issued rule regarding GP could be found in conflict with it.\(^{461}\) Some FPA provisions, such as those which deal with receipt and accounting of funds touch upon GP indirectly, but there are no FPA provisions that have a direct bearing on GP processes, except possibly “surcharge” provisions discussed *supra*.\(^{462}\) Further, the latter provisions are in accord with current Treasury issued rules, thus, excluding the possibility that these rules are amended, no rule

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\(^{458}\) See, *infra* notes 517 et seq. and accompanying text.


\(^{460}\) See, Jain *supra* note 84, at 78. Various sections of the FPA detail procedures which must be followed by all within its jurisdiction. See, e.g., Financial Procedures Act, 1957 (Act 61 amended 1972) § 7 (detailing procedures which must be followed in regards to “Consolidated Fund Accounts”).


\(^{462}\) See, Financial Procedures Act, 1957 (Act 61 amended 1972) §§ 7 (detailing procedures which must be followed in regards to “Consolidated Fund Accounts”), 13 (“Payment of Monies”), 18-21 (surcharge provisions); *supra* notes 402-05 and accompanying text (discussing the operation §§ 18-21).
issued by the Treasury pursuant to FPA Article 4 could be “inconsistent therewith.”

Thus, the broad, and otherwise unconditioned, grant of authority contained Article 4 almost eliminates any possibility of a Treasury-issued GP rule being found by a court to be either beyond the grant of authority by the FPA to the Treasury, or in conflict with FPA provisions, and thus invalid.

The “almost symbolic” character this gives the judiciary as a check on executive power, is further increased by several fairly unique provisions of Malaysian law. First, provisions of the Interpretation Act create a presumption against ultra vires findings. It requires for example, that a regulation be found ultra vires only if it does not fall within any grant of power to the Ministry involved, even if the regulation purports to be issued under a different authority, which does not in actuality provide a valid basis for the action taken, or even if it lists no authority for that action at all. Further, even retroactively applicable regulations are acceptable as long as their effect does not extend further into the past than the date on which their authorizing statute was enacted.

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463 See, Financial Procedures Act, 1957 (Act 61 amended 1972) § 4. Further, it is extremely unlikely that rules, which bear on the financial responsibility of government officials to the government, could form the basis of a suit by an aggrieved provider or another interested citizen.


465 Jain supra note 122, at 222-23.

466 See, Interpretation Act, 1948 (Act 81 amended 1967) §§ 20, 25; See, also Jain supra note 84, at 91, 105-06.

467 Interpretation Act, 1948 (Act 81 amended 1967) § 25; See, also Jain supra note 84, at 91.

468 Interpretation Act, 1948 (Act 81 amended 1967) § 20; See, also Jain supra note 84, at 105-06.
Thus, for example, even if a court found that the Finance Ministry was not free, in light of FPA Section 36 discussed infra, to issue financial regulations on the basis of FPA Section 4, it seemingly could still hold the rule valid, paradoxically, on the basis of the grant of power contained in Section 36.\textsuperscript{469} Further, should the Treasury choose to enforce GP rules retroactively, for example, by denying Bumiputera status mid-project to a provider pursuant to changed qualification criteria, under the Interpretation Act that provider would have no basis for complaint.\textsuperscript{470} Finally, it is even possible under Malaysian law for regulations to modify and/or cancel provisions of their authorizing statute, and, in at least one case, over ride conflicting constitutional provisions.\textsuperscript{471}

Treasury rules promulgating preferences for Bumiputera in GP are additionally protected from legal challenge (and even open criticism) by provisions of the Sedition Act, which \textit{inter alia} makes questioning privileges granted to Bumiputera a seditious act, a strictly liability offense punishable by up to three years in jail and/or a fine of RN 5000 (~US$ 1300).\textsuperscript{472} The Sedition Act \textit{inter alia} defines a “seditious tendency” to include “question[ing] any matter, right, status, position, privilege, sovereignty or prerogative established or protected by the provisions of...Article...153...of the Federal Constitution.”\textsuperscript{473} That article gives the federal government the authority and

\textsuperscript{469} \textit{See, infra} notes 535 et seq. and accompanying text. Of course, this would not seem to deal with the failure to consult with the National Financial Council which gave rise to the constitutional issues in the first place. \textit{Id.}

\textsuperscript{470} Interpretation Act, 1948 (Act 81 amended 1967) § 20.

\textsuperscript{471} \textit{See, Jain, supra} note 84, \textit{at} 225-27.


\textsuperscript{473} Sedition Act, 1948 (Act 15) § 3(1)(a) (amended 1969); \textit{See, also} Sedition Act, 1948 (Act 15) § 3(1)(a) (amended 1969) (defining “seditious tendency” as \textit{inter alia} “the
responsibility to protect the special position of Bumiputera. In *Fan Yew Teng v. Public Prosecutor*, an appeals court upheld the original defendant’s conviction for seditious publication of an article which was, in the court’s words, “an attack on the Alliance Government for their alleged partiality in favouring a particular group of citizens,” stating flatly that Bumiputera privileges “cannot be questioned.” Thus, a judicial challenge of rules granting preferences to Bumiputera providers in GP would not only have little chance of success but would also put the individual, bringing the challenge, at risk of criminal prosecution.

**ii) Obstacles to Challenging Specific Contract-award Decisions**

Currently, there does not appear to be any grounds in Malaysian law on which either an aggrieved tenderer or an interested citizen could challenge specific contract-award decisions. M.P. Jain, in his comprehensive and authoritative treatise on administrative law in Malaysia and Singapore, discusses at length the development in India of doctrines that view government contract decisions as administrative decisions governed by public rather than private law and the judicial remedies that arise out of this distinction. However, the discussion is ended with the terse conclusion that while these

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475 *Fan Yew Teng v. Public Prosecutor*, [1975] 2 M.L.J. 235, 238; See, also, Othman et al., supra note 219, at 145 (stating that the “sensitive issues” which cannot be questioned “include the Special Privileges of the indigenous people, the Malays and the Bumiputera.”)

476 JAIN, *supra* note 84, at 568-69.

477 *Id.*
developments are of interest, “no more need be said of them here because such issues have not yet arisen in Malaysia and Singapore.” As Jain continues, in Malaysia government contracting is dealt with at the level of private law, and therefore the government is free to contract however, and with whomever, it pleases; and those who feel they have been wronged in this process only have access to the judicial remedies, which would apply in a contractual dispute between private parties. In other words, a provider who has not been awarded a government contract has no more right to challenge that decision than it would have in the context of a rejection by a private party, viz. none.

Further, in Malaysia, as in many other countries such as the United States, the “majority view” is that interested citizens or “taxpayers” do not have the standing to challenge in court specific government contract-award decisions. In this regard, the Supreme Court in Lim Kit Sang v. United Engineers of Malaysia stated firmly:

There is nothing in the Constitution or in the Government Contracts Act which imposes a legal duty on the government to consult and accept the view of any taxpayer of group of taxpayers or to hear objections. There may be a moral and political obligation on the part of the government to be mindful of taxpayers’ objections, but it is not a basis for the court to find a legal duty giving any taxpayer locus standi to maintain this suit, such obligations should be addressed in other forums.

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478 Id., at 569

479 See, Id. at 568-69; compare, infra notes 473 et seq. and accompanying text for a discussion of the judicial remedies which are available in public law contexts.

480 See, Jain, supra note 84, at 569.

Thus, absent a change in Malaysian law, the judiciary provides no check at all on the way governmental entities make contract-award decisions.\textsuperscript{482}

\textit{iii) Obstacles to Judicial Challenge of GP-Related Status Decisions}

While, it can be stated with certainty that a provider that felt aggrieved through the operation of the contract-award procedures is without remedy,\textsuperscript{483} the situation is not so clear in regards to a provider that felt aggrieved because of the operation general registration or preference qualification procedures.\textsuperscript{484} In \textit{Ketua Pengarah Kastam v. Ho Kwan Seng} (a case which Jain terms “a landmark in Malaysian administrative law”),\textsuperscript{485} Malaysia’s highest court declared broadly:

\begin{quote}
[T]he rule of natural justice that no man may be condemned unheard should apply in every case where an individual is adversely affected by an administrative action, no matter whether it is labeled ‘judicial’, ‘quasi-
\end{quote}

\textsuperscript{482} Any potential suit brought in the context of an award decision made directly by the Finance Ministry would be further hampered by the fact that while other governmental entities to keep records of the process by which contract award decisions have been made and in some cases explain why the lowest priced bid was not excepted, Arahan Perbendaharaan [Treas. Instr.] Nos. 170.3(b), 173.2 (1997), no similar provisions exist regarding the decisions made directly by the Finance Ministry. See, Arahan Perbendaharaan [Treas. Instr.] No. 168 (1997). Additionally, according to K.S. Jomo, the government routinely uses provisions in the Official Secrets Act of 1972 to make the processes by which contract decisions are made secret, making their disclosure and knowing receipt punishable by prison sentences of one to seven years. Reyes, supra note 408, at 1; See, Official Secrets Act, 1972 (Act 88) §§ 2(1), 8. As discussed supra the OSA allows any Minister or his delegate to declare any type record or communication secret, thus the obstacles potential posed by OSA to suits regarding contract award decisions is not limited to those made directly by the Finance Ministry. See, supra notes 395-98 and accompanying text.

\textsuperscript{483} See, JAIN, supra note 84, at 560.

\textsuperscript{484} See, supra notes 121-31 and accompanying text (generally applicable registration); supra notes 423-36 and accompanying text (certification of domestic production); supra notes 441-45 and accompanying text (qualification as a Bumiputera company); supra notes 249-50 and accompanying text (qualification as a Bumiputera producer).

\textsuperscript{485} JAIN, supra note 84, at 258.
judicial’, or administrative, or whether or not the enabling statute makes provision for the hearing.\footnote{486}{[1977] 2 MJL 152.}

Further, Malaysian courts, on several occasions, have agreed to hear complaints which arose out of administrative decisions that negatively affected the claimant’s status, e.g.: cancellation of an architect’s required registration,\footnote{487}{Lim Ko v. Board of Architects [1966] 2 MLJ 80.} cancellation of import/export agency’s required registration,\footnote{488}{Ketua Pengarah Kastam v. Ho Kwan Seng [1977] 2 MJL 152.} cancellation of trade union members’ required registrations,\footnote{489}{Metal Industry Employees v. Registrar of Trade Unions [1892] 1MLJ 46.} and the cancellation of various types of professional licenses.\footnote{490}{See, Keith Sellar v. Lee Kwang [1980] 2 MJL 191; Au Kong Weng v. Bar Committee Pahang [1980] 2 MJL 89; DK Gudgeon v. Professional Engineers Board [1980] 2 MJL 181; Tann Boo Chee, David v. Medical Council of Singapore [1980] 2 MJL 116; Tan Choon Chye v. Singapore Society of Accountants [1980] 1 MLJ 258; See, also generally JAIN supra note 84, at 255-75.}

A decision regarding provider registration or qualification for preferences, similarly deals with a person’s status, and given the scale of the Malaysian market GP and that of preference programs in it,\footnote{491}{See, supra notes 81-82 and accompanying text.} a provider would seem to be “adversely affected by an administrative” determination of status which results in their exclusion from either.\footnote{492}{Ketua Pengarah Kastam v. Ho Kwan Seng [1977] 2 MJL 152.}

The problem, however, appears to be twofold. First, as we saw in the context of contract-award decisions, the government contracting operates according to private law rather than public law considerations.\footnote{493}{See, JAIN, supra note 84, at 568-69} Thus, while the actions of administrative...
agencies in the context of, for example, licensing or union registration, are constrained by the basic requirements’ fairness and rationality, or “natural justice,” which, under Malaysian law, apply generally to “exercise of power by a public authority,” the same constraints simply do not appear to apply to actions taken by governmental entities in GP. In this context the government is treated like a private party, rather than a public authority, and so is free to conduct itself free from the constraints which would otherwise apply. Thus, it is quite possible that in making these GP-related status decisions, governmental entities are just as unconstrained as they are when making GP-related contract decisions; the fact that the author found no cases in which Malaysia courts found otherwise supports this.

Second, even assuming that GP-related status decisions are constrained in the same manner as other status decisions made by public authorities, is that a court might find that a denial of registration as a provider or qualification for preferences does not constitute an injury and so fails to entitle someone so affected to a remedy. According to Jain, and reflected in the Ho Kwan Seng case quoted supra, whether or not a party deserves some sort of review of an administrative action no longer depends on the characterization of that action. Rather, “[t]he emphasis is now placed on the element of

494 Jain, supra note 84, at 226.
495 Id., at 568.
496 Id.
497 See, id., at 230
injury to the concerned individual in by the administrative decision in question.” Thus, while courts in the past decided the issue mainly on whether the complained of action was quasi-judicial or administrative, the modern trend looks more often to whether the complained of action negatively affected a right, interest, or “legitimate expectation” of the complaintant.

A decision to cancel a provider’s registration would seem to qualify under this standard as a decision affecting the complaining party’s interest, in the same manner as the other status decisions subject to review described supra. However, a decision denying a party’s request to be registered or to qualify for preferences, or which canceled a party’s prior preference qualification, would seem to qualify only if the party could show it legitimately expected to receive the benefit that it was thereby denied. Without an in depth examination of the way Malaysian courts have defined “legitimate expectation,” which is beyond the scope of this paper, it is impossible to state conclusively whether or not these situations would qualify. However, from the cases cited on this issue by Jain, it does not appear that they likely would.

499 Id.

500 See, id., at 255-69(describing inter alia various cases in which e turned on the characterization of the action in question), 273-274 (describing more modern cases)

501 See, supra notes 491-94 and accompanying text.

502 See, Jain, supra note 84, at 273-274

503 See, Id., at 273-74 (describing inter alia: John Peter Berthelsen v. Director General of Immigration [1987] 1 MLJ 134 (finding that cancellation of foreign journalist’s work permit one week before it expired qualified); Lee Freddie v. Majlis Perbandaran Petaling Jaya [1994] 3 MLJ 64 (finding that failure to give community, which had been using a vacant plot of land for recreation for several, notice and opportunity to be heard before plot was sold to a developer qualified); Dr Amir Hussein bin Baharuddin v.
In addition, even if these fundamental uncertainties regarding the applicability of judicial review to GP-related status claims were overcome, other significant obstacles would still stand in the way of effective relief. First, if a court agreed to hear such a complaint, it would likely only grant relief, if the complaintant could show that the process, by which the administrative decision in question was reached, did not, in light of “the circumstances of the case,” comply with “minimal norms of procedure [which] ensure justice and fair play.” 504 In fact, because there are no statutory provisions, which require hearings for parties that feel they have been adversely affected by GP-related status decisions, according to Jain, courts will take an even more permissive approach demanding only the “minimal requirements” of these already minimal norms. 505

Second, while three types of remedies could hypothetically be available in such a case, mandamus/specific performance, certiorari, and declaration, 506 a court’s decision

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504 Jain supra note 84, at 290. There are some indications in the recent jurisprudence of lower courts that there may be a “substantive fairness” element in the “natural justice” standard, which would protect providers from purely arbitrary and/or malicious decisions by administrative officials. Pillay, supra note 83, at iv (quoting Sugumar Balakrisham v. Pengarah Imigresen Negeri Sabah dan Pihak Berkuasa Negeri [1998] 3 MJL 289, 323. However, this standard has not been adopted by higher courts, id., at 325. and, as various cases show, the threshold generally applied is very flexible and easily met. Jain, supra note 84, at 288-380.


506 Courts of Judicature Act 1964 (Act 91) Schedule 1 ¶ 1 (1) the Courts of Judicature Act 1964 (CJA), which gives the High Court the “power to issue to any person or authority directions, orders, or writs, including writs of habeas corpus, mandamus, prohibition, quo warranto and certiorari or any others, for the enforcement of the rights conferred by Part II of the Constitution, or any of them or for any other purpose”); Jain, supra note 84, at 657 ( “a judge may make an order requiring any specific acts to be done or forborne, by
whether or not to issue them is purely discretionary, with an apparent presumption against issuance, especially in the case of *certiorari* and declaration.\(^{507}\) Further, in the case of both *mandamus* and *certiorari*, a claimant must show cause before consideration of her application for review will be granted, and though that requirement should be fulfilled by a *prima facie* showing, according to Jain, these requirements are “quite a hurdle to cross by anyone seeking any of these orders, and many applications are rejected at this initial stage.”\(^{508}\) And while no similar showing of cause is necessary for consideration of an application for declaration, the remedy has no coercive effect but rather declares the rights of the claimant with the expectation that governmental entities will act accordingly.\(^{509}\)

Finally, a claimant’s ability to prevail both on the merits and at a hearing to show cause would also be greatly handicapped by the likely inaccessibility of much information needed to make its case. There are no recordkeeping requirements for decisions made directly by the Finance Ministry or CSC in the context of either contract-award or status decisions, thus there may be no records of the process on which to base a

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\(^{507}\) Jain, *supra* note 84, at 655 (listing delay and the existence of an alternative remedy as reasons for not issuing *mandamus*), 658 (similar for specific performance), 666 (relating Court of Appeal decision that *certiorari* is “extraordinary and discretionary remedy” that should not be issued “unless substantial justice has ensued, or is likely to ensue.”), 728 (relating Federal Court opinion that “the power to grant declaration in lieu of prerogative orders or statutory reliefs [sic] must be exercised with ‘caution’ and ‘sparingly’ and with great care and jealously.”).

\(^{508}\) *Id.*, at 630. An application for certiorari also must be filed within six weeks of the administrative decision at issue. *Id.* at 744.

\(^{509}\) *Id.* at 725, 744.
claim that it was unfair. In addition, even if such documents were available, the applicable Minister in each case would have complete discretion under the OSA to declare them secret (which is not uncommon). Even if the OSA was not invoked, such records would most likely be privileged and inadmissible under Section 123 of the Evidence Act, which applies to “unpublished official records relating to the affairs of state,” absent the specific permission of the applicable Minister, in cases involving federal governmental bodies, or Chief Minister, in cases involving state governmental bodies. Thus, if a provider could bring a case at all the chances of its success would be extremely slim and so probably not worth the possible ill will such a challenge could create, especially in light of the fact that contract-award decisions are not reviewable for any reason, even if tainted by obvious bias.

3. Control through Parliamentary Structures, Consultative Mechanisms, and other Governmental Bodies

Given the absence of effective judicial or quasi-judicial control over the actions of the Finance Ministry in GP, it might be hoped that parliamentary

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511 Official Secrets Act, 1972 (Act 88) § 2(1) (Sep. 26, 1972); Reyes, supra note 408 at, 1.

512 Evidence Act, 1950 (Act 56) § 123; See, also JAIN supra note 84, 606-610.

513 See, supra notes 481-83 and accompanying text.
structures, consultative mechanisms and/or other governmental bodies fill the gap; unfortunately, this is not the case. As Sudah Pillay states bluntly, “invariably the Parliament is unable to serve as an adequate check on government.”

Indeed, the manner in which the Treasury has chosen to issue rules related *inter alia* to GP evades what marginal control the Parliament might impose on the process. What’s more, it also eliminates the applicability of non-parliamentary consultative mechanisms, which are arguably required by the constitution and which could provide at least a marginal check the Treasury’s GP rule-making.

The only governmental body which, thus, might effect some measure control over the actions of the Finance Ministry is the Anti-Corruption Agency, but given its location in the executive branch and limited mandate, it cannot be considered sufficient to the task.

*a. Parliamentary Control*

As a general matter in the Malaysian system, there is very little legislative control over administrative bodies once powers are delegated to them, which is usually done broadly. First, no mechanism/institution exists in the Malaysian Parliament, which operates in the manner of a parliamentary scrutiny committee to monitor and control the

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514 Pillay *supra* note 122, at xxii.


516 *See* Jain, *supra* note 84, at 826.

517 *Sharifah Suhana Ahmad, Malaysian Legal System, 84* (1999) (stating in regards to legislative controls of administrative bodies “such methods of control while prominent and effective in other jurisdictions, such as the United Kingdom and India, are not significant where Malaysia is concerned.”); *See, supra* notes 406 et seq. and accompanying text.
actions of administrative bodies.\textsuperscript{518} Second, there are no generally applicable requirements in Malaysian law for subsidiary legislation to be laid before Parliament for approval or notice.\textsuperscript{519} Third, since 1968, when the Interpretation Act was amended to remove such a provision, there is not even a generally applicable requirement that subsidiary legislation be published.\textsuperscript{520} Further, given the manner in which the structure of ruling party politics has established the effective domination of the parliament by the executive, even were such mechanisms to exist, they would likely be an ineffective in controlling the executive branch.\textsuperscript{521} Thus, it is no exaggeration to state that in Malaysia “Parliament serves as a check on government…is a mythical and false assumption.”\textsuperscript{522}

In regards to the Finance Ministry’s administration of GP, the insulation from legislative control described \textit{supra} is accentuated by what appears to be a calculated move by the former to evade even nominal accountability to the parliament. As discussed \textit{supra}, the Treasury division of the Finance Ministry issues rules regulation GP pursuant to a grant of authority in Section 4 of the Financial Procedures Act (FPA), which states:

\begin{quote}
Every accounting officer shall be subject to this Act and shall perform such duties, keep such books and render such accounts as may be prescribed by or under this Act or by instructions issued by the Treasury
\end{quote}

\begin{footnotes}
\item \textsuperscript{518} \textit{JAIN supra} note 84, at 147.
\item \textsuperscript{519} \textit{Id.}, at 131.
\item \textsuperscript{520} \textit{Id.}, at 153.
\item \textsuperscript{521} See, Pillay \textit{supra} note 122, at xxii; \textit{CASE}, supra note 218 111-13; \textit{AHMAD}, \textit{supra} note 521, at 77 (“It has grown to be a convention that the President of the UMNO…, the major Malay-based political party in the ruling Barisan Nasional coalition, be appointed Prime Minister.).
\item \textsuperscript{522} Pillay \textit{supra} note 122, at xxii (quoting Thio Li Ann, \textit{Trends in Constitutional Interpretation: Oppuging, Ong, Awakening Arumgan}, (1997) SJLS 240, 256-57).
\end{footnotes}
in matters of financial and accounting procedure not inconsistent therewith. 523

In light of the permissive approach with which courts in Malaysia address questions of delegated authority, there is almost no chance that this provision would be found not to provide sufficient authority for the issuance of GP rules. 524 However, it is arguable that when the parliament drafted the FPA, they did not intend for rules issued by the Treasury pursuant to Section 4 to be the chief means by which the Finance Ministry regulated the financial procedures of governmental bodies. 525 Rather, it appears that parliament intended such regulations to be issued by the Finance Ministry pursuant to Section 36, titled “Regulations,” contained in Part V, also titled “Regulations.” 526

Section 36, unlike Section 4, requires inter alia that all regulations issued under this authority be laid before parliament. 527 As Jain has observed the laying requirement embodied in Section 36 is “informational in nature and is only directory and failure to lay the regulations before Parliament does not affect their validity.” 528 However, as Jain also


524 See, supra notes 469-73 and accompanying text.


527 Financial Procedures Act, 1957 (Act 61 amended 1972) § 36. This provision technically gives the Sultan the power to issue such regulations but as Jain explains such provisions have no substantive effect as the Sultan’s power in such cases is symbolic with the applicable minister, in this case the Finance Minister, actually wielding the authority granted. Jain supra note 122, at 218; See, also AHMAD supra note 504, at 75; R.H. HICKLING, MALAYSIAN PUBLIC LAW, 68-69 (stating inter alia that the Sultan “must act in accordance with [Ministers’] advise.”) (1994); compare Financial Procedures Act, 1957 (Act 61 amended 1972) § 4.

528 JAIN supra note 84, at 131.
notes, this sort of laying requirement is rare in Malaysian law.\textsuperscript{529} Thus, it was certainly placed within the FPA purposefully, likely with the intention of monitoring the important matter of how the Finance Ministry regulated the way other government bodies received and spent monies. Therefore, while not technically \textit{ultra vires}, the Finance Ministry’s decision to evade this requirement by issuing rules under Section 4 is, at the very least, contrary to the spirit of the FPA.

\textit{b. Consultative Mechanisms}

Similar to the situation regarding legislative control, there are no generally applicable consultation requirements in Malaysian law,\textsuperscript{530} and while limited consultative requirements are written into the FPA, the Finance Ministry avoids them by issuing rules under Section 4 of the law.\textsuperscript{531} However, in so doing, it arguably violates not just the spirit of the FPA but also provisions of the Federal Constitution.

Section 36(1) of the FPA, in addition to requiring that the regulations issued under the it be laid before parliament, requires that, prior to their issuance, the Finance Ministry consult with the National Finance Council (NFC), something which appears is not done for most or all current rules that govern GP and preferences for Bumiputera and other domestic providers.\textsuperscript{532} The NFC consists “of the Prime Minister, such other Ministers as

\textsuperscript{529} Id.

\textsuperscript{530} Id., at 163.


\textsuperscript{532} Financial Procedures Act, 1957 (Act 61 amended 1972) § 36(1); \textit{see, supra} note 513-16 and accompanying text; \textit{see, also, e.g.,} Surat Pekeliling Perbendaharaan Bil. 7 Thn. 2002 [Treas. Circ. Let. No. 7/2002], Penggunaan Bahan/Barangan/Perkhidmatan Tempatan Dalam Perolehan Kerajaan [Use of Domestic Materials/Goods/Services in Government Procurement] (June 5, 2002); Dasar dan Keutamaan Kepada Syarikat
the Prime Minister may designate, and one representative from each of the States, appointed by the Ruler or Yang di-Pertua Negeri [State Sultan].”

According to Article 108(4) of the Federal Constitution the federal government has “the duty… to consult the National Financial Council in respect of…[inter alia] the matters referred to in Item 7(f) and (g) of the Federal List.” Item 7(f) reserves to the federal government powers over:

Financial and accounting procedures, including procedures for the collection, custody, and payment of the public monies of the Federation and of the States, and the purchase, custody, and disposal of public property other than land of the Federation and States.

Rules governing GP clearly fall within Item 7f, a conclusion which emphasized by the fact that TI No. 4, which describes the scope of the rules that follow it (including those regarding GP) uses exactly the same language as that of Item 7(f) quoted supra.

Thus, in avoiding the consultation requirements of FPA Section 36(1) by issuing rules, regarding GP, pursuant instead to the authority granted by Section 4 of the FPA, the Finance Ministry is not only subverting the will of the Parliament (which felt it important, in light of the probable impact of financial regulations on states to allow them

533 Federal Constitution Art. 108(1).
535 Federal Constitution Ninth Schedule List I-Federal List Item 7(f) [emphasis added].
the opportunity to consult regarding them) it is also arguably violating constitutional requirements. However, given the extremely permissive attitude in Malaysia towards arguably ultra vires administrative acts, it is not likely that a court would invalidate Treasury issued regulations even on these grounds.

c. Control by the Anti-Corruption Agency (ACA)

The final possible control mechanism for the actions taken by governmental bodies, including the Finance Ministry, directly in the field of GP, is the investigation and prosecution by ACA. While the provisions of the Prevention of Corruption Act of 1961 (PCA) give the ACA a solid legal basis to investigate and prosecute the worst abuses of the system, questions about its independence, arising from its location in the executive, are supported by evidence of politically motivated prosecutions. Thus, its sufficiency as monitor in this regard, already suspect given the limited scope of abuses in its jurisdiction, is further imputed.

Corruption in the procurement process appears to be prosecutable under four different provisions of the PCA, and in all four cases both those giving, or attempting give, bribes and those receiving, or soliciting, bribes are subject to their respective provisions. The two provisions most directly related to GP processes are Articles 7 and

537 See, generally, HICKLING, supra note 531, at 60-62.

538 See, e.g., JAIN supra note 84, 78-80 (discussing inter alia the acceptance by Malaysian courts of regulations which purport to trump contrary constitutional provisions).

539 See, JAIN, supra note 84, at 826.

9. Article 7 makes it a crime punishable up to RM 10,000 (~US$ 2,600) and/or seven years in jail to offer or give someone a bribe to forego competing for a government contract or to solicit or accept a bribe for the same. Article 9(c) provides for the same punishment for bribing or attempting to bribe a government official to award, or forego awarding, a contract to someone and for soliciting or accepting the same. More generally, Article 3 makes it a crime subject to a fine of up to RM 10,000 (~US$ 2,600) and/or five years in jail to bribe or attempt to bribe a public official and for such an official to solicit or accept the same. Finally, Article 12 obligates any government official who has been “corruptly” offered or given such a gratuity to report such instances “to the nearest police officer,” and punishes failures to do so with fines up to RM 500 (~US$ 131 and/or six months in jail.

However, the decision whether to bring charges under any of these provisions appears to be left to the discretion of the ACA, on the basis of its own preliminary investigation. The ACA is located in the executive, and significant evidence supports

543 Prevention of Corruption Act of 1961 (Act 57 amended 1971) art. 9(c) (“Anyone who offers to a member of any public body, or, being a member of any public body solicits or accepts any gratification as an inducement or reward for…the member aiding in procuring of preventing…the granting of any contract or advantage for any person”) [official translation].
546 See, JAIN, supra note 84, at 826; See, ACA Detained 102 Persons in First Four Months, NEW STRAIT TIMES, 6 (May 28, 2000); No Corruption in Pularek Project, Says
the conclusion that, at least, some of its decisions to prosecute have been heavily influenced by political considerations.\textsuperscript{547} For example, when then Prime Minister Mahathir and his Deputy Prime Minister Anwar Ibrahim had their very public falling out, Anwar was imprisoned pursuant to PCA provisions in circumstances many deemed questionable at best.\textsuperscript{548} Indeed, there are indications that a significant part of the motivation behind his prosecution was Mahathir’s unhappiness with the effects of Anwar’s efforts to weed out corruption.\textsuperscript{549} The broad language of PCA provisions, especially Article 3,\textsuperscript{550} and the strong level control by the ruling UMNO party over the judiciary, facilitate politically motivated prosecutions of this kind.\textsuperscript{551} At the same time, the wording of these provisions, which phrases punishable offenses exclusively in terms of bribery related offenses, insulates from prosecution the patronage-style awards (and denials), which seem to characterize Malaysian GP more pervasively than outright bribery.\textsuperscript{552} Thus, the PCA, and prosecution by ACA under it, are insufficient to fill the gap left by the lack of traditional control mechanisms.

\textit{Agency, New Strait Times}, 4 (July 5, 2000); \textit{Meeting with Mitsui Officials Over Allegation, New Strait Times}, 5 (Feb. 23, 2000).

\textsuperscript{547} See, e.g., \textit{CASE}, supra note 218, at 134; See, also Simon Elegan, \textit{Less than Convincing}, \textit{Far Eastern Economic Review}, vol. 162, iss. 27, 27 (July 8, 1999); see, also, generally, \textit{JAIN}, supra note 84, at 826 (questioning the ACA’s independence as a result of its location in the executive).

\textsuperscript{548} See, \textit{Id}.

\textsuperscript{549} See, \textit{CASE}, supra note 218, at 132-34.


\textsuperscript{551} See, \textit{supra} note 550-51 and accompanying text.

III. THE “PRICE” OF JOINING AN AGREEMENT ON TGP

The Malaysian MITI Minister, in a publicly available statement released explicitly to explain why Malaysia took the positions it did at Cancun, stated that Malaysia was against an agreement on TGP because “[t]he price [of joining such an agreement] for developing countries would be too high.” The foregoing examination of the structure of Malaysian GP, including the broader policy objectives to which it is put and the distribution of power within it, allows us to evaluate this claim. Using the draft TGP agreements respectively submitted by the EU and a US-led coalition, the following sections examine the potential “price” for Malaysia if it joined such an agreement.

The first section examines the extent to which Malaysia would need to change its regulatory and institutional infrastructure in order to comply with obligations in the US and EU draft agreements. This takes a cue from not only frequent critiques of the analogous burden which other WTO rule-making initiatives have had on developing countries, but also specific complaints made by the LDC Group in a recent statement, containing the proposal that all work on a TGP agreement be “dropped.” The second section examines the claim, frequently made by Malaysia and other developing countries, that the sort of agreement on TGP envisioned by developed country Members would threaten the availability of GP as developmental tool. Specifically in the Malaysian context, it looks at what sort of threats could be posed to its system of preferences to Bumiputera and other domestic providers.

553 MITI Statement, supra note 2.
554 See, supra notes 45-48 and accompanying text.
555 WT/GC/W/522, supra note 8, ¶ 6.
In doing so, this section looks not only at how provisions in each of the draft agreements could directly impede the manner in which these preferences are currently applied. It also examines claims by Malaysia and other developing country Members that: 1) many of the provisions advocated by developed countries are really about market access and so would indirectly threaten (inherently protectionist) domestic preference programs; \(^{556}\) and 2) that developed countries intend the TGP as a predecessor to the GPA, which under most interpretations, would makes preferences for domestic providers violatory without waivers that likely could only be won by developing country Members at a significant cost, if at all. \(^{557}\) The third and final section, examines the extent to which the provisions in the draft agreements could potentially affect distribution of power within and without the Malaysian political system. Of course, the conclusions reached in all three categories are necessarily hypothetical and are meant to be illustrative rather

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\(^{556}\) Note by the Secretariat, Report of the Meeting of 29 May 2002, WT/WGTGP/M/14 ¶ 5 (relating statement by the Malaysian and Indian representatives) (Aug. 13, 2002); WT/WGTGP/M/17, supra note 60, ¶ 22 (relating statement by the Malaysian representative); WT/WGTGP/M/15, supra note 59, ¶ 47 (relating statement by the Malaysian representative) (Jan. 9, 2003); MALAYSIAN MINISTRY OF TRADE AND INDUSTRY, MALAYSIA AND THE WTO, 25 (“[S]ome Members are seeking to liberalise the government procurement market in countries where limited opportunities are currently offered to foreign participants, thus going beyond the issue of transparency.”) (2003) available at http://www.miti.gov.my..

\(^{557}\) See, WT/WGTGP/M/9, supra note 44, ¶ 11 (“The representative of Pakistan, joined by representatives of Egypt, India, Indonesia and Malaysia, said that the European Community’s proposition that an agreement on transparency in government was merely a building block towards the establishment of a multilateral framework for government procurement went beyond the mandate of the Working Group. An all encompassing government procurement agreement containing rules on market access would be another way of forcing the plurilateral Agreement on Government Procurement on developing countries.”); Abbott, supra note 9, at 289 (“Discussions [at the WGTGP] appear to have largely consisted of the recitation of opposing opinions.”).
than comprehensive. That said, in all three categories it appears that the potential impact could be significant, giving credence to the Minister’s claim.558

A. Changes in Regulatory Infrastructure

In a piece issued soon after the collapse of the Cancun Ministerial, titled *In Defense of the WTO: Hard rules are better than no rules at all?*, the British trade scholar, Peter Holmes stated simply, “There is little dispute that the TRIPs agreement was a bad deal for LDCs.”559 As Holmes and others have explained, in order to bring themselves into compliance with TRIPs (and to a lesser extent TRIMs and SPS), developing country Members were required to undertake massive internal transformations of their regulatory structures, which, according to a world bank study, cost some “as much as a full year’s development budget.”560 In exchange developing country Members received few or no benefits, neither in the form of delivered, developed country Member promises of access to their textile and agricultural markets nor benefits directly flowing from the agreements


themselves.\footnote{561} Indeed, former Canadian Trade Representative, Sylvia Ostry, goes so far as to call \textit{Trade-Related Aspects of Intellectual Property} an “oxymoron,” since the effect of the agreement has actually been to restrict trade.\footnote{562} Holmes goes even further, stating that TRIPS “has not brought the promised investment in LDCs, but rather \textit{a transfer of rents from the developing world to the US and the EU}.”\footnote{563}

The strident opposition, which Malaysia and other developing country Members have mounted against developed country efforts to push new rule-making efforts, including TGP, is born in part from this experience and their determination “not…to be ‘rolled’ this time.”\footnote{564} In fact, in a statement submitted by the LDC Group to the General Council in preparation for the Cancun Ministerial follow-up meetings, the costs of infrastructural changes necessary to comply with an agreement on TGP was highlighted as being among the main reasons for the group’s position that work on one should be “dropped.”\footnote{565} The following section examines to what extent Malaysia would be required to change the general regulation and administration of GP to comply with the obligations

\footnote{561} See, Ostry, \textit{Reform}, supra note 35, at 111; Ostry, \textit{Uruguay Round}, supra note 20, at 295-96; Amorin, supra note 46, at 95; Holmes, supra note 563; Litchenfield, supra notes 35, at 1020.

\footnote{562} Ostry, \textit{Uruguay Round}, supra note 20, at 296.

\footnote{563} Holmes, \textit{supra} note 563.

\footnote{564} Odell, supra note 20, at 418 (citing World Trade Agenda, Nov. 8, 1999, at 19); see, also, \textit{Id.}, at 403 (describing the “backlash” caused by the experience of developing countries with TRIPs and SPS; Ostry, \textit{Reform}, supra note 35, at 111 (describing among the unintended consequences of the “Uruguay Round Grand Bargain (or bum deal)...a major North-South divide in the WTO”); Abbott, \textit{supra} note 9, at 293 (stating that, post Seattle, “[b]y all accounts, WTO discussions took on the divisive tone of North-South disputes in the UN”)

\footnote{565} WT/GC/W/522, \textit{supra} note 8, ¶ 6.
of the draft agreements.\(^566\) Setting aside (somewhat artificially) for now the impact that the two draft agreements could potentially have on Malaysia’s preference programs and specific issues related to distribution of power, the analysis looks at the changes which would be necessarily in four, partially overlapping, areas: 1) dispute resolution procedures (DRPs); 2) provision of information; 3) exceptions; and 4) decisions made directly by the Finance Ministry, state financial officials, and/or the CSC.\(^567\)

1. Disputer Resolution Procedures (DRPs)

The largest change, which Malaysia would have to make in order to comply with the two draft agreements, would be the addition of a mechanism for the resolution of disputes arising out of procurement process. Both agreements would require that Members “maintain fair and transparent judicial, arbitral, or administrative bodies or procedures for the purpose of prompt review” of disputes arising out of the procurement process.\(^568\) Both agreements share the requirement that whatever institution is established

\(^566\) In this regard it is important to note that both of the draft agreements contain within their first articles (both of which are titled “General Objective), the requirement that signatories adjust their GP regimes so as to comply with their respective provisions. US Draft Agreement, supra note 49, art. I (“Each Member shall adopt and apply its procurement laws, regulations and requirements in good faith and in a manner that does not undermine the aims of this Agreement.”) [emphasis added]; EU Draft Agreement, supra note 49, art. 1(3) (“Members shall adopt and apply their legislation in good faith so as not to undermine the aims of this Agreement.”) [emphasis added].

\(^567\) While several of the procedures used in lower value tenders would facially violate various obligations in the draft agreements, see, supra, both draft agreements exclude lower value procurement from their respective purviews and so would not cover these actions. See, US Draft Agreement, supra note 49, art. III(3); EU Draft Agreement, supra note 49, art. 2(2).

\(^568\) US Draft Agreement, supra note 49, art. X(2)-(3); EU Draft Agreement, supra note 49, art. 8(1)-(2).
for this purpose, it must operate independently of the procuring entity, but differ somewhat from one another in terms of scope of review and standing requirements.\footnote{US Draft Agreement, supra note 49, art. X(2)-(3); EU Draft Agreement, supra note 49, art. 8(1)-(2).}

The U.S. draft agreement is somewhat more expansive in terms of both.\footnote{US Draft Agreement, supra note 49, art. X(2)-(3).} It would mandate review of all “procurement practices or actions that may be inconsistent with the requirements of this Agreement, as implemented by the Member,”\footnote{US Draft Agreement, supra note 49, art. X(2).} and access for “all interested parties who participated in the procurement process and are affected by the practice or action.”\footnote{US Draft Agreement, supra note 49, art. X(3).} EU draft would limit review to “decisions of procuring entities creating legal effects.”\footnote{EU Draft Agreement, supra note 49, art. 8(1) [emphasis added].} This might exclude some decisions made in Malaysian GP, such as registration, that are not made by the same entity engaged in procurement, as well as practices or actions which, while inconsistent, did not create any legal effect.\footnote{See, supra notes 124 et seq. and accompanying text.} Further, access to such procedures under the EU draft agreement would be limited to “all interested parties that are directly and individually affected by [such] a decision.”\footnote{EU Draft Agreement, supra note 49, art. 8(2) [emphasis added].} Thus, while under the US draft agreement, access would need to be given to, for example, a provider who believed it was indirectly disadvantaged by a favorable registration decision (either general or to qualify for preferences) of another provider that

\begin{footnotesize}
\begin{itemize}
\item[569] US Draft Agreement, supra note 49, art. X(2)-(3); EU Draft Agreement, supra note 49, art. 8(1)-(2).
\item[570] US Draft Agreement, supra note 49, art. X(2)-(3).
\item[571] US Draft Agreement, supra note 49, art. X(2).
\item[572] US Draft Agreement, supra note 49, art. X(3).
\item[573] EU Draft Agreement, supra note 49, art. 8(1) [emphasis added].
\item[574] See, supra notes 124 et seq. and accompanying text.
\item[575] EU Draft Agreement, supra note 49, art. 8(2) [emphasis added].
\end{itemize}
\end{footnotesize}
was allegedly contrary to established rules and/or procedures, under the EU draft agreement, access could be refused to such a claimant.

However, even with these differences, the DRPs provisions of either draft would force very significant changes by Malaysia. As discussed supra, Malaysia currently offers no means, judicial or administrative, for a provider to challenge a contract-award decision.576 Further, while traditional common law writs may allow providers to judicially challenge administrative decisions, which affect their status, such as registration decisions if available at all, they are subject to the judge’s discretion whether to hear the claim and provide only a very limited scope of review.577 Thus, in order for Malaysia to comply with either draft agreement’s DRPs requirements, it would have to either establish a sui generis administrative structure, independent of all other procuring entities, to hear provider claims, or rewrite applicable legislation defining the scope of judicial review of administrative decisions.578 Given the very significant impact the latter choice would have on the distribution of power in the federal government,579 it is likely that the former path would be taken, which would lessen, though in no way eliminate, changes in distribution of power, and would create significant financial costs.580

576 See, supra notes 430 et seq. and accompanying text.

577 See, supra notes 437 et seq. and accompanying text.

578 Courts of Judicature Act 1964 (Act 91); see, also, supra notes 501 et seq. and accompanying text.

579 See, supra notes 396 et seq. and accompanying text.

580 While the PCB, discussed supra notes 448 et seq. and accompanying text, could possibly be modified to fill this role, significant costs would be incurred in the process of transforming it from toothless and un-independent to effective and independent.
2. Provision of Information

Closely related to DRPs requirements (in the case of the E.C. draft agreement, explicitly related) are obligations in the two draft agreements regarding the provision of information. Assuming that provision in Bahasa Malay is acceptable, most of the obligations related to provision of information pre-contract-award decision, such as those regarding tendering opportunities, applicable laws and regulations, and tender notifications, are either already satisfied or could be easily without significant restructuring. The only exception is registration criteria, discussed infra. Given the

581 See, US Draft Agreement, supra note 49, arts. VIII(2.2)-VIII(3), IX(1); EU Draft Agreement, supra note 49, arts. 7(2), 8(3).

582 The US Draft Agreement, supra note 49, art. IX(3), makes provision in either the official language of the Member or a WTO language acceptable. The EU Draft Agreement, supra note 49, art. 10, on the other hand, states that “Members are encouraged to ensure that all information referred to in this Agreement is provided in a WTO language.”[emphasis added] While aspirational, the latter language in the EU draft agreement could cause concerns for some countries for whom translation would be a significant burden.

583 See, US Draft Agreement, supra note 49, arts. II, III, V(1); EU Draft Agreement, supra note 49, art. 5, 3(1); Surat Pekeliling Perbendaharaan Bil. 2 Thn. 1995 [Treas. Circ. Let. No. 2/1995], Tatacara Penydiaan, Penilaian dan Penerimaan Tender [Tender Preparation, Evaluation and Acceptance] § 6.1.2.3 (listing required information in international tenders) (April 10, 1995); Penggunaan Bahan/Barangan/Perkhidmatan Tempatan Dalam Perolehan Kerajaan [Use of Domestic Materials/Goods/Services in Government Procurement] lampiran [attachment] A § 9 (requiring notification in works tendering documents of requirement to use domestically produced goods) (June 5, 2002); Surat Pekeliling Perbendaharaan Bil. 4 Thn. 1995 [Treas. Circ. Let. No. 4/1995], Dasar dan Keutamaan Kepada Syarikat Bumiputera Dalam Perolehan Kerajaan [Policy and Preferences for Bumiputera Firms in the Context of Government Procurement] § 8.2 (requiring notification of Bumiputera preferences be listed in tendering documents) (April 12, 1995); Arahan Perbendaharaan [Treas. Instr.] Nos. 172.1 (requiring advertisement of tenders for goods worth more than RM 50, 000), 181 (requiring same for works) (1997); but see, Arahan Perbendaharaan [Treas. Instr.] No. 190 (making no mention of an advertising requirement for services). It should be noted that both of the draft agreements provide for exceptions to their respective disciplines when the value of the contract in question falls below an applicable threshold. See, US Draft Agreement, supra note 49, art. III(3); EU Draft Agreement, supra note 49, art. 2. While Malaysia does
Finance Ministry’s virtual hegemony over GP and its already significant use of web-based media to distribute information, even US draft agreement’s requirement that a single entry point for the dissemination of information could be easily met.\textsuperscript{585}

However, obligations in both draft agreements, regarding the provision of information in the post contract-award context, would require a significant transformation of the current system in Malaysia. Both draft agreements would require procuring entities to not only inform unsuccessful bidders of their failure (something which Malaysian regulations already require),\textsuperscript{586} but also respond to requests for information from those bidders concerning the reason for the rejection of their bids and, in the case of the EU draft agreement, also the reasons why the successful bid was chosen.\textsuperscript{587} Further, each would require that procuring entities keep, and with some differences in manner make it available, a record of the process by which they reached award decisions\textsuperscript{588} The US Draft Agreement would require that such information be “available upon request by another Member” (a provision which is actually contained within brackets).\textsuperscript{589} The EU draft

\textsuperscript{584} See, infra notes 618 et. seq and accompanying text.

\textsuperscript{585} US Draft Agreement, supra note 49, art. III(5); see www.treasury.gov.my

\textsuperscript{586} Surat Pekeliling Perbendaharaan Bil. 2 Thn. 1995 [Treas. Circ. Let. No. 2/1995], § 13.2.3.

\textsuperscript{587} See, US Draft Agreement, supra note 49, art. VIII(2) ; EU Draft Agreement, supra note 49, art. 7(2)

\textsuperscript{588} US Draft Agreement, supra note 49, art. IX(1); EU Draft Agreement, supra note 49, art. 8(3).

\textsuperscript{589} US Draft Agreement, supra note 49, art. IX(1).
agreement, on the other hand, includes within the same article which details other DRPs requirements, a clause stating that “Members shall ensure that each procuring entity is able to respond to requests for information on the way the procurement was carried out,” apparently making the receipt of such information a matter of right, at least, for every provider involved in a covered challenge.590

The current system in Malaysia conflicts with these requirements in several ways. First, while current rules require that unsuccessful bidder be notified of their failure, there are no provisions to allow them to request reasons why their bids were rejected, let alone why the successful bid was chosen.591 Second, while individual procuring entities and their respective procurement boards and committees are required to keep a record of the process by which they reach a contract-award decision, no similar provision applies when the decision is made by the Finance Ministry or state financial officials, as it often is.592 Finally and most significantly, under Malaysian law, not only is that information, if produced, not freely and easily available, but it is subject to the discretion of ministry officials or their delegates to deem it confidential, making its possession, receipt or distribution a serious crime.593 Further, in an adjudicative proceeding, in which the EU agreement would mandate that this information be available as a matter of right, the information would be inadmissible, absent an explicit waiver of privilege by the

590 EU Draft Agreement, supra note 49, art. 8(3).
592 See, supra notes 169 et seq. and accompanying text.
593 See, supra notes 405 et seq. and accompanying text.
Thus, in order to comply with either draft agreement, Malaysia would need to massively restructure not only how information is collected and distributed by governmental entities in the context of contract-award decisions, but also the way in which it has chosen to balance the government’s need for privacy and the public’s need for information.

3. Exceptions

Another area of the Malaysian GP system, which would have to be modified considerably to comply with the provisions in the US and EU draft agreement, is exceptions. The current Malaysian system provides for exceptions of two basic types: emergency exceptions, for which retroactive approval by the Finance Ministry is required;595 and general exceptions, for which prior approval by the Finance Ministry is required.596 Within the latter category of general exceptions fall both one-off exceptions, granted to procuring entities on a case-by-case basis, and more systematic exceptions, providing procuring entities (apparently often including government-owned companies) a generalized waiver from otherwise applicable GP rules.597 The flexibility towards GP rules, which these categories of exceptions represent, would be impossible under the EU draft agreement and very narrowly limited under the US draft agreement.

The US and EU draft agreements require, as a general matter, that both tendering processes and contract-award processes be conducted according to a set, pre-established

594 See, supra notes 515 et seq. and accompanying text.
595 See, supra notes 199 et seq. and accompanying text.
596 See, supra notes 195 et seq. and accompanying text.
597 See, supra notes 199 et seq. and accompanying text.
criteria and that the invitation to tender be widely and freely publicized to all qualified (if applicable) providers. Further, both make their rules applicable to the purchasing activities of government-owned firms, as long as that purchasing is not done “with a view to commercial resale nor to use in the production of goods (in the US case, “and services”) for commercial use.”

The EU draft agreement provides no exceptions from these requirements, while the US agreement only allows exceptions for “any action which the Member considers necessary for the protection of its essential security interests or any action which is necessary under GATT Article XX or GATS Article XIV.” The use of the modifier, “necessary,” appears to limit the exceptions, which can be transposed form GATT and GATS, to protection of public morals or maintenance of public order, protection of human, animal or plant life or health, securing compliance with non-inconsistent laws or regulations, and probably the acquisition and distribution of products in short national or local supply. Further, reference to GATT XX and GATS XIV would also transpose the


599 See, US Draft Agreement, supra note 49, art. III(1); EU Draft Agreement, supra note 49, art. 2(1).

600 See, EU Draft Agreement, supra note 49.

601 US Draft Agreement, supra note 49, art. IV [emphasis added].

602 Id.

603 See, GATT, supra note 33, art. XX(a), (b), (d), (j); General Agreement on Trade in Services, Apr. 15, 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Annex 1B art. XIV(a)-(c), in The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 284 (1999), 33 I.L.M. 1167 (1994)[thereinafter GATS]. References to GATS art. XIV would also transpose security exceptions. See, Id., art. XIVbis. However, given the text of the exception
requirement that the transposed exceptions not be “applied in a manner which would constitute a means of arbitrary or unjustified discrimination between countries, were the same conditions to prevail, or a disguised restriction on international trade.”

In order to comply with the EU draft agreement, the Malaysian government would have to eliminate all of the exceptions discussed supra, except any which applied to purely commercial purchases by government-owned companies and other government-owned commercial enterprises. Under the US draft agreement, the only additional flexibility would be in the narrowly confined categories just described. None of the general exceptions currently provided would survive, and it is unlikely that most emergency exceptions would survive either. These latter exceptions apply when there is an immediate need for the products sought or where following normal GP processes would endanger basic services and fundamental interests. It might be possible to get some situations which fit within this definition under the limited exceptions that the US

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604 GATT, supra note 33, art. XX; see also, GATS, supra note 608, art. XIV (“applied in a manner which would constitute a means or arbitrary or unjustified discrimination between countries were the same conditions prevail, or a disguised restriction on international trade in services.”); see also United States-Import Prohibition of Certain Shrimp and Shrimp Products: Report of the Appellate Body, WT/DS58/AB/R, ¶¶ 146 et seq. (describing the standard by which a measures application will judged in this context) (Oct. 12, 1998) [herein after Shrimp/Turtle I]

605 See, EU Draft Agreement, supra note 49, art 2(1).


607 See, supra notes 195 et seq. and accompanying text.

608 See, supra notes 199 et seq. and accompanying text.

609 Id.
agreement allows, but most would not qualify. In addition, as discussed infra, the lack of explicit exceptions for preferences for Bumiputera and other domestic providers could also result in the necessity of eliminating several elements of those programs.\footnote{See, infra notes 666 et seq. and accompanying text.} Thus, these provisions could threaten the independence that Malaysia grants its government-owned companies, a factor which has been credited with part of their success,\footnote{See, e.g. Likosky, supra note 113, at 20; JAIN, supra note 84, 834.} the flexibility it grants governmental entities to react to emergency situations,\footnote{See, supra notes 199 and accompanying text.} and maintain essential services, but also its preferences programs.\footnote{See, supra notes 202 and accompanying text.}

4. Decisions Made Directly by the Finance Ministry, State Finance Officials, and/or the Contractor Service Center (CSC) of the Ministry Entrepreneurial Development

The final area, in which Malaysian would have to significantly modify its GP procedures in order to comply with provisions of the US and EU draft agreements, is in regard to procedures applicable in situations where decisions are made directly by the Finance Ministry, state finance officials, or the CSC (the Finance Ministry and others) for purposes other than for fulfilling their own respective procurement needs. These situations fall into two basic categories: contractor registrations; and contract-award decisions made on behalf of one or more other governmental entity. In each category many of the processes currently used by the Finance Ministry and others would have to be replaced with processes that in most cases would reduce the flexibility and discretion that the Finance Ministry and others currently enjoy.

a. Provider Registration

\footnote{See, infra notes 666 et seq. and accompanying text.}
Both draft agreements would require provider registration (or, as the draft agreements term it, “qualification”) decisions be made according to a pre-established criteria, which are freely available to aspiring providers.\(^{614}\) In addition, as discussed in more detail *infra*, both draft agreements contain vague requirements in regards to technical specifications, which are aimed at limiting *inter alia* qualification criteria to characteristics that are related to, in the case of the US draft agreement, “required functional performance”\(^{615}\) or, in the case of the EU draft agreement, the “entity’s procurement functions.”\(^{616}\) Finally, at least under the US draft agreement, a record of the proceedings by which such decisions were made would need to be kept and made available upon request.\(^{617}\)

Generally applicable Malaysian GP rules require that a provider be appropriately registered in order to compete in any tender, and that procuring entities indicate in tender documentation what type of registration is required.\(^{618}\) Rules also describe which entities have the authority to make registration decisions, depending on the type of thing to be provided and in some cases the location of the provider.\(^{619}\) However, they do not

\(^{614}\) US Draft Agreement, supra note 49, arts. VII(2), VII(4), VIII(1); EU Draft Agreement, supra note 49, art. 7(1).

\(^{615}\) US Draft Agreement, supra note 49, art. VII(4).

\(^{616}\) EU Draft Agreement, supra note 49, arts. 4(2) 7(1).

\(^{617}\) US Draft Agreement, supra note 49, art. IX(1).


\(^{619}\) See, *supra* notes 125 et seq. and accompanying text
described the criteria according to which such decisions are made, except in the case of Bumiputera firm (though not producer) qualification,\(^{620}\) and there are no rules which require that any information regarding the decision process be kept or made available.\(^{621}\)

Thus, in addition to establishing an applicable record keeping system (at least under the US draft agreement),\(^ {622}\) Malaysia would be required, under these agreements, to not only change to a system of pre-established provider registration criteria,\(^ {623}\) but also ensure that the criteria chosen reflected the \textit{function} of the procurement.\(^ {624}\) The cost of the first would depend on the shape of current procedures in place and would (excluding possible costs related to exposure of illegitimate activities) mainly be financial. However, the other two criteria could affect more profoundly the way in which the GP market is managed by the Malaysian government, freezing qualification criteria in time and limiting the factors which could be appropriately considered. According to MITI Minister’s statement and discussed in more detail \textit{infra}, one potential casualty could be the flexibility with which the Finance Ministry and others can design and administer preferences for Bumiputera and other domestic providers in GP.\(^ {625}\)

\begin{itemize}
  \item \(^{620}\) \textit{Id.}
  \item \(^{621}\) \textit{Id.}
  \item \(^{622}\) US Draft Agreement, \textit{supra} note 49, art. IX(1).
  \item \(^{623}\) US Draft Agreement, \textit{supra} note 49, arts. VII(2), VII(4), VIII(1); EU Draft Agreement, \textit{supra} note 49, art. 7(1).
  \item \(^{624}\) US Draft Agreement, \textit{supra} note 49, art. VII(4); EU Draft Agreement, \textit{supra} note 49, arts. 4(2) 7(1).
  \item \(^{625}\) MITI Statement, \textit{supra} note 3; \textit{see, infra} notes 666 et seq. and accompanying text.
\end{itemize}
b. Contract-award Decisions

The principal problem in regard to contract-award decisions made directly by the Finance Ministry and others on behalf of one or more other governmental entity is that, while it appears that basic, best-value and contractor-registration requirements apply to such decisions, no other information is available regarding how such decisions are reached, and no record keeping requirements seem to apply.626 This is true both in situations where an individual entity is not allowed, or does not have the capacity, to award a specific contract on its own behalf, causing the decision making authority reverts to the Finance Ministry or state financial officials, and when the Finance Ministry concludes contracts on behalf of other governmental entities through central contracting and/or the umbrella concept. 627 Both agreements would require that the criteria, on which all contract-award decisions are based, be made explicit, and that a detailed record of the process by which they are made, be kept, which would eliminate the flexibility that the Finance Ministry and others currently enjoy.628 As discussed infra and also reflected in the MITI Minister’s statement, the loss of this flexibility could significantly be felt in the administration of preferences for Bumiputera providers in GP.629

626 See, supra notes 169 et seq. and accompanying text. Further, clear guidelines for the limit of PB authority in the context or purely state procurement do not appear to exist. Id.

627 See, supra notes 169 et seq. and accompanying text.

628 See, US Draft Agreement, supra note 49, arts. VII(2), VII(4), VIII(1); EU Draft Agreement, supra note 49, art. 7(1).

629 See MITI Statement, supra note 2; see, infra notes 666 et seq. and accompanying text.
B. Threats to Preference Programs

The reason, most often raised by the Malaysian government in public statements to explain its opposition to an agreement on TGP, is the threat such an agreement could pose to Malaysia’s preference programs for Bumiputera and other domestic providers.  

For example, in typically bellicose language, the then Prime Minister Mahathir in the budget speech for 2004 referred to developed country efforts to conclude an agreement on TGP as another instance of “the West...using the WTO to push forward their agenda for economic colonization,” warning that:

If we do not oppose this agenda, our efforts to implement the National Development Policy, which safeguards the interests of domestic entrepreneurs, including Bumiputera, as well as the objective of promoting domestic industries, will not be achieved.  

While it would be easy to dismiss this as just another example of Mahathir using inflammatory, anti-Western rhetoric to generate domestic support, there is some truth in at least the second half of his statement.

Notwithstanding the consistent promises of developed countries (now embodied in the Doha Declaration’s mandate regarding TGP) that domestic preferences are off the table, a TGP agreement such as that envisioned by the US and the EU could threaten

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630 See, e.g. MITI Statement, supra note 2; Mahathir Budget Speech, supra note 73, ¶ 99; MALAYSIA AND THE WTO, supra note 560, at 25.

631 Mahathir Budget Speech, supra note 73, ¶ 99.

632 See, e.g., Communication from the European Communities, Positive Effects of Transparency in Government Procurement, WT/WGTGP/W/41 ¶10 (“It is not the case, as it is often claimed, that new multilateral TGP rules will open DC procuring markets to suppliers from developed countries.”) (June 17, 2003); Communication from the United States, Proposal for a Work Plan to Build on the Progress of the Working Group WT/WGTGP/W/35 ¶ 9 (“The Doha Ministerial Declaration has narrowed scope by limiting its parameters to ‘transparency aspects, and explicitly providing that an
the preferences Malaysia grants Bumiputera and other domestic providers in, at least, three ways. First, various provisions respectively contained in the US and EU draft agreement could directly impact the manner in which those preferences are currently administered in several, not insignificant, ways. Second, while developed countries are wont to plead up and down that a TGP agreement would not serve as a means to create greater access for foreign providers to Members’ GP markets and thus threaten domestic provider preference programs, the provisions contained within the two draft agreements could indirectly have this effect. Finally, there are strong indications that a TGP agreement is meant by its developed country proponents to be an initial step on the way to a multilateral GPA, which under most interpretations would require Malaysia to abandon its preferences programs, unless it won (i.e., paid dearly for) a specific waiver.633

1. Direct Threats to Current Operation of Preference Programs

The direct threats, which the provisions of the two draft agreements could pose to the current operation of preferences for Bumiputera and other domestic providers, fit into two categories. In the first category are threats posed to the hands-on role which the executive plays in areas of the preference program for Bumiputera providers. In the second category are threats to current and potential preference programs, which depend on flexible administration and differential treatment in technical specifications, posed by provisions in each agreement which seek to rationalize GP processes and reduce discrimination within them.

633 See infra.
a. “Hands-On” Approach

In the Sixth Malaysian Plan, the Malaysian government stated that while preference programs for Bumiputera would be continued, “they will be designed and managed to encourage only the more enterprising individuals and businesses in order to promote viable Bumiputera interests and increase their presence in the economy.”

According to the Second Outline Perspective Plan (the ten-year development plan issued the same year and which embodies the NDP), this policy represented a change in policy away from simply encouraging the participation of Bumiputera in business to promoting “quality of participation.” It also represented the government’s recognition of the abuses, which had come to be common in the preference system and the need to control them.

In the operation of GP preferences, this change in policy meant both a reversion of authority over who qualifies for Bumiputera preferences to Finance Ministry and CSC, and a more general shift toward increased direct involvement in the administration of preferences by members of the federal executive, and in particular Mahathir and Finance Ministry officials. A significant handful of the elements which grew out of these changes present conflicts with provisions in the two draft agreements.

The component of the preference program which would be most affected are the preferences granted by the Finance Ministry to Bumiputera providers in the context of

634 Sixth Malaysia Plan, 1991-1995 § 1.97 (July 10, 1991) [emphasis added]; see also . Second Outline Perspective Plan, 1991-2000 p 112(June 17, 1991);


636 See, supra notes 326 et seq. and accompanying text.

637 See, supra notes 420 et seq. and accompanying text.
central contracting and procurement organized under the umbrella concept. The draft agreements would require that tendering and contract-award decisions be conducted according to a set, pre-established criteria, that the invitation to tender be widely and freely publicized to qualified (if applicable) tenderers, and that any applicable preferences be announced in that invitation. Further, the EU draft agreement would require negotiated and limited tenders to be restricted by laws or regulations to “clearly prescribe[d]…conditions,” and one version of the US draft agreement would require that the procurement method chosen be “the most efficient and effective method to achieve their procurement objective, taking into account market circumstances and the costs and benefits of each method.”

The preference rules governing central contracting and procurement under the umbrella concept, however, give no indication beyond the affirmation of their applicability in these contexts of their extent or form; this suggests that they operate in a relatively informal manner, informing the choices which the Finance Ministry makes but dictating none. Indeed, given the nature of projects implemented under the umbrella concept, which involves the coordination of the capabilities of a large number of SMEs to fulfill the needs of single consumer, arguably such flexibility is a necessary

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638 See, supra notes 285 et seq. and accompanying text.


640 EU Draft Agreement, supra note 49, art. 5(4).


642 See, supra notes 285-87 and accompanying text.
component. Under either of the draft agreements, this flexibility likely could not be continued; rules would need to be drafted which direct exactly how these decisions are to be made in each context and precisely what preference would be given to Bumiputera and/or other domestic providers. Further, depending how narrowly the requirements in the two draft agreements regarding procurement methods quoted supra were read, negotiated procurement under the umbrella concept could be attacked as either not sufficiently constrained by laws or regulations, or not the best tendering method given the procurement’s purpose. In fact several other preferential practices taken directly by the Finance Ministry or authorized by it could also come under attack, including government coordinated foreign and domestic joint ventures for works projects, negotiated tenders with singular Bumiputera producers, and depending how it was implemented even the set-aside of 30% of all works contracts for Bumiputera providers.

A second and related element of the system of preferences for Bumiputera providers that would very likely violate the same provisions of the draft agreements is the strategy employed by Mahathir and others to develop a strong, viable entrepreneurial BCIC, by selectively doling out privileges and contacts to only those Bumiputera which

643 See, id.


645 See, EU Draft Agreement, supra note 49, art. 5(4); US Draft Agreement, supra note 49, art. V(2)(option 2)

646 See, supra note 379 and accompanying text.

647 See, supra note 248 and accompanying text.

648 See, supra note 271 and accompanying text.
they believed had the unique capacity to be successful. This strategy, which Gomez terms “pick a winner,” often involved choices that there were not based on even past performance of the beneficiaries (let alone any other pre-set criteria), but rather whether they had the indefinable quality that was believed would allow them to be successful. Such strategy (which may or may not be continued under the new Batawi administration) could violate several provisions of both draft agreements, including:

- the requirement in both draft agreements that contract-award decisions be based on a preset criteria;
- the requirement in the EU draft agreement that negotiated tenders be restricted by law or regulation to clearly specified conditions; and the requirement in the US draft agreement that that award criteria contain “explicit and objective requirements that are, to the greatest extent possible, defined in terms of required functional performance.”

Finally, the way in which the Finance Ministry qualifies those eligible for the extraordinary preferences given to Bumiputera producers, would have to be changed. Both draft agreements require that all qualification decisions be based on pre-set criteria.

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649 See, Gomez (1994) supra note 212, at 7-8; Gomez (2003), supra note 102, at 76-77, 79-81, 103, 115.

650 See, Gomez (2003), supra note 102, at 81; Gomez (1994), supra note 212, at 7


652 EU Draft Agreement, supra note 49, art. 5(4).

653 US Draft Agreement, supra note 49, art. VIII(1); EU Draft Agreement, supra note 49, art. 7(1).

654 US Draft Agreement, supra note 49, art. VII(4)

655 See, supra notes 250 et seq. and accompanying text.
which are freely available, the US agreement stating further that they must be “explicit and objective.”\footnote{US Draft Agreement, supra note 49, arts. VII(1), VII(2), VII(4), VIII(1); EU Draft Agreement, supra note 49, art. 7(1).} While the Malaysian GP rules are explicit in regards to the criteria necessary to qualify generally as a Bumiputera company, they say nothing about the criteria for qualification as a Bumiputera producer.\footnote{See, supra notes 250 et seq. and accompanying text.} Analogous to references to preferences granted in the context of central contracting and procurement done under the umbrella concept,\footnote{See, supra notes 282 et seq. and accompanying text.} the rules state only that Bumiputera producer status will be given by the Finance Ministry.\footnote{See, supra notes 250 et seq. and accompanying text.} It might be that the government feels it is necessary to have this flexibility, so that it can, for example, encourage joint ventures of various shapes between Bumiputera and foreigners.\footnote{See, e.g. Sixth Malaysia Plan 1991-1995 § 1.99 (describing government plans to “encourage the establishment of genuine joint-ventures between Bumiputera and non-Bumiputera or foreigners.”) (July 10, 2001).} However, unless the considerations which inform that flexibility could be reduced not only to preset criteria, but also one that was explicit and objective, it would likely have to be abandoned.\footnote{See, US Draft Agreement, supra note 49, arts. VII(1), VII(2), VII(4), VIII(1); EU Draft Agreement, supra note 49, art. 7(1).}

\textit{b. Rationalization and Non-Discrimination}

Provisions in the draft agreements could also threaten the current flexibility which allows tendering processes, contract-award processes, and completion and qualification requirements to be tailored so as to accommodate the needs and/or weaknesses of...
Bumiputera and/or other domestic providers. With the probable exception of preferences that are applicable in the context of central contracting and GP under the umbrella concept, the current system of preferences operates in the form of price preferences and set-asides.\textsuperscript{662} However, this has not always been the case. For example, TCL No. 3/1974 (the first post-1969 TCL to articulate preferences for Bumiputera providers, in force until 1995) provided \textit{inter alia} that, in order to “allow the participation of tailors of small means,” large tenders should be broken into smaller parts.\textsuperscript{663} Further, the same TCL, recognizing the importance that “continuity”\textsuperscript{sic} plays “in the progress of some Bumiputera companies,” ordered governmental entities to “give contracts that are successive for a number of years to [Bumiputera] contractors that have proven their abilities.”\textsuperscript{664} Similarly, TCL No. 17/1981, recognizing that due to financial and organizational shortcomings many Bumiputera providers were not able to complete works projects within the period allotted in their respective contracts, ordered that such providers should be given up to three additional months to complete the contracted for works.\textsuperscript{665} Several provisions in the draft agreements would make actions analogous to

\begin{flushright}
\textsuperscript{662} \textit{See, supra} notes 202 et seq. and accompanying text.


\end{flushright}
these, if not directly violatory, at least subject to potential challenge which could greatly increase their costs of administration.⁶⁶⁶

Both agreements require that Members carry out the obligations which they respectively describe in a non-discriminatory (ND) manner.⁶⁶⁷ The US draft agreement confirms that this incorporates both obligations of, what are known as, most favored nation treatment (MFN) and obligations of national treatment, i.e. a Member could not treat the providers of another Member any less favorably than it treats its own providers or those from another country.⁶⁶⁸ These provisions would arguably, foreclose several reasonably foreseeable preference policies similar to those used in the past. For example, if the government wanted to allow Bumiputera and/or other domestic providers additional time to prepare their bids in an open-tendering for a complicated project, so as to compensate for their lack of experience and/or capability in the preparation of such bids, they would be in violation of these ND provisions.⁶⁶⁹ Both agreements would require that

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⁶⁶⁸ US Draft Agreement, supra note 49, art. II. It should be noted that the preferences for providers from other ASEAN countries, which until 1995 were clearly in force in Malaysia and appear to still be mandated by the terms of the ASEAN PTA, see supra note 236, would not be in violation of these non-discrimination provisions. The countries of ASEAN were granted a waiver of generally applicable MFN requirements by GATT Members in order that they may grant one another more favorable treatment than each grants to other GATT (now WTO) Members. GATT Contracting Parties in Agreement on ASEAN Preferential Trading Arrangement, Decision of 29 January 1979 (L/4768); see, also, Differential and More Favorable Treatment Reciprocity and Fuller Participation of Developing Countries, Decision of 28 November 1979 (L/4903); [cite Davidson 7]

providers be given sufficient time to prepare a responsive bid. Thus, if Bumiputera and/or other domestic providers were given more time to do so, the former provision would not have been applied in the same manner to foreign and domestic providers and so violate these ND provisions. In fact, the US draft agreement explicitly requires in this regard “that such time-periods be the same for all suppliers.”

Each draft agreement also contains provisions, which would limit the freedom of procuring entities to craft tendering or qualification specifications in a way that would create a favorable competitive environment for Bumiputera and/or other domestic providers, such as the splitting of tailoring tenders discussed supra. The EU draft agreement, Article 4(2) states:

Each procuring entity shall ensure that technical specifications are not prepared, adopted, or applied in a manner which constitutes a disguised means of achieving objectives which are unrelated to that entities procurement functions.

Article VII(4) in the US agreement states, analogously, that “[p]rocuring entities shall specify explicit and objective requirements that are, to the greatest extent possible,

670 US Draft Agreement, supra note 49, art. VI(3); EU Draft Agreement, supra note 49, art. 6.


672 See US Draft Agreement, supra note 49, art. VI(3.1).

673 See US Draft Agreement, supra note 49, art. VII(4); EU Draft Agreement, supra note 49, art. 4(2).

674 See, supra note 667 and accompanying text.

675 EU Draft Agreement, supra note 49, arts. 4(2).
defined in terms of required functional performance.”\textsuperscript{676} It is possible that under both of these provisions procuring entities could get around the obstacle, which they seem to create, by making the assistance of a class of providers an explicit function of the procurement in question. However, as discussed \textit{infra}, while this approach has been accepted in the context of GP regulation in the EU, it is not clear that it would succeed in the context of the WTO.\textsuperscript{677} Thus, even if Malaysian procuring entities were explicit about the preferential function that any technical specifications crafted for this purpose had, they would still risk a costly challenge at the DSB and incur the risk of not prevailing.\textsuperscript{678}

A more specific threat would be created by provisions in both draft agreements that would limit the freedom of procuring entities to parse bids, forbidding it when the intent behind the parsing is to avoid application of the respective agreement.\textsuperscript{679} On its face, parsing tenders to make them easier to compete for by a class of providers (such as the policy regarding tailors discussed \textit{supra}) would not seem to violate this provision.\textsuperscript{680} However, in addition to other possible arguments based on ND and on technical specifications, it could be argued that by structuring preferences this way, the procuring entity is avoiding having to apply more traditional price-preferences and set-asides and thus the obligation under the agreement to include in tendering documentation all

\textsuperscript{676} See US Draft Agreement, supra note 49, arts. VII(4).

\textsuperscript{677} See, \textit{infra} note 778 and accompanying text.

\textsuperscript{678} See, \textit{infra} notes 737 et seq. and accompanying text for discussion of the possible application of the DSU to any agreement concluded on TGP.

\textsuperscript{679} See US Draft Agreement, supra note 49, art. III(3.1); EU Draft Agreement, supra note 49, art. 2(3).

\textsuperscript{680} See, \textit{supra} note 667 and accompanying text.
applicable preferences.\textsuperscript{681} Thus, depending how broadly this prescription was read, it could make any parsing of bids, in order to advantage Bumiputera and/or other domestic providers, violatory.

Finally, the generally applicable requirements that tender documentation contain all relevant information about the project to which the tender applies, including applicable time limits and preferences, could arguably be violated by Malaysian preferences both actual and potential.\textsuperscript{682} First, these requirements would forbid the type of flexibility currently enjoyed by the Finance Ministry in the preference programs it administers directly, as discussed \textit{supra}. It would also eliminate the government’s flexibility to adopt measures which sought to aid Bumiputera or other domestic providers who were already engaged in fulfilling government contracts and required assistance and/or dispensation from otherwise applicable rules to complete them. Thus, for example, the rule issued in the mid-1980’s that granted Bumiputera providers additional time to complete government contracts, which they had already been awarded, would be violatory.\textsuperscript{683} In fact, in addition to violating the requirement in both agreements that all applicable preferences be listed in tendering documents, such an action would also arguably violate the requirement in both draft agreements that tender documents include applicable completion times, and possibly even ND provisions.\textsuperscript{684}

\textsuperscript{681} \textit{See}, US Draft Agreement, supra note 49, art. III(3.1); EU Draft Agreement, supra note 49, art. 2(3).

\textsuperscript{682} \textit{See} US Draft Agreement, supra note 49, art. VII(3); EU Draft Agreement, supra note 49, art. 5(2).

\textsuperscript{683} \textit{See, supra} note 669 and accompanying text.

\textsuperscript{684} \textit{See}, US Draft Agreement, supra note 49, arts. II, III(3.1); EU Draft Agreement, supra note 49, arts. 1(1),2(3).
2. Market Access Implications

In addition to these potential direct threats to Malaysia’s preference programs, the two draft agreements could also threaten preferences indirectly by increasing the access of foreign providers to its GP markets, and thus possibly imperiling both types of preferences, which after all are fundamentally about limiting access to that market. Recognizing this, Malaysia, joined by many of the other members of the LDC Group, has repeatedly voiced its concern that provisions suggested by developed countries for inclusion in a TGP agreement “delved into the area of market access.” Several provisions proposed by developed country Members arguably fall in that category. However, it is provisions, which would mandate DRPs and linkage to the DSU, that are of particular concern to Malaysia and other developing country Members in this context. The strength of this concern appears to derive from two sources: 1) the worry

685 WT/WGTGP/M/14, supra note 506, ¶ 5 (relating statement by the Malaysian representative) (Aug. 13, 2002); see, also, e.g. Id. (relating comments India); WT/WGTGP/M/17, supra note 60, ¶ 22; WT/WGTGP/M/15, supra note 59, ¶ 47 (relating statement by the Malaysian representative) (Jan. 9, 2003); MALAYSIA AND THE WTO, supra note 560, at 25 (“[S]ome Members are seeking to liberalise the government procurement market in countries where limited opportunities are currently offered to foreign participants, thus going beyond the issue of transparency.”).

686 See, Abbott, supra note 9, at 288 (“[T]he vast majority of the TGP Group’s deliberations concerned mundane procurement matters like publication of national regulations, open versus limited tendering, drafting of specifications and bidder qualifications, time periods, record-keeping, and the like. These are important issues, especially in negotiations whose sub-text is market access.)[emphasis added; internal citation omitted]; see, also, MITI Statement, supra note 2 (complaining that “discussions have ventured into issues such as procurement methods, decisions on qualification and decisions on contract awards.”)

687 WT/WGTGP/M/17, supra note 60, ¶ 22; see also, e.g., WT/WGTGP/M/18, supra note 60, ¶ 12 (July 7, 2003); WT/WGTGP/M/17, supra note 60, ¶ 22; WT/WGTGP/M/15, supra note 59 ¶¶ 13, 47, 78, 83; WT/WGTGP/M/12, supra note 396, ¶ 25; Report of the Meeting of 25 Sep. 2000, Working Group on Transparency, WT/WGTGP/M/11 ¶¶ 31, 33; (Dec. 19, 2000); WT/WGTGP/M/10, supra note 74, ¶ 16.
that powerful providers from wealthy countries would use these mechanisms in combination with other provision as a way to challenge decisions in the procurement process and thus coerce greater market access; and 2) the perception that these sorts of challenge mechanisms make no sense in the structure of an agreement which does not purport to guarantee market access and thus may, by implication, create them.

\textit{a. Challenging for Access}

In a meeting of the WGTGP held just months before the Cancun Ministerial, the Malaysian delegation stated:

\begin{quote}
Any eventual agreement on transparency in government procurement… should not have provisions on domestic review that could be used to question the decisions of Members’ governments, administrators and procuring entities.
\end{quote}

The EU responded to this, and similar concerns of other developing country Members, stating “that, in practical terms, the only possibility for disputes was when a Member would omit to publish a tendering notice or would be late in publishing some procurement rules.” The truth appears to be that several provisions contained in the two draft agreements could provide a basis for challenging both contract-award decisions and provider registration decisions, and in the process be used as a way to widen access to Malaysia’s GP market.

\begin{footnotes}
688 See, e.g. WT/WGTGP/M/17, supra note 60, ¶ 23;
689 See, e.g., WT/WGTGP/M/17, supra note 60, ¶ 16.
690 WT/WGTGP/M/17, supra note 60, ¶ 23 [emphasis added].
691 WT/WGTGP/M/17, supra note 60, ¶ 29.
\end{footnotes}
i) Contract-award Decisions

Several provisions in both agreements provide possible bases for challenging of specific contract-awards on grounds related both to how the contract was awarded and how the tender for that contract was conducted, which could directly effect an opening of Members’ GP markets. The most basic threat in this context are provisions, which would require that the contract-award decisions be based on pre-set criteria,692 and the absence or, in the case of the US draft agreement, the limited quality of exceptions to this requirement.693

In the Malaysian context, such challenges would likely be successful in regard to contracts awarded directly by the Finance Ministry and thus could result in an opening up of these processes to greater participation by foreign providers.694 However, even in regards to contracts awarded by other governmental entities, which must be done according to set criteria, a particularly litigious provider could use challenges as a way to harass procuring entities, and thus place pressure on the entity to treat it favorably.695 The same is true in regard to non-discrimination provisions, which could give rise to

692 US Draft Agreement, supra note 49, art. VIII(1); EU Draft Agreement, supra note 49, art. 7(1).

693 See, supra notes 604 et seq. and accompanying text.

694 See, supra notes 169 et seq. and the accompanying text.

695 See, supra notes 134 et seq.; WT/WGTGP/M/17, supra note 60, ¶ 36 (relating comments by the Brazilian representative: “….his authorities experience has been that suppliers who lost a procurement would use each and every possible recourse, administratively and judicially, to delay the procurement, perhaps even feel that if they could protract the whole bidding process long enough the whole bidding process could be declared null and void and they could get a second chance.”)
harassing, amorphous claims that domestic or other foreign providers were granted better
treatment at some stage in the tendering or contract-award process.\textsuperscript{696}

Several bases for challenge of contract-award decisions also exist in provisions of
both agreements, which address in vague (thus, easily manipulable) language the
technical specifications that a procuring entity is allowed to use in contact award
decisions. These provisions are Article 4(2) in the EU draft agreement and Article VII(4)
in the US draft agreement which require respectively that “each procuring entity ensure
that technical specifications are not prepared, adapted or applied in a manner that
\textit{constitutes a disguised means or achieving objectives which are unrelated to that entity’s}
procurement \textit{functions},”\textsuperscript{697} and “[p]rocuring entities shall specify explicit and objective
requirements that \textit{are, to the greatest extent possible, defined in terms of functional}
performance.”\textsuperscript{698}

Under both of these provisions, an unsuccessful bidder could challenge a contract-
award decision on the basis of both the definition of a specific procurement’s function as
well as whether the manner in which a contract was awarded aligned with those
functions.\textsuperscript{699} Thus, conceivably even if a procuring entity followed preset procedures,
which it believed resulted in the best possible fulfillment of its procurement functions, it
could be found to have violated these provisions, if the body ruling on challenge either
disagreed on the function of the procurement in question or the advisability of the means

\textsuperscript{696} Id.

\textsuperscript{697} EU Draft Agreement, supra note 49, art. 4(2) [emphasis added].

\textsuperscript{698} US Draft Agreement, supra note 49, art. VII(4) [emphasis added].

\textsuperscript{699} See, US Draft Agreement, supra note 49, art. VII(4); EU Draft Agreement, supra note
49, art. 4(2).
used to pursue it. The agreements provide no basis for determining either question, thus, leaving them open to interpretation, argument, and, therefore, challenge.

A Member could also challenge an entity’s contract-award, decision methods at the DSB on analogous bases, wherein it would not be unlikely that the “function” of procurement activities could be defined narrowly to include only best value objectives. This would not only open GP markets generally, but could also imperil technical definitions designed to favor local producers in the manner described supra. As one commentator put it, “[a] myriad of methods are used to frustrate foreign competition in public purchasing…includ[ing] technical standards or bid requirements,” these provisions in the two draft agreements could make that much more difficult.

In addition to these more generally focused provisions, others contained in the agreements could be used to challenge contract-award decisions on more specific bases, particularly in regards to tendering methods. While neither draft agreement specifically prescribes the tendering methods which procuring entities may use, the vague wording of Article 5(4) of the EU draft agreement and Article V(2)(option 2) of the US draft


702 See, generally, WT/WGTGP/M/17, supra note 60, ¶ 77 (relating comments by EU representative: “…the DSU had been conceived in the WTO to be applied to agreements related to market access, and in principle, the DSU did not apply to agreements with no market access or clear economic impact.”).

703 See, supra notes 667 and accompanying text.

agreement both create opportunities for challenge. The former states that while tenders open to a single provider or limited number are allowed, their use should be confined to specific conditions defined by laws or regulations and “Members shall ensure that procuring entities do not utilise such methods for the purpose of restricting participation in the procurement participation in a non-transparent manner.” Analogously, the US draft agreement states that “entities may select the most efficient and effective method to achieve their procurement objective, taking into account market circumstances and the costs and benefits of each procurement.” The vague wording of both italicized sections would provide significant opportunity for challenge, e.g.: What is the procurement’s objective? Was this the most effective and efficient method to achieve it? Is the method being used to limit participation in a “non-transparent manner”? What does that mean? Further, the US agreement appears to partially limit the universe of reasons, which can be used to justify the choice of a method, to economic considerations, increasing the difficulty a procuring entity would face defending the method it chose.

Finally, both agreements contain provisions which require that time-limits for the submission of bids take into account the “particular circumstances” and “complexity” of

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706 EU Draft Agreement, supra note 49, art. 5(4) [emphasis added]

707 US Draft Agreement, supra note 49, art. V(2)(Option 2) [emphasis added].


each project.\textsuperscript{710} Thus, somewhat paradoxically, a procuring entity could see its contract-award decision challenged because it followed preset bid acceptance time-limits, rather than the time-limits believed appropriate by an unsuccessful bidder in light of the “particular circumstances” and “complexity” of the project.\textsuperscript{711}

\textit{ii) Registration (Qualification) Decisions}

Many of the same provisions, which have been discussed \textit{supra} in regard to contract-award decisions, could be used to challenge provider registration decisions in a similar manner.\textsuperscript{712} First, as discussed \textit{supra}, unless the current system is changed, any potential provider whose registration application was denied would almost certainly challenge that decision on the grounds that there are no publicly available, preset criteria on which registration decisions are made.\textsuperscript{713} However, even if that criteria was set and released, the vague wording about technical requirements and the obligation that such requirements comport with the functional objective of the procurement, would likely make registration decisions vulnerable to the same sorts of challenges to which contract-award decisions would be vulnerable under these provisions.\textsuperscript{714} If a provider’s registration was denied, the chances are great that the provider and/or its parent

\textsuperscript{710} US Draft Agreement, supra note 49, art. VI(3.2); EU Draft Agreement, supra note 49, art. 6(1).

\textsuperscript{711} \textit{Id.}

\textsuperscript{712} \textit{See, supra} notes 696 et seq. and accompanying text; \textit{see also}, MITI Statement \textit{supra} note 2 (mentioning the effect on registration decisions that developed country proposals would have).

\textsuperscript{713} \textit{See, supra} notes 622 et seq. and accompanying text.

\textsuperscript{714} \textit{See, US} Draft Agreement, \textit{supra} note 49, art. VII(4); EU Draft Agreement, \textit{supra} note 49, art. 4(2)
government would, as a matter of course, challenge the method by which that decision was reached as well as the criteria on which it was based. Further, non-discrimination provisions in both agreements would give additional grounds to such provider or its parent country to challenge the rejection of his registration request, if he could make a colorable claim that domestic providers were being advantaged as a result of the shape of the registration criteria or how it was applied in his case. Whatever bases the challenges were grounded upon, it can be fairly certain that the result (because of their success and/or coercive effect) would be an increased number of registered foreign providers and thus more competition for Bumiputera and other domestic providers.


The other major source of concern, which developed country Member proposals to include DRPs and DSU linkage provisions appears to raise for Malaysia and other developing country Members, is structural. Specifically, provisions that would allow aggrieved providers to seek redress and/or which would allow the Member government’s to do so on their behalf only make sense in the context of an agreement which guarantees certain levels of market-access. In other words, if there were no market access guarantees how could a provider be injured, and what would constitute an appropriate remedy for such an injury? Thus, accepting developed country assertions that no agreement on


716 See, e.g., WT/WGTGP/M/14, supra note 560, ¶ 5 ; WT/WGTGP/M/17, supra note 60, ¶ 23 ; WT/WGTGP/M/18, supra note 60, ¶ 12.
TGP would contain market access guarantees, including DRPs requirements and linkage to the DSU, is as Malaysia has put it “fundamentally flawed.”

i) DRPs

In discussions at the WGTGP, there has been widespread agreement that if DRPs provisions were included in any agreement on TGP, they should be flexible and not require any one model, and the two draft agreements reflect this. Unlike analogous provisions in the GPA, relevant provisions in both agreements require only that any DRPs be fair, transparent, prompt, and independent. Neither says anything about the kinds of injuries it would be called on to remedy (only that it should be available to providers “affected by” the challenged action or decision) and neither discuss the types of remedies it should be capable of providing for such injuries. However, statements by proponents of the inclusion of DRPs provisions betray an understanding of their intended function in regards to injury and remedy, which closely mirrors that of analogous provisions in the GPA and which strongly demonstrates the difficulty, if not impossibility, of reconciling support for inclusion of DRPs provisions with claims that any agreement on TGP will not create market access guarantees.

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717 WT/WGTGP/M/17, supra note 60, ¶ 23.
718 WT/WGTGP/W/33, supra note 70, ¶ 53 (describing the view as “widely held”).
720 GPA, supra note 359.
722 Id.
Article XX(7) of the GPA provides that challenge procedures should be available for *inter alia*: “(a) rapid interim measures to correct breaches of the Agreement and *to preserve commercial opportunities*...[and] (c) correction of the breach of the Agreement or *compensation for the loss or damages suffered.*” Further GPA Article XX(8) requires that challenges should be dealt with promptly “[w]ith a view to the *preservation of commercial* and other interests involved.” Similarly, proponents of including DRPs provision in an agreement on TGP have stated that “a review provision should provide adequate remedies to protect the interest of suppliers...[which] should include the possibility of re-tendering procurements or damages to cover legitimate damages.” Elsewhere, they have referred to the need to provide “compensation...[for] an injury or economic loss [,which] has flowed from an inconsistency of a procurement process with the applicable legislation.” The difficulty is that while the GPA is meant to lower market barriers in GP in order to increase the opportunities for foreign providers to compete freely with domestic providers, any potential TGP, supposedly, is not supposed to create any guarantees of increased market access. Therefore, while speaking about the “preservation of commercial opportunities” and the “compensation” of providers, should such opportunities be lost makes sense, in the context of the GPA, it

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723 GPA, supra note 359, art. XX(7)(a), (c) [emphasis added].

724 Id., art XX(8) [emphasis added].

725 WT/WGTGP/W/33, supra note 70, ¶ 65.

726 Id., ¶ 66.

727 See, GPA, supra note 360, prmb.

728 See, supra note 636.
is incompatible with an agreement on TGP that does not guarantee any level of market access to Member country providers. 729 However, as these statements betray, it is almost impossible to conceive of the function of DRPs procedures in an agreement on TGP in a manner that does not implicitly create market access guarantees.

A provider who has not yet contracted with a governmental entity could only conceivably be injured in the GP process, if it was unfairly denied the opportunity to contract with that entity. 730 In other words, the only possible injury would be unfair denial of market access, and the only possible remedies for such an injury would either be remediation of the process to undo that denial or compensating the provider for the denial. A right to an effective DRPs depends implicitly on a market access right, and so it appears impossible to reconcile developed country advocacy for including provisions mandating DRPs with their claims that an agreement on TGP would not create a market access right. 731 Therefore, it is difficult not to share Malaysia’s opinion, shared with others, that almost inherently “the issue of domestic review procedures delves into the realm of market access,” 732

729 WT/WGTGP/W/33, supra note 70, ¶¶ 65-66.

730 See, e.g., WT/WGTGP/M/17, supra note 60, ¶ 54 (relating comments by the Egyptian representative: “why is it important that the possibility to challenge be available to all suppliers affected by a measure given that a the Working Group’s work had nothing to do with market access.

731 See, supra note 636.

732 WT/WGTGP/M/15, supra note 59, ¶ 47; see, also, e.g., WT/WGTGP/M/17, supra note 60, ¶ 54
ii) Linkage to the DSU

The problems with linking an agreement on TGP to the DSU, if the former is not intended to guarantee market access, are closely analogous to those identified with including DRPs provisions *supra.* They relate to identifying what injury would flow from non-compliance with such an agreement’s provisions and how a remedy could be crafted for such an injury, if the Member, found in violation, refused to bring itself into compliance. The best articulation of these problems was delivered by the Brazilian representative:

Unlike other WTO agreements, an agreement on transparency in government procurement...would not seek to address trade relations among Members. The WTO dispute settlement mechanism was based on the presumption that a violation of an obligation would have an effect on the trade of Members, whereas in the context of an agreement on transparency in government procurement, there could be no such presumption. Further, under the DSU, the way to correct non-compliance was through compensation or retaliation. It would be difficult to base any dispute settlement system on that premise because there would be no violation of trade rights in the case of a transparency agreement.  

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733 See, *supra* notes 723 et seq. and accompanying text.

734 See, WT/WGTGP/M/15, supra note 59, ¶¶ 78, 83; General Agreement on Tariffs and Trade: Multilateral Trade Negotiations Final Act Embodying the Results of the Uruguay Round of Trade Negotiations [hereinafter WTO Agreement], Apr. 15, 1994, annex 2, art. 22, 33 I.L.M. 1125, 1226, [hereinafter DSU]; *See also* WT/WGTGP/M/14, supra note 560, ¶ 5; *See also, e.g.*, WT/WGTGP/M/18, supra note 60, ¶ 12; WT/WGTGP/M/17, supra note 60, ¶ 23.

735 WT/WGTGP/M/17, supra note 60, ¶ 16 [emphasis added]; *see also*, WT/WGTGP/M/17, supra note 60, ¶ 77 (relating comments by EU representative: “…the DSU had been conceived in the WTO to be applied to agreements related to market access, and in principle, the DSU did not apply to agreements with no market access or clear economic impact.”).
The language of applicable provisions in the two draft agreements, when compared to language in analogous provisions of the GPA, implicitly admits this distinction.

The GPA repeats language contained in GATT Article XXIII(a), which refers explicitly to the availability of recourse to the DSB for Members that feel “any benefit accruing to it, directly or indirectly, under this Agreement is being nullified or impaired…as the result of another Party or parties to carry out its obligations under this agreement.”736 On the other hand, applicable provisions in the former state, almost sheepishly and without detail, that Member provisions for dispute settlement under GATT Articles XXII and XXIII, GATS Articles XXII and XXIII, “as elaborated and applied by the [DSU],” apply to disputes between members over the application of the agreements in which they are respectively contained.

This apparent sheepishness reflects the fundamental incompatibility of linking an agreement which is not supposed to guarantee any level of market access to WTO dispute resolution procedures. Robert Howse and Petros Mavroidis note in regard to GATT Article XXIII(a) (which is effectively the same as GATS Article XXIII(a)) that “[o]n its face…it would seem that a complaining party would have to prove beyond violation of a GATT provision, that a benefit accruing to it had been nullified or impaired.”737 As the statement by the Brazilian representative supra explains, if an agreement on TGP is not

736 See, GPA, supra note 359, art. XXII(2); General Agreement on Tariffs and Trade 1947, Oct. 30, 1947 art. XXIII(a), 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194 (1994) (providing complaint procedures shall be available for a Member, which “considers that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that any objective of the Agreement is being impeded as the result of (a) the failure of another contracting party to carry out its obligations under this agreement.”).

737 HOWSE & MAVROIDIS, supra note 27, chap. 26 § 2.21.
supposed to effect any change in market access for Member providers, it would not seem to grant any benefit which could be nullified or impaired.\textsuperscript{738} Howse and Mavroidis go on to note that GATT case-law “has made it clear that any time the complaining party has managed to prove a violation of the GATT there was ipso facto a\textit{ prima facie case} that a benefit has been nullified or impaired.”\textsuperscript{739} However, in addition to the fact that past DSB rulings are not strictly binding on subsequent cases before it, the facial incompatibility between GATT Article XXIII(a) and an agreement that is not supposed to create any guarantees of market access, supports the position by Malaysia and others that linking the two makes no sense.\textsuperscript{740}

Even assuming that the problems in regard to defining an injury could be overcome in a manner suggested by Howse and Mavroidis, it seems impossible to

\textsuperscript{738} See, supra note 739 and accompanying text.

\textsuperscript{739} HOWSE & MAVROIDIS, supra note 17, chap. 26 § 2.21 (stating further that in no case has this presumption been overcome) [emphasis original].

\textsuperscript{740} See, generally, WT/WGTGP/M/14, supra note 560, ¶ 5; See, also, e.g., WT/WGTGP/M/18, supra note 60, ¶ 12; WT/WGTGP/M/17, supra note 60, ¶¶ 16, 23; WT/WGTGP/M/15, supra note 59, ¶¶ 78, 83. It should be noted also that adopted Panel or Appellate Body decisions do not strictly have precedential effect, HOWSE & MAVROIDIS, supra note 17, chap. 25 § 4.1, and that the fundamental cannon of interpretation, which such WTO adjudicating bodies must follow, is the rule of customary international law that a treaty’s provisions should be given their plain meaning in the context where they are found. See, DSU, supra note 738, art. 3.2 (“The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Member recognize that is serves to preserve the rights and obligations of Members and to clarify the existing provisions of those agreements in accordance with\textit{ customary rules of interpretation of public international law.”}) [emphasis added]. The italicized section or art. 3.2 has interpreted by WTO adjudicating bodies to mean Article 31-33 of the Vienna Convention on the Law of Treaties. HOWSE & MAVROIDIS, supra note 17, chap. 25 §1; See, Vienna Convention on the Law of Treaties, May 23, 1969, art. 31(1) 1155 U.N.T.S. 331 (“A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context.”) [hereinafter VCLT].
conceive how the DSB could overcome problems related to crafting remedies, if a Member was found to be in violation of an agreement on TGP (which did not guarantee market access) and fails to bring itself into compliance.741 Article 22.2 of the DSU provides that if a Member, against whom a violation has been found, does not within a reasonable time comply with the recommendations or rulings of the DSB and no satisfactory settlement has been reached between the parties, the successful complaining Member “may request authorization from the DSB to suspend the application to the Member concerned of concessions or other obligations under the covered agreements.”742 However, DSU article 22.4 provides that “[t]he level of the suspension of concessions or other obligations authorized by the DSB shall be equivalent to the level of the nullification or impairment.”743 In other words, while the successful party is authorized to suspend concessions to the noncompliant Member, the extent of that suspension is limited to that which would have the same economic effect on the noncompliant member as the latter’s noncompliance has on the successful complaining member.744

But if an agreement on TGP did not guarantee any level of market-access, it would seem impossible to calculate this sort of equivalency.745 How could you determine in the first place the economic effect on a successful complaining Member of another Member’s noncompliance with the provisions of an agreement that did not guarantee any

741 See, DSU, supra note 738, art. 22.
742 DSU, supra note 738, art. 22.2.
743 DSU, supra note 738, art. 22.4.
744 See, DSU, supra note 738, art. 22.4.
745 See, DSU, supra note 738, art. 22.4.
form of market access to the successful complaining Member’s providers? What would be the economic benefit that was nullified and impaired, and how could it be calculated so that the successful complaining member could suspend equivalent concessions in retaliation? It seems almost impossible to conceptualize, let alone calculate and apply.\textsuperscript{746}

In addition, even assuming that the economic effect of such a violation could be determined, crafting a remedy which did not turn the presumption of Article 22.3 on its head would be difficult if not impossible.\textsuperscript{747} As the arbitration panel in \textit{European Communities-Bananas} explained:

\begin{quote}
“[T]he basic rationale of [Article 22.3] disciplines is to ensure that the suspension of concessions or other obligations across sectors or across agreements (beyond those sectors or agreements under which a panel or Appellate Body has found violations) remains the exception and does not become the rule.”\textsuperscript{748}
\end{quote}

However, in the context on an agreement on TGP, it is hard to see how suspensions across sectors or agreements would not become the rule. For example, it would be impracticable, given the free flow of information, to suspend access of information about an upcoming tender to only providers from certain countries, or given the standing rules and separation of powers issues in many nations, to suspend access to DRPs only in regard to providers from some countries. Thus, successful complaining Members would

\textsuperscript{746} See, WT/WGTGP/M/18, \textit{supra} note 60, ¶12; WT/WGTGP/M/17, \textit{supra} note 60, ¶¶ 22-23; WT/WGTGP/M/15, \textit{supra} note 59, ¶¶ 18, 47; WT/WGTGP/M/14, \textit{supra} note 560, ¶ 5; WT/WGTGP/M12, \textit{supra} note 8, ¶25.

\textsuperscript{747} See, DSU, \textit{supra} note 738, art. 22.3.

\textsuperscript{748} \textit{European Communities—Regime For The Importation, Sale And Distribution Of Bananas—Recourse to Arbitration by the European Communities Under Article 22.6 Of The DSU} WT/DS27/ARB/ECU, March 24, 2000, ¶ 3.7.
almost invariably be forced to suspend concessions to a noncompliant Member which flow from another agreement and which relate to a sector other than GP.\textsuperscript{749}

Finally, assuming that a WTO adjudicating body found that it was possible to suspend concessions contained in a TGP agreement vis-à-vis an individual Member, such a suspension would seem particularly contrary to the overall purposes of an agreement on TGP. It is arguable that the use of suspension of concessions as a remedy for noncompliance is, as a general matter, contrary to the underlying trade liberalization purpose of the WTO and its constituent agreements.\textsuperscript{750} However, in the case of an agreement on TGP, the contradiction would seem even more pronounced. Proponents of an agreement on TGP often claim its benefits would be enjoyed in large part not by providers of other Members but the citizens of the Members who institute the reforms it requires.\textsuperscript{751} Indeed, the preamble of the US draft agreement states, among the assumptions on which its provisions are based, that \textit{inter alia}:

\begin{quote}
[E]fficient, effective and appropriate government procurement enhances the management of government resources, the quality of governance and the economic performance of the community as a whole.\textsuperscript{752}
\end{quote}

\textsuperscript{749} It is interesting to note in this regard that GPA Article XXII(7) specifically prohibits cross agreement suspension of concessions in retaliation for violations of the GPA, as well as, suspension of concession contained in the GPA in retaliation for violations of other WTO agreements. GPA, supra note 359, art. XXII(7) (“Notwithstanding paragraph 2 of Article 22 of the Dispute Settlement Understanding, any dispute arising under any Agreement listed in Appendix 1 to the Dispute Settlement Understanding other than this Agreement shall not result in suspension of concessions or other obligations under this Agreement, and any dispute under this Agreement shall not result in the suspension of concessions or other obligations under any other Agreement listed in said Appendix 1.”)


\textsuperscript{751} \textit{See}, e.g., WT/WGTGP/M/15, supra note 59, ¶ 15 (relating comments of Switzerland).

\textsuperscript{752} US Draft Agreement, supra note 49, prmb.

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If that is the case, it would seem particularly odd to sanction the nontransparent operation of a successful complaining Member’s GP system—for example by making a number of provider registration decisions in a manner which was contrary to established procedures, secretive and without recourse—as a means of punishing non-compliance by another Member. Rather than instilling among Member government officials a long-term respect for transparent procedures as the fundamental requirements of a well-operating and accountable GP system, it would cast them as benefits which can be granted or denied as the situation demands.

In response to these sorts of complaints, the US representative has generally been dismissive. He has stated that the manner in which WTO dispute resolution mechanisms, like suspension of concessions, would operate was “not the most important issue that needed to be considered,” and that “if a Member did not implement any provisions of the transparency agreement, Members would not be seeking concessions or retaliation, but compliance.”

In the first place, the latter statement is an almost meaningless truism. Complaints are always brought in the first place to seek compliance, the remedy provisions, just discussed and with which the most problems of compatibility exist, come into play only after a Member found in violation refuses to bring itself into compliance. And as Howse and Mavroidis have observed, since 1998 there has been

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753 WT/WGTGP/M/11, supra note 691, ¶ 38; See, also WT/WGTGP/M/17, supra note 60, ¶ 32.

754 WT/WGTGP/M/17, supra note 60, ¶ 32; See, also WT/WGTGP/M/11, supra note 691, ¶ 38.

755 See, generally, Pauwelyn, supra note 754, at 343-44.
“an avalanche of compliance panels.” Thus, while it can be safely assumed that every claim brought under an agreement on TGP “would not be seeking concessions or retaliation, but compliance,” that fact says nothing about whether a dispute over compliance would result in which a Member would seek concessions or retaliation.

Second, irrespective of protestations by some Members that an agreement on TGP would not create market access guarantees, its effect as interpreted by the DSB could well be otherwise. The Appellate Body (AB) of the DSB, in its very first case, stated explicitly that when a WTO adjudicative body is called upon to interpret a constituent treaty of the WTO, it is guided by “customary rules of interpretation of international law,” which are embodied in Articles 31-33 of the Vienna Convention on the Law of Treaties (VCLT). The VCLT makes clear that the primary source for interpretation is “the ordinary meaning to be given to the terms of the treaty in context and light of its object and purpose.” An instrument’s negotiating history, or travaux preparatoires, will, as a general matter, only be looked to as a supplementary source of interpretation in limited circumstances, particularly when the plain meaning of treaty’s terms read in context are unclear.

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756 Howse & Mavroidis, supra note 17, chap 26 p. 56.
757 WT/WGTGP/M/17, supra note 60, ¶ 32; See, also WT/WGTGP/M/11, supra note 691, ¶ 38.
758 United States-Standards for Reformulated And Conventional Gasoline, WTO Doc. WT/DS2/AB/R (quoting DSU, supra note 738, art. 3.2)(adopted April 29, 1996)
759 VCLT, supra note 744, art. 31.
760 Id., art. 32; see, also, Howse & Mavroidis, supra note 17, chap. 25 §§2.1-2.2.2.3.
Thus, for example, in the original *Shrimp-Turtle* case the AB rejected the complaintants’ suggestion that “exhaustible natural resources” as used in GATT Article XX(g) should be interpreted to include only things such as coal, oil or diamonds, an interpretation which the proponents’ claimed (and to an extent showed) was reflected in the negotiating history. The AB based its holding primarily on the fact that “[t]extually, Article XX(b) is not limited” in the narrow manner suggested, and secondarily on the theory that the GATT’s provisions should be interpreted according to an “evolutionary” approach which takes into account modern understandings of the terms in question. Thus, notwithstanding the frequent statements made at the working group that an agreement on TGP would not create any market access guarantees, there is nothing stopping a WTO adjudicative body from finding that the plain meaning of such an instrument’s provision (for example, language such as that quoted supra regarding technical specifications) read in context with the agreement’s other provisions, such as DRPs and linkage to the DSU, logically creates such guarantees.

Finally, WTO adjudicative bodies have shown themselves disposed to examine, and often apply, interpretations reached by other WTO adjudicative bodies (particularly

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761 *Shrimp/Turtle I*, supra note 608, ¶¶ 127-29.

762 Id., ¶128 [emphasis original].

763 Id., ¶ 130.

764 See, generally, e.g., *European Communities—Measures Affecting Asbestos And Asbestos-Containing Products*, WTO Doc. WT/DS135/AB/R ¶ 188 (adopted March 12, 2001) (rejected the EU’s contention that certain measures because of their substance could be excluded from the application of GATT Article XXIII:1(b) and thus the DSU.).
the AB) in order to resolve a disputed point before them.765 Therefore, though arguably questionable in light of differences in purposes between the two agreements, provisions that an agreement on TGP share with the GPA (discussed infra and including provisions related to technical specifications) could be interpreted in a dispute, according to interpretations of similar provisions contained in the GPA or even a wholly unrelated agreement.766 In the process, provisions in an agreement on TGP could well take on the quality of market access guarantees, which every other WTO constituent agreement explicitly contains and in terms of which the adjudicative structures of the WTO are designed and implicitly assume.

3. Prelude to a Multilateral WTO Government Procurement Agreement?

An agreement on TGP in the form envisioned by the US and EU drafts would also threaten Malaysia’s preference programs for Bumiputera and other domestic providers if it fulfilled its purpose as a prelude to a multilateral GPA. As baseline, the GPA requires that party governments:

[P]rovide immediately and unconditionally to the products, services and suppliers of other Parties offering products or services of the Parties, treatment no less favorable than: (a) that accorded to domestic products, services and suppliers; and (b) that accorded to products, services and suppliers of any other Party.767

Further, it requires that all domestically established suppliers be treated no less favorably, irrespective of the extent of their foreign affiliation or ownership and/or the country-

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765 See, e.g. European Communities-Trade Description of Sardines, WTO Doc. WT/DS231/AB/R ¶ 155 et seq. (citing extensively prior WTO case law to support its decision to accept amicus curiae briefs) (adopted Sep. 25, 2002); see, also, HOWSE & MAVRODIS, supra note 17, chap. 28 § 4.

766 See, infra notes 771 et. seq. and accompanying text.

767 GPA, supra note 359, art III(1) [emphasis added].
origin of the products or services that they supply, if the foreign country in question is a party to the GPA.\textsuperscript{768} 

While these baseline obligations forbid programs, which give preferential treatment to domestic providers and/or products, unlike most other WTO agreements, the GPA does not apply equally to, or between, all parties.\textsuperscript{769} Rather, its specific application to a party, in general, and as between it and specific other Members, is a matter of negotiation.\textsuperscript{770} Thus, for example, the US has demanded and received an exemption from the GPA rules, regarding national treatment and contract-award procedures in regards to “set asides for small and minority business” and programs established by sub-central government entities that are intended to encourage development of distressed area and businesses owned by various vulnerable groups.\textsuperscript{771} In response to these exemptions, other parties have taken similar exemptions themselves (in some cases though no analogous programs previously existed), or, as in the case of the EU, have in retaliation, excluded providers from the US and other countries, which have claimed similar exemptions, from benefiting from certain concessions, in the case of the EU, access to DRPs.\textsuperscript{772}

\textsuperscript{768} \textit{Id}, art III(2).

\textsuperscript{769} \textit{See}, TREBILCOCK \& HOWSE, \textit{supra} note 16, at 202.

\textsuperscript{770} \textit{See}, GPA, supra note 359, arts. I(1), XXIV(11).

\textsuperscript{771} GPA, supra note 359, United States Annex to Appendix 1, General Notes, Note1; \textit{See} McCRUDDEN, \textit{supra} note 359, chap. 8, p. 27 (forthcoming).

\textsuperscript{772} McCRUDDEN, \textit{supra} note 359, chap. 8, p. 27.
Thus, if Malaysia, which has very extensive preference programs in place for both Bumiputera and other domestic providers, was to become a party to the GPA it would have three choices: 1) eliminate these programs; 2) negotiate an exception for them; or 3) possibly save some of their constituent elements, by restructuring the way they are implemented so as to transform their policy objectives into contract requirements.

The second option seems unlikely. The scale of Malaysia’s preferences is such that, if they were left in tact, they would eviscerate Malaysia’s ND obligations under the GPA. Further, unlike the U.S., Malaysia does not wield significant negotiating clout at the WTO. Thus, if won at all which seems unlikely, exceptions for its preference programs could only be won by Malaysia, if it agreed to allow other Member countries to deny concessions to Malaysian providers to such an extent that the GPA would likely not benefit them at all.

The third option is advocated by Christopher McCrudden on the basis of his reading of GPA Article XIII(4)(b) and the Beentjes Case decided by the European Court of Justice (ECJ), in which the ECJ found that social objectives could be included in contract requirements (as opposed to contractor qualification requirements) in a manner which did not violate ND provisions. The approach is intriguing and not without potential application to some of the objectives to which, especially Bumiputera, preferences are put. However, the approach could not be expanded wide enough to encompass all of Malaysia’s extensive preference programs, especially those which explicitly discriminate against non-domestic providers. Further, as an untested

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773 See, supra notes 202 et seq. and accompanying text.
774 See, McCrudden, supra note 359, chap. 14, pp. 39-41.
interpretation in the context of the GPA, it would be risky to defend on its basis even those elements of Malaysia’s program which it could arguably encompass.

Thus, if Malaysia (or any other similarly situated developing country Member) joined the GPA, it would, as a practical matter, be left with only one option, the elimination of most or all of its GP preference programs.

According to Kenneth Abbott (on the basis of *inter alia* interviews with trade officials from the US and EU), “[t]he whole aim of the [TGP] exercise from the US and EU perspectives, was to multilateralize the GPA.”775 The following sections appear to support this. First, statements by US and EU officials demonstrate clearly their intention to use the TGP as a preliminary step on the way to multilateral GPA. Second, elements of the two draft TGP agreements demonstrate an intention by their respective authors to use them as building blocks for a future multilateral GPA.

a. *US and EU Official Statements*

In his article tracing the origin of the TGP initiative at the WTO, Abbott describes a situation wherein the US and the EU shared the common aim of expanding the GPA to include all WTO Members.776 According to Abbott, the US believed that this was impossible to do immediately and so “it would be more effective to create a new multilateral agreement covering only transparency; then try to add market access commitments overtime.”777 The EU did not immediately share this view, believing “WTO negotiations would only be meaningful if they promised increased concrete

775 Abbott, supra note 9, at 290.

776 See, id., at 286-87.

777 Id., at 287.
opportunities to participate in foreign procurement projects by broadening the GPA and enlarging its substantive coverage." Abbott states that the US was ultimately able to win the EU over to its strategy, and their joint proposal for a TGP agreement focused almost exclusively on transparency with only a single sentence “suggesting the possibility of future market access negotiations,” a line that was subsequently dropped in the face strong developing country opposition. Statements by US and EU, for the most part, support this characterization of events, except possibly the claim that EU was truly won over by the US strategy.

Maybe reflecting the desire of US officials to play their cards close to the chest once efforts to pursue an agreement on TGP began in earnest, the only official statements made by the US which have drawn an explicit relationship between efforts to negotiate an agreement on TGP and the GPA are contained in a USTR report released a few months before the Singapore Ministerial in 1996. However, the statements are unambiguous in this regard. In describing the efforts, which the USTR had been making at the WTO to increase the fairness with which US providers were treated in foreign GP, the report laid out a “three-prong strategy.” The first prong listed is “[e]ncouraging additional WTO members to accede to the current WTO GPA, and in particular, those countries newly acceding to the WTO.” The second is:

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778 Id., at 286-87.
779 Id., at 286.
780 USTR Annual Report (1996), supra note 12, art. III.
781 Id.
782 Id.
[S]eeking a mandate at the first WTO Ministerial Conference in Singapore in December to launch a broader negotiation on procurement among all WTO members to develop an interim arrangement on transparency and due process in procurement of goods and services.\textsuperscript{783}

In case that was not clear enough, the report continues, “[a]n interim agreement on transparency and openness and due process in government procurement will be an important step towards a more comprehensive agreement in the WTO in the near future.”\textsuperscript{784}

While the strong negative reaction of developing country Members at the Singapore Ministerial to the idea of a TGP as the first step on the path to a multilateral GPA seemed to have dampened US enthusiasm for making such statements, the same cannot be said for the EU.\textsuperscript{785} The EU draft agreement, as well as the introductory memo attached to it, both contain statements, which strongly reflect the EU’s hope to use an agreement on TGP as jumping off point for a multilateral GPA.\textsuperscript{786} The introductory section states:

The European Communities appreciate that the mandate of the Working Group is limited to elements on transparency in government procurement. Nevertheless, during this exercise it became clear that introducing multilateral rules in transparency in government procurement will not be sufficient to resolve possible distortions in procurement practices. Therefore, further work on additional multilateral rules on government procurement is necessary.\textsuperscript{787}

\textsuperscript{783} Id. [emphasis added].

\textsuperscript{784} Id. [emphasis added].

\textsuperscript{785} See, Abbott, supra note 9, at 287.

\textsuperscript{786} See, WT/WTGP/W/26, supra note 49, p. 1; EU Draft Agreement, supra note 49, prmbl., art. 14(1).

\textsuperscript{787} WT/WTGP/W/26, supra note 49, p. 1 [emphasis added].
The preamble, then, takes a thinly veiled swipe at preference programs, stating that “further negotiations are necessary to ensure that governments obtain the best value for money in their procurement practices.” Article 14(3) of the draft agreement establishes among the chief duties of the Committee on Transparency on Government Procurement (CTGP), the “initiat[ion of] a study on how to achieve ‘best value for money’ in government procurement and develop elements for further multilateral rules for adoption in due course.” These statements signal, unambiguously, the EU’s continuing determination to use an agreement on TGP as a spring board for a future multilateral GPA, and, as a result, elicited forceful denunciations from developing country Members that also correlated with a noticeable deterioration of the tone of WGTGP’s meetings.

b. Government Procurement Agreement Building Blocks in the Transparency in Government Procurement Agreement Drafts

The suspicion, that was elicited in Malaysia and other developing country Members by the EU’s comments, that “an agreement on transparency in government was merely a building block towards the establishment of a multilateral framework for government procurement” is supported by various provisions in the two draft agreements.

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788 EU Draft Agreement, supra note 49, prmbl. [emphasis added].
789 Id., art. 14(3)
790 See, WT/WTGP/M/9, supra note 44, ¶ 11 (“The representative of Pakistan, joined by representatives of Egypt, India, Indonesia and Malaysia, said that the European Community’s proposition that an agreement on transparency in government was merely a building block towards the establishment of a multilateral framework for government procurement went beyond the mandate of the Working Group. An all encompassing government procurement agreement containing rules on market access would be another way of forcing the plurilateral Agreement on Government Procurement on developing countries.”); Abbott, supra note 9, at 289 (“Discussions [at the WGTGP] appear to have largely consisted of the recitation of opposing opinions.”).
agreements.\footnote{WT/WTGP/M/9, supra note 44, ¶ 11.} Both contain several provisions which not only have direct counterparts in the GPA, but also appear to be aimed at creating in developing country Members the regulatory and institutional infrastructure necessary for their future compliance with the GPA, as well as instituting in a \textit{lightweight} form some of the substantive market-access obligations of the GPA. In other words the form of both draft agreements reflect the USTR’s promise to Congress that “[a]n interim agreement on transparency…[would] be an important step towards a more comprehensive agreement in the WTO in the near future.”\footnote{\textit{Id.} [emphasis added].}

\textit{i) Regulatory Infrastructure}

A majority of the provisions in common between the GPA and the draft agreements predictably deal with transparency, representing for the most part the basic obligations contained in the draft TGP agreements. They include: the requirement that qualification decisions be based on a pre-set, publicly available criteria and that provider candidates be notified whether their applications have been approved or denied;\footnote{\textit{See}, GPA, supra note 359, arts. VIII(a), (f); US Draft Agreement, supra note 49, arts. VII(2), VIII(1); EU Draft Agreement, supra note 49, arts. 7(1).} the requirement that offers for open and selective tenders be publicly announced, that they contain certain types of information, and that procuring entities respond to information requests regarding them;\footnote{\textit{See}, GPA, supra note 359, arts. IX(1), IX(6), IX(8), XII(2), XII(3); US Draft Agreement, supra note 49, arts. VI(1)-(2); EU Draft Agreement, supra note 49, arts. 5(1)-(2).} the requirement that contracts be awarded according to a set

\footnote{WT/WTGP/M/9, supra note 44, ¶ 11.}

\footnote{\textit{Id.} [emphasis added].}

\footnote{\textit{See}, GPA, supra note 359, arts. VIII(a), (f); US Draft Agreement, supra note 49, arts. VII(2), VIII(1); EU Draft Agreement, supra note 49, arts. 7(1).}

\footnote{\textit{See}, GPA, supra note 359, arts. IX(1), IX(6), IX(8), XII(2), XII(3); US Draft Agreement, supra note 49, arts. VI(1)-(2); EU Draft Agreement, supra note 49, arts. 5(1)-(2).}
criteria;\textsuperscript{795} that information be given to unsuccessful bidders on request to explain why their bid was rejected, including why the successful one was chosen (though, interestingly, in the GPA, all such information is delivered via the parent government of the provider rather than directly to requesting providers);\textsuperscript{796} the requirement that information on awarded contracts be generally available;\textsuperscript{797} and, finally, the requirements that government publish all applicable laws, regulations and policies,\textsuperscript{798} respond to information requests about the same,\textsuperscript{799} and make available a list of qualified suppliers, when such qualification is necessary.\textsuperscript{800}

In the GPA, these provisions have an independent function, furthering what Christopher McCrudden has labeled the agreement’s “transparency principle,” under which the agreement seeks to eliminate the barriers to GP which non-transparent practices can create.\textsuperscript{801} However, they also play an important structural by ensuring that party countries have the regulatory infrastructure necessary for confidence among other parties that substantive guarantees of market access are being obeyed. In particular, these

\begin{footnotesize}
\begin{enumerate}
\item See, GPA, supra note 359, art. XIII(4)(c); US Draft Agreement, supra note 49, art. VIII(1); EU Draft Agreement, supra note 49, arts. 7(1).
\item See, GPA, supra note 359, art. XIX(1) ; US Draft Agreement, supra note 49, art. VIII(2.2); EU Draft Agreement, supra note 49, art. 3(2).
\item See, GPA, supra note 359, art. XVIII ; US Draft Agreement, supra note 49, art. VIII(3); EU Draft Agreement, supra note 49, art. 8(3)
\item See, GPA, supra note 359, art. XIX(1); US Draft Agreement, supra note 49, art. V(1), (4); EU Draft Agreement, supra note 49, art. 3(1)
\item See, GPA, supra note 359, art. XVII(2) ; US Draft Agreement, supra note 49, art. V(3), (5); EU Draft Agreement, supra note 49, art. 3(2).
\item See, GPA, supra note 359, art. IX(9) ; US Draft Agreement, supra note 49, art. VI(4).
\item McCrudden, supra note 359, chap. 14, p. 39.
\end{enumerate}
\end{footnotesize}
provisions ensure that both providers and their parent countries can quickly and easily confirm that members are meeting their substantive obligations. Further, in the event that a party is believed to have not complied with those obligations, they greatly facilitate enforcement through party complaints at the DSB and provider actions through DRPs.\textsuperscript{802} Thus, the inclusion of analogous obligations in an agreement on TGP not only would further the underlying “transparency principle” of the GPA but would also create much of the regulatory infrastructure on which the substantive market access obligations of the GPA depend.\textsuperscript{803}

\textit{ii) Institutional Infrastructure}

The second category of provisions, which are shared between the GPA and two draft agreements, are those that create institutional structures (\textit{hard} and \textit{soft}) for the enforcement of obligations. They are arguably the most important in terms of laying the groundwork for the subsequent accession of developing country Members to the GPA.

On the hard side in both the GPA and the draft agreements are provisions mandating DRPs and linkage to the DSU.\textsuperscript{804} DRPs provisions represent one of the most novel and important provisions of the GPA, allowing providers to directly and effectively enforce the market access obligations, which their parent countries have negotiated on their behalf.\textsuperscript{805} Thus, the inclusion of DRPs provisions in an agreement on TGP would

\textsuperscript{802} This is evidenced well by the placement in the EU draft agreement of the clause, which obligates provision of information on specific procurement decisions, within the article that requires DRPs. EU Draft Agreement, \textit{supra} note 49, art 8(3).

\textsuperscript{803} McCrudden, \textit{supra} note 359, chap. 14, p. 39.


\textsuperscript{805} GPA, \textit{supra} note 359, art XX.
get established in developing country Members one of the fundamental components of the GPA structure. This would not only greatly reduce the institutional development that would be necessary when developing country Members joined the GPA, but would also likely facilitate efforts to encourage them to join it by spreading the out its costs. It may have been hoped by developed country Members that developing country Members would be less resistant to an obligation to establish DRPs when the agreement, in which that obligation was contained, did not also contain significant market access guarantees which could be enforced against them through those DRPs established.

Analogous considerations appear to have motivated developed country support for linking an agreement on TGP to the DSU. According to Abbott, linkage was believed by the US and EU to be essential to their strategy of using an agreement on TGP as a way to “multilateralize the GPA.”\(^{806}\) As Abbott explains, that strategy (evidenced by EU comments quoted \textit{supra})\(^ {807}\) involved negotiating an agreement on TGP, first, and then “try[ing] to add market access commitments over time.”\(^ {808}\) If an agreement on TGP was not linked to DSU enforcement provisions, any market access commitments added would not be enforceable. This would not only make them ineffective in and of themselves, but also ineffective first steps towards developing country Member compliance with a comprehensive GPA.

On the \textit{soft} enforcement side are provisions in the two draft agreements which call respectively for the establishment of a CTGP and the provision of technical

\(^{806}\) Abbott, supra note 9, at 290.

\(^{807}\) See, \textit{supra} notes 789 et seq. and accompanying text.

\(^{808}\) Abbott, supra note 9, at 287.
assistance for developing country Members. As mentioned supra, the EU draft agreement states explicitly that among the chief functions of the CTGP should be to “initiate a study on how to achieve ‘best value for money’ in government procurement and develop elements for further multilateral rules for adoption in due course.” Further, it gives the CTGP a broad intermediate dispute settlement role, which would allow it to hear complaints regarding “any particular matter which a Member considers to be detrimental to its interests under this agreement” and issue non-binding “observations as it deems appropriate,” which could be useful as developed country members pushed for expansion of the agreement’s substantive scope.

The US draft agreement is more circumspect but leaves the door open for the CTGP to be used as a mechanism for facilitating the agreement’s evolution. It would give the CTGP the authority to review the agreement’s implementation and the capacity to “perform such additional functions related to government procurement as assigned by the General Council,” a broad mandate that could easily include the duties explicitly assigned to it by the EU draft agreement.

Technical assistance (TA), is often viewed in fairly innocuous terms. However, TA can play an important soft role in achieving developing country compliance not simply which agreement obligations but, more specifically, developed country

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810 EU Draft Agreement, supra note 49, art. 14(3).

811 Id., art. 14(1) [emphasis added].

812 See, US Draft Agreement, supra note 49, art. XI.

813 See, Id., art. XI(1)-(2).
interpretations of those obligations, a role which TA in the context of an agreement on TGP could well play. As Christopher Mays explains in the context of TRIPs related TA, training programs run by the WTO and/or developed country personnel have tended to reflect the developed country Members’ interpretations of TRIPs obligations held by the trainers, which thus becomes inculcated in developing country trainees (generally, judges, lawyers, and government officials). Further, specific legal advice regarding agreement compliance issues given to developing country Member governments in the context of TA has often been focused, principally, on keeping advisee country Members out of expensive trade disputes. Such advise, therefore, has erred on the side of caution and so frequently contained recommendations that advisee countries adopt laws or regulations that go beyond the formal requirements of the agreement in question. Thus, according to May, TRIPs-related TA, in the form of both training and advise, has paradoxically resulted in increased obligations for developing country Members or, as he puts it, “TRIPs-plus.”

Both draft agreements provide for TA to be given to “developing and least developed country Members.” The EU provision is worded broadly and only speaks specifically about assistance to help “set up and operated electronic systems for ensuring

814 Mays, supra note 564.
815 Id.
816 Id.
817 Id.
818 Id.
transparency of procurements.”820 The US draft agreement, however, is far more detailed and lists five broad areas in which TA will be given, including “development of nation legislation and procedures;…training;…[and] institution building.”821 Further, while provision of TA is at the request of the recipient, the US draft agreement would place the authority to “identify specific priorities for individual Members” not in the hands of those individual Member governments but rather with the CTGP.822 Thus, the CTGP would decide how a Member should reform its system and would, then, with the assistance of developed country Member officials, set about instituting those reforms. In such a context, it is not hard to imagine provisions (like the vaguely worded clause in the two draft agreements regarding technical specifications) taking on interpretations which progressively restricted the ability of TA recipient countries to use GP as a policy delivery tool, and thus pave the way for eventual developing country Member adoption of a market-oriented approach to GP embodied by the GPA.

Finally, according to the Malaysian representative, “that the European Communities [have] tied provision of technical assistance to an eventual agreement on transparency in government procurement or to the demonstration of a readiness to negotiate,”823 a charge which the EU representative did not clearly deny.824 Both agreements would make provision of technical assistance subject to “mutually agreed

820 EU Draft Agreement, supra note 49, art. 16.
821 US Draft Agreement, supra note 49, art. XIII(2).
822 Id.
823 WT/WGTGP/18.
824 Id., ¶ 37.
Thus, it is not inconceivable that under either draft agreement TA could be offered to developing country Members explicitly on the condition that they reform their system of GP, not just to bring it into line with the obligations of an agreement on TGP, but rather the GPA or an intermediate step between them.

**iii) Substantive Obligations**

In addition to these provisions which appear aimed at preparing the regulatory and institutional framework for subsequent ascension by developing country Members to the GPA, several provisions common to the draft agreements and the GPA are substantive in nature and, tellingly, are the same provisions identified *supra* as those that would most likely be invoked in combination with challenge procedures to coerce increased market access under either of the draft agreements. In terms of non-discrimination (ND), provisions in the two draft agreements would require Members to apply their respective substantive obligations equally among all providers regardless of origin, while analogous provisions in the GPA apply both generally and specifically in regards to provision of information regarding tenders.\(^{826}\) Further, provisions in both the GPA and the EC draft agreement restrict the availability of limited and negotiation tenders so as to prevent them from being used as a disguised means of discriminating among tenderers.\(^{827}\)

The draft agreements also share a couple of important concrete, or direct, obligations with the GPA. These include the requirement that time limits for accepting

\(^{825}\) US Draft Agreement, *supra* note 49, art. XII(1); EU Draft Agreement, *supra* note 49, arts. 16.


bids vary, depending on the complexity of the project and other circumstances,\(^828\) and limitations on the availability of limited and negotiated tenders.\(^829\) However, the most significant common provisions are those related to technical specifications.

The GPA Article VI requires \textit{inter alia} that: “[t]echnical specifications laying down the characteristics of the products to be procured…shall not be prepared to, adopted or applied with a view to, or with the effect of, creating unnecessary obstacles to international trade,” and that “where appropriate” those specifications be defined “in terms of performance rather than design or descriptive characteristics.”\(^830\) Further, GPA Article VIII(b) requires that “any conditions for participating in tendering procedures shall be limited to those which are essential to ensure the firm’s capability to fulfill the contract in question,” and limit “technical qualifications” to those “necessary to establish the financial, commercial, and technical capacity of suppliers.”\(^831\)

Both draft agreements contain very similar requirements. Article 4(2) of the EU draft agreement states:

\begin{quote}
Each procuring entity shall ensure that technical specifications are not prepared, adapted or applied in a manner that constitutes a disguised means of achieving \textit{objectives which are unrelated to that entity’s functions}.\(^832\)
\end{quote}

Similarly, the US draft agreement, Article VII(4) states:

\begin{quote}
\end{quote}

\(^828\) See, GPA, supra note 359, arts. XI(1); US Draft Agreement, supra note 49, art. VI(3); EU Draft Agreement, supra note 49, art. 6.

\(^829\) See, GPA, supra note 359, arts. XI; US Draft Agreement, supra note 49, art. V(2)(option 2); EU Draft Agreement, supra note 49, art. 5(4).

\(^830\) GPA, supra note 359, arts. VI(1), (2).

\(^831\) Id., art. VIII(b).

\(^832\) EU Draft Agreement, supra note 49, art. 4(2).
Procuring entities shall specify explicit and objective requirements that are, to the greatest extent possible, *defined in terms of required functional performance.*  

As discussed *supra*, depending on how narrowly the *function* of a procurement is defined, these provisions could provide a basis for challenging any number of decisions in the procurement process that appear based on considerations which not are purely economic.\(^834\) In fact, to avoid this possibility, and as a reflection of their own understandings, it seems not unlikely that advisors working under TA arrangements would advocate such an economic understanding of GP function.\(^835\) In the process the EU’s plan to encourage developing country Members to adopt “best value for money” [policies] in government procurement” would be furthered, \(^836\) and, thus, the ultimate goal of multilateral GPA brought closer to fulfillment.\(^837\)

*C. Changes to Distributions of Power*

The final potential “price” that Malaysia could pay if it joined an agreement on TGP, in a form like that proposed by the US and EU, is the effect that such an agreement that could have on the power and authority of, and between, parties in the context of GP system, as well as, more generally in the Malaysian political system.\(^838\) Given, as Jain puts it, the “hegemony of the executive” in both contexts, most of these changes are


\(^834\) See, *supra* notes 701 et seq. and accompanying text.

\(^835\) See, *supra* notes 818 et seq. and accompanying text.

\(^836\) EU Draft Agreement, supra note 49, art. 14(3).

\(^837\) See, Abbott, *supra* note 9, at 286-87.

reflected, at least in part, by a diminution of that hegemony, a point which is particularly important in light of the executive’s control over trade policy.\textsuperscript{839} That diminution would come in two different forms: redistribution of rights and authority within the Malaysian system, and transfer of authority outside the Malaysian system.

\textit{1. Redistribution of Rights and Authority Within the Malaysia System}

Provisions of the two draft agreements could effect a redistribution of rights and authority within the Malaysian system in three ways: 1) directly, by changing the balance of rights and review authority within the operation of the GP system; 2) subjecting Treasury-issued GP rules to unprecedented review; and 3) indirectly, by disrupting informal patrimonial relationships of political power.

\textit{a. Changing the Balance of Rights and Review Authority in the Operation of Malaysian Government Procurement}

The introduction of specific provider rights, corollary government obligations, and a procedure for their enforcement (DRPs), which both draft agreements would effect, would dramatically alter the balance of rights and authority in the operation of GP, and indeed would change the status of actions taken by the government in the context of GP under Malaysian law. As discussed supra, GP is not recognized under Malaysian law as an issue, to which public law considerations and rules attach, but rather as an issue of private law.\textsuperscript{840} Thus, when a governmental entity engages in GP related activities (with the possible exception of GP-related status decisions), it is not constrained by obligations, which attach to other actions of governmental authorities recognized under Malaysian

\textsuperscript{839} Jain, \textit{supra} note 77, at 214

\textsuperscript{840} See, \textit{supra} notes 481 et seq. and accompanying text.
law as “administrative.” Specifically, they are not required to treat citizens affected by GP-related decisions according to the same basic rules of fairness, and, as a result, those decisions are not subject to judicial review to ensure that such basic rules of fairness are obeyed. Provisions in both agreements would profoundly change this.

i) Establishment of Provider Rights and Governmental Obligations

As a fundamental matter, the agreements would require Member governments to enact laws and/or regulations that establish a system of rights for providers and corollary obligations for the government in the context of GP. While these rights and obligations are, for the most part, concerned only with transparency and so would not have immediate applicability to all decisions taken in GP by their establishment, the more general status of GP as an area subject to public law considerations and corollary obligations of the government to treat fairly those affected by decisions made in context would also be established. As a result, for the first time all such decisions would not only be so constrained, but also would be subject to judicial review aimed at ensuring those obligations are fulfilled.

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841 See, supra notes 501 et seq. and accompanying text.
842 Id.
843 See, US Draft Agreement, supra note 49, arts. I (“Each Member shall adopt and apply its procurement laws, regulations and requirements in good faith and in a manner that does not undermine the aims of this Agreement.”) II (“In carrying out its obligations under this Agreement, each Member shall accord to suppliers from any other Member treatment no less favorable that that which it V(5) (re [cite]
844 See, supra notes 501 et seq. and accompanying text.
845 Id.
Further, assuming that Malaysia complied with the obligation to enact laws and/or regulations to place into force domestically the substantive requirements or the draft agreements, the rights and obligations which the drafts specifically enumerate would become, subject to a court’s discretion and a required showing of cause, specifically enforceable through a court order by providers against the element of government to which that duty was assigned. Under both its common law power of *mandamus* and statutory authority to order specific performance (under § 44 of the Specific Performance Act 1950) a court can compel the performance by a government official of “a duty of a public nature, the performance of which is imperative, not optional or discretionary, with the concerned authority.” The threshold requirements that must be proven by an applicant before a court will issue such an order are:

(i) a legal duty is imposed on an authority, and it does not perform the same; and
(ii) the applicant has a legal right to compel the performance of the public duty prescribed by law.

Thus, for example, under the US draft agreement, if a procuring entity did not supply, upon request by a provider, “information as to why their bid was rejected…or the reasons for the denial of their request to become a qualified provider,” a court would have the

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848 *Id.*, at 653.

849 *Id.*
authority to order the entity to do so.\textsuperscript{850} Not only does a court not have the authority, under current Malaysian law, to make such an order, since the applicable rights and obligations do not exist, but, in fact, the entity or its Ministerial superior has the authority to deem such information secret, making its possession and circulation criminal.\textsuperscript{851}

Even in situations where the agreement did not articulate specific provider rights and governmental duties, the more general bringing of GP within the realm of public law, would give courts the power, under § 41 of the Specific Relief Act, to issue declaratory orders in favor of providers, or potential providers, seeking to establish their “legal character” or “right as to any property.”\textsuperscript{852} While a declaratory order does not have any direct coercive effect but rather gains its power from the assumption that governmental entities will not violate the law, the two categories of applicant interests, which can be established through such an order, “legal character” and “right as to any property,” are defined broadly, encompassing any “position recognized by law” and a broad array of rights.\textsuperscript{853} All an applicant must do, subject to a court’s discretion, to receive such an order, is show that a “person is denying, or interested to deny, his title to the ‘character’ or ‘right’.”\textsuperscript{854} Thus, for example, a provider, which felt that it was unfairly denied, or would likely be denied, Bumiputera status by the Finance Ministry, could

\begin{footnotes}
\item[\textsuperscript{850}] US Draft Agreement, \textit{supra} note 49, art. VII(2.2).\textit{see, also}, EU Draft Agreement, \textit{supra} note 49, art. 7(2) (“Un successful bidders can, on request, obtain detailed information as to why their bid was rejected and/or the winning bid was chosen;;”)
\item[\textsuperscript{851}] \textit{See}, \textit{supra} notes 404 et seq. and accompanying text.
\item[\textsuperscript{852}] \textit{See}, JAIN, \textit{supra} note 84, at 726.
\item[\textsuperscript{853}] \textit{Id}.
\item[\textsuperscript{854}] \textit{Id}.
\end{footnotes}
make an application for a declaratory order, establishing that status, effectively taking
from the Finance Ministry this ultimate authority, which they explicitly took back from
procuring entities in the last reform of Bumiputera GP preference rules.855

It should be noted that both of the latter two remedies are subject to the courts
discretion whether or not to issue them, in the case of mandamus, are further limited by
the requirement that an applicant show cause, and among the reasons recognized for
exercising its discretion to refuse an application for either order is the availability of an
alternative remedy.856 Under Malaysian law, unchanged other than to include these
expansions of provider rights and governmental entity obligations, this would not be an
effective bar, since no alternative remedy exists.857 Under both draft agreements, an
alternative remedy in the form of DRPs would most likely exist, however, as shown
infra, this would not mean less judicial involvement, but, indeed, maybe more.858

ii) Introduction of DRPs

Given the current lack of any mechanism for a provider to seek review actions
related to the award of a GP contract and the very likely similar lack of any mechanism
for a provider to seek review of actions taken in regards to GP-related status decisions,859
the provision of DRPs, as mandated by both agreements, would give unprecedented

855 See, supra notes 441 et seq. and accompanying text.

856 See, JAIN, supra note 84, at 658, 727.

857 See, supra notes 447 et seq. and accompanying text.


859 See, supra notes 481 et seq. and accompanying text.
rights of challenge to GP providers in Malaysia. However, as dramatic as the effect that would have on the relationship between providers and governmental entities, the effect it would have on the balance of authority between the executive and judicial branch would be greater.

As argued immediately supra, merely by establishing legal provider rights and corollary governmental entity obligations in the context of GP, laws giving either draft agreement domestic legal force in Malaysia would bring GP-related actions within the scope of judicial review. However, standing requirements would limit access to that review to those providers, which could show that the decision challenged affected adversely a right or interest held by them or frustrated a reasonable expectation of theirs. As discussed supra in the context of an examination of obstacles to challenging of GP-related status decisions, meeting this threshold in the context of GP decisions could well be difficult. Further, because none of the applicable statutes mandate hearing procedures, a review court would only look to whether the challenged decision met the very minimal requirements of minimal procedural (not substantive) fairness. Under either draft agreement, access to review would be much more permissive and the scope of review, both directly and on subsequent examination by courts, would be significantly more expansive.

861 See, supra notes 847 et seq. and accompanying text.
862 See, supra notes 501 et seq. and accompanying text.
863 Id.
864 See, supra notes 508 et seq. and accompanying text.
Under the US draft agreement, DRPs would have to be open to providers who meet two basic requirements. The provider would: 1) have to have “participated in the procurement process,” in regards to which the challenge relates; 2) would have to allege that it was “affected” by “procurement practices or actions that may be inconsistent with the requirements of this agreement, as implemented by the Member.”

Thus, a provider could seek review of virtually any specific action or mode of conduct by a governmental entity that was allegedly inconsistent with the agreement, even if the action or practice affected it only indirectly and regardless of whether or not the provider could prove that it had some interest, right or reasonable expectation that was frustrated as a result. Further, given the broadness and ambiguity with which some of the agreement’s provisions are drafted (particularly the provision regarding technical specifications), a broad range of actions could become subject to challenge. The EU draft agreement is somewhat less permissive, requiring claimants to show that they were “directly and individually affected” by “decisions of procuring entities creating legal effects,” but would still allow far more claims than under the common law.

In terms of form and procedure, both draft agreements would require that DRPs be “fair and transparent” and that they “operate independently of the procuring entity,”

865 US Draft Agreement, supra note 49, art. X(2)-(3).
866 Id., art. X(3).
867 Id., art. X(2)-(3).
868 Id., art. X(2)-(3).
869 See, id, art. VII(4); see also, supra notes 701 et seq. and accompanying text.
870 EU Draft Agreement, supra note 49, art. 8(1)-(2)
but leave the exact form open, allowing members to choose from “judicial, arbitral, or administrative” options.\textsuperscript{871} That said, it seems unlikely that discretionary review by courts to determine whether the actions challenged met minimal standards of natural justice would qualify as “fair.”\textsuperscript{872} Thus, if Malaysia chose to satisfy this requirement by giving jurisdiction to its courts to hear such complaints, their scope of review would have to be extended as much as their requirements for standing weakened.\textsuperscript{873} However, even if, as is more likely, Malaysia chose the administrative option, its courts’ scope of review of GP-related actions would be much expanded beyond that, which would apply simply as a result of the relationships between providers and governmental entities becoming covered by public law as discussed supra.\textsuperscript{874}

As Jain states, a Malaysian court’s authority to review an administrative decision no longer depends on whether that decision is characterized as administrative or quasi-judicial.\textsuperscript{875} However, as he also freely admits, an application for review which springs from a quasi-judicial proceeding is likely to get much more substantial review than one springing from a more traditional administrative decision.\textsuperscript{876} In the latter case, courts will generally only demand that the challenged action meet a minimum level of minimal

\textsuperscript{871} US Draft Agreement, supra note 49, art. X(2); EU Draft Agreement, supra note 49, art. 8(1).

\textsuperscript{872} \textsuperscript{873} US Draft Agreement, supra note 49, art. X(2); EU Draft Agreement, supra note 49, art. 8(1); See, supra notes 508 et seq. and accompanying text.

\textsuperscript{874} See, supra notes 501 et seq. and accompanying text.

\textsuperscript{875} See, supra notes 847 et seq. and accompanying text.

\textsuperscript{876} Jain, supra note 84, at 665,

\textsuperscript{876} Id., at 214.
procedural fairness. However, when the complaint arises out of a quasi-judicial proceeding, a court is likely to be more demanding, looking on *certiorari* review at, not only whether, the proceeding met minimum standards of procedural fairness, but also but also whether there was an error of jurisdiction, a specific procedural defect, the findings of fact wholly unsupported by the evidence, and, finally, an error of law apparent on the face of the record. In addition, in recent years, there has been, what one author has termed, “a heartening surge in judicial activism,” wherein some lower courts have begun examining whether administrative decisions are not only procedurally fair but also “substantively fair.” Thus, under either agreement, Malaysian courts would ultimately have the authority, according to a traditional definition of their review authority, to determine the substance of the obligations flowing from their provisions, and in extreme cases whether they were in fact violated. And according to the more modern formulation, would have a more general power to determine whether or not a provider was, as substantive matter, treated fairly by the system.

The net result, however these uncertainties were resolved, would be that the Finance Ministry’s authority, as the ultimate monitor of procuring entity compliance with applicable rules, would be shifted to another part of the government, and at least in part would accrue to the judiciary. Further, providers, who currently have almost no enforceable rights in the system, would suddenly have a number of such rights and

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877 *Id.*

878 *Id.*, at 696-718.

879 Pillay, *supra* note 84, at cxli (1999); *See, also, JAIN, supra* note 84, at 255.
several effective options for their enforcement, including against the Finance Ministry, itself, when it participates directly in GP processes.

b. Unprecedented Review of Rule-Making

An additional consequence of the US draft agreement’s provisions regarding DRPs (though interestingly not the EU draft agreement’s) would be the unprecedented creation of a governmental entity with the capacity and authority to review and possibly declare void GP rules issued by the Finance Ministry through its Treasury division.\(^880\)

Under the FPA, the Treasury currently enjoys almost unlimited authority to enact rules regulating the GP activities of other governmental entities.\(^881\) The FPA provision, under which the Treasury has chosen to issue such rules, is extremely broad and contains no language that would limit the Treasury’s authority in this regard, and nowhere else in the FPA are there provisions that could have this effect either.\(^882\) Thus, it would be virtually impossible for a court on review to find that a Treasury-issued GP rule was void because it *ultra vires* or was in conflict with the provisions of its authorizing statute.\(^883\) Even if it was more possible, the chance of it happening are further reduced by provisions in the Interpretation Act, which create a strong presumption against *ultra vires*

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\(^880\) *See,* US Draft Agreement, *supra* note 49, art. X(2); *compare* EU Draft Agreement, *supra* note 49, art. 8(1)

\(^881\) *See,* supra notes 460 et seq. and accompanying text.

\(^882\) *See,* Financial Procedures Act, 1957 (Act 61 amended 1972) § 4; *see,* also, *supra* notes 460 et seq. and accompanying text.

\(^883\) *See,* *supra* notes 460 et seq. and accompanying text.
findings, and the demonstrated capability and willingness of the executive to severely punish judges who attempt to void executive actions.

In addition GP rule-making activities of the Treasury are free from oversight by the legislature or any other body. There is no legislative entity, which has the responsibility to monitor administrative rule-making, and there are no generally applicable presentation or publication requirements. Further, as a result of the Finance Ministry’s choice to issue GP-related rules under § 4 of the FPA rather than § 36, as the FPA’s drafters likely intended, it is able to avoid special presentation and consultative requirements which would otherwise have been applied and possibly constrained its actions. Thus, under current Malaysian law, there is no body which has the effective authority to monitor and control Finance Ministry GP rule-making. That would change under the US draft agreement.

The US draft agreement would require that DRPs bodies have the capacity to “review of procurement practices or actions that may be inconsistent with the requirements of this Agreement.” The Oxford English Dictionary defines “practice” in

884 See, Interpretation Act, 1948 (Act 81 amended 1967) §§ 20, 25; See, also JAIN supra note 84, at 91, 105-06.
885 See, supra note 459.
886 See, supra notes 518 et seq. and accompanying text.
887 See, supra note 522 and accompanying text.
888 See, supra note 523 and accompanying text.
889 See, supra notes 528 et seq., 534 et seq. and accompanying text.
891 Id. [emphasis added].
its foremost entry as “[t]he habitual doing or carry out of something; usual or customary action or performance.” The term as used in the US draft agreement, thus, refers to something more than a one-off activity, rather, it has a more general application referring to the way, in which the complained against entity conducts itself in a type of situations, its mode of conduct. This conclusion is supported by the distinction made in the clause between “practices” and “actions,” and by contrast with the EU draft agreement would limit the jurisdiction of DRPs bodies established under it to “review of decisions of procuring entities creating legal effects.” Thus while under the EU draft agreement a provider would be limited in its challenge to individual decisions “creating legal effects,” under the US draft agreement, a provider could challenge both a specific decision taken by procuring entity (“action”) and the way in which that entity conducts itself, generally, (“practice”).

Further, under the US draft agreement provision, the body would be called upon not to review whether that mode of conduct was inconsistent with applicable laws and

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895 It is interesting to note the EU draft agreement actually places the term “inter alia” before this language suggesting the potential for broader review authority. EU Draft Agreement, supra note 49, art. 8(1).

896 Id.

897 US Draft Agreement, supra note 49, art. X(2).
regulations but rather “the requirements of [the] Agreement.”\textsuperscript{898} Thus, if that mode of conduct was, in fact, mandated by applicable laws and/or regulations, and the body held that it was “inconsistent with the requirements of [the] Agreement,” by implication it would be holding that the applicable laws and/or regulations are themselves “inconsistent with the requirements of [the] Agreement.”\textsuperscript{899} In other words, as long as the provider could meet the standing requirements discussed \textit{supra}, he could bring a claim which challenged the validity of the rules under which procurement is conducted.\textsuperscript{900} And while his grounds for challenge would be limited to violations of the agreement, given the broad and vague language of some provisions contained in it, notably regarding technical specifications, a wide range of rules could become subject to challenge.\textsuperscript{901}

Though it is unclear from the wording of the draft agreement what kind of remedy crafting authority a DRPs body would be required to have, it is conceivable that under the US agreement, the Finance Ministry could find any number of its Treasury-issued GP rules, which formerly were, as a practical matter immune from review, struck down by a quasi-judicial entity which was required to operate independently of the Finance Ministry and whose decisions were subject, ultimately to judicial rather than executive control.\textsuperscript{902}

\textsuperscript{898} \textit{Id.}; \textit{see, also, id.}, art I (Each Member shall adopt and apply its procurement laws, regulations and requirements…in a manner that does not undermine the aims of this Agreement.).

\textsuperscript{899} \textit{Id.}, art. X(2).

\textsuperscript{900} \textit{See, supra} notes 869 et seq. and accompanying text.

\textsuperscript{901} \textit{See}, US Draft Agreement, \textit{supra} note 49, arts. X(1), VII(4).

\textsuperscript{902} \textit{Id.}, art. X.
c. Effect on Informal Relationships of Power

In addition to these effects, which an agreement on TGP like that proposed by the EU and the US could have on formal relationships of power within the Malaysian political system, it would also likely have a significant effect on informal relationships of power within the system, particularly in regards to patrimonial relationships of power. As stated at the outset, an in-depth study of patrimonial politics in Malaysia and the effect which an agreement on TGP could have on them is beyond the scope of the current study. That said, given, at the very least, the strong intuitive relationship between the two, it is believed that at least a rough outline of the issue should be given.

For much of Malaysia’s modern history the political structure of, and the distribution of power within, the ruling UMNO, which dominates the coalition of parties that has, in turn overwhelmingly dominated Malaysian politics since 1969, has to a very large degree been based on patrimonial political relationships. Within that context, government contracts have circulated like currency, providing candidates with a means to generate support as well as punish those who fail to support them, creating incentives for party politicians to move up in the hierarchy and curry favor with those above them, and allowing politicians a way to distribute wealth to donors that can later be funneled back to them to pay campaign expenses. An agreement on TGP, like either of the two draft agreements, could (as it was hoped inter alia they would) disrupt that system.

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903 See, CASE, supra note 218, at 99 (Politics in Malaysia can be conceptualized in terms of a steep pyramid,...[a]t is apex looms a national leader...tightly concentrating power in his prime ministerial office, then dispensing benefits to elites in patronimalist ways.”), 111-14; GOMEZ(1994), supra note 212, at 6-26, 35, 60-61; HOROWITZ, supra note 280, at 666-669; Gomez(2003), supra note 102, at 77-80.

904 Id.; See, also e.g. Azmi Khalid & Harun Halim Rasip, Corruption and the Malaysian situation, in CORRUPTION, 74, 76-82 (ALIRAN ed., 1981); Leaders Support PM’s Stand
For example, eliminating the Finance Ministry’s discretionary contract-award authority, making it subject to record keeping requirements, and constraining the availability of negotiated tenders, would make it much more difficult for highest level officials in the federal government to dole out contracts to political allies to secure future support. The same requirements in combination with the elimination, or strict limitation of, exceptions would disrupt the practice of allowing district level UMNO official to award themselves government contracts as a way to pay for party activities at that level. Rules that limit qualification criteria to preset criteria and that give providers

904 Case, supra note 73, 99.

905 See, USTR Annual Report (1996), supra note 12, § III.

906 See, US Draft Agreement, supra note 49, arts. V(2), VIII(1), IX(1); EU Draft Agreement, supra note 49, art. 5(4), 7(1), 8(3); Gomez(2003), at 78-80; supra notes 169 and accompanying text.

907 US Draft Agreement, supra note 49, arts. IV, V(2), VIII(1), IX(1); EU Draft Agreement, supra note 49, art. 5(4), 7(1), 8(3); Leaders Support PM’s Stand on Government Contracts supra note 886, at 2 (“If Umno does not want division heads to expect government awards, then the party should perhaps increase the allocation given to

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on Government Contracts NEW STRAITS TIMES, 2 (Apr. 4, 2002); Con-fusing, MALAY TIMES, 3 (Mar. 30, 2002); Sabri Zain Reform: Questioning our Feudal Loyalty; Malaysians are New People, ASIaweek, 1 (Nov. 3, 2000); Alejandro Reyes, supra note 398, at 1; No Corruption in Pularek Project, Says Agency, NEW STRAITS TIMES, 1 (Jul. 5, 2000); Shahrir to be UMNO ‘Postman’, NEW STRAITS TIMES, 2 (May 22, 2000); Government Agencies Rapped for not Doing Enough for the Poor, NEW STRAIT TIMES, 14 (May 14, 2000); S. Jaysankaran, Revenge Attack, FAR EASTERN ECONOMIC REVIEW, 25 (Mar. 30, 2000)); S. Jaysankaran, Regional Briefing, FAR EASTERN ECONOMIC REVIEW, 16, 16 (Mar. 30, 2000); Malacca Takes Action Against Civil Servants, NEW STRAIT TIMES, 4 (Mar. 26, 2000); Bank Submits List of Errant Staff, supra note 87, at 4 (Mar. 22, 2000); Preparations to be Made for Sanggang By-Election, NEW STRAIT TIMES, 2 (Mar. 7, 2000); UMNO Divisions Must Nominate all Posts, NEW STRAIT TIMES, 18 (Mar. 7, 2000); Malacca Takes Steps to be Fair to Supporters, NEW STRAIT TIMES, 4 (Mar. 6, 2000); Unity Versus Choice as UMNO Polls, NEW STRAIT TIMES, 13 (Jan. 9, 2000); Caterers Fear Losing Contracts, NEW STRAIT TIMES, 10 (Feb. 28, 2000); John Funston, Malaysia’s Tenth Elections: Status Quo, Reformasi, or Islamization?, CONTEMPORARY SOUTHEAST ASIA, Vol. 22, Iss. 1, 23, 32
a way to challenge their treatment, either directly through DRPs or in the courts as a result of transformative effect discussed infra, would make it less likely that officials could blacklist providers who failed to support them and/or their party.\textsuperscript{908}

It is almost impossible to look upon these potential effects as costs rather than benefits, however, it is important to keep in mind that from the perspective of ruling party officials for whom the operation of this system might determine their chances for political survival, the picture could be quite different. Without a more detailed analysis it is not possible to determine just how much concerns regarding these sorts of effects have motivated Malaysia’s opposition to an agreement on TGP, and to do so has not been the point of this paper. However, its probable impact should be kept in mind.

2. Transfer of Authority Out of the Malaysian Political System

While the title of this section is “transfer of authority out of the Malaysian political system,” it might be more accurately titled “transfer of authority away from the Finance Ministry and out of the Malaysian political system.” Given the Finance each division to carry out activities.” quoting Marang UMNO deputy head Datuk Dr Bdul Latiff Awang.)

\textsuperscript{908} US Draft Agreement, supra note 49, arts. VII(2), X; EU Draft Agreement, supra note 49, arts. 7(1), 8; Jayasankaran, Revenge Attack, supra note 886, at 25 (describing actions of the Chief Minster of the state of Malacca, who sought to punish those who had voted for the opposition Islamic party in the 2000 by issuing an order to the various governmental entities located in his state, placing “private clinics, architects, a property valuer and several providers on a blacklist where they [were] excluded from government contracts.” See, also Jayasankaran, Regional Briefing, supra note 886, at 16 ( reporting that 20 contractors and professionals were banned as part of the action); Malacca Takes Steps to be Fair to Supporters, supra note 886, at 4 (quoting the Malaccan Minister as saying, “It is only right that we replace [those who voted for other parties] with supporters who ‘swim and sink’ with the government.” Bank Submits List of Errant Staff, supra note 87, at 4 (detailing actions by Bank Islam against errant employees and contractors done to appease state and get funds back, and actions taken in compliance by federal government-owned companies such as Petronas and Telekom to blacklist any doctors or lawyers who sided with opposition).
Ministry’s hegemonic control over GP in Malaysia, any reduction in the degree of autonomy with which Malaysia is allowed to conduct its GP system, or as Abbott puts it, the “sovereignty costs” of an agreement on TGP like either of the two draft agreements, would be disproportionately borne by the Finance Ministry. This is true not only in relation to its authority in a supervisory role but also its discretionary authority as a direct participant in GP.

a) Limitation of Supervisory Discretion

In terms of its supervisory authority, the Finance Ministry would feel the impact of provisions contained in the two draft agreements most pronouncedly in the area of rule-making, but also in regards to its authority to monitor and control the GP actions of other governmental entities and the corollary authority to grant such entities exceptions to otherwise applicable rules.

i) Rule-Making

As discussed in regards to the potential effects of the DRPs provisions in the US draft agreement on Finance Ministry GP rule-making, the latter currently enjoys practically unfettered discretion over the rules it enacts in this context. This discretion would be greatly limited under provisions in both draft agreements that would link them to the DSU and require that the Members conform their respective laws and regulations to the agreements’ substantive requirements. Assuming problems discussed supra, regarding the incompatibility of linking WTO dispute settlement under the DSU with an

909 Abbott, supra note 9, at 285

910 See, supra notes 885 et seq. and accompanying text.

agreement on TGP that did not purport to create market access guarantees, could be overcome, under either agreement a Member could challenge the consistency of a Treasury-issued GP rule with one or more provisions of the agreement. If the DSB agreed with the complaint, it would have the authority to “recommend” that the Treasury bring the complained of rules into compliance, and if the Treasury failed to do so, the DSB could authorize the complaining party to suspend concessions to Malaysia until it did so.

Of course, it would be up to Malaysia whether or not it, ultimately, changed the offending regulation so as to bring it into compliance with the DSB’s recommendation. However, depending on how the effect of the offending regulation on the complaining member was calculated, the cost of non-compliance for Malaysia could be quite high. Thus, there might be significant incentive for Malaysia to concede the fight and change the offending regulation, making the Finance Ministry’s formerly discretionary rule-making authority de facto subject to DSB review. That proposition would likely be particularly distasteful to Malaysia in light of its recent experiences before the DSB.

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912 See, supra notes 740 et seq.
914 DSU, supra note 738, art. 19.1.
915 Id., art. 22.2;
916 See, supra notes 745 et seq. (discussing retaliation remedies under the DSU and the potential problems of applying them in the context of an agreement on TGP).
917 Most recently the DSB found nothing wrong with a US import regulation, that, in Malaysia’s opinion, violated Malaysia’s “sovereign right” and “coerced [it] into adopting….measures…unilaterally determined by the United States.” United States-
and its opinion, more generally, that the developed country domination of the WTO has biased the decisions of its institutions in their favor.  

**ii) Rule Enforcement and Exceptions**

The other area, in which the Finance Ministry’s current exclusive supervisory authority would be weakened and in part transferred to institution(s) outside the Malaysian political system, is the power to enforce rules and grant exceptions to them where appropriate. Under current law, the Finance Ministry (with the possible exception of PBs in limited circumstances), is solely responsible for ensuring that other governmental entities follow GP rules. As a corollary, the Finance Ministry has the exclusive authority to grant governmental entities involved in federal procurement exceptions from those rules. Thus, it controls whether or not a governmental entity will be required to obey GP rules.

Both draft agreements would eliminate this discretionary authority in a couple of ways. First, as discussed *supra*, provisions providing for DRPs would allow providers to

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918 See, e.g., Marathi Budget Speech, *supra* 73, ¶ 99 (Describing the developed country support for an agreement on TGP: “Once again, the West is using the WTO to push forward their agenda of economic colonisation.”); Eighth Malaysia Plan 2001-2005 § 22.22 (“The failure of the WTO’s Second Ministerial Meeting in Seattle in 1999 demonstrated the need to review the framework of the rule-based multilateral trading system, taking into account the interests of all members, particularly those of developing countries.”) (Oct. 30, 2003).


920 See, *supra* notes 398 et seq. and accompanying text.

921 State financial have analogous authority in the context of state procurement. See, *supra* notes 193 et seq. and accompanying text.
seek review of decisions and/or of the practices of procuring entities, which were
contrary to the respective agreement’s provisions.\textsuperscript{922} Second, under the US and EU draft
agreements, the power to issue exceptions from rules would be, respectively, severely
limited and eliminated, and, when exceptions were not available, would require that all
decisions by entities involved in procurement be made according to a pre-set criteria.\textsuperscript{923}
Third, other Members would have the right to challenge at the DSB \textit{inter alia} any
conduct by procuring entities which was contrary to agreement obligations, and under the
EU draft agreement, could request review or a DRPs body holding at the DSB.\textsuperscript{924} Finally,
under the EU draft agreement, Members could initiate consultations with another member
at the CTGP for review of “any particular matter which a Member considers to be
detrimental to its interests under this agreement,” which could easily (and, in fact,
probably usually would) encompass the failure of a procuring entity to obey rules
reflecting the agreement’s obligations.\textsuperscript{925}

Through the operation of all of these provisions, the Finance Ministry would be
constrained in the choices it made regarding enforcement, and would, in fact, be
compelled to ensure that procuring entities obey GP rules all the time. As a result, some
of the influence, which the Finance Ministry has vis-à-vis other governmental entities,
could be significantly reduced.

\textsuperscript{922} See, US Draft Agreement, \textit{supra} note 49, art. X(2); EU Draft Agreement, \textit{supra} note
49, art. 8(1)

\textsuperscript{923} See, US Draft Agreement, \textit{supra} note 49, arts. IV, VIII(1); EU Draft Agreement,
\textit{supra} note 49, art. 7(1).

\textsuperscript{924} See, US Draft Agreement, \textit{supra} note 49, art. XII; EU Draft Agreement, \textit{supra} note
49, art. 13; see, also, \textit{supra} notes 915 et seq. and accompanying text

\textsuperscript{925} EU Draft Agreement, \textit{supra} note 49, art. 14(1).
b. Limitation of Discretion as Participant in GP

The final and, in some ways, most obvious reduction of discretionary authority within the Malaysian system, which the two draft agreements would have, would be felt by Finance Ministry (and, to a lesser extent, state financial officials and the CSC others) in its role as a direct participant in GP activities. The Finance Ministry participates directly in GP activities, both in provider registration/qualification decisions, and as the entity with the sole authority to award contracts in several situations. In all such situations the Finance Ministry operates unhindered by preset rules/criteria and is free of reporting requirements. Under both draft agreements, this exceptional discretionary authority would disappear, and the Finance Ministry would be required, like all other Malaysian governmental entities are currently, to follow pre-set rules and procedures and keep records of the processes by which decisions were made. While the elimination of this discretionary authority might not have many significant effects on formal relationships of power within the Malaysian political system, it could impact significantly informal relationships of power touched on supra.

IV. CONCLUSION—POSSIBILITIES FOR COMPROMISE?

After the December follow-up meetings to the failed Cancun Ministerial ended also in failure, the Malaysian trade delegation joined by other members of the LDC

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926 See, supra notes 124 et. seq., 425 et seq. and accompanying text.

927 See, supra notes 169 et. seq.

928 See, e.g., supra notes 169 et seq. and accompanying text.

929 See, supra notes 480 et seq. and accompanying text.

930 See, supra notes 907 et seq. and accompanying text.
Group issued an official statement, which proposed unambiguously that efforts to negotiate an agreement on TGP “be dropped.” 931 According this groups reading of the Doha Declaration, which is supported by its text and the comments of the Doha Chairman, an agreement on TGP cannot be conclude unless all WTO Members explicitly consent to it.932 Thus, this group appears to have the power to block such an agreement from ever coming to be, and the inclination to do so. Whether that ultimately occurs depends, at this point, on whether possibilities for sufficient compromise exist; frankly, it appears that they do not.

On the Malaysian side, the recent retirement by Mahathir and instillation of Abdullah Ahmad Badawi in his place may have created a shift in attitudes within the Malaysian executive that would be more favorable towards an agreement on TGP.933 Since taking office Badawi has publicly made cleaning up governmental corruption, particularly in the area GP, a focus of his administration.934 However, it is not clear yet how substantially Badawi is prepared to (or will be able to) reform the way GP is conducted in Malaysian and, maybe more importantly, the way political power is distributed in the system.

931 WT/GC/W/522, supra note 8, ¶ 6.
932 See, supra note 7.
934 Jayasankaran, Tycoons in Trouble, supra note 655, at 50.
In the run-up to the election, Badawi promised “more openness” in GP,\textsuperscript{935} he put some prominent infrastructure projects on hold,\textsuperscript{936} and initiated the prosecution of a prominent businessman and a sitting Minister on corruption charges.\textsuperscript{937} However, it is unclear how far, beyond such statements and high-profile actions, Badawi will be willing or able to go in order to truly reform the way GP is conducted in Malaysia. Besides enacting a policy that forbids businessmen from unilaterally proposing large government projects, Badawi does not appear to have made any other significant changes to GP policies.\textsuperscript{938}

Further, in the area of civil liberties and power-sharing within government, Badawi has done little to improve, and in some ways has allegedly made worse the situation left to him by Mahathir. Badawi has continued government policies aimed at suppressing dissent. Oppressive laws, which allow the government to quash political dissent at will and detain government critics without trial remain not only in effect but were used, in occasionally violent fashion, in the run up to the election to restrict opposition party activities.\textsuperscript{939}

In addition, and significant for the chances of Malaysia compromising an agreement on the TGP which could affect executive control and disrupt the way power-
politics operate within the ruling party, post election Badawi did little to shake up the political structure left to him by Mahathir and took moves apparently aimed at consolidating his control. A number of cabinet officials left over from the Mahathir regime remain in power, including some who have been tainted by accusations of corruption. Further, the Prime Minister’s office was expanded to include six ministers as opposed to the previous four. Badawi retained the important Financial and Internal Security portfolios for himself, the former is the Ministry whose authority would be most affected by an agreement on TGP. Thus, even if a sea change in Malaysian politics would be enough to eliminate obstacles to an agreement on TGP (an assumption which ignores the opposition of other developing country Members which share Malaysia’s complaints), that sea change does not appear to have been brought by the Badawi administration.

On the part of developed country Members, there seems to have been some willingness to compromise, demonstrated by concessions made in the interim between submission off the original and the revised daft ministerial texts at Cancun. The original draft text effectively left everything on the table, stating that the negotiations on a TGP agreement would be based on the work that had been accomplished at the WGTGP, “in particular the 12 issues identified by the Chair.” The revised text, while still stating that

940 See, supra notes 842 et seq. and accompanying text
942 Id.
943 Id.
944 First Draft Cancun Text, supra note 63, Annex F.
work on negotiating an agreement on TGP “shall build on the progress made in the [WGTGP],” contained a couple concessions to developing country complaints.\footnote{Second Draft Cancun Text, \textit{supra} note 63, Annex D.} Most notable among these was that:

\begin{quote}
In regard to domestic review mechanisms, the agreement will address the transparency of such mechanisms, but not otherwise prescribe their characteristics.\footnote{\textit{Id.}, Annex D ¶ 2.}
\end{quote}

However, the other key sticking point, linkage to the DSU, still remained explicitly on the table (though slightly limited to exclude review of individual contract-awards).\footnote{\textit{Id.}} Even the language regarding DRPs quoted \textit{supra}, while possibly limiting the impact which such a provision could have, does not completely remove the issue from the table.\footnote{\textit{Id.}} Indeed, it is unclear what such a provision would mean in a country like Malaysia which does not currently have any functional DRPs; it is not inconceivable that the absence of any functioning DRPs would be considered a violation, forcing Members such as Malaysia to create them.\footnote{\textit{See, supra} note 950 and accompanying text.}

Malaysia has stated on several occasions that as long DRPs and linkage to the DSU remained on the table, it would not agree to begin negotiations on an agreement on TGP.\footnote{\textit{See, e.g.,} WT/WGTGP/M/17, supra note 60, ¶ 23; WT/WGTGP/M/18, \textit{supra} note 60, ¶ 12} Given the recent moves towards consolidation of power by the new Badawi

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\begin{footnotes}
\item[945] Second Draft Cancun Text, \textit{supra} note 63, Annex D.
\item[946] \textit{Id.}, Annex D ¶ 2.
\item[947] \textit{Id.}
\item[948] \textit{Id.}
\item[949] \textit{See, supra} note 950 and accompanying text.
\item[950] \textit{See, e.g.,} WT/WGTGP/M/17, supra note 60, ¶ 23; WT/WGTGP/M/18, \textit{supra} note 60, ¶ 12
\end{footnotes}
administration, it does not seem likely its position on this issue will change.\textsuperscript{951} The developed country Members, while they may be willing to conceded some ground, appear unwilling to budge on linkage to the DSU, a position which Abbott traces in large part to an understanding shared by the EU and US that “[t]he whole aim of the exercise…[is] to multilateralize the GPA.\textsuperscript{952} This, in combination with a more general feeling among developed country Members that “no new WTO agreement should be made unless it is legally binding and subject to the dispute settlement system and the whole apparatus of compensation and retaliation,” appears to make it equally unlikely that the developed country Members will back down on these issues.\textsuperscript{953} Thus, it seems unlikely, absent a dramatic shift on either side, that a multilateral agreement on TGP will be ultimately concluded.

At the end of the Cancun Ministerial, Chairperson Luis Derbez called on members “to learn from the lack of consensus,” to engage in “soul-searching,” and to realize “that business as normal will not succeed.”\textsuperscript{954} In the context of TGP, these comments clearly have resonance. Developed country Members need to move away from simplistic analyses like that of Ambassador Sourmelis, which reduce developing country Member opposition to a TGP agreement to their desire “to protect certain practices like bribery and things like that,”\textsuperscript{955} and the equally simplistic conclusion that an agreement

\textsuperscript{951} See, supra notes 945-47 and accompanying text.

\textsuperscript{952} Abbott, supra note 9, at 290.

\textsuperscript{953} Id., at 293.

\textsuperscript{954} Summary of 14 Sep. 2003, supra note 80.

\textsuperscript{955} Sourmelis, supra note 1.
on TGP would bring only benefits to developing country Members.\(^{956}\) Rather, they need to look more closely at the various costs which this and other similar agreements could create for developing members, and do their best to address them.

As this paper has shown in the case of Malaysian GP, such costs could be significant and could affect fundamental questions like how power is distributed between branches of government, and whether GP can continue to be used as tool to create ethnic harmony. Unless developed country Members appreciate, respect, and address these potential effects, not only will efforts to negotiate an agreement on TGP be not likely to succeed, but also efforts, more generally, to transform the WTO into a comprehensive rule-based institution could also fail.

\textit{Epilogue}

Following the completion of this paper, a deal was struck between developed and developing country Members to restart Doha Round negotiations that had floundered in Cancun.\(^{957}\) The highlight of the deal is the establishment of a framework according to which Members will negotiate an agreement that will ultimately eliminate agricultural export subsidies and significantly reduce domestic agricultural support.\(^{958}\) The framework

\footnotesize  
\(^{956}\) \textit{See, e.g., Abbott.} at 293; Larson, \textit{supra} note 9, at 1169.


\(^{958}\) \textit{See, Decision Adopted by the General Council on 1 August 2004, Doha Work Programme, WT/L/579 ¶ 1(a)-(b) (Aug. 2 2004) [herein after Doha Work Programme].}
also contained a provision which suspended indefinitely all work on negotiating an agreement on TGP.\textsuperscript{959}

\textit{Appendix 1 – TREASURY CIRCULAR LETTER BIL. 4/2003 [unofficial translation]}

All Heads of Ministry Secretaries,  
All Heads of Federal Departments,  
All Respected State Government Secretaries,  
All Heads of Federal Statutory Bodies,  
All Sections with the Authority over Local Government,  
All Head Executive Officials of Government Firms.

**DIRECT PAYMENTS TO SUBCONTRACTORS**

This Treasury Circular Letter has the goal of announcing to all agencies rules concerning direct payments to subcontractors.

2. At this time direct payment is only allowed to \textit{Nominated Sub Contractor (NSC)} [sic]. However in order to overcome the problem of subcontractors that are not paid, agencies are allowed to make direct payments to subcontractors, depending on the following conditions:

- (i) advance payment can be made directly to subcontractor up to 90\% of the total value of the related work of the subcontractor;

- (ii) the remaining 10\% should be paid to the Principle Contractor after CPC is produced and the Agency should make sure that the Principle Contractor pays the subcontractor after the expiration of the completion time guarantee.

- (iii) a direct subcontractor payment condition should be included in the tender documents and contract documents;

- (iv) involved subcontractor should be listed in the class which is appropriate, defined as a Bumiputra and domestic contractor that operates in the area/jurisdiction where the project is implemented;

\textsuperscript{959} Doha Work Programme, \textit{supra} note 964, ¶ 1(g) (“Relationship between Trade and Investment, Interaction between Trade and Competition Policy and Transparency in Government Procurement: the Council agrees that these issues, mentioned in the Doha Ministerial Declaration in paragraphs 20-22, 23-25 and 26 respectively, will not form part of the Work Programme set out in that Declaration and therefore no work towards negotiations on any of these issues will take place within the WTO during the Doha Round.”) [emphasis added].
(v) a direct subcontractor payment condition should also be included in the Letter of Agreement (LOA) [sic] to the principal contractor and contractors are required to return the LOA signed;

(vi) principle contractors are required to sign the Deed of Assignment [sic] with sub contractors for payment for supplies and work that is done by the related subcontractor in a format like that in Attachment A and Attachment B;

(viii) the ultimate contractor may not change the subcontractor list without receiving written approval from the Government; and

(ix) contract should have an indemnity clause to protect the interest of the Government.

3. Payment rules and procedures like those listed in SPP 4/2001 may be used for the payment purposes under this SPP for projects which are completed by PMC.

4. This SPP is in force beginning on the date of this letter.

And thus, thank you.

“SERVICE FOR NATION”

Tan Sri Dr. Samsudin Bin Hitam
Treasury Secretary Head

July 10, 2003

s.k.

Head of the National Secretary
Malaysian National Audit Head
Malaysian National Accountant
All Respected State Financial Officials
USE OF DOMESTIC MATERIALS/GOODS/SERVICES IN GOVERNMENT PROCUREMENT

To:
Heads of Ministry Secretaries,
Heads of Federal Department,
Federal Statutory Body Heads,
Respected State Government Secretaries,
Sections in Charge of Domestic Government,
Head Executive Officials of Government-Owned Companies.

This Treasury Circular Letter aims to announce rules for the use of domestic materials/goods/services in all Government procurement. All agencies are required to obey all the rules that are established as in Attachment A.

2. Treasury Directive 169.2 is changed to that as follows:

169.2(a) “Domestic Materials/Goods/Services should be used fully by agencies in the context of each government procurement. Procurement via importation only will be considered after it has been made sure that it cannot be procured in a domestic manner.”

169.2(b) Abrogated

3. Appropriate steps will be taken against agencies that fail to obey these the above rules and officials that are responsible can be subject to surcharge measures. Negotiators that are appointed to manage government projects that fail to follow this rules also will be black listed and will not be considered for other Government projects.

4. With the coming into force of this Treasury Circular Letter, the following Circular letters are canceled:
   a. SPP Bil. 4/1996
   b. First Amendment and First Addition to SPP 4/1996
   c. SPP Bil. 6/1997

And thus, thank you.

“SERVICE FOR THE NATION”

I that joins in the order,

(Tan Sri. Dr. Samsudin Bin Hitam)
Treasury Secretary Head
RULES FOR THE USE OF DOMESTIC MATERIALS/GOODS/SERVICES IN GOVERNMENT PROCUREMENT

1. As used in this SPP, materials/goods are materials/goods that are made and/or that are produced by domestic producers through production activities. The definition of producers and production activities is as follows:

1.1. “Producer” means a firm that is listed under the Firm Act 165 that take part and/or runs production activities within Malaysia and are ultimately responsible for the quality of the related materials/goods.

1.2. “Production Activities” means making and/or producing any materials/goods with a view to use and includes putting together parts through a production process.

2. Approval of the MITI group should be attained as soon as possible before imported goods with a value over RM 50 thousand are intended to be used. Procurement of completed imported materials/goods that are in the Nations (ex-stock) [sic] and valued at more than RM 50 thousand need approval from the Finance Ministry prior to the procurement of such materials/goods is made. Materials/goods that are valued over RM 200 thousand for one contract that is allowed to be imported should be implemented in a Free on Board (FOB) [sic] manner.

3. Agencies should make sure that specifications that are established for all procurement should conform with and be based on domestic materials/goods of Standard Malaysia (MS) [sic] that have been released by the Malaysian Standard Department. If there is no MS for the related materials/goods, specifications that are prepared by one Specification Preparation Bureau or another international standard that is appropriate should be used.

4. For work procurement that is done in a turnkey [sic] manner, or design & build [sic] or a conventional manner via a negotiator, Agencies must make sure that the policies and rules that are established are completely obeyed and implemented as mandatory conditions within the tender documents. Agencies also are required to make sure the
appointed negotiator includes the use domestic material/goods use conditions within specifications.

5. In order to make reference easy and make sure that domestic materials/goods are fully used, the Finance Ministry has appointed IKRAM QA Services Sdn. Bhd. (IKRAM QA) and SIRIM QA Services Sdn. Bhd. (SIRIM QAS) to implement inspections and certifications hence forth is authorized to compile lists of domestic materials/goods. Those lists are as follows:
   i) Domestically Constructed Materials/Goods (IKRAM QA).
   ii) Domestically Made Materials/goods (SIRIM QA).

The respective lists can be attained through IKRAM QA and SIRIM QA according to that which is related and will be updated now from time to time. Agencies should use goods that are listed by IKRAM QA and/or SIRIM QAS in line with what is related.

6. Procurement of negotiator service should be of the circle of domestic negotiator firms that are listed with the Finance Ministry. Procurement of negotiator services from abroad only can be used after the agency receives Finance Ministry approval. Service procurement not of negotiators should be from domestic firms/contractors that are listed with the Finance Ministry only.

7. In the case that quality system certification in conformity with STANDARD MS ISO 9000/ISO 9000 is needed, the respective narration certificate should be released with the substance of the certification that is accredited by the Malaysian Standard Department.

8. The importation for categories of materials/goods that are the same as domestic materials/goods only may be considered if:
   (i) there are none domestically made of the required grade/class; or
   (ii) the applicable materials/goods cannot be replaced with different domestic materials/goods; or
   (iii) there is a National supply shortage.

9. In order to make sure that this rule is fully obeyed, agencies should include the following conditions within the tender/price quotation documents and should within contracts as follows:

   (a) “The contractor is obligated to use materials/goods made domestically that are listed with in the List of Domestically Made Constructed Materials/Goods that is prepared by IKRAM QA Services Sdn. Bhd. and/or List of Domestically Made Constructed Materials/Goods that is prepared by SIRIM QA Services Sdn. Bhd. as is applicable. In cases that the contractor does not obey the rule to
use domestically made materials/goods after an agreement letter has be produced, penalties and/or rejection of materials that are supplied will be imposed against the contractor.”

(b) For domestically made materials/goods that are not listed, these also may be considered if the respective goods have already been inspected and approved by IKRAM QA Services Sdn. Bhd. or SIRIM QA Services Sdn. Bhd. as is applicable. If the inspection cannot be done by IKRAM QA Services Sdn. Bhd. or SIRIM QA Services Sdn. Bhd. the contractor can request and submit to the Empowered Officials approval to do the inspection with another agency.

10. For work procurement, Agencies are required to take monitoring actions like those which are established within SPP Bil. 10/2000. Agencies can use internal resources or can appoint IKRAM QA Services Sdn. Bhd. to make an inspection of the any project in cases where it is suspected that the contractor is not obeying the domestically made materials/goods conditions as are recorded in this SPP.

11. For international tenders, Agencies should make sure of the completion specifications conform with the domestically made materials/goods requirement.

Finance Ministry of Malaysia
Kuala Lumpur

Jun 5, 2002
Appendix 3 – TREASURY INSTRUCTION No. 169 (1997) [unofficial translation]

169 Market investigation in procurement

169.1 It is the obligation of every government official that manages procurement to investigate the market of the goods that will be bought for those that are most appropriate and advantageous. This consideration is made after taking estimates of quality, price, the good’s intended use and other related factors.

169.2 (a) A preference should be given to all goods made locally even if the difference in inclusive costs of the locally made goods compared to similar foreign made goods is higher, provided that the quality of locally produced goods is satisfactory. A price preference should be given to locally made goods in these amounts:

(i) 10% from the lowest offer received for procurement valued at, and less than, RM 10 million;

(ii) 5 % from the lowest offer received for procurement valued between RM 10 million and RM 100 million; and

(iii) 3% from the lowest offer received for procurement valued at RM 100 million.

(a) “Inclusive cost” as it is meant in this Directive includes freight, insurance, taxes and the like. For imported goods, taxes are those that involve customs duties and sales taxes, whereas for local goods or products, taxes are those that involve excise tax and sales tax.
Appendix 4 – TREASURY CIRCULAR LETTER BIL. 4/1995 [unofficial translation]

Date: 4/12/95

POLICY AND PREFERENCES FOR BUMIPUTRA COMPANIES IN THE CONTEXT OF GOVERNMENT PROCUREMENT

To:
Heads of Ministry Secretaries,
Heads of Federal Departments,
Federal Statutory Body Heads,
Respected State Government Secretaries,
Sections in Charge of Local Government,
Head Executive Officials of Government-Owned Companies.

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1. PURPOSE

1.1 The Purpose of this Treasury Circular Letter is to announce and clarify to all Ministries/Departments/Agencies concerning the policy and preferences for Bumiputera Companies that need to be obeyed and implemented in Government procurement.

2. DEFINITIONS

2.1 Bumiputera Companies

2.1.1 Companies that are recognized as Bumiputera companies should fulfill that criteria as follows:

2.1.1.1 at least 51% of the ownership of company shares are owned by Bumiputera; individual Bumiputera share ownership should be more than individual share ownership by non-Bumiputera;

2.1.1.2 at least 51% of the company’s Board of Directors are Bumiputera;

2.1.1.3 the Head Executive post, Director of Management or Chief Manager and other key posts [sic] are held by Bumiputera;

2.1.1.4 at least 51% of the company workers are Bumiputera;

2.1.1.5 financial management should be controlled by Bumiputera; and
2.1.1.6 organization and company management function charts should fully indicate the authority of Bumiputera.

2.2 Joint Ventures Between Domestic and Foreign

2.2.1 Companies that are recognized as joint ventures between Domestic and foreign should fulfill criteria as follows:

2.2.1.1 Such companies should be formed in Malaysia. Foreign equity ownership should not be more than 30% and that of Bumiputera citizens of Malaysia not less than 30%. Membership in the Board of Directors, management, and labor should reflect percentages in equity ownership.

2.3 Joint Ventures Between Bumiputera and Foreign

2.3.1 Companies which are recognized as joint venture between Bumiputera and Foreign should fulfill criteria as follows:-

2.3.1.1 Such companies should be formed in Malaysia. Equity ownership by Bumiputera citizens of Malaysian should be not less than 51% and by foreigners not more than 49%; and

2.3.1.2 Membership in the Board of Directors, management and labor should reflect percentages of equity ownership.

3. SECTIONS WITH THE POWER TO GIVE STATUS

3.1. The giving of Bumiputera status to all companies that qualify for the Supply and Services sectors will be done by the Finance Ministry only and for work sectors by the Contractor Service Center only.

4. GIVING OF BUMIPUTERA STATUS TO GOVERNMENT TRUST AGENCIES

4.1 Bumiputera status is automatically given to all Government Trust Agencies that like Agencies or Government-Owned Companies that are formed by Federal/State Governments, which have the purpose of increasing Bumiputera participation in trade and business sectors.

4.2 For the subsidiaries of Trust Agency requests for Bumiputera status should be dealt with on a case by case basis.

5. PREFERENCE POLICY FOR BUMIPUTERA COMPANIES FOR THE PROCUREMENT OF SUPPLIES AND SERVICES

5.1 Procurement not over RM 100,000
5.1.1 All supply and service tenders that are valued at not more than RM 100,000 should be competed for by the Bumiputera only.

5.2 Price Preferences

5.2.1 For tenders more than RM 100,000, Agencies are required to give a price preference to Bumiputera companies for supply and service procurement in percentages like those which follow:-

<table>
<thead>
<tr>
<th>Value Tender Percentage Preference</th>
</tr>
</thead>
<tbody>
<tr>
<td>More than RM 100,000 until RM 500,000</td>
</tr>
<tr>
<td>More than RM 500,000 until RM 1.5 million</td>
</tr>
<tr>
<td>More than RM 1.5 million until RM 5 million</td>
</tr>
<tr>
<td>More than RM 5 million until RM 10 million</td>
</tr>
<tr>
<td>More than RM 10 million until RM 15 million</td>
</tr>
<tr>
<td>More than RM 15 million</td>
</tr>
</tbody>
</table>

5.2.2 This price preference is based on the lowest offered price which can be that of a Bumiputera company.

5.2.3 This price preference should be used in all Government procurement except those in situations covered by paragraph 5.3.3

5.3 Preferences for Bumiputera Producers/Makers

5.3.1 Producer/maker status is given by the Financial Ministry to companies that qualify.

5.3.2 Agencies should give preference to companies that have Bumiputera producer/maker status in their procurement. If there is more than one (1) Bumiputera producer/maker of the applicable goods, it should be implemented through a tender limited to the Bumiputera circle. If there is only one (1) Bumiputera producer/maker, procurement through negotiation can conducted. Agencies are reminded so that they receive approval from the Ministry of Finance prior to implementing the above two points.

5.3.3 In the case that applicable supply procurement is implemented in tendering process open too the circle of domestic producers, a price preference should be given to Bumiputera makers like that which follows:-

<table>
<thead>
<tr>
<th>Tender Value Preference Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Until RM 10 million</td>
</tr>
<tr>
<td>Over RM 10 million until RM 100 million</td>
</tr>
<tr>
<td>Over RM 100 million</td>
</tr>
</tbody>
</table>
5.3.4 The above preferences also can be used for ship owners that are listed with the Ministry of Finance.

5.4 Preferences for Bumiputera Importers

5.4.1 Agencies are also reminded to give preference to Bumiputera sole importers or whatever Bumiputera companies that are the holders of franchises for supplies.

5.5 Preferences for Bumiputera in Central Contracting

5.5.1 Procurement under Central Contracts and the Umbrella concept that are done regularly at this time will be continued as well as the preferences given to Bumiputera companies.

5.6 Preferences for Members of the Malay Traders & Business Council

5.6.1 In cases where there arises choices where all price factors, capabilities and other factors are the same, if the competition is between a Bumiputera contractor that is a member of the Malay Traders and Business Council and another person that is a Bumiputera contractor who is not a council member, a preference must be given to the contractor that is a member of the Malay Traders and Business Council.

6. PREFERENCE POLICY FOR BUMIPUTERA FOR WORK CONTRACTS

6.1. Agencies are required to make sure and allocate at least 30% of the value of work except small/coordination work worth under RM 50,000 per year to Bumiputera contractors for competition just within their circle. The Works meant are construction works like construction of buildings, roads, ditches, construction of air fields, construction of construction sites, construction of dams, etc. This includes all civil, mechanical and electrical work.

6.2 For the remaining 70% of that work, Bumiputera are allowed to take part in the tender competition without receiving preferences.

6.3 For work that has a value not more that RM 50,000.00 and also works that use a rate Table should be limited to just Bumiputera contractors. These works should not be included with in the 30% allocation of works value that is limited to Bumiputera like in paragraph 6.1.

6.4 Works with a value from RM 50,000.00 until 350,000.00, an allocation of at least 50% should be limited to Bumiputera contractors, whereas the rest should be competed for by Bumiputera and domestic contractors.

7. PRIME COST SUM [sic]/MECHANICAL/EXPERT WORKS
7.1 For prime cost sum [sic]/mechanical/expert works a price preference should be given to Bumiputera base on the price preference like that applied in supplies and services.

8. PREFERENCE IMPLEMENTATION

8.1 The above preferences should be given with conditions of quality, time for delivery/completion of works, and adequacy of supplies and services.

8.2 In order that it does not eviscerate tender rules, Agencies should explain clearly the preferences given to contractors in tender forms released. With this foreign companies which will offer foreign made goods will enter tenders in an open manner and know that a special percentage treatment will be given to goods made domestically.

9. IMPLEMENTATION REPORT

9.1 The head of the Agency that sends out the tender is responsible making sure that the this preference is implemented in a methodical manner and completely.

9.2 In order to join in the development of the implementation off this preference policy, agencies should deliver announcements concerning procurement using the forms in Attachments A, B, and C. The announcements should be delivered to the Government Procurement Management Division every year not after February.

9.3 In order to make it easy for the Treasury while it compiles the declarations, Agencies are required to use the ‘Procurement Board Meeting Form’ like that in Attachment D. This Form should be completed by the Procurement Board Secretary every time a Procurement Board Meeting is held and the form that has already been completed should be delivered to the Treasury representative at the end of the related meeting. The forms that are filled in should contain the tenderer announcements that are successful only.

10. FORCE AND CANCELATIONS

10.1 This Circular Letter is in force begin May 1, 1995. With the coming into force of this Circular Letter, the following Treasury Circular Letters and their additions are canceled.

i) SPP Bil. 3/74; Implementation of the Bumiputera Economic Seminar Proposals.

i i) SPP Bil. 7/74; and Addition 1 dating August 11, 1976 and Addition 2 dating July 27, 1979 Preferences for Bumiputera in the Procurement of goods, services and work.

iii) SPP Bil. 6/78; Preferences for Domestic Businessmen
iv) SPP Bil. 3/82; 
 Preferential Help for Bumiputera Traders.

v) SPP Bil. 7/84 

vi) SPP Bil, 13/89; and Addition 1 dated September 1, 1990 
Preferences rules and percentages for elevating the use of domestic goods,

Thank you.

“SERVICE FOR NATION”

“THRIFTY AND PRODUCTIVE”

(DATO’ DR. ABDUL AZIZ BIN MOHAMAD) 
Government Procurement Management Section 
b.p. Treasury Secretary Head, 
Finance Ministry of Malaysia. 

Dated: April 12, 1995

File No. : S(K&B)(8.09)735/3/1-348 Jd.7(5)

S.K.

Malaysian National Accountant, 
National Audit Head, 
All Respected State Finance Officials, 
All Malaysian Treasury Section Heads
Date: 11/2/89

PREFERENCE RULES AND PERCENTAGES FOR ELEVATING THE USE OF GOODS MADE DOMESTICALLY

To:

All Heads of Ministry Secretaries,
All Heads of Federal Department,
All Respected State Government Secretaries,
All Statutory Body Heads,
All Head Executives of Government-Owned Companies.

1. INTRODUCTION

1.1 The attention of the Ministries/Departments/Statutory Bodies is directed to Bil. 7/1986 dated April 4, 1986 concerning rules for elevating the use of goods made domestically.

1.2 The Financial Ministry has examined afresh the 20% price preference for goods made domestically and has come to the opinion that it is too high (compared with the quality of goods imported). As a result, this Circular letter aims to describe new rules related to the percentage price preference for elevating the use of domestically made goods.

2. RULES AND PERCENTAGES OF PRICE PERCENTAGES FOR GOODS MADE DOMESTICALLY WITHIN THE MANAGEMENT OF SUPPLY TENDERS

2.1 In cases where tenders from within and without the country are allowed, A preference should given to goods made/produced domestically even if the entire cost of the goods made/produced domestically are higher than the entire cost of similar foreign made goods, with the condition that the quality of the goods made/produced domestically are adequate.

2.2. The new price preference percentage respecting each level for procurement of goods made domestically are as follows:

Percentage Price Preference Contract Value

Under $10 million 10%
Over $10 million and under $100 million 5%
Over $10 million 3%
3. CORRECTION TO FORMER TREASURY DIRECTIVE 169

3.1 With the coming into force of this new regulation, hereafter Treasury Directive is correct and is read as follows:

Treasury Directive 169

It is the obligation of every official that approves or assists in some purchasing to make sure after a reasonable investigation that goods which are intended to be bought are the most favorable to be bought in terms of price, quality, suitability for what the goods will be used for and other factors which are related. Even if the difference between the entire cost for goods made domestically are higher than the entire costs of similar goods made abroad, with quality conditions fulfilled by domestically made/produced goods, a price preference should be given to domestically made goods of 10% for procurement valuing under 10 million, 5% for procurement more than $10 million up to $100 million, 3% for procurement more than $100 million. The entire costs is calculated by including transportation, insurance, taxes and the like. For imported goods, taxes that involve custom taxes [duties] (viz. hammer [??] taxes and import taxes) and sales tax. Whereas for domestically made/produced goods, taxes involve excise taxes and sales tax.

3.2 The phrase domestically made/produced goods that is meant by Treasury Directive 169 above is like that which is defined in the Business Clarification Act 1975. Among the definitions those that are relevant are as follows:

3.2.1 ‘Manufacturer’ means a person that takes part in manufacturer activities;

3.3.2 ‘Manufacturer Activities’ with in its various conjugations and forms, fundamentally means making, changing, blending, embellishing, or with another way preserving or adjusting goods or objects intended for use, sale, transportation, delivery or and including parts and fixing ships but does not include activities that usually are connected with the trade of small bit sales or entire stock sales.

3.3.3 ‘Production’ means goods, things, bodies or services that are produced as the yield of productions activities and including assembled products.

3.3 It is remembered also that goods that are made or produced by producers in the Free Trading Zone, that are included in Government procurement, should be defined as import goods. Thus good that are made or produced by producers in the Free Trade Zone, even if ‘Made in Malaysia’ are not qualified to receive the special treatment under this Treasury Circular Letter.

4. CANCELATION

4.1 With the enactment of this new regulation, hereby Treasury Circular Letter Bil. 7/1986 is canceled.
5. DATE OF ENACT

5.1 This Circular Letter is in force immediately.

And thus, Thank you.

“SERVICE FOR THE NATION”

I join in the order,

(YAHYA YAACOB)
Contract and Supply Management Division
b.p. Secretary Head
Financial Ministry of Malaysia
Date 12/19/84

RULES FOR IMPLEMENTING ARTICLE 7, SPECIAL TRADING COMMITMENTS IN THE ASEAN CIRCLE OF NATIONS-INDONESIA, PHILIPPINES, SINGAPORE, THAILAND, BRUNEI AND MALAYSIA

To:
All Ministry Secretary Heads,
All Federal Department Heads,

Sir,

1. INTRODUCTION

1.1 Several steps are and have been taken by the Government of Malaysia in efforts to cultivate the spirit of cooperation among the ASEAN nations within various special cooperative sectors within the economic sphere. This was declared in the “Declaration of ASEAN Concord” [sic] that was signed by the Foreign Ministers of the ASEAN Nations in Bali on February 24, 1976. The latter declaration emphasized that ASEAN nations should take steps to cooperate economically within the implementation of national and regional development by using anywhere that is possible product resources that exist in the ASEAN regional alone so as to widen the economic activity of each nation.

1.2 This declaration also specified that special trading rules between ASEAN nations would be able to create solidarity and economic stamina of the ASEAN nations and also development projects. One means that can be used to accomplish this target was decided in Article 7, Special Trading Provisions which give special treatment to ASEAN nations within procurement of goods and services that are connected (auxiliary services) [sic] which are implemented by Government Departments.

2. JURISDICTION ARTICLE 7, SPECIAL TRADING PROVISIONS

2.1 All Ministries and Government Departments that are given allocation from the Central Government expenditure are required to obey the rules which are establish in the Circular Letter. Following this definition all Statutory Bodies are not included under this letter.

2.2. The special treatment should be given to ASEAN nations for supplying goods and auxiliary services like “installation” [sic] and “commissioning” [sic] only.

3. SPECIAL TREATMENT THAT IS ESTABLISHED UNDER ARTICLE 7, SPECIAL TRADING PROVISIONS
3.1 The Special Trading Provisions have established that ASEAN nations should give special treatment to goods of ASEAN nations. The special treatment that is included is:

3.1.1 One week before internationally advertised in newspapers, ASEAN nations should be given information concerning the respective tender through their respective embassies in Kuala Lumpur and one copy also should be delivered to the ASEAN Secretariat. The announcement that is delivered to the embassies of the ASEAN nations should only consist of the tender notice which is disseminated.

3.1.2 A preference of 2% limited to a maximum of US$40,000 should be given to goods and auxiliary services from ASEAN nations in competition with goods from countries not ASEAN members.

3.1.3 This preference should be given with the quality conditions, auxiliary service completion and supply of goods delivery time requirements.

4. RULES FOR IMPLEMENTING THIS SPECIAL TREATMENT

4.1 Rules that need to be followed by all Ministries/Departments in the context of giving this special treatment are those within Attachment ‘A’.

5. THINGS THAT NEED TO BE GIVEN ATTENTION

5.1 In order to make sure that this special treatment is implemented smoothly, the following things should be given attention:

5.1.1 Preferences that already exist, viz. preferences for Bumiputra contractors like those which are established within Treasury Circular Letter Bil. 7/1974 and preferences for goods produced/made locally like that which is given in Treasury Circular Letter Bil. 15/1983 and other Government strategies under the New Economic Policy are not eviscerated.

5.1.2 This preference is limited only to calls for international tenders and an explanation of this feature should be included within the tender document.

5.1.3 The distribution of tender documents are that same as those contained within Treasury Circular Letter Bil. 24/1984, viz. via international tender rules. Tender documents given to the embassies of ASEAN nations should at the most be limited to 2 copies for free. Any additional copies should cost the normal fee.

5.1.4 This special treatment should not be applied to procurement of goods that are paid for by foreign loans.

5.1.5 Tenders from ASEAN nations should be accompanied by a Certificate of Proposal/Verification like that in Appendix ‘a’. Failure to turn in this Certificate will disqualify the respective tenderer from receiving this preference.
5.1.6 Proposal Certificates should be verified while the time for tender is open. In cases where there exists suspicion within this context, Departments should report to the Ministry or Trade and Industry as soon as possible for decision.

5.1.7 Departments should not skip the process of weighing tenders merely to wait for confirmation letters of Proposal Certificates.

6. IMPLEMENTATION REPORT

6.1 In order to join in the development of the implementation of this preference, Departments are asked to complete declarations concerning the preferences that are given in the format like that in attachment ‘B’.

7. DATE IN FORCE

7.1 This Circular Letter is in force immediately.

“SERVICE FOR NATION”

I that joins in the order,

(HELMI BIN MOHD. NOOR)

Contract and Supply Management Section
b.p. Secretary Head
Financial Ministry of Malaysia
PREFERENTIAL HELP FOR BUMIPUTRA TRADERS

Date: Jan. 15, 1982

To:
Head Secretaries of Federal Ministries,
Head Directors of Federal Departments,
Heads of Federal Departments,
Y.B. State Government Secretaries,
Management Sections of Federal and State Statutory Bodies,
Management Sections of Domestic Authorities.

It is clarified that the government should give preferences to Bumiputra contractors in the context of government procurement of supplies, services and construction works, like those which are apparent from directives which are released by the government from time to time. Among these directives, which are related, are Treasury Circular Letter Bil. 7/1974 dated January 19, 1974; First Addition to Treasury Circular Letter Bil. 7/1974 dated August 19, 1976; Treasury Circular Letter Bil. 1/1981 dated January 29, 1981 and Treasury Circular Letter 17/1981 dated August 13, 1981.

2. The goal of this circular letter is to announce an additional preferences to be give to Bumiputra contractors that become are members of the Malay Trade and Business Council [Dewan Perniagaan dan Perusahaan Melayu (DPPN)] in the context of weighing between all the government tenders for supplies and services. Bumiputra contractors that are suitable to be given these preferences are those that can prove the membership in DPPN by giving their membership number or some other evidence when turning in their offer application to Government Ministries and Agencies.

3. Thus, if it happens that in a choice all price factors, means, etc. are the same, if the competition is between a Bumiputra person that is a member of DPPN and another person who is a trader that is not a member of DPPN, the choice here must be to give to the trader that is a member of DPPN.

4. This directive is in force as of this date now.

“SERVICE FOR COUNTRY”

(DATO’ SALLEHUDDIN BIN MOHAMED)
Acting Head Treasury Secretary
EXTENTION ON TIME BY THREE MONTHS FOR WORK CONTRACTS THAT ARE MANAGED BY BUMIPUTRA CONTRACTERS BY ALL MINISTRIES/DEPARTMENTS/STATUTORY BODIES

To:
All Heads of Ministry Secretary,
All Heads of Federal Department,
All State Government Secretaries,
All Heads of Statutory Bodie.

Sir,

It is announced that as of now there are still Bumiputra contractors performing work contracts that are experiencing various problems, most cannot completely finish their work within the time determined in the applicable contract. This is because most of these contractors are forced to face problems as follow:

1.1 The financial state of bumiputra contractors is not solid.

1.2 Delays in receiving approval of loans from banks and financial institutions.

1.3 Difficulties getting Bank Guarantees.

1.4. Bumputra contractor organization are not that good or efficient and it is difficult getting construction materials and skilled workers.

2. If the above situation is allowed to continue, certainly various problems will arise for all sides. As a result the Ministry has examined this issue and made the decision to give an extension of time of 3 months for work contracts that are managed by Bumiputra contractors without imposing any fine. However, the extension of time is subject to the following conditions:

2.1 The time extensions given for the above reasons are distinguished from cases of time extensions that are allowed under “Basic Contract Conditions” like “force majeure” [sic], weather, general circumstances that are not conducive to operation and others that can constrain the work as well.

2.2 Granting of the extension is by this letter only and reasons for the time extension are not contained within the “Basic Contract Conditions.”

2.3. This time extension is given to all Bumiputra contractors that are listed with the Ministries/Departments/Statutory Bodies in all registration classes.
2.4 The time extension that is given should not be more than 3 months.

2.5 This time extension should be given only in the last phase for completion of work for one project.

2.6 Time extensions are given to Bumiputra contractors that are judged to need help only.

2.7 The giving of this time extension will be examined completely by this Ministry after implementation. Ministries/Departments/Statutory Bodies that are involved should turn in complete reports to the Financial Ministry about how far this time extension has had an impact on the level of performance of Bumiputra contractors and whether this time extension needs to be made permanent or not. The reports should be turned in at the latest 3 months after the time which the authority of this Circular Letter is finished.

3. This Circular Letter is in force immediately and finishes December 31, 1983.

“SERVICE FOR NATION”

I that joins in the order,

(MOHID. HUSSAINI BIN ABD. JAMIL)
Contract and Supply Management Section
b.p. Secretary Head,
Financial Ministry Malaysia

s.k.
All State Financial Officials.
Date: Jan. 31, 1978

PREFERENCES FOR DOMESTIC BUSINESSES

To:
All Head of Ministry Secretaries,
All Heads of Federal Departments,
All State Government Secretaries,
All Heads of Statutory Bodies.

Sir,

Ministries/Departments are reminded that in the context of international tendering activities especially for supplying, a percentage preference should be given to goods that are produced or made by domestic firms. Within this context Treasury Directive 169 needs to be followed. The referenced Treasury Directive among others affirms that in the context of government purchasing of goods, a preference must be given to goods that are domestic products, even if the difference in the cost of 10% higher that the cost of similar foreign made goods, with the condition that the quality of the domestically produced goods is satisfactory. All costs are calculated by including customs duties, fares, insurance and the like.

2. It is also decided that in addition to this preference for domestically produced goods, Ministries/Departments should also give preferences to domestic expert negotiators in the context of negotiator selections for projects that are planned to be done with expert negotiators. For this goal Treasury Directive 169 can be used as a guide.

3. For implementing preferences under Treasury Directive 169 without breaking tender regulations, it is crucial for Ministries/Departments to announce these preferences to all prospective tenderers. This should be done by announcing clearly preferences that are given to domestic businessmen in the context of tender forms that are produced. With this foreign firms are offering goods made abroad will enter tendering in an open manner and know of the special price preference that will be given to goods produced domestically.

Understood hope,

I that joins in the order,

(Helmi bin Mohd. Noor)
Contract and Supply Management Section,
b.p. Head Treasury Secretary,
Malaysia
Appendix 10 – TREASURY CIRCULAR LETTER BIL. 7/1974 [unofficial translation]

Date: [sic]

PREFERENCES FOR BUMIPUTRA IN THE PROCUREMENT OF GOODS, SERVICES AND WORKS

To:
All Heads of Ministry Secretaries
All Heads of Federal Departments
All State Government Secretaries
All Management Secretaries/Officials of Statutory Bodies

Sir,

DECISION OF THE NATIONAL FINANCIAL COUNCIL

I have been ordered to announce that the Assembly of the National Financial Council that occurred on February 18, 1974 has made a resolution concerning preferences for Bumiputra in the procurement of goods, services and works as follows:

“(i) Definition Bumiputra Companies or Company Enterprises with Bumiputra

(a) Companies, of which the majority (at least 51%) of the shares are owned by Bumiputra persons; and the majority (at least 51%) of management positions of which are held by Bumiputra: and the majority of company workers are Bumiputra; OR

(b) Organizations or Companies which were brought into existence by the Federal Government or State Governments and their Subsidiaries that aim to increase the participation of Bumiputra in trade and businesses like Pernas, Perbadanan Kemajuan Ekonomi Negara [National Economic Development Corporation] and their subsidiaries and the subsidiaries of the MARA Company and the like.

(ii) Privileges for Contracts for Works

(a) 30% of works, other than the works that are done on their own by the Government Department and other Federal and State Departments should be reserved to Bumiputra Contractors for competition only between them;

[ the 30% of the value of the works that is meant refers to 30% of the value of the works that are planned to be implemented each year]

(b) For works that are to be done on the basis of scheduled work rates that are not more than $25,000-they should be done by Bumiputra contractors exclusively.
(c) For the remaining 70% of those works, Bumiputra contractors may take part in the invitations for tender or quotation, but without being given any preference.

(iii) Preferences for Supplying Goods and Services

(a) For procurement of goods and services that have a value under $50,000-a preference of 10% should be given to Bumiputra;

(b) For procurement of goods and services that have a value over $50,000 but under $100,000-a preference of 7 1/2 % should be given to Bumiputra;

(c) For procurement of goods and services that have a value more than $100,000 but under $1 million-a preference of 5% should be given to Bumiputra;

(d) For procurement of goods and services that have a value over $1 million but under $5 million-a preference of 2% should be given to Bumiputra

(iv) Implementation of Preferences

(a) The above preferences should be given with conditions regarding quality, delivery/completion times for works and services, and supplies that are satisfactory.

(b) Department heads that invite applicable bids are responsible for assuring that these preferences are completely implemented;

(c) Preferences for contracts for works should be implemented by all Federal and State Ministries and Departments.

(v) Cancellation of Treasury Circular Letter Bil. 26/1968

Treasury Circular Letter Bil. 26/1968 is cancelled. Actually, the practice of listing Class F Contractors only for Bumiputra contractors should be continued.

IMPLEMENTATION GUIDE OF THE DECISIONS OF THE NATIONAL FINANCIAL COUNCIL

3. Works that are referred to are construction works like construction of buildings, excavation of ditches, construction of airports, construction of area foundations, construction of dams and other things. This includes all civil, mechanical and electrical works.

4. Goods that are referred to are materials and things like construction materials, food, clothes, vehicles, complete departments and similar things.

5. Services are defined as services that are performed by humans through manual or skilled labor for the receipt of wages and which are done regularly or on a one off basis
after a tender or price quotation has been invited. For example, cleaning department buildings, printing, maintaining and fixing department machines and transportation.

6. In some things there exist divisions that are vague and the following explanation is given:

(a) Procurement of goods in the context of construction works where the contractor is directly responsible and that cost takes the form of costs of works for that one procurement, a 30% foundation should be applied within this matter;

(b) For construction works where supplying is outside the control of the contractor, tender or price quotation competition should be offered and a “sliding scale” [sic] preference should be used, for example supplying lifts and air conditioning for one building.

(c) “Sliding Scale” [sic] preference should be imposed for the supplying where building and installation constitutes the result of the supplying, for example supplying and installing “heavy plant and equipment”[sic].

Explanation Concerning the Implementation of the 30% Order

7. Related to the system for implementation of the 30% order, all Federal and State Ministries and Departments as well as Legal Bodies should determine that 30% of the value of works that are done in each year are reserved for Bumiputra and competed for by Bumiputra contractors only. This means that 30% is determined according to the value of the work rather than the amount of the work. Within the 30% selection of works value only works that are considered to be able to be implemented by Bumiputra contractors chosen for the tender goal are to be so limited.

8. Advise from the Contractor Unit; The Head Department of the Government Work Department, Jalan Tun Ismail, Kuala Lumpur can be acquired in order to receive a complete explanation concerning the implementation of this order.

Supervision

9. The Government’s order for creating a group of Bumiputra contractor/supplier that are “viable” [sic] is in line with the New Economic Policy. Therefore, tidy supervision should be done by all Government bodies concerning contracts that are given to Bumiputra under the preference order. Bumiputra contractors/suppliers that are given contracts under the preference order are not allowed to “sub-contract” [sic] to contractors that are not Bumiputra, except for “specialist” work, but Bumiputra contractors are not allowed to subcontract all that specialist work, moreover they must buy only the goods that are intended to be used. Ministries/Departments and Legal Bodies should make sure that Bumiputra Companies that are given the preferences fulfill the definition of Bumiputra company in the same manner that is determined and that Bumiputra are enterprising.
Guidance

10. Because Bumiputra are just newly entering into trade and business, guidance and proper advise should be given to make sure that Bumiputra companies succeed in their business aimed at taking part in the procurement of Government works, goods, and services.

Procurement that is Paid for by Foreign Loans

11. Preference orders should not be implemented for procurement of goods, services and works that are paid for with by foreign loans like loans from the Asian Development Bank or the World Bank.

IMPLEMENTATION REPORT

12. In relation to the development of the implementation of this preference order, all Federal and State Ministries/Departments as well as Legal Bodies are asked to deliver announcements concerning procurement like that in Attachments A, B, C, and D to the Malaysian Treasury, Kuala Lumpur. Ministries/Departments that have delivered announcements that conform to the Treasury do not need to deliver those announcements again to the Treasury. Data that is need like that in the attachments should be delivered to the Treasury not later than August 30, 1974. Data concerning procurement for the year 1974 and the following years should be delivered every year not later that February 28 within the year after the year which is thereby reported. For example, procurement data for the year 1974 should be delivered by February, 1975.

FORCE OF THIS LETTER

13. This Circular Letter is in force as of June 1, 1974.

I that joins in command,

(ABDULLAH BIN KASSIM)
Division Secretary,
Contract Processing and Supplies,
b.p. Treasury Secretary Head

s.k.: All State Financial Officials, Peninsular Malaysia.
Permanent Secretary, Financial Ministry of Sabah.
State Financial Ministry, Sarawak.

Federal Financial Officials of Sarawak and Sabah.
Implementation of Proposals of the Bumiputra Economic Seminar

To:
All Heads of Ministry Secretaries
All Heads of Federal Departments

Sir,

I am directed to bring to your attention the proposals that were made at the Bumiputra Economic Seminar that occurred in April of 1973. It is announced that most of those proposals have been agreed to by the Government for implementation by Government Ministries and Departments.

2. Among the proposals that have been agreed to be implemented, there are some that can be implemented by all Government Ministries and Departments now. These proposals are as follow:

2.1 “Government Departments and Statutory Bodies that intend to employ transportation services should favor Bumiputra services whether through tender or quotation [sic].”

2.2 “For the tenders that need supplying from goods abroad the time between advertisement and closing of tender should be up to 45 days

2.3 “In the tenders that are offered by the Government, ‘Specification’ [sic] should be made generally and not based one particular brand.”

2.4 “The Government is asked to break-up large tenders into smaller tenders to allow the participation of tailors that have small means and should give priority to local Bumiputra tailors.”

2.5 “The Workshop agrees that ‘continuity’ [sic] constitutes a an important factor in the progress for some Bumiputra Companies. Therefore the Workshop agrees to request that the Central Government, the State Governments, the Statutory Bodies, Government Agencies and other Statutory Bodies that are involved with the Government give contracts that are successive for a number of years to contractors that have proven their abilities.”

3. The goal of the above proposals is to give a push and encourage Bumiputra contractors so that they are active in the supply and service sectors and to encourage the progress of their businesses. The implementation of these proposals is also in conformity with the Government’s New Economic Policy for the encouragement of the participation Bumiputra in the supply and service sectors.
4. In regards to proposal 2.1 above, the Transportation Ministry can give detailed information concerning Bumiputra Companies that are active in the transportation sector. The Ministries or Departments are asked to contact the branch of the Transportation Ministry concerning these cases. The proposal in paragraph 2.2 concerns only local tenders that need supplying by goods from abroad and do not include international tenders. Concerning proposal 2.3 I would like to bring to your attention Treasury Directive 175(c) that has the same goal, viz. to avoid focusing on one brand when the Government invites tenders. The proposals in paragraphs 2.4 and 2.5 are clear. The proposal in paragraph 2.4 for helping tailors that have only small means so that they can get tailoring tenders that are invited by Ministries and Departments of the Government. The Proposal in paragraph 2.5 has the goal of giving guarantees to Bumiputra contractors that they will get connected return contracts if they have demonstrated their ability in the performance of the original contract. This consists of one of the most important factors for helping Bumiputra businesses. Government Ministries and Departments are asked to implement this proposal, viz. continue one by one contracts if they are gotten by Bumiputra contractors that have performed the contract satisfactorily and have the ability to perform future contracts. In continuing contracts one by one, those certified by Treasury should receive it soonest.

5. The cooperation of all the Ministries and Departments of the Government is requested in order that these proposals are implemented. The Government Departments and Ministries may contact the Contract and Supply Management Section at the Malaysian Treasury if there are any problems connected with the implementation of these proposals.

I that joins in the command,

(Abdullah bin Kassim)
Division Secretary,
Contract and Supply Management
b.p. Head Secretary of the Treasury

s/k
All State Government Secretaries
All Management Secretaries/Officials of Statutory Bodies.