
WTO Government Procurement Rules and the Local Dynamics of Procurement Policies: A Malaysian Case Study

Christopher McCrudden* and Stuart G. Gross**

Abstract

This article examines efforts to create binding international rules regulating public procurement and considers, in particular, the failure to reach a WTO agreement on transparency in government procurement. The particular focus of the discussion is the approach taken by Malaysia to these international procurement rules and to the negotiation of an agreement on transparency. Rules governing public procurement directly implicate fundamental arrangements of authority amongst and between different parts of government, its citizens and non-citizens. At the same time, the rules touch upon areas that are particularly sensitive for some developing countries. Many governments use preferences in public procurement to accomplish important redistributive and developmental goals. Malaysia has long used significant preferences in public procurement to further sensitive developmental policies targeted at improving the economic strength of native Malays. Malaysia also has political and legal arrangements substantially at odds with fundamental elements of proposed global public procurement rules. Malaysia has, therefore, been forceful in resisting being bound by international public procurement rules, and has played an important role in defeating the proposed agreement on transparency. We suggest that our case study has implications beyond procurement. The development of international public procurement rules appears to be guided by many of the same values that guide the broader effort to create a global administrative law. This case study, therefore, has implications for the broader exploration of these efforts to develop a global administrative law, in particular the relationship between such efforts and the interests of developing countries.

* Professor of Human Rights Law, Oxford University; Fellow, Lincoln College, Oxford. Email: christopher.mccrudden@law.ox.ac.uk

** Associate, Shearman & Sterling LLP, New York; JD University of Michigan Law School, 2004. Email: stugross@hotmail.com

1 Introduction

For some, the absence of a global administrative law is a major blot on the landscape of international decision-making, and a justification for going slow in international integration. Without a global administrative law, based on the principles of legality, accountability and participation, international regulation, it might be argued, loses its legitimacy. A global administrative law that would apply to the way that international organizations currently operate must, however, be minimalist in order to be acceptable.¹ The assumption often is that these minimalist principles are widely accepted in principle, even if flouted in practice, and that there is an emerging consensus on these principles, partly growing from the practice of states, partly growing from the efforts of international organizations (like the World Bank's good governance programmes).

There is certainly increased pressure to apply these principles. A good example is in the area of public procurement, where basic principles of traditional domestic administrative law are now widely applied in the often previously exempted area of domestic procurement. The EC, WTO, and NAFTA all now regulate procurement, although there are important differences in approach, coverage and membership, and they incorporate these principles in their regulatory requirements.² The main principles of this approach have also spread more widely, even to countries not members of the EC or parties to NAFTA or the WTO Government Procurement Agreement (GPA). Several intergovernmental organizations now routinely incorporate these principles as conditions in lending,³ while the effects of regional and international procurement reform movements can be felt more generally. For example, it is effectively now a *condition* for membership of the WTO that new applicants will agree to apply to join the GPA,⁴ and procurement disciplines are a significant part of several bilateral free trade agreements.⁵

Let us assume that these principles are increasingly accepted in *developed* countries, and that the differences in administrative law that previously existed among developed countries are waning. Let us further assume that these developments are beneficial for developed countries.

Studies of the emergence of global administrative law concentrate, to the extent that they consider the effect on individual states at all, on the developed world. If the project of a global administrative law is to be other than very partial, however, a major additional element needs to be taken into account. How far are even these

¹ For consideration of these issues, see, generally, Kingsbury, Krisch and Stewart, 'The Emergence of Global Administrative Law', 68 *Law & Contemporary Problems* (2005) 15.

² See S. Arrowsmith, *Government Procurement in the WTO* (2003), P. Trepte, *Regulating Procurement: Understanding the Ends and Means of Public Procurement Regulation* (2004), and A. Reich, *International Public Procurement Law: The Evolution of International Regimes on Public Purchasing* (1999).

³ See, e.g., World Bank, *Guidelines Procurement under IBRD Loans and IDA Credits: May 2004* (2004); European Bank for Reconstruction and Development, *Procurement Policies and Rules* (Aug. 2000).

⁴ WTO, Technical Note on the Accession Process – Note by the Secretariat, WT/ACC/10 of 21 Dec. 2001.

⁵ WTO, Working Party on GATS Rules – Overview of Government Procurement-Related Provisions in Economic Integration Agreements – Note by the Secretariat, S/WPGR/W/44 of 24 June 2003.

limited administrative law principles acceptable to, and desirable for, *developing* countries? Indeed, is the development of a global administrative law *developing-country* friendly? In particular, to what extent would traditional administrative law principles unduly restrict the ability of such countries to drive forward a substantive agenda of economic redistribution in the development context? Would traditional administrative law merely strengthen the ability of already powerful actors to preserve the status quo against such redistribution? What, in other words, is the relationship between these traditional administrative law principles and sustainable development?⁶

This article attempts to explore these issues through a case study of the failure to persuade developing countries to sign on to the plurilateral GPA or, more recently, to agree to the inclusion of the issue of a multilateral ‘transparency’ in government procurement (TGP) agreement as part of the Doha Round negotiations. Those countries that have ratified the GPA are overwhelmingly from the developed world.⁷ We look, in particular, at the approach taken by Malaysia to the issue of the proposed TGP agreement. The EU and the US advocated a TGP agreement, apparently on traditional administrative law grounds. Malaysia, however, regarded the elements of the proposed agreement as giving rise to the potential of an increased resort to legal challenges to its procurement policies, and as tantamount to stripping it of its ability to use procurement as part of its development agenda, particularly in the context of redistributive policies directed at increasing the economic empowerment of the native Malays or ‘Bumiputera’.

There are several themes that we consider in the course of this discussion: the development of procurement reform as part of the movement for liberalization of the international economy during the second half of the last century; the main instruments and methods for accomplishing procurement reform in addition to the GPA; arguments for and against the use of procurement for social purposes; the role of administrative law-type procedures in operationalizing public procurement disciplines; and why resistance to such procedures developed.

2 Development of International Norms Regulating Procurement

After the Second World War, domestic procurement was often seen, rightly or wrongly, as characterized by corruption, inefficiency, political capture, rent seeking,

⁶ A somewhat similar debate was more important at the domestic level in the past than now, particularly in the context of discussions about the relationship between administrative law and the welfare state.

⁷ Parties to the Agreement are: Canada, European Communities (including its 25 Member States: Austria, Belgium, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Slovak Republic, Slovenia, Spain, Sweden, and United Kingdom), Hong Kong China, Iceland, Israel, Japan, Korea, Liechtenstein, Netherlands with respect to Aruba, Norway, Singapore, Switzerland, and United States. Negotiating accession are: Albania, Bulgaria, Georgia, Jordan, Kyrgyz Republic, Moldova, Oman, Panama, Chinese Taipei (information available at http://www.wto.org/english/tratop_e/gproc_e/memobs_e.htm) (last visited 29 Sept. 2005).

protectionism, inflated costs, and the development of cartels. Many saw procurement reform regulation as necessary to limit these features of unreformed procurement markets, but how this should be achieved remained controversial.

Procurement reform would have to attempt to juggle several different sets of interests. There are at least four groups of stakeholders whose interests are most involved in the development of procurement reform. Buying anything, whether it is pencils or tanks, requires financial resources; at the domestic level, these resources will most likely derive from taxation, whether direct or indirect, personal or corporate. In certain instances, however, these resources will derive from others who provide the necessary funds, such as international development banks. The first stakeholders, therefore, that will be important are taxpayers and other funding bodies. Second, there will be those who stand to benefit from the goods or services that are being purchased by government. Where school buildings are being built, for instance, pupils and their families will be concerned with whether the buildings are built on time and to specification. Third, there are those who are, or who seek to become, contractors with government. Whether or not firms are successful in bidding for such contracts, and on what conditions, may well significantly affect the economic success of the firm, potentially even its survival. Fourth are the interests of ‘the government’. We have so far assumed that ‘government’ is a homogeneous set of interests, but of course that is far from being the case. Those in ‘government’ comprise a diverse set of (sometimes competing) interests. The distribution of contracts involves the potential for significant patronage. There are therefore important conflicts between those who stand to gain financially or politically from using procurement as a tool of personal or political aggrandizement and those who will benefit from procurement being seen as free from such possibilities.

No doubt due to the complexity of the balancing involved, international regulation was slow in coming. The otherwise wide-ranging Havana Charter excluded public procurement from coverage.⁸ Although the United States administration had indeed proposed in its draft treaty that procurement should be included, there was insufficient support and active opposition by the United Kingdom and several other major countries. An explicit provision was included which had the effect of excluding procurement from the ambit of the agreement. This approach was taken over in the GATT.⁹

⁸ Final Act and Related Documents, United Nations Conference on Trade and Employment, Havana, Cuba, 21 Nov. 1947–24 Mar. 1948, UN Doc. ICITO/1/4 (1948).

⁹ Provisions of the General Agreement on Tariffs and Trade (GATT 1947), which required ‘national treatment’, explicitly did not apply to ‘procurement by governmental agencies of products purchased for governmental purposes’; instead, a much weaker ‘fair and equitable treatment’ commitment was made applicable: General Agreement on Tariffs and Trade 1947, 30 Oct. 1947, 61 Stat. A-11, TIAS 1700, 55 UNTS 194 (1994), Art. XVII(2). Although Art. III(4), concerning national treatment on internal taxation and regulation, would otherwise have covered procurement, Art. III(8)(a) stated: ‘The provisions of this Article shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of products purchased for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial sale’. Art. III(8)(b) provided further: ‘The provisions of this Article shall not prevent the payment of subsidies exclusively to domestic producers, including payments to domestic producers derived from the proceeds of internal taxes or charges applied consistently with the provisions of this Article, and subsidies effected through government

However, beginning in the 1960s, procurement regulation underwent a significant change, domestically, regionally and internationally. This movement for procurement reform grew in importance during the following decades, and has far from spent its force.

At the Organisation for European Economic Co-operation (OEEC), and then subsequently at the Organisation for Economic Co-operation and Development (OECD), discussions had taken place in the 1960s and 1970s on the possibility of international regulation of procurement, but resulted in no formal agreement.¹⁰ Yet these discussions were vital in paving the way for negotiations in the Tokyo Round, and the fruits of the OECD discussions were transferred to the multilateral negotiations then taking place. The first Government Procurement Agreement (GPA 1979) was concluded in 1979, as a plurilateral agreement, during the Tokyo Round of multilateral trade negotiations.¹¹ The GPA 1979, though limited, was, in the words of one participant, 'an outstanding reversal of more than fifty years of international trade and economic history'.¹² The GPA 1979 required each party to accord the products and suppliers of each other party 'treatment no less favourable' than that accorded to its own or any other party's products and suppliers, together with a significant array of administrative requirements relating to the process of procurement.¹³ However, coverage was limited to those governmental entities volunteered by the parties,¹⁴ and the GPA 1979 applied only to procurement contracts above a minimum threshold of 150,000 special drawing rights (SDR).¹⁵ It came into force on 1 January 1981.¹⁶

purchases of domestic products'. The argument that procurement was included to some extent, however, derives from the provisions of Art. XVII, concerning state trading. Para. 1 provides that state trading shall be carried out on the basis of the General Agreement. Para. 2 states that, with respect to imports involving government procurement, 'each contracting party shall afford to the trade of the other contracting parties fair and equitable treatment'. In so far as procurement was included in this minimal way in the GATT, the general exceptions provided in Art. XX and the national security provisions in Art. XXI were applicable.

¹⁰ Christopher McCrudden is grateful to Gherardo Bonini of the Historical Archives of the European Communities in Florence and Mary-Ann Grosset, Head of OECD Records Management and Archives Service in Paris, for their help in gaining access to the OEEC and OECD records of these discussions.

¹¹ See Jones, 'The GATT-MTN System and the European Community as International Frameworks for the Regulation of Economic Activity: The Removal of Barriers to Trade in Government Procurement', 8 *Maryland J Int'l L & Trade* (1984) 53; Bourgeois, 'The Tokyo Round Agreements on Technical Barriers and on Government Procurement in International and EEC Perspective', 19 *CML Rev* (1982) 5.

¹² Pomeranz, 'Toward a New International Order in Government Procurement', 11 *Law & Pol'y Int'l Bus.* (1979) 1263.

¹³ Agreement on Government Procurement, done 11 Apr. 1979, Art. II, GATT Doc. MTN/NTM/W/211/Rev. 2, reprinted in 18 *ILM* (1979) 1052 (hereafter '1979 Agreement'), Art. II.

¹⁴ *Ibid.*, Art. I.

¹⁵ At that time, around US\$190,000.

¹⁶ For background on GPA 1979 see Goldstein, 'Doing Business Under the Agreement on Government Procurement: The Telecommunications Business – a Case in Point', 55 *St John's L Rev* (1980) 63; Peterson, 'The Trade Agreements Act of 1979: The Agreement on Government Procurement', 14 *Geo Wash J Int'l L & Econ* (1980) 321; De Mestral, 'The Impact of the GATT Agreement on Government Procurement in Canada', in J. Quinn and P. Slayton (eds), *Non-Tariff Barriers After the Tokyo Round* (1982), 171; Horsch, 'Eliminating Nontariff Barriers to International Trade: The MTN Agreement on Government Procurement', 12 *NYU J Int'l L & Pol* (1979) 315.

Although amended somewhat in the late 1980s,¹⁷ it was not until the 1990s that any significant amendments were introduced. A new Agreement on Government Procurement (GPA 1994) was concluded as part of the Uruguay Round multilateral trade negotiations on 15 December 1993, and signed in Marrakesh in April 1994, entering into force in January 1996.¹⁸ The GPA 1994 extended coverage to procurement beyond just goods to specified works and services;¹⁹ it further included procurement by specified sub-national governmental authorities (such as states within federations and municipalities), and public utilities. Coverage by the GPA 1994 depended on whether the value of the procurement was above a specified threshold, which varied depending on the type of procurement and the level of government involved in purchasing.²⁰ In addition, access to procurement by sub-central governments, public utilities, and for services was contingent on other parties making acceptable reciprocal offers. Not all have done so, and so commitments do not apply uniformly to all parties.

A brief outline of some of the more relevant provisions of the agreement applying to procurement above the specified thresholds will be useful at this point. A basic non-discrimination provision requires parties to the GPA 1994 to accord the products, services and suppliers of any other party treatment 'no less favourable' than they give to their domestic products, services and suppliers. It also requires that parties not discriminate among goods, services and suppliers of other parties.²¹ Each party is required to ensure that its contracting bodies do not treat a locally established supplier less favourably than another locally established supplier on the basis of degree of foreign affiliation or ownership.²² Each party is also required not to discriminate against a locally established supplier on the basis of country of production of the goods or service being supplied.²³

¹⁷ The Agreement was amended in 1987, but only relatively minor changes were made to its text.

¹⁸ Agreement on Government Procurement, contained in Proposal for a Council Decision Concerning the Conclusion of the Results of the Uruguay Round of Multilateral Trade Negotiations (1986–1994), COM(94)143 final/2, Brussels, 25 Apr. 1994. The full Agreement, including the Annexes, is contained in Agreement Establishing the World Trade Organization: Plurilateral Trade Agreements: Agreement on Government Procurement, Cm 2575 (1994). For discussion of the background to the Agreement, see Barshevsky, Sutton, and Swindler, 'Developments in EC Procurement Under the 1992 Program', 4 *Brigham Young U L Rev* (1990) 1269, at 1326–1336. Messerlin, 'Agreement on Public Procurement' in OECD, *The New World Trading System: Readings* (1995), at 65; B. M. Hoekman and P. C. Mavroidis (eds), *Law and Policy in Public Purchasing: The WTO Agreement on Government Procurement* (1997), in addition to the literature cited below.

¹⁹ See the useful article by Low, Mattoo, and Subramanian, 'Government Procurement in Services', 20 *World Competition* (1996) 5, at 6.

²⁰ The GPA 1994 threshold is 130,000 SDR (1 SDR = \$US 1.45 (2005)) for procurements of goods and services (except construction services) by central government entities. Thresholds for purchases by sub-central entities vary by country (usually around 200,000 SDR), as do purchases by government-related enterprises (usually around 400,000 SDR). In general, the threshold is 5,000,000 SDR for procurement of construction services by all of these entities: Agreement on Government Procurement, 15 Apr. 1994, WTO Agreement, Annex WTO Agreement (hereinafter GPA 1994), App. 1.

²¹ *Ibid.*, Art. III.

²² *Ibid.*, Art. III(2)(a).

²³ *Ibid.*, Art. III(2)(b).

In addition to this basic set of non-discrimination requirements, there is a detailed set of obligations which procuring entities are required to follow. Regarding qualification of suppliers, for example, the Agreement provides that 'any conditions for participation shall be limited to those which are essential to ensure the firm's capability to fulfil the contract in question',²⁴ and that such conditions may not discriminate between national and foreign suppliers, or among foreign suppliers. In the case of selective tendering procedures, entities maintaining permanent lists of qualified suppliers are required to publish 'the conditions to be fulfilled by suppliers with a view to their inscription on those lists . . .'.²⁵ Tender documentation must in general contain all information necessary to permit suppliers to submit responsive tenders, 'the criteria for awarding the contract'²⁶ and 'any other terms and conditions'.²⁷ To be considered for the award of a contract the tender 'must . . . conform to the essential requirements of the notices or tender documentation and be from a supplier which complies with the conditions for participation'.²⁸ Under the Agreement, the public body may decide not to issue the contract to anyone. If it does award the contract, the public body 'shall make the award to the tenderer who has been determined to be fully capable of undertaking the contract and whose tender . . . is either the lowest tender or the tender which in terms of the specific criteria set forth in the notices or tender documentation is determined to be the most advantageous'.²⁹

An entity which has received a tender that is abnormally lower than other tenders may enquire with the tenderer to ensure that it can comply with the conditions of participation and be capable of fulfilling the terms of the contract.³⁰ Regarding the award of contracts, awards 'shall be made in accordance with the criteria and essential requirements specified in the tender documentation'.³¹ Except in the case of developing countries, procuring entities 'shall not, in the qualification of suppliers, products, or services, or in the evaluation of tenders and award of contract, impose, seek or consider offsets'.³² Article XXIII of the GPA 1994 provides a general exception to the provisions of the Agreement:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustified discrimination between countries where the same conditions prevail or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent any Party from imposing or enforcing measures: necessary to protect public morals, order or safety, human, animal or plant life or health or intellectual

²⁴ *Ibid.*, Art. VIII (b).

²⁵ *Ibid.*, Art. IX(9)(b).

²⁶ *Ibid.*, Art. XIII(2)(h).

²⁷ *Ibid.*, Art. XIII(2)(j).

²⁸ *Ibid.*, Art. XIII(4)(a).

²⁹ *Ibid.*, Art. XIII(4)(b).

³⁰ *Ibid.*, Art. XIII(4).

³¹ *Ibid.*, Art. XIII(4)(d).

³² *Ibid.*, Art. XVI(1). According to a footnote to this Art., included in the text of the Agreement, offsets are regarded as 'measures used to encourage local development or improve the balance-of-payments accounts by means of domestic content, licensing of technology, investment requirements, counter-trade or similar requirements'.

property; or relating to the products or services of handicapped persons, of philanthropic institutions or of prison labour.³³

As under the GPA 1979, several countries sought exemptions from the coverage of the Agreement for particular social policies. The United States continued to seek an exemption under the GPA 1994 for those legislative policies which required that a percentage of public contracts in certain circumstances be set aside in favour of tenderers from minority and small businesses.³⁴ The United States stipulated that the Agreement did not apply in respect of 'set-asides for small and minority businesses'.³⁵ Canada was 'unable to persuade the United States to moderate the terms'³⁶ of these programmes. 'Consequently', according to an official Canadian Government report, 'the Canadian federal government is not required to open up to Code members its procurement of high-technology communications, transportation-related construction and specified services'.³⁷ Specifically, Canada included a minority and small business exception in its Annex.³⁸ In response to the US and Canadian moves, a similar exception for set-asides for small- and medium-sized businesses was adopted by South Korea, which did not have any such preference programmes.³⁹ Regarding sub-central government entities, covered for the first time in the 1994 Agreement, the United States also required that a provision be inserted which provides that '[p]rocurements subject to programmes promoting the development of distressed area and businesses owned by minorities, disabled veterans and women are reserved from coverage'.⁴⁰ The exemptions granted to the United States in the GPA 1994 apply both in relation to the provisions forbidding discrimination on the basis of nationality and to the rules on award procedures.⁴¹ The EC was opposed to these United States exceptions. It responded, not by including a general exception of an equivalent kind, but by providing that bid challenge

provisions of Article XX shall not apply to suppliers and service providers of . . . Japan, Korea and the USA in contesting the award of contracts to a supplier or service provider of Parties other than those mentioned, which are small or medium sized enterprises under the relevant provisions of EC law, until such time as the EC accepts that they no longer operate discriminatory measures in favour of certain domestic small and minority businesses.⁴²

³³ *Ibid.*, Art. XXIII(2).

³⁴ The United States had earlier taken a reservation stating that Agreement obligations would not apply to set-asides on behalf of small and minority businesses under the North American Free Trade Agreement (NAFTA), ch. 10, Annex 1001.2b, General Notes, Schedule of the United States, Note 1.

³⁵ GPA 1994, *supra* note 20, United States Annex to App. 1, General Notes, Note 1.

³⁶ Industry Canada, *Industry and the Uruguay Round, Volume 1 – Results of the Negotiations* (1995).

³⁷ *Ibid.*

³⁸ GPA 1994, *supra* note 20, Canadian Annex to App. 1, General Notes, Note 1(d).

³⁹ *Ibid.*, Korean Annex to App. 1, Annex 1, Note 3; Annex 2, Note 3; Annex 3, Note 2.

⁴⁰ *Ibid.*, United States, Annex 2.

⁴¹ *Ibid.*, United States Annexes to App. 1, General Note 1.

⁴² They were notified by the European Community to the WTO in a communication dated 22 Dec. 1995 (WTO, Interim Committee on Government Procurement, Modifications to Appendix I of the European Communities and the United States, GPA/IC/10 of 16 Jan. 1996, at 8).

The GPA 1994 also provides stronger enforcement procedures and new remedies for breach.⁴³ Disputes between parties under the Agreement are subject, with a few modifications, to the procedures of the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU).⁴⁴ The GPA 1994 also introduces a mechanism for firms to use if they consider that there has been a breach of the Agreement affecting them, the so-called bid challenge system.⁴⁵ The GPA 1994 requires each party to establish a procedure whereby a supplier has a right of challenge to an independent domestic tribunal.⁴⁶ As Messerlin has written, this is a 'unique innovation in the GATT system; it is the first time that direct access to enforcement procedures under the regulations of the importing country has been granted to foreign firms within the context of a GATT text'.⁴⁷

Finally, the GPA 1994, like the GPA 1979 but unlike GATT, remained plurilateral in nature, rather than multilateral. All Member States of the European Community are parties, as are the other major industrialized countries in North America and the Far East.⁴⁸ The membership of the GPA 'club', with 37 members, is considerably smaller than the membership of GATT, with 148. As we have seen, the GPA has proven relatively unpopular with other countries, particularly developing countries. There is, however, increasing pressure from the IMF, the World Bank and the EC on developing countries to reform their domestic procurement, often by adopting a variation of the UNCITRAL model procurement legislation, in order to secure access to loans and other technical assistance. In some developing countries, the role of international financial institutions is of vital importance in funding development projects. Frequently, the method adopted for the dispersal of funds is for the lending institution to lend to a government or private body (depending on the financial institution involved), which then in turn contracts with another party to deliver works, supplies or services to the loan recipient. The question is what, if anything, the lending institution requires to be included in contracts that are financed by loans from the financial institution. It is clear that these financial institutions, because of their role, have had (and will continue to have) an important role in furthering procurement reform in these countries. Countries that are not subject to EC procurement rules, and are not members of the GPA 1994, are nevertheless likely to come under considerable pressure from international financial institutions to reform their public procurement practices, or face the likelihood that they will otherwise not be awarded development

⁴³ Davies, 'Remedies for Enforcing the WTO Agreement on Government Procurement from the Perspective of the European Community: A Critical View', 20 *World Competition* (1996–1997) 113; Hoekmann and Mavroidis, 'The WTO's Agreement on Government Procurement: Expanding Disciplines, Declining Membership?' 4 *Public Procurement L Rev* (1995) 63.

⁴⁴ GPA 1994, *supra* note 20, Art. XXII(1).

⁴⁵ *Ibid.*, Art. XX.

⁴⁶ *Ibid.*, Art. XX(6).

⁴⁷ Messerlin, 'Agreement on Public Procurement', in OECD, *The New World Trading System: Readings* (1995), at 65.

⁴⁸ For a detailed discussion of EU implementation of the 1994 GPA, see Didier, 'The Uruguay Round Government Procurement Agreement: Implementation in the European Union', in B. Hoekman and P. Mavroidis (eds), *Law and Policy in Public Purchasing* (1997), ch. 7.

loans.⁴⁹ Here we see a clear example of the effect of an international agreement in helping to develop administrative law at the international level.

This is not to say that the effectiveness of such influence at the domestic level is clear. A recent report acknowledged that this work ‘has proceeded with limited success. It received a major boost in the late 1990s when the international donor community decided to tackle the question of corruption head on’.⁵⁰ However, progress ‘in the development of public procurement systems worldwide, that can deliver on the basic principles of a well functioning system, contribute to better governance and reduce the opportunity for corruption, has been slow’.⁵¹ Efforts are now being made to ensure that greater progress will be made in the future in securing procurement reform.⁵²

3 Why Procurement Reform?

The movement at the regional and international levels to reform the practice of public procurement was part of a wider move to reduce non-tariff barriers to international trade. International trade law increasingly, therefore, sought to limit non-tariff barriers, including domestic regulation, that may appear to be neutral from a trade point of view but intentionally or unintentionally had the same or an equivalent effect as tariffs, excluding products from other countries entirely, or making their import more expensive. It is because of this important shift in thinking about the ambit of international economic law that the question arose as to how far procurement reform principles should be applied not only between countries, to ensure that the methods chosen for the allocation of contracts were not intentionally protectionist, but also within a particular country to ensure that domestic social regulation was not unintentionally protectionist.

There were, however, several additional reasons why this movement occurred, and some controversy over what it hoped to achieve.⁵³ There appear to be several overlapping objectives of the new procurement regulation reforms adopted from the

⁴⁹ ‘International Benchmarks and Standards for Public Procurement Systems’, paper presented to the OECD/DAC World Bank Round Table, *Strengthening Procurement Capacities in Developing Countries*, Paris, 22–23 Jan. 2003, paras 2–3.

⁵⁰ *Ibid.*, para 2.

⁵¹ *Ibid.*, para 3. The report further stated: ‘[e]fforts have been underway since the 1980’s in many countries worldwide to develop well functioning public procurement systems in order to increase the effective use of public funds to achieve a range of governmental and developmental objectives. New instruments were created to facilitate the development of public procurement systems, including a model law on procurement produced by the UN Commission on International Trade Law (UNCITRAL). The World Bank, other multilateral development banks, international organizations, and increasingly bi-lateral donors have supported the development of public procurement systems in the countries they support through loans, grants and technical assistance’: *ibid.* para 2.

⁵² *Ibid.* See also Hernandez, ‘Harminization [*sic*] of Procurement Policies and Practices of Public International Financial Institutions: Report on the Progress of Work by Heads of Procurement, November 2002’, presentation made at the High Level Forum on Harmonization, Rome, 24–25 Feb. 2003.

⁵³ See S. Arrowsmith, J. Linarelli, and D. Wallace, Jr., *Regulating Public Procurement: National and International Perspectives* (2000), at 15 ff.

1960s onwards. This is not to say that all procurement reform regulation attempted to further all of these principles, merely that it will be useful to set out in schematic form the main principles underpinning procurement reform. We can see that in several respects they reflect traditional administrative law concerns.

One of the most important principles underpinning procurement reform was *transparency*, meaning openness and clarity as to what government procurement policy was and how it was delivered. This often involved the enactment of procurement legislation, sometimes for the first time in several countries, and the publication of procurement policy, where before these had often been regarded as confidential. Second, there was a principle of *integrity*, meaning that procurement regulation should ensure probity: there should be no personal or political corruption, and improper collusion between government and particular suppliers should be eliminated.⁵⁴ Third, procurement reform was built on the concept of *competitive supply*, acquiring goods and services was considered as best achieved by competitive bidding unless there were convincing reasons to the contrary. Fourth, procurement reform aimed to enhance the *effectiveness* of procurement in meeting the commercial and regulatory goals of government in a manner appropriate to the requirement. Fifth, the goods, works or services needed by government should be acquired as cost-effectively as possible. Sometimes this was termed '*value for money*'. This involved 'ensuring that the goods, works or services being acquired are suitable for requirements', that 'the contract itself should be concluded on the best available terms', and that 'the contractor chosen is able to provide what is required on the terms agreed'.⁵⁵ Sixth, there should be *fair-dealing* between government and others involved in the procurement process, which involved ensuring that suppliers and others were treated fairly and equally, without discrimination. Seventh, to a lesser extent, procurement reform sometimes sought to increase the *responsiveness* of those involved in government procurement in meeting the aspirations, expectations and needs of the wider community served by the procurement. Eighth, there should be *informed decision-making*; decisions should be based on accurate information. Ninth, suppliers should, all other things being equal, be able to expect the same general procurement policy across the public sector, a principle of *consistency*. Tenth, *accountability* should be increased and effective mechanisms set in place in order to achieve such accountability. We have seen, in particular, that the GPA 1994 requires the establishment of a domestic system of remedies. Here we see an example of the direct influence that international agreements can have on the development of domestic administrative law.

⁵⁴ On corruption in government procurement, see Hellman, *et al.*, 'Measuring Governance Corruption, and State Capture: How Firms and Bureaucrats Shape the Business Environment in Transition Economies', EBRD and the World Bank: Policy Research Working Paper 2312, available at <http://www.worldbank.org/wbi/governance/pdf/measure.pdf>; Boehm and Polanco, 'Corruption and Privatisation of Infrastructure in Developing Countries', Transparency International: Integrity Pact And Public Procurement Programme, IP & PC Working Paper 1, Nov. 2003, available at http://www.transparency.org/integrity_pact/resources/working_papers/dnld/wk1_boehm_polanco.pdf.

⁵⁵ Arrowsmith *et al.*, *supra* note 53, at 29.

4 Set-asides in Malaysia: The History and Economic Context

With this background in mind, we can turn to look more specifically at the Malaysian context. The scale of government procurement in Malaysia is considerable. In 2003, Malaysian governmental entities, state and federal, spent over RM100 billion (roughly US\$26 billion) on procurement, the equivalent to over one-fourth of Malaysia's nominal GDP.⁵⁶ As has been the case since 1974, a large percentage of this total was allocated to two particular types of providers through two sets of interlinked preferences: one set involving preferences for Bumiputera, and another set of preferences for other domestic providers.⁵⁷

Bumiputera preferences have developed into a complex arrangement of set-asides and price preferences that vary in form and size depending on a number of factors. The complexity and variety reflect the Malaysian government's periodic efforts to make the preferences more effective in delivering policy goals, which have been among, if not the, most important to Malaysia's rulers for the last three and a half decades, while at the same time decreasing well-documented abuses of the system.⁵⁸ Preferences for other domestic providers, on the other hand, consist of relatively straightforward set-asides, operating in most cases to limit procurement to domestic sources unless one is not available.⁵⁹ Why does Malaysia operate such an extensive system of such preferences?

⁵⁶ This figure was reached by adding the total federal government expenditure for supplies and services to 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 21 Dec. 2003). For an analogously based analysis of Malaysian government procurement expenditure see Report by the Secretariat, Trade Policy Review-Malaysia WT/TPR/S/92, Table 111-4 (5 Nov. 2001) (hereinafter Malaysia TPR (2001)). As this figure does not include the non-development-related procurement of supplies and services by non-federal governmental bodies, it can be assumed that the total true figure including these elements would be significantly higher.

⁵⁷ See 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 (5 June 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) (12 Apr. 1995); Surat Pekeliling Perbendaharaan Bil. 2 Thn. 1995 (Treas. Circ. Let. No. 2/1995), Tatacara Penyediaan, Penilaian dan Penerimaan Tender (Tender Preparation, Evaluation and Acceptance), § 4.1.3 (10 Apr. 1995). According to the Mid-Term Review of the Eighth Malaysia Plan 2001–2005, preferences for Bumiputera, already large, would be scrapped in favour of a set-aside of 60% of government procurement spending for Bumiputera providers. Midterm Review of the Eighth Malaysia Plan § 3.53 (30 Oct. 2003).

⁵⁸ 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), §§ 5.1–5.5, 6–7 (12 Apr. 1995); see also Midterm Review of the Eighth Malaysia Plan, *supra* note 57, § 1.57 (30 Oct. 2003); Third Malaysia Plan 1976–1980, §§ 599–600 (5 July 1976).

⁵⁹ 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 (5 June 2002); Surat Pekeliling Perbendaharaan Bil. 2 Thn. 1995 (Treas. Circ. Let. No. 2/1995), Tatacara Penyediaan, Penilaian dan Penerimaan Tender (Tender

Malaysia is a paradigmatic example of what Amy Chua has characterized as the problem of the 'market-dominant minority'.⁶⁰ Malaysian Chinese, in particular, conform to the pattern she identifies of 'ethnic minorities who . . . tend under market conditions to dominate economically . . . the "indigenous" majorities around them'.⁶¹ For Chua, such situations are particularly problematic where the countries in which these market-dominant minorities live are being pressed by powerful economic and political forces to adopt more democracy *and* free-market economic policies.

Markets concentrate wealth, often spectacular wealth, in the hands of the market-dominant minority, while democracy increases the political power of the impoverished majority. In these circumstances the pursuit of free market democracy becomes an engine of potentially catastrophic ethno-nationalism, pitting a frustrated 'indigenous' majority, easily aroused by opportunistic vote-seeking politicians, against a resented, wealthy ethnic minority.⁶²

For Chua, where 'free market democracy is pursued in the presence of a market-dominant minority, the almost invariable result is backlash'.⁶³ This backlash will either be against free-market ideology, or against democracy. Managing such situations is, therefore, particularly problematic. The place of preferences for particular ethnic groups in government contracting in assisting Malaysia to handle this problem is therefore of particular interest.

Preferences in favour of the indigenous Malays or Bumiputera had existed in colonial Malaya. In the run-up to independence, they took on an important political salience.⁶⁴ The Constitutional Commission established to recommend the structure and content of an independence constitution reported in 1957.⁶⁵ Its terms of reference had required it to include provisions 'safeguarding . . . the special position of the Malays and the legitimate interests of other Communities'.⁶⁶ Essentially, it recommended that existing preferences should be retained, but that they should ultimately cease, and that no new preferences should be created.⁶⁷

These recommendations were implemented in Article 153 of the new Constitution, as part of a package of measures aimed at securing multi-ethnic support for the new Constitution. The Constitution imposed the responsibility 'to safeguard the special

Preparation, Evaluation and Acceptance), §4.1.1. (10 Apr. 1995); see also, e.g., Mid-Term Review of the Eighth Malaysia Plan, 2001–2005, *supra* note 57, foreword, §§ 1.33, 1.67, 5.76, 8.09 (30 Oct. 2003).

⁶⁰ A. Chua, *World on Fire: How Exporting Free Market Democracy Breeds Ethnic Hatred and Global Instability* (2003), at 6.

⁶¹ *Ibid.*

⁶² *Ibid.*, at 6–7.

⁶³ *Ibid.*, at 10.

⁶⁴ On the background, see Tun Haji Mohd. Salleh Bin Abas, 'Traditional Elements of the Malaysian Constitution' in F.A. Trindada and H.P. Lee (eds), *The Constitution of Malaysia: Further Perspectives and Developments* (1986), at 10–11; D. Nesiiah, *Discrimination With Reason?: The Policy of Reservations in the United States, India and Malaysia* (1999), at 74–88.

⁶⁵ Colonial Office, *Report of the Federation of Malaya Constitutional Commission 1957*, Colonial No. 330 (1957).

⁶⁶ *Ibid.*, para. 163.

⁶⁷ *Ibid.*, paras 163–168.

position of the Malays⁶⁸ on the Yang di-Peruan Agong (the King or presiding Sultan), who should ‘exercise his functions under this Constitution and federal law in such a manner as may be necessary’ to safeguard that special position.⁶⁹ There were specific provisions permitting preferences for Malays in employment in the public service, in education, in land distribution, and in the granting of permits and licences required for trade and business operations. These provisions were, however, only part of the package. First, the provisions were explicitly limited by other provisions in the Constitution.⁷⁰ Second, they would remain in place only for a period of 15 years from the date of independence; they would be repealed in 1972. Third, in exchange for agreeing to these special rights, non-Malays ‘would be granted favourable revisions in citizenship regulations . . . after independence’.⁷¹ Finally, these constitutional provisions were set in the political context whereby the government would be composed of an Alliance of the three main ethnically-based political parties representing the Malays, the Chinese and the Indians.

After independence, a ‘laissez-faire economic model’ was developed that ‘guided development’,⁷² in which the emphasis was on growth rather than redistribution. Growth plus an ethnic balance of power would, it was assumed, satisfy ‘Malay aspirations for progress towards parity . . . non-Malay desires to protect and enhance their existing living standards’, and thus secure a stable ‘political foundation’ of endorsement from Malays and non-Malays.⁷³

Central to the development of extensive preferences for Malays (or Bumiputeras) in the allocation of government contracts were the riots that broke out in 1969. The riots were seen as resulting from Malay dissatisfaction with economic distribution since independence from the British in 1957 and were ‘mainly against the Chinese’.⁷⁴ Whilst the Chinese were gaining ground economically, Malays perceived themselves to be losing out economically, despite the preferences. When the government which Malays dominated politically lost ground in the general election of 1969, Malay sensitivities were heightened further, leading to increasing tensions with the Chinese community and, ultimately, ferocious attacks by Malays on the Chinese and Chinese business. As Stafford says: ‘Having already lost control of much of the economy to Chinese-Malaysians and foreigners, the weakening of the Alliance, the Malay-dominated coalition, frightened many Malays by highlighting the possibility that political control might also be in jeopardy.’⁷⁵ In an influential book, *The Way Forward*,⁷⁶ by

⁶⁸ Constitution of Malaysia, Art. 153(1).

⁶⁹ *Ibid.*, Art. 153(2).

⁷⁰ See, generally, L.A. Sheridan and H.E. Groves, *The Constitution of Malaysia* (1979), at 382–386.

⁷¹ Phillips, ‘Positive Discrimination in Malaysia: A Cautionary Tale for the United Kingdom’ in B. Hepple and E. M. Szyszczak, *Discrimination: the Limits of Law* (1992), at 349.

⁷² J. van der Westhuizen, *Adapting to Globalization: Malaysia, South Africa, and the Challenges of Ethnic Redistribution with Growth* (2002), at 19.

⁷³ *Ibid.*, at 27.

⁷⁴ Nesiah, *supra* note 64, at 90.

⁷⁵ Stafford, ‘Malaysia’s New Economic Policy and the Global Economy: The Evolution of Ethnic Accommodation’, 10 *Pacific Review* (1997) 556.

⁷⁶ M. bin Mohamad, *The Way Forward* (1998).

Mahathir bin Mohamad (Prime Minister from 1981 to 2003), the 1969 riots were explained as the result of the Malays and the Chinese 'not knowing each other' because of the divide and rule policy of the British colonial government. As a result, he said, the Alliance leaders and some of the opposition came to realize that 'economic imbalances between the races were an important contributory factor to poor race relations'.⁷⁷ A less generous assessment is that the Bumiputera aristocratic elite had since independence maintained an implicit deal with Malaysia's ethnic Chinese, which allowed the former to retain political power in exchange for their acceptance of the latter's economic dominance, a deal which the riots proved to be unsustainable.⁷⁸ We have seen that there was a relatively modest programme of preferential treatment in favour of the Malays, particularly in government employment prior to the riots in Kuala Lumpur in May 1969. Despite these provisions, however, the economic position of the Malays had hardly improved by the late 1960s.⁷⁹ After the riots, 'they were given added political muscle',⁸⁰ and the system of preferences was considerably increased, in the award of loans and licences, in admission to higher education, and in government employment (in the police and the armed forces particularly). After a period of emergency rule, elections were held in 1971, after which a new government was formed in which non-Malay parties were significantly weaker. The new government was aggressively in favour of preferences, which became key to the government's stated goal to create social harmony and stability by ensuring 'that within one generation [Bumiputera] can be full partners in the economic life of the nation'.⁸¹ Affirming this commitment, when Parliament was restored, the Constitution was amended to strengthen the system of preferences, remove their time-limited nature, and made questioning the special privileges a criminal offence under the Sedition Act 1948.⁸²

⁷⁷ *Ibid.*

⁷⁸ E. T. Gomez, *Political Business: Corporate Involvement of Malaysian Political Parties* (1994), at 1–2.

⁷⁹ In 1969, 65% of Bumiputera still lived in poverty, though they represented 62% of the population: Ganguly, 'Ethnic Policies and Political Quiescence in Malaysia and Singapore', in M.E. Brown and S. Ganguly (eds), *Government Policies and Ethnic Relations in Asia and the Pacific* (1997), at 234 (citing 1995 Malaysian Government Census figures). They owned only 2.3% of the nation's commercial equity: Second Outline Perspective Plan 1991–2000, Tables 2-1, 2-6 (17 June 1991). The situation of the Chinese, though better, was not great; 26% of Chinese also lived in poverty: Ganguly, this note, at 234 (citing 1995 Malaysian Government Census figures). However, their *per capita* and absolute share of the nation's commercial equity was quite a bit better, representing just 27% of the population: *ibid.* They held 22.8% of its commercial equity: Second Malaysia Plan, 1971–1975, Table 3-1 (25 June 1971). That said, in reality it was foreign interests rather than the Chinese that dominated Malaysia's economy; it was the foreign interests who owned 63.3% of Malaysia's commercial equity: Second Outline Perspective Plan 1991–2000, Table 2-1 (17 June 1991) and, with the exception of those parts controlled by the Chinese, continued to 'control large-scale commercial agriculture and all forms of non-agricultural enterprises' as they had during colonial times: Ganguly, this note, at 261.

⁸⁰ A. Harding, *Law, Government and the Constitution in Malaysia* (1996), at 230.

⁸¹ See Second Malaysia Plan 1971–1975, foreword, §§ 20, 26, 26, 27, 126, 135, 147, 149, 155(1) 155 (iv); 25 (25 June 1971); E. T. Gomez and K.S. Jomo, *Malaysia's Political Economy* (1999), at 29–32.

⁸² See Sedition Act 1948 (Act 15, amended 1969), § 3(1)(a), (f) (amended 1969). For a general discussion of the various laws enacted by the government in this period to pacify the country and the important role they have played in defending subsequent regimes from political attack, see W. Case, *Politics in Southeast Asia: Democracy or Less* (2002), at 108–111.

There are several contrasts between the systems of preferences adopted in other countries, and those adopted in Malaysia. First, unlike several other jurisdictions where equivalent provisions are in place, in Malaysia these preferences ‘remained outside the area of constitutional litigation’.⁸³ Why this should be the case remains unclear. Harding comments:

It may be that the lack of litigation is a function of the designation of special privileges as sensitive issues: in practice the challenge of special privileges, even through litigation, is likely to involve the inflaming of public feeling on the issue, thereby discouraging the litigant, who might be held responsible for any adverse consequences. It could also be that litigants view these issues as beyond the willingness of the judiciary to intervene.⁸⁴

Second, unlike in some other jurisdictions, the public services in Malaysia identified much more closely with the recipient of the preferences, leading some to comment that ‘in Malaysia, the public services tend to be over-zealous in implementing Bumiputera policies’.⁸⁵

The new, heightened system of preferences was set in the context of a significantly revised economic policy. A New Economic Policy (NEP) was developed over time after the 1969 riots, the aim of which was poverty reduction and ethnic redistribution accomplished by means of economic growth.⁸⁶ Two interlinking policies that rose to considerable prominence in the 1970s as part of the NEP are of particular importance for our purposes. The first was the policy of increasing Bumiputera share ownership in Malaysian companies. The Second Malaysia Plan adopted the objective of increasing Bumiputera ownership of publicly quoted equity to 30 per cent by 1990, up from an estimated 4 per cent in 1971.⁸⁷ The Industrial Co-ordination Act 1975 furthered the policy by requiring the restructuring of equity ownership in manufacturing industry as a condition for the award of a government licence. All qualifying companies were required to submit a plan for the achievement of a 30 per cent Bumiputera share by 1990. New manufacturing companies of a particular size were required to have Bumiputera equity of at least 30 per cent of the total.⁸⁸

The second, and the primary, focus of this article was the use of the government procurement power to bolster the system of preferences by institutionalizing preferences for majority-Bumiputera controlled companies in the award of government contracts. Together, these two policies can be seen as attempts to achieve, as the

⁸³ Hickling, ‘An Overview of Constitutional Changes in Malaysia: 1957–1977’, in Tun Mohamed Suffian, H.P. Lee, and F.A. Trindade (eds), *The Constitution of Malaysia: Its Development: 1957–1977* (1978), at 23.

⁸⁴ Harding, *supra* note 80, at 231–232; see also Othman *et al.*, ‘Social Change and National Integration’ in J. Yahaya *et al.* (eds), *Sustaining Growth, Enhancing Distribution: The NEP and NDP Revisited (Proceedings of CEDER Conference)* (2003), at 141, 145 (‘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.’).

⁸⁵ Nesiah, *supra* note 64, at 231.

⁸⁶ See Second Malaysia Plan 1971–1975, foreword (25 June 1971); Othman *et al.*, *supra* note 84, at 141, 145; Gomez, *supra* note 78, at 3.

⁸⁷ Second Malaysia Plan 1971–1975, § 135 (25 June 1971).

⁸⁸ See Gomez and Jomo, *supra* note 81, at 29–32.

Malaysian government put it, the goal of 'eliminating the present identification of race with economic function'.⁸⁹ To do so it was necessary to go beyond merely rectifying imbalances in income between Bumiputera and non-Bumiputera and attempt to equalize equity ownership. This was seen as contributing to wealth equalization in the longer term. It was also necessary to achieve a significant cultural shift within the Malay population, from conceiving of themselves not only as primarily rural agricultural workers but also as (potential) urban entrepreneurs. In addition, it was likely that companies that were majority Bumiputera-owned would be more likely to increase the proportion of Bumiputera employees. Although he claims that the NEP was formulated independently, and without knowledge of, steps towards 'affirmative action' in the United States, Mahathir states in his 1998 book that it was 'roughly an embodiment of the affirmative action approach formulated in the USA'.⁹⁰ The NEP was essentially about the creation of the same class structure in the Bumiputera community as in the non-Bumiputera communities.

What marks out the policy context in which these redistributive policies developed is the extent to which the Malaysian government situated them within an overall economic policy of substantially investment-led economic growth. Economic growth, it was made clear, provided the resources which could then be redistributed. The two went hand in hand. Without racial stability, investors would be scared away; without investment, racial stability could not be financed.⁹¹ From the government's point of view at least, redistributive policies were necessary to provide a stable political context in which to attract investment. Equally, for redistribution to achieve the goal of greater stability, it had to be financed from growth, rather than squeezing the Chinese and Indian populations, because to do so would increase ethnic tensions rather than lessen them. No particular group should feel that it was losing out.⁹² Without external investment, in other words, everything was at risk. This meant that redistributive policies were, to an extent, affected by the external economic climate affecting Malaysia, as well as the internal domestic political climate.⁹³ This made the government more sensitive than some to the problems that were thrown up by its redistributive policies. As a result, the NEP was 'continually amended to take account of changing external conditions as well as the program's own successes and failures'.⁹⁴

The National Development Policy replaced the New Economic Policy.

While the NDP maintains the basic strategies of the NEP, its new dimensions will be to: (a) shift the focus of the anti-poverty strategy towards eradication of hard-core poverty while at the same time reducing relative poverty; (b) focus on employment and the rapid development of an active Bumiputera Commercial and Industrial Community (BCIC) as a more effective strategy to increase the meaningful participation of Bumiputera in the modern sectors of the economy;

⁸⁹ Third Malaysian Plan 1976–1980 (1976), *supra* note 58, para. 567. See also I. Emsley, *The Malaysian Experience of Affirmative Action: Lessons for South Africa* (1996), at 49.

⁹⁰ *Ibid.*, at 81.

⁹¹ See Second Malaysia Plan 1971–1976, § 3 (25 June 1971).

⁹² *Ibid.*

⁹³ This is essentially Stafford's argument: see *supra* note 75.

⁹⁴ *Ibid.*, at 559.

(c) rely more on the private sector to be involved in the restructuring objective by creating greater opportunities for its growth; and (d) focus on human resource development as a fundamental requirement for achieving the objectives of growth and distribution.⁹⁵

Growth and redistribution were both seen as key elements, but redistribution was seen as dependent on growth even more than before. 'The emphasis will be on managing the success already achieved and enhancing the growth momentum to bring about a better distribution of income opportunities . . .'.⁹⁶ The process of creating the BCIC 'will take into account the need for Bumiputera to participate in an environment of competition and efficiency'. Government policies and programmes 'will continue to provide the necessary support to Bumiputera entrepreneurs' but they would 'be expected to develop their business activities increasingly on their own efforts and be less dependent on Government subsidies and assistance'.⁹⁷ The system of preferences would be implemented to 'ensure that only Bumiputera with potential, commitment and good track records will be accorded access so that the objectives of creating a viable and resilient BCIC under the NDP are achieved'.⁹⁸ Edmund Gomez has termed this approach Mahathir's 'pick a winner' strategy.⁹⁹ This strategy involved a self-conscious favouritism, whereby Mahathir and/or other top officials individually chose to bestow advantages upon only those Bumiputera entrepreneurs who, in their minds, were most promising and thus most capable of using the advantages to their benefit.¹⁰⁰

From the 1990s, a considerably reduced role for the government in the economy was adopted. Privatization was heavily promoted. It was, however, privatization with a redistributive aspect, with preferences for Bumiputera in the distribution of shares.¹⁰¹ In this context, government contracting became even more important since many of the activities that had been carried out directly by government-owned businesses were now to be carried out by private enterprise under contract to government. Preferences for Bumiputera companies therefore became even more important than in the past. The combination of share-preference and contract-preference lessened opposition from Malays to the New Economic Policy. At the same time, however, the increased opportunities for investment in the newly privatized sectors of the economy led to an expansion of foreign direct investment.

5 Operation of Preferences in Malaysia

We shall concentrate on the organization of preferences for Bumiputera operating since 1995.¹⁰² The Finance Ministry exercises a broad grant of rule-making authority

⁹⁵ Second Outline Perspective Plan, 1991–2000 (1991), 4.

⁹⁶ Sixth Malaysia Plan, 1991–1995, § 1.99; see also § 1.30 (10 July 1991).

⁹⁷ Second Outline Perspective Plan, 1991–2000 (1991), para. 4.51.

⁹⁸ *Ibid.*, para. 4.53.

⁹⁹ Gomez, 'Capital Development in Malaysia' in Yahaya *et al.*, *supra* note 84, 71, 81.

¹⁰⁰ *Ibid.*

¹⁰¹ Stafford, *supra* note 75, at 573.

¹⁰² 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

through Treasury regulations in two basic forms: *Arahan Perbendaharaan*, Treasury Instructions (TIs), and *Surat Pekeliling Perbendaharaan*, Treasury Circular Letters (TCLs).¹⁰³ 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) generally 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).¹⁰⁴ The latter establishes that, all other things being equal between the bid of a Bumiputera tenderer, who is a MCCM member, and the bid of a Bumiputera tenderer, who is not, the member should be awarded the contract over the non-member.¹⁰⁵ While TCL No. 4/1995 provides specific details in regard to the first three categories,¹⁰⁶ the fourth is stated in only the most general of terms.¹⁰⁷

Preferences for Bumiputera providers in government procurement have been and continue to be focused principally on contributing to the restructuring of Malaysian society through the creation of a viable BCIC, and in particular the development of Bumiputera-owned small and medium-sized enterprises (SMEs). 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.¹⁰⁸

Firms in the Context of Government Procurement) (12 Apr. 1995); Surat Pekeliling Perbendaharaan Bil. 2 Thn. 1995 (Treas. Circ. Let. No. 2/1995), Tatacara Penyediaan, Penilaian dan Penerimaan Tender (Tender Preparation, Evaluation and Acceptance), § 4.1.3 (10 Apr. 1995).

¹⁰³ Arahan Perbendaharaan (Treas. Instr.), §§ 166 ff (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 Materials/Goods/Services in Government Procurement) (5 June 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) (12 Apr. 1995); Surat Pekeliling Perbendaharaan Bil. 2 Thn. 1995 (Treas. Circ. Let. No. 2/1995), Tatacara Penyediaan, Penilaian dan Penerimaan Tender (Tender Preparation, Evaluation and Acceptance) (10 Apr. 1995). In addition to these provisions, government procurement is also regulated by the very brief Government Contracts Act of 1949 (Act 67, amended 1973), which grants to Ministers the authority to contract directly or by delegation on behalf of the Federal Government (in § 2), and to Chief Ministers of States the authority to contract directly, or by delegating, on behalf of their respective states.

¹⁰⁴ See Surat Pekeliling Perbendaharaan Bil. 4 Thn. 1995 (Treas. Circ. Let. No. 4/1995), §§ 5–6. In addition to establishing/reaffirming these preferences, TCL No. 4/1995 eliminates preferences for providers from other ASEAN nations that had been in effect since 1984; *ibid.*, § 10.1(v) (cancelling Surat Pekeliling Perbendaharaan Bil. 7 Thn. 1984 (Treas. Circ. Let. No. 7/1984), Peraturan-Peraturan Untuk Melaksanakan Artikel 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), § 3 (19 Dec. 1984)). While there does not appear to be any official document confirming that this is the case, additional evidence suggests that Art. 7 of the 1977 ASEAN Preferential Trading Arrangements (PTA) is no longer in force.

¹⁰⁵ Surat Pekeliling Perbendaharaan Bil. 4 Thn. 1995 (Treas. Circ. Let. No. 4/1995), § 5.6.

¹⁰⁶ *Ibid.*, §§ 5–6.

¹⁰⁷ *Ibid.*, §§ 5.2.1, 5.3.3.

¹⁰⁸ *Ibid.*, §§ 5, 7, 8; see also Midterm Review of the Eighth Malaysia Plan, *supra* note 57, § 1.57 (30 Oct. 2003); Third Malaysia Plan 1976–1980, *supra* note 58, §§ 599–600 (5 July 1976).

However, the current system of preferences also reflects government efforts to control abuse of the system by Bumiputera acting as front-men for non-Bumiputera businesses,¹⁰⁹ as well as furthering the policy's secondary purposes of contributing to the NEP's poverty eradication goals.¹¹⁰ The latter include encouraging the movement of Bumiputera into the upper levels of company hierarchies and creating opportunities for Bumiputera to shift from low-paying rural, agricultural, low-skilled jobs to higher-paying urban, industrial, semi-skilled jobs,¹¹¹ and, arguably, indirectly reducing poverty by increasing the money circulating within Bumiputera communities.¹¹²

The other major preference programme in Malaysian government procurement is one that favours domestic providers.¹¹³ For many years, the programme focused mainly on aiding the development of domestic SMEs, by concentrating preferences in lower-value contracts where SMEs could best compete.¹¹⁴ This has a particular importance in light of the NEP's underlying goal of creating national unity.¹¹⁵ While the two major prongs of the NEP's strategy to achieve national unity focus on improving the socio-economic 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'.¹¹⁶ Thus, the NEP and its successors have always predicated their distributive strategies on 'increasing opportunities for *all* Malaysians', from which an increased portion could be allocated to Bumiputera without a corollary decrease in the welfare of other groups.¹¹⁷ Chief among the strategies for achieving this predicate condition is a 'rapidly expanding economy' made possible by the peace and stability brought by the NEP's two prong distributive strategy.¹¹⁸ However, programmes, like preferences for *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 successful in their stated goal, by the 'promot[ion] of domestic industry', which would benefit all Malaysians.¹¹⁹

¹⁰⁹ Surat Pekeliling Perbendaharaan Bil. 4 Thn. 1995 (Treas. Circ. Let. No. 4/1995), §§ 2, 5–7; Sixth Malaysia Plan 1991–1995, §§ 1.99, 1.109 (10 July 1991).

¹¹⁰ See Third Perspective Plan, 2001–2010, foreword (3 Apr. 2001); Second Outline Perspective Plan, 1991–2000, foreword (17 June 1991); Second Malaysia Plan 1971–1975, foreword (25 June 1971).

¹¹¹ See Surat Pekeliling Perbendaharaan Bil. 4 Thn. 1995 (Treas. Circ. Let. No. 4/1995), §§ 2.1.1.2–2.1.1.6; Second Malaysia Plan 1971–1975, §§ 122–124 (25 June 1971).

¹¹² See Second Malaysia Plan 1971–1975, foreword (25 June 1971); Midterm Review of the Eighth Malaysia Plan, *supra* note 57, § 1.57 (30 Oct. 2003).

¹¹³ See Surat Pekeliling Perbendaharaan Bil. 7 Thn. 2002 (Treas. Circ. Let. No. 7/2002), § 2; Surat Pekeliling Perbendaharaan Bil. 2 Thn. 1995 (Treas. Circ. Let. No. 2/1995), § 4.

¹¹⁴ See Surat Pekeliling Perbendaharaan Bil. 11 Thn. 1965 (Treas. Circ. Let. No. 11/1965), Preference in the Purchase of Domestically Made Articles (14 Aug. 1965) (referencing a General Circular Memorandum No. 5 of 1963); Arahan Perbendaharaan (Treas. Instr.), § 169.2 (1997).

¹¹⁵ See Second Malaysia Plan 1971–1976, foreword (25 June 1971).

¹¹⁶ *Ibid.*, § 3.

¹¹⁷ *Ibid.*, (emphasis added); see also §§ 20, 140 ('The strategy is founded on the philosophy of active participation not on disruptive redistribution.').

¹¹⁸ *Ibid.*, § 3 (emphasis added).

¹¹⁹ Datuk Seri Dr. Mahathir Bin Mohamad (then Prime Minister of Malaysia): The 2004 Budget Speech, ¶ 99 (12 Sept. 2003 at Dewan Rakyat (the House of Representatives)) (official translation).

6 Internal Controversy about Preferences in Malaysia

There has clearly been significant internal political debate within Malaysia as to how these preferences were operated in practice. The redistribution arising from the preferences has increasingly been seen as bringing some unacceptable costs.¹²⁰ One problem continually identified is political corruption arising from the process of preference in the award of contracts. This has been seen as being due to the 'rent that exists in protected contracts . . . [which] has been a feature of Malaysian "money politics" at the highest levels'.¹²¹ In December 2000, Abdul Rahman Yusof (Keadilan-Kemaman) during the Committee stage debate on the Supply Bill, for example, accused the government of blacklisting Bumiputera contractors who supported the Opposition.¹²² Entrepreneur Development Minister Datuk Mohamed Nazri Abdul Aziz said that the award of government contracts was based on the capability of Bumiputera contractors, regardless of whether they are government supporters. 'There is no truth to allegation [sic] that contracts are given based on political consideration.'¹²³

However, since 2001, the *New York Times* reported,¹²⁴ Prime Minister Mahathir Mohamad

appears to have ostracized a clique of tycoons once extolled as role models for an emerging Malay bourgeoisie. Entrusted with national assets and lavished with government contracts, they expanded their reach, only to find themselves drowning in debt when the Asian financial crisis erupted in 1997. After a series of controversial bailouts that deepened foreign investors' cynicism about Malaysia, Dr. Mahathir began to purge his tarnished champions last year.

Their downfall, reported the *NY Times*,

coincided with a new emphasis here on meritocracy and, with it, a re-evaluation of affirmative action policies for Malaysia's native races, known as Bumiputera. Recently Dr. Mahathir has repeated publicly what many here have said privately for years: that policies intended to help give the Bumiputera a fairer stake in an economy once dominated by foreigners and ethnic Chinese have succeeded in creating a Malay middle class but have also created a culture of entitlement, complacency and mediocrity.

The *NY Times* continued: 'The removal of the best-known beneficiaries of crony capitalism has undoubtedly helped restore confidence in Malaysia's corporate integrity.' In August 2001, Standard & Poor raised its ratings on Malaysia's long-term foreign currency debt one notch, to BBB+.

A second common problem that has been identified is the potential for such policies to lead to a decline in entrepreneurial activity amongst the target group because the preferences have established 'dominant and undynamic Bumiputera groups. These

¹²⁰ Thomas Sowell also criticizes these policies as not achieving a reduction in income differences between the races, but that does not appear to have been their purpose: T. Sowell, *Preferential Policies: An International Perspective* (1990), at 45–49.

¹²¹ Emsley, *supra* note 89, at 65.

¹²² BERNAMA (Malaysian National News Agency), 'Award of Government Contracts Based on Contractors' Capability', *Malaysia General News*, 5 Dec. 2000.

¹²³ *Ibid.*

¹²⁴ Arnold, 'Scandal Lets Malaysia Prove Its Mettle', *The New York Times*, 16 Oct. 2002, W 1, col. 4.

groups actually pose an obstacle to the creation of a more vital entrepreneurial community by acting to exclude potential new Bumiputera entrants.¹²⁵ Entrepreneur Development Minister Datuk Mohamed Nazri Abdul Aziz was reported to have said that Bumiputera contractors were too dependent on government contracts for business. 'We try to make them competitive in acquiring outside contracts, but it seems, year in year out, they still continue to depend on the government.'¹²⁶ In May 2001, Datuk Seri Abdullah Ahmad Badawi, the Deputy Prime Minister said¹²⁷ that the affirmative action policy must go straight to those who need the help and this would mean that special privileges for the Bumiputeras would be channelled to those who deserved them either through need or merit. 'Poor Bumiputeras and brilliant Bumiputeras must be the first recipients of special privileges. We must cut the vicious cycle of mediocrity perpetuated by those who deserve no help but keep receiving it', Abdullah said. In August 2002, Dr Mahathir Mohamad said that Bumiputera entrepreneurs must stop depending solely on the government to buy their goods because such a market is limited and it is not the way to do business.¹²⁸ The Prime Minister said that Bumiputera entrepreneurs must focus on the open market, which is the real market and which can help them improve the quality of and demand for their goods. 'The entrepreneurs must avoid being too dependent on the government to buy their products. Instead, they should try to market their goods to the public within and outside the country,' he added. Later, at a media conference, he said that 100 per cent of the Bumiputera contractors depended on government contracts and in the absence of government contracts 'they are not competitive enough'.

This concern is particularly important in view of a third problem: the increased competition from contractors outside Malaysia that is likely to arise with the implementation of the ASEAN Free Trade Area. Malaysia has increasingly seen itself as benefiting from liberalized trade, particularly among Asian trading countries. The development of the ASEAN Free Trade Area was considered an important opportunity, but also one that would impose increased market disciplines on domestic entrepreneurs. To be successful, increased international competitiveness was necessary. For one observer, 'efficiency-decreasing policies such as the NEP have become costly luxuries'.¹²⁹ The government 'has been forced to promote overall competitiveness at the expense of continued ethnic restructuring. In other words, it is no longer possible for growth *and* equity to continue in tandem to the same degree as they had in the 1970s.'¹³⁰

A fourth problem continually referred to is the tendency of Bumiputera contractors to become commission agents by sub-contracting the job offered to them to others. This has been a recurring criticism, not least from Dr. Mahathir himself. In September

¹²⁵ *Ibid.*, at 65.

¹²⁶ BERNAMA, *supra* note 122.

¹²⁷ BERNAMA (Malaysian National News Agency), 'M'sians Urged Not to Recoil into Own Racial Cocoons', *Malaysia General News*, 18 May 2001.

¹²⁸ BERNAMA (Malaysian National News Agency), 'Dr Mahathir Tells Bumi Entrepreneurs to Stop Depending on Govt', *Malaysia General News*, 6 Aug. 2002.

¹²⁹ Stafford, *supra* note 75, at 572.

¹³⁰ *Ibid.*, at 573.

2002,¹³¹ he returned yet again to the problem of those who sell the contracts to obtain quick profits. 'This irresponsible action has jeopardised the government's efforts to create a Bumiputera Commercial and Industrial Community', he said. As a result, the government would be more cautious in awarding contracts only to those who are committed, responsible, have proper organization, adequate capital and strive hard to become successful entrepreneurs in the construction industry. Those who sell contracts and do not actively manage the contracts would be blacklisted, he warned.

7 The 'Administrative Law' of Government Procurement in Malaysia

These controversies, whilst lively and public, do not translate into the development of any effective administrative law controls of the type that would be recognized in most developed countries. At all stages in the procurement process, including the administration of preferences, the Finance Ministry and, to a lesser extent, the Contractor Service Centre (CSC) of the Ministry of 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 Treasury Division of the Finance Ministry enjoys almost complete discretion to make rules, which govern government procurement by all federal, state and local governmental entities.¹³² These rules delegate some authority to procuring entities at various stages of the process and to the CSC 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.

Significant mechanisms exist, which allow the Finance Ministry to monitor and control the government procurement activities of other governmental entities to ensure that they obey Treasury-issued government procurement regulations. 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-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 powers granted to it by democratically elected bodies, are similarly absent. Thus, the Finance Ministry is practically free to rule government procurement in Malaysia according to its discretion, while the government procurement activities of other governmental entities are subject, for the most part, only to its control.¹³³

¹³¹ BERNAMA (Malaysian National News Agency), 'Contract Value of All Class Bumi Contractors Increased', *Malaysia General News*, 20 Sept. 2002.

¹³² See Financial Procedures Act 1957 (Act 61, amended 1972), § 4.

¹³³ The minor exception is the monitoring role of procurement boards, which play a role in some types of procurement but which are themselves significantly controlled by the Finance Ministry. See Arahan Perbendaharaan (Treas. Instr.) No. 191 (1997).

There are virtually no means for an aggrieved provider or other interested citizen to challenge either Treasury rules governing government procurement or specific decisions made under those rules, whether by the Finance Ministry or another governmental entity. There are no complaint procedures established specifically to deal with problems that arise in the context of government procurement, 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.

Judicial challenge of both Treasury government procurement rules and actions taken pursuant to them is also limited. The broad grant of power, under which the Treasury issues government procurement rules, in combination with other elements of the Malaysian legal system, make challenging the legality of government procurement rules almost impossible and,¹³⁴ in the case of challenges to rules applicable to Bumiputera preferences, potentially dangerous to one's freedom. (Treasury rules promulgating preferences for Bumiputera in government procurement are protected from legal challenge (and even open criticism) by provisions of the Sedition Act, which *inter alia* makes questioning privileges granted to Bumiputera a seditious act, a strictly liability offence punishable by up to three years in jail and/or a fine of RN 5000 (approximately US\$1,300).)¹³⁵ Neither interested citizens nor participating providers appear to have access to courts to challenge specific contract decisions.¹³⁶ 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 any remedy is discretionary.¹³⁷ Further, while some

¹³⁴ See Financial Procedures Act 1957 (Act 61, amended 1972), § 4. M.P. Jain calls the Malaysian judiciary's role in determining whether administrative agencies have overstepped their rule authority under laws such as the Financial Procedures Act 'almost symbolic'; Jain, 'Administrative Law in Malaysia' in M.B. Hooker (ed.), *Malaysian Legal Essays* (1986), at 213, 214, 222–223; see also Interpretation Act, 1948 (Act 81, amended 1967), §§ 20, 25; M. P. Jain, *Administrative Law of Malaysia and Singapore* (1997), at 91, 105–106.

¹³⁵ Sedition Act 1948 (Act 15) §§ 3(1)(a), 3(1)(f) (amended 1969).

¹³⁶ See Jain, *supra* note 134, at 568–569; *Lim Kit Sang v United Engineers of Malaysia* [1988] 1 SCR at 22; [1988] 2 MJL 25.

¹³⁷ The authors are not aware of any case in which a provider has challenged his status in Malaysian courts. Some cases, which deal with other status-type administrative decisions, appear to indicate that such a claim could be entertained by the courts. See, e.g., *Ketua Pengarah Kastam v Ho Kwan Seng* [1977] 2 MJL 152; *Metal Industry Employees v Registrar of Trade Unions* [1992] 1 MLJ 46; *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; *Lim Ko v Board of Architects* [1966] 2 MLJ 80. However, in order for a provider to prevail it would be likely to have to show that it had a legitimate expectation of the status which it was denied; Jain, *supra* note 134, at 273–274, which might be difficult, given the 'private law' perspective from which government contracting decisions are viewed by Malaysia's courts; *ibid.*, at 568–569. See also *ibid.*, at 606–610 (for a discussion of some of the obstacles to gathering evidence that a challenger to a decision by an administrative agency might have); 655–657 (for a discussion of the discretion courts have to hear or refuse to hear challenges of administrative agency decisions).

have recently noted ‘a heartening surge in judicial activism’,¹³⁸ 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.¹³⁹ Finally, in Malaysia, government contracting is dealt with as part of private law, and therefore the government is largely free to contract however, and with whomever, it pleases. Those who feel they have been wronged in this process only have access to the judicial remedies that would apply in a contractual dispute between private parties.¹⁴⁰ 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.

8 An Agreement on Transparency in Procurement?

The original small group of parties to the GPA has become larger, due in part to the requirement from some existing members of the GPA that if they were to agree to other states becoming members of the WTO generally, they would be expected also to become members of the GPA (thus bringing China, for example, into the fold), and in part due to the EU’s requirement that states becoming members of the EU will also become members of the GPA.¹⁴¹ However, very few developing countries are members, and in part that seems to be because of a perception that the GPA would be too restrictive of its use of procurement for socio-economic goals.¹⁴² It is clear that some states have made assessments of what would need to be changed in that area if they were to become members of the GPA.¹⁴³ We have seen that the GPA is in fact remarkably broad in enabling states to negotiate which entities are to be covered by the Agreement, which services are to be covered, and the thresholds that are applicable. In addition, the parties may specify particular exceptions, as the United States, Canada and Korea did, as we have seen, regarding small business and minority set-asides. In addition, there are provisions allowing developing countries specifically to become members of the GPA, whilst retaining certain preferences. Article V recognizes the

¹³⁸ Sudha CKG Pillay, ‘The Changing Faces of Administrative Law in Malaysia’, 1 *Malayan LJ* (1999) pp. cxli, cxlii; See also Jain, *supra* note 134, at 255.

¹³⁹ The dangers posed for judges who take on the executive were powerfully demonstrated in 1988, when a High Court ruling, which nullified for registration irregularities UMNO party elections that had narrowly left Mahathir in power, precipitated the removal of, first, the Lord President of the 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 defence. See Gomez, *supra* note 78, at 62–63; Marks, ‘Judicial Independence’, 68 *Austl LJ* (1994) 173, at 177–179 (stating *inter alia* that these events ‘resulted in a judiciary stripped of whatever independence it formerly had’); Case, *supra* note 82, at 116–117.

¹⁴⁰ See Jain, *supra* note 134, at 568–569.

¹⁴¹ For the details, see Arrowsmith, ‘Reviewing the GPA: The Role and Development of the Plurilateral Agreement After Doha’, 5 *J Int’l Econ L* (2002) 761, at 768.

¹⁴² *Ibid.*, at 769.

¹⁴³ Australian Department of Foreign Affairs and Trade, WTO Agreement on Government Procurement: Review of Membership Implications (1997).

need of developing countries to ‘promote the establishment or development of domestic industries including the development of small-scale and cottage industries in rural or backwater areas; and economic development of other areas of the economy’.

Although a Member of the WTO, Malaysia steadfastly refused to become a party to the GPA despite these provisions, which it could do, of course, since the GPA was a *plurilateral* agreement, rather than part of the required package of agreements to which all Members of the WTO are parties. Malaysia has largely escaped the direct and indirect effects of the GPA by consistently refusing to become a party to the GPA, although it has not escaped scrutiny entirely. The WTO Trade Policy Report commented:

Government procurement preferences accorded to Malaysian firms constitute government assistance to these firms. Selected state-owned enterprises are required by public procurement regulations to follow similar practices. These preferences not only restrict competition among suppliers, thereby impairing economic efficiency, but also raise the cost to the Government and state-owned enterprises of procuring goods and services. The competitiveness of state-owned enterprises is, in turn, hampered insofar as they are forced by preferential procurement regulations to purchase their inputs from relatively high-cost local suppliers.¹⁴⁴

Malaysia is also, of course, a relatively wealthy member of the group of developing countries, and thus not subject to the type of pressure that requiring loans from the World Bank and the IMF would entail.¹⁴⁵ This degree of immunity from the international procurement rules was threatened, however, by the establishment of a Working Group on Transparency in Government Procurement (WGTGP) by the WTO Ministers at its meeting in Singapore in December 1996. Members agreed to establish the WGTGP to *study* the issues involved, ‘taking into account national policies, and based on this study, . . . [to] develop elements for inclusion in an appropriate agreement’.¹⁴⁶ This was a *multilateral* exercise, and its mandate was to conduct a study on transparency and develop elements for inclusion in an appropriate agreement. The aim to produce a multilateral agreement must be seen in the context of the failure of the GPA to make itself attractive to countries outside a relatively small group. However, a movement developed among several developing countries that resisted further development of international procurement disciplines, particularly any that would be multilateral, and would thus result in an obligation for all Members of the WTO to comply with them.

¹⁴⁴ WTO Trade Policy Review: Malaysia, WT/TPR/S/31, 3 Nov. 1997, para. 122.

¹⁴⁵ Interestingly in this regard Malaysia has consistently included exceptions to its various preferences programmes for procurement paid for by international development organizations, such as the IMF and World Bank. See, e.g., Surat Pekeliling Perbendaharaan Bil. 7 Thn. 1974 (Treas. Circ. Let. No. 7/1974), Keutamaan Kepada Bumiputra Dalam Perolehan Barang-Barang, Perkhidmatan Dan Kerja-Kerja (Preferences for Bumiputera in the Procurement of Goods Services and Works), § 11 (1 June 1974). Current regulations simply require any such procurement to be done in accordance with requirements established by the funding organization: Surat Pekeliling Perbendaharaan Bil. 2 Thn. 1995 (Treas. Circ. Let. No. 2/1995), Tatacara Penyediaan, Penilaian dan Penerimaan Tender (Tender Preparation, Evaluation and Acceptance), §§ 2.2.3, 4.3 ff, 8.4 (10 Apr. 1995).

¹⁴⁶ Singapore Ministerial Declaration (Adopted 13 Dec. 1996), WT/Min(96)/DEC, ¶ 21 (18 Dec. 1996); see also Abbott, ‘Rule-Making in the WTO: Lessons from the Case of Bribery and Corruption’, 4 *J Int’l Econ L* (2001) 275, at 287.

At the Ministerial Meeting in Doha in November 2001, setting in motion a new round of trade liberalization negotiations, it was decided that multilateral negotiations would take place after the Fifth Ministerial Meeting ‘on the basis of a decision to be taken, by explicit consensus, at that session on the modalities of negotiations’.¹⁴⁷ These negotiations would include consideration of whether to include transparency in government procurement in the future negotiating agenda.¹⁴⁸ Due to the divisiveness of the work at the WGTGP there was no negotiating text, but only a ‘List of Issues and Points Raised’, the ambiguous name of which reflects its amorphous contents.¹⁴⁹ As a result, the draft agreements respectively submitted by the EU (EU draft agreement) and a coalition of countries led by the US (US draft agreement) provide the most accurate and complete picture of the sort of agreement which proponents of a TGP agreement sought.¹⁵⁰ There are several features of these drafts that are of particular importance for our purposes.

Both agreements would have required 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. These are the so-called ‘domestic review procedure’ (DRP) requirements.¹⁵¹ Both agreements shared the requirement that whatever domestic institution was established for this purpose, it must operate independently of the procuring entity, but differed somewhat from one another in terms of scope of review and standing requirements.¹⁵² This would have been in addition to requiring parties to accept that inter-state complaints under a transparency agreement would be able to be taken through the WTO dispute settlement procedures, otherwise known as ‘linkage’ to the DSU.

Closely related to the DRP requirements (in the case of the EU draft agreement, explicitly related) were obligations in the two draft agreements regarding the provision of information.¹⁵³ Both would have required procuring entities not only to inform unsuccessful bidders of their failure but also respond to requests for information from such bidders concerning the reason for the rejection of their bids and, in the

¹⁴⁷ WTO, Ministerial Declaration, Ministerial Conference Fourth Session, 14 Nov. 2001 (WT/MIN(01)DEC/W/1), para. 26.

¹⁴⁸ Doha Declaration, para. 26.

¹⁴⁹ 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 (23 May 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 (3 Oct. 2002); see also Abbott, *supra* note 146, at 289 (noting the passively named ‘List of the Issues Raised and Points Made’).

¹⁵⁰ See Elements for an Agreement on Transparency in Government Procurement, Communication from the European Communities, WT/WGTGP/W/26 (5 Nov. 1999) (hereinafter EU Draft Agreement); Communication from Hungary, Korea, Singapore, and the United States, Preparations for the 1999 Ministerial Conference, The WTO’s Contribution to Transparency in Government Procurement, WT/GC/W/384, WT/WGTGP/W/27, Annex, Draft Text for an Agreement on Transparency in Government Procurement Articles X, XII (9 Nov. 1999) (hereinafter US Draft Agreement).

¹⁵¹ *Ibid.*, Art. X(2)–(3); EU Draft Agreement, *supra* note 150, Art. 8(1)–(2).

¹⁵² *Ibid.*

¹⁵³ See US Draft Agreement, *supra* note 150, Arts VIII(2.2)–VIII(3), IX(1); EU Draft Agreement, *supra* note 150, Arts 7(2), 8(3).

case of the EU draft agreement, also the reasons why the successful bid was chosen.¹⁵⁴ Further, each would have required that procuring entities keep and, with some differences in manner, make available a record of the process by which they reached award decisions.¹⁵⁵ The US draft agreement would have required that such information be ‘available upon request by another Member’ (a provision which was actually contained within brackets).¹⁵⁶ The EU draft agreement, on the other hand, included within the same article that details other DRP 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.¹⁵⁷

Despite arguments that a proposed multilateral agreement on transparency in public procurement would be beneficial for developed and developing countries,¹⁵⁸ several developing countries strongly objected to the proposals on the basis that they could undermine the ability of such states to use procurement for social policy purposes. In Malaysia’s case in particular, notwithstanding the statements of developed countries (embodied in the Doha Declaration’s mandate regarding the transparency agreement) that domestic preferences were off the table,¹⁵⁹ a TGP agreement such as that envisioned by the US and the EU was seen as threatening the preferences granted to Bumiputera and other domestic providers. Apart from the provisions of the draft agreements themselves, there were strong suspicions that a transparency agreement was intended by its developed country proponents to be an initial step on the way to a multilateral GPA, which was seen as requiring Malaysia to abandon its preferences programmes, unless it negotiated a specific waiver.¹⁶⁰ The transparency agreement was seen as a step towards more open access; that was seen as the ambition of those pressing for it; therefore the

¹⁵⁴ See US Draft Agreement, *supra* note 150, Art. VIII(2); EU Draft Agreement, *supra* note 150, Art. 7(2).

¹⁵⁵ US Draft Agreement, *supra* note 150, Art. IX(1); EU Draft Agreement, *supra* note 150, Art. 8(3).

¹⁵⁶ US Draft Agreement, *supra* note 150, Art. IX(1).

¹⁵⁷ EU Draft Agreement, *supra* note 150, Art. 8(3).

¹⁵⁸ World Trade Organization, WT/WGTGP/W/41, 17 June 2003, Working Group on Transparency in Government Procurement, Positive Effects of Transparency in Government Procurement and its Implementation: Communication from the European Communities.

¹⁵⁹ See, e.g., *ibid.*, ¶ 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.’) (17 June 2003); Communication from the United States, Proposal for a Work Plan to Build on the Progress of the Working Group, *ibid.*, ¶ 9 (‘The Doha Ministerial Declaration has narrowed scope by limiting its parameters to “transparency aspects, and explicitly providing that an agreement will neither restrict domestic preferences nor require market access commitments”.’) (30 Sept. 2002); Doha Declaration, *supra* note 148, ¶ 26.

¹⁶⁰ See, e.g., Note by the Secretariat, Report of the Meeting of 6 Oct. 1999, WT/WGTGP/M/9, ¶ 11 (9 Nov. 1999) (relating suspicions voiced by Malaysia’s representative on behalf of itself and other developing country members that in the view of developed country members ‘an agreement on transparency in government was merely a building block towards the establishment of a multilateral framework for government procurement’); cf Abbott, *supra* note 146, at 290 (stating on the basis of interviews with trade officials from the US and EU that ‘[t]he whole aim of the [TGP] exercise from the US and EU perspectives, was to multilateralize the GPA’).

agreement should be resisted.¹⁶¹ This argument was particularly associated with Malaysia.¹⁶²

Provisions requiring DRPs and linkage to the DSU were of particular concern to Malaysia and other developing country Members in this context.¹⁶³ The strength of this concern appears to derive from two sources: (1) the concern that powerful providers from wealthy countries would use these mechanisms in combination with other provisions as a way to challenge decisions in the procurement process and thus coerce greater market access;¹⁶⁴ 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 such a guarantee.¹⁶⁵ A particularly litigious provider could use challenges as a way to harass procuring entities, and thus place pressure on the entity to treat it favourably.¹⁶⁶ The same is true in regard to non-discrimination provisions, which could give rise to harassing, amorphous claims that domestic or other foreign providers were granted better treatment at some stage in the tendering or contract-award process.¹⁶⁷

Leaving this objection aside, in the Malaysian context, the provisions of the draft agreements, particularly those provisions dealing with the DRP and information requirements, would appear to have required a radical reversal of current Malaysian approaches to procurement award processes, leading to a radical shift of power

¹⁶¹ For opposition to the Transparency Agreement from a developing country perspective, see Khor, 'WTO "Singapore Issues": What's at Stake and Why it Matters', in *TWN Briefings for Cancun*, No. 3, available at www.twinside.org.sg. See also United Nations Development Programme *et al.*, *Making Global Trade Work for People* (2003), ch 15, noting the extent to which a new agreement on transparency in procurement may reduce domestic policy space for linkages and give rise to extra implementation costs for developing countries.

¹⁶² For Malaysian opposition to the Transparency Agreement, see Rafidah Aziz, Minister of International Trade and Industry, Malaysia, 'Doha Development Agenda – The Way Forward', in *The Federal Trust, Where Next for the WTO? After Cancun: Views, Ideas and Proposals by Trade Ministers* (2003), at 31.

¹⁶³ 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') (7 July 2003); Report of the Meeting of 7 Feb. 2003, Working Group on Transparency, WT/WGTGP/M/17, ¶ 22 (15 Apr. 2003); Working Group on Transparency, WT/WGTGP/M/15, ¶¶ 13 (relating to the statement by the Malaysian representative, 'Developing countries ha[ve] difficulties with essentially two elements, namely domestic review procedures and the application of WTO dispute settlement procedures') 47, 78, 83 (9 Jan. 2003); Report of the Meeting of 25 Sept. 2000, Working Group on Transparency, WT/WGTGP/M/11, ¶¶ 31, 33 (19 Dec. 2000); Report of the Meeting of 7 June 2000, Working Group on Transparency, WT/WGTGP/M/10, ¶ 16 (1 Aug. 2000).

¹⁶⁴ See, e.g., WT/WGTGP/M/17, *supra* note 163, at ¶ 23.

¹⁶⁵ See, e.g., *ibid.*, at ¶ 16.

¹⁶⁶ See, e.g., *ibid.*, at ¶ 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').

¹⁶⁷ *Ibid.*

within the Malaysian system. In order for Malaysia to comply with either of the draft agreements' DRPs requirements, it would have been necessary either to establish a *sui generis* administrative structure that was independent of all other procuring entities to hear provider claims, or the scope of judicial review of government contractual decisions would have had to be considerably widened.¹⁶⁸ The issues raised in this context echo similar debates over the implications for domestic regulation of other international economic law agreements, such as in the area of intellectual property. Since obligations arising from these agreements 'involve domestic regulatory structures embedded in the institutional infrastructure of the economy', they are potentially expensive and may well affect sensitive areas of national sovereignty.¹⁶⁹ According to World Bank estimates, creating the regulatory structure required by TRIPs had cost some developing countries an entire year's development budget.¹⁷⁰ These experiences influenced developing countries' evaluations of developed country TGP agreement proposals and their ultimate decision to oppose the process.¹⁷¹

Obligations in both draft agreements, regarding the provision of information in the post contract-award context, would also require a significant transformation of the current system in Malaysia. The current system in Malaysia conflicts with these requirements in several ways. First, while current rules require that unsuccessful bidders 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.¹⁷² 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 is often the case.¹⁷³ 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 to deem it confidential, making its possession, receipt or distribution a serious crime.¹⁷⁴

¹⁶⁸ Courts of Judicature Act 1964 (Act 91); see also *supra* notes 133–140, and accompanying text.

¹⁶⁹ Ostry, 'The World Trading System: In Dire Need of Reform', 109 *Temple Int'l & Comp LJ* (2003) 109–111.

¹⁷⁰ Finger and Schuller, 'Implementation of Uruguay Commitments: The Development Challenge', in The World Bank Research Department, *Policy Research Working Paper* (1999).

¹⁷¹ In a statement posted on the Malaysian Ministry of International Trade and Industry (MITI) website soon after the collapse of the Cancun Ministerial Conference, MITI Minister, YB Dato'Seri Rafidah Aziz made this explicit: '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': *Cancun WTO Ministerial Conference: The Malaysian Perspective*, available at <http://www.miti.gov.my/wto-cancun.html> (last accessed 12 Jan. 2004).

¹⁷² See Surat Pekeliling Perbendaharaan Bil. 2 Thn. 1995 [Treas. Circ. Let. No. 2/1995] § 13.2.3.

¹⁷³ See Arahan Perbendaharaan (Treas. Instr.), Nos. 170.3, 198.1(b), 198.3 (1997).

¹⁷⁴ See 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'), 8 (making unauthorized distribution (even inadvertent) or knowing receipt of designated documents

In order to comply with either of the draft agreements, Malaysia would need to 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.

An additional effect that a TGP agreement in the form of either of the two drafts could have on the Malaysian political system (though not one generally publicized by Malaysian officials) is disruption of the existing system of patrimonial power exercised by the Malaysian federal executive via the procurement system.¹⁷⁵ It appears that 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 been based to a very large degree on patrimonial political relationships.¹⁷⁶ 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 favour with those above them, and giving politicians a means to distribute wealth to donors that can later be funnelled back to the politicians as campaign contributions.¹⁷⁷ Eliminating

punishable by a prison sentence of 1 to 7 years) (26 Sept. 1972). See also Jain, *supra* note 134, at 611–619 (discussing *inter alia*, *Lim Kit Siang v Public Prosecutor* [1979] 2 MJL 37 (upholding designation of purely administrative material, '[b]roadly 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.'), *Datuk Haji Dzulkipli 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.')). 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', quoted in Reyes, 'The War Against Cronies', 26 No. 43 *Asiaweek*, 3 Nov. 2000, 1.

¹⁷⁵ Not surprisingly, this type of effect is among those which the US has cited in favour of concluding a strong TGP agreement. See United States Trade Representative, *Annual Report on Discrimination in Foreign Government Procurement* (30 Apr. 1996) (hereinafter USTR Annual Report (1996)), § III.

¹⁷⁶ See Case, *supra* note 82, at 99 ('Politics in Malaysia can be conceptualized in terms of a steep pyramid. . . [a]t its apex looms a national leader. . . tightly concentrating power in his prime ministerial office, then dispensing benefits to elites in patrimonialist ways'), 111–114; Gomez, *supra* note 78, at 6–26, 35, 60–61; D. Horowitz, *Ethnic Groups in Conflict* (1985), at 666–669; Gomez, *supra* note 99, at 77–80.

¹⁷⁷ *Ibid.*; see also, e.g., Khalid and Rasip, 'Corruption and the Malaysian Situation', in Aliran (ed.), *Corruption* (1981), at 74, 76–82; 'Leaders Support PM's Stand on Government Contracts', *New Straits Times*, 4 Apr. 2002, at 2; 'Con-fusing', *Malay Times*, 30 Mar. 2002, at 3; Zain, 'Reform: Questioning our Feudal Loyalty: Malaysians are New People', 26 No. 43 *Asiaweek*, 3 Nov. 2000, at 1; Reyes, *supra* note 174, at 1; 'No Corruption in Pularek Project, Says Agency', *New Straits Times*, 5 July 2000, at 1; 'Shahriar to be UMNO "Postman"', *New Straits Times*, 22 May 2000, at 2; 'Government Agencies Rapped for not Doing Enough for the Poor', *New Straits Times*, 14 May 2000, at 14; Jaysankaran, 'Revenge Attack', *Far E Econ Rev.*, 30 Mar. 2000, at 25; Jaysankaran, 'Regional Briefing', *Far E Econ Rev.*, 30 Mar. 2000, at 16; 'Malacca Takes Action Against Civil Servants', *New Straits Times*, 26 Mar. 2000, at 4; 'Bank Submits List of Errant Staff', *New Straits Times*, 22 Mar. 2000 at 4; 'Preparations to be Made for Sanggang By-Election', *New Straits Times*, 7 Mar. 2000, at 2; 'UMNO Divisions Must Nominate all Posts', *New Straits Times*, 7 Mar. 2000, at 18; 'Malacca Takes Steps to be Fair to Supporters', *New Straits Times*, 6 Mar. 2000 at 4; 'Unity Versus Choice as UMNO Polls', *New Straits Times*, 9 Jan. 2000, at 13; 'Caterers Fear Losing Contracts', *New Straits Times*, 28 Feb. 2000, at 10; Funston, 'Malaysia's Tenth Elections: Status Quo, Reformasi, or Islamization?', 22(1) *Contemp Southeast Asia* 23, 32.

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 the highest-level officials in the federal government to distribute contracts to political allies to secure future support.¹⁷⁸ The same requirements in combination with the elimination, or strict limitation of, exceptions would disrupt the practice of allowing district-level UMNO officials to award themselves government contracts as a way to pay for party activities at that level.¹⁷⁹ Rules that limit qualification criteria to preset criteria and that give providers a way to challenge their treatment, either directly through *sui generis* DRPs or in the courts, would make it less likely that officials could use procurement decisions to punish those who have failed to support them and/or their party.¹⁸⁰

In short, 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, transferring authority away from the Finance Ministry and out of the Malaysian political system. Given the 'hegemony of the executive' in the procurement context,¹⁸¹ most of these changes would bring about, at least in part, a diminution of that hegemony, changing the balance of rights and review authority within the operation of the procurement system, subjecting Treasury-issued rules to unprecedented review, and likely disrupting informal patrimonial relationships of political power exercised by the Executive.

In discussions of the working group that followed Doha, consensus (or, at least, grudging acceptance) emerged on some issues, but on the key points of domestic review DRPs and linkage to the DSU, the developing and developed country Members

¹⁷⁸ See US Draft Agreement, *supra* note 150, Arts V(2), VIII(1), IX(1); EU Draft Agreement, *supra* note 150, Arts 5(4), 7(1), 8(3); Gomez, *supra* note 99, at 78–80.

¹⁷⁹ US Draft Agreement, *supra* note 150, Arts IV, V(2), VIII(1), IX(1); EU Draft Agreement, *supra* note 150, Arts 5(4), 7(1), 8(3); 'Leaders Support PM's Stand on Government Contracts', *supra* note 183, at 2 ('If Umno does not want division heads to expect government awards, then the party should perhaps increase the allocation given to each division to carry out activities', quoting Marang UMNO deputy head Datuk Dr Bdul Latiff Awang).

¹⁸⁰ US Draft Agreement, *supra* note 150, Arts VII(2), X; EU Draft Agreement, *supra* note 150, Arts 7(1), 8; Jaysankaran, 'Revenge Attack', *supra* note 177, at 25 (describing actions of the Chief Minister of the state of Malacca, who sought to punish those who had voted for the opposition Islamic party in 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 Jaysankaran, 'Regional Briefing', *supra* note 177, 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 177, 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 177, 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 candidates).

¹⁸¹ Jain, *supra* note 134, at 214.

remained far apart.¹⁸² Following the collapse of the September 2003 Ministerial Meeting of the WTO at Cancun, the then Malaysian Prime Minister launched an attack on the potential effect of the draft texts on transparency in public procurement discussed during the meeting, accusing supporters of these texts of undermining Malaysian attempts to ensure greater economic equality for native Malays:

[W]e strongly oppose the agenda to open up markets for Government procurement, which is being discussed at the WTO forum in Cancun. Once again, the West is using the WTO to push forward their agenda for economic colonisation. 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.¹⁸³

On 16 December 2003, meetings held to overcome the impasse of the Cancun Ministerial also ended in failure.¹⁸⁴ Among the issues still dividing WTO Members was whether discussions regarding a potential TGP agreement should move into actual negotiations on a multilateral agreement.¹⁸⁵ The official position of a group of developing countries (including *inter alia* Malaysia, India, Pakistan and China), which refer to themselves collectively as the 'LDC Group', was that 'all further work' on the subject, apparently including even work at the WGTGP, 'should be dropped'.¹⁸⁶ There seems to have been some willingness to compromise on the part of developed country Members, demonstrated by concessions made in the interim between submission of the original and the revised draft ministerial texts at Cancun, but it was not enough. Suspicion that an agreement on TGP was to be 'a stalking horse for the expansion of the GPA' continued,¹⁸⁷ as was general developing country unhappiness with the proposed TGP texts themselves and the possible expansion of 'behind-the-border' rule-making, which it and companion initiatives on other Singapore issues represented.¹⁸⁸

A deal was subsequently struck between developed and developing country Members to restart Doha Round negotiations that had floundered in Cancun.¹⁸⁹ The highlight of the deal was the establishment of a framework according to which Members

¹⁸² See, e.g., WT/WGTGP/M/15, *supra* note 163, ¶¶ 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'), 42 (relating comments by the Singapore representative: 'a bid challenge mechanism was an integral part of national procurement systems.'). WT/WGTGP/M/17, *supra* note 163, ¶ 65 (relating comments by the US representative: 'Without a link to the DSU, an agreement could not be effective').

¹⁸³ Prime Minister of Malaysia, Mahatir Bin Mohamad, *supra* note 119.

¹⁸⁴ See *supra* note 119.

¹⁸⁵ See *ibid.*

¹⁸⁶ 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 (12 Dec. 2003).

¹⁸⁷ Abbott, *supra* note 146, at 287.

¹⁸⁸ See *ibid.*

¹⁸⁹ 'Round-the-Clock Meeting Produces Historic Breakthrough', *WTO News - 2004 News items*, available at http://www.wto.org/english/news_e/news04_e/dda_package_sum_31july04_e.htm (last visited 15 Aug. 2004).

would negotiate an agreement, which would ultimately eliminate agricultural export subsidies and significantly reduce domestic agricultural support.¹⁹⁰ The framework also contained a provision that suspended indefinitely all work on negotiating an agreement on TGP.¹⁹¹ The need to achieve a consensus among the Members had resulted in the ability of those hostile to the development of a multilateral agreement dealing with transparency in government procurement to prevent it being placed on the agenda for further trade liberalization negotiations. Or, put differently, those in support of an agreement on TGP had failed to convince all those whose support was necessary for its acceptance that the benefits it could offer outweighed what it could cost.

9 Conclusion

To the extent that it is part of a global administrative law to build an administrative law that is workable in the context of developing countries, the story of the failure of the TGP agreement is somewhat disheartening, not least because of its complexity and uncertainty. We can regard it either as the story of a self-interested elite attempting to hold on to the tools of political patronage, or as the story of a country strong enough to hold out against the imposition of administrative law principles that are unsuitable. Such policies as preferences for less economically powerful members of society could be made much more difficult to handle in the context of a full panoply of administrative law controls of the type included in the draft TGP agreements. Should we see the administrative law controls in the draft agreements as merely part of a strategy to open market access to powerful Western economic interests, underpinning an '[e]conomic constitutionalism . . . [which] . . . attempt[s] to treat the market as a constitutional order with its own rules, procedures and institutions, operating to protect the market order from political influence',¹⁹² and threatening the types of programmes that had allowed Malaysia to become one of the most successful countries in Southeast Asia? For Westhuizen, without the maintenance of networks of influence sustained by programmes such as the contract preferences, 'Malaysia's adaptation to the competition state model would have been even more difficult, complex and unstable'.¹⁹³

Nor is it clear whether this is a story of a temporary stalling in the movement towards a global administrative law by a small group of countries that are *sui generis*,

¹⁹⁰ See Decision Adopted by the General Council on 1 Aug. 2004, Doha Work Programme, WT/L/579, ¶ 1(a)–(b) (2 Aug. 2004).

¹⁹¹ *Ibid.*, ¶ 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).

¹⁹² See Jayasuriya, 'Governance, Post-Washington Consensus and the New Anti-Politics', in T. Lindsey and H. Dick (eds), *Corruption in Asia: Rethinking the Governance Paradigm* (2002), at 24, 31.

¹⁹³ Westhuizen, *supra* note 72, at 91.

or whether it indicates a much greater scepticism amongst a larger group of countries. For example, in the case of Malaysia, the recent retirement of Prime Minister Mahathir and his replacement by Abdullah Ahmad Badawi may have created a shift in attitudes within the Malaysian executive that would be more favourable towards an agreement on TGP.¹⁹⁴ It is too early to tell, but it indicates to us the need for any theorizing about the development of global administrative law to take into account the development dimension in a way that accommodates this complexity.

¹⁹⁴ See Jaysankaran, 'The New Way: Thinking Small', *Far E Econ Rev*, 6 Nov. 2003, 14. Since taking office Badawi has publicly made cleaning up governmental corruption, particularly in the area of government procurement, a focus of his administration: Jaysankaran, 'Tycoons in Trouble', *Far E Econ Rev*, 15 Jan. 2004, 50.