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Enhancing Institutions and Improving Regulation: The Malaysian Case

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ENHANCING INSTITUTIONS AND IMPROVING REGULATION: THE MALAYSIAN CASE

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INTRODUCTION

There is a good deal of agreement that the microeconomic foundations of economies count towards ensuring that macroeconomic objectives such as full employment and growth are achieved. Stated differently, this means that macroeconomic goals can only be achieved if there are robust institutions that will ensure the microeconomic policies are designed, executed and monitored in a manner that is in accordance with the principles of transparency and good governance. While institutional strategies do not usually take a place of prominence in debates on national economic growth, it seems that this is a mistaken view since the foundations of economic growth are based on sound institutional processes that can guide microeconomic policy.

The micro foundations of macroeconomic growth are well-recognised, and even at the policy level in Malaysia there is ample evidence that the political leadership accepts the need for microeconomic reform. The privatisation initiative that was undertaken in the late 1980s is a milestone in microeconomic reform in Malaysia; and while it points to the recognition of the need for micro reform, it also bares the glaring necessity for institutional structures that can support microeconomic reform.

The approach that this paper will take will be to establish the need for institutional strategies that can accommodate effective and efficient institutional processes. Having laid out the broad parameters for such an argument, this paper will then proceed to instantiate the need for institutional reform in Malaysia by citing some areas where institutional strategies were not established or inadequately established. The primary thrust of this paper will be to argue for a comprehensive institutional strategy in the context of cases highlighting policy developments (or their absence) in Malaysia. Towards this end the paper will be organised as follows. The second section will review some of the theoretical issues

surrounding institutional strategies. This will be followed by case studies that demonstrate the need for institutional reform. The fourth section will enquire as to how APEC as an organisation can assist in the reform process. Finally, some concluding remarks will be made.

CONCEPTUAL CONSIDERATIONS

A significant objective of good microeconomic policy is to ensure competition. The underlying philosophy that supports this notion arises from the aim of ensuring that social welfare is maximised. Theory informs us that social welfare is maximised when prices are allowed to find their own levels and are not fixed at some pre-determined level. This being the case, the purpose of any regulatory agency is to ensure that competition is protected. It, then, follows that particular suppliers of goods and services should not receive specific protection. It would be the intention of any regulatory agency to ensure that competition is allowed to prevail in the market without distortion or intervention, either from an external source such as the government or from within the more powerful firms in the market.

The overall principle that is at stake is competition, and it follows from this principle that regulatory bodies must ensure that competition, rather than specific competitors, is protected. With this idea forming the backdrop to policy-making, it must be added that the overall welfare of society must be given due consideration rather than any sectoral or groups' interests. This is often forgotten as governments and lobby groups campaign for the interests of particular groups instead of taking into account the impact of policies on the economy as a whole. Broadly, the intention of any microeconomic policy, and, by extension, of any regulatory body, should be to safeguard the principle of attaining the highest possible welfare for the economy *as a whole.*

In making the claim for efficiency and competition, one must admit that there are various qualifications that pose limits on competition; and that competition does not exclusively vie for the policy maker's attention. Natural monopoly is one such concern. When a dam or an electricity facility has been built, the issue of pricing

will be an important one to decide upon. In this case it definitely does not help to insist on encouraging competition in the market since too many entrants into the market will make it difficult for the pre-existing firm to make adequate profits. What needs to be considered here is the fact that costs are declining, given the considerable proportion of fixed to variable costs and the economies of scale. The focus must turn to fair pricing under these circumstances rather than competition in this instance. Clearly, there are aspects other than competition that have to be taken into account. A possible list of such issues includes health and safety standards, income inequalities, and regional disparities.

The presence of non-competition issues that have to be taken into account does not waive the key role that is deserved for regulatory reform, or of the need for regulatory agencies to improve the state of play of regulation. As has just been pointed out, competition is not the only factor that must be considered in making good policy; the multiplicity of factors and issues that must be weighed in creating good policy elicits a role for regulatory bodies. If anything, these competing considerations call for independent regulatory agencies that can review, assess and monitor policy design as well as monitor the implementation of policies.

Dee (2006) observes that while there is a "presumption in favour of non-intervention" a range of regulatory practices is possible in reality. She lists the following policy responses:

1. Amending prior government action
- Non-regulatory government action
- Industry self-regulation

4. Agreements negotiated between industry and government
5. Quasi-regulation (constituting either industry-based practices or standards with government endorsement, or direct government involvement in industry standards and practices)
6. Government guidelines suggesting actions not specified by law
7. Co-regulation
8. Explicit government legislation

As is obvious, these forms of policy response cover the entire spectrum of intervention, ranging from low degrees of intervention (e.g. amending or simplifying previous action) to high degrees of intervention (as in black letter law). Dee creates this gradation of measures so as to create a matrix that is the product of the impact of an event or issue and the probability of an adverse event. Thus a point in the lower left-hand quadrant would signify a policy approach that can be characterised by self-regulation since the probability of a risk is low and the event, if it occurs, will not generate any significant impact. The top right-hand quadrant will signify an event that has a high probability of occurring, and will generate considerable impact: in this case black letter law is an appropriate policy response.

Clearly, a variety of responses may be appropriate depending on the circumstances that obtain. It always is not appropriate for the government to intervene neither is it appropriate to leave matters to the market to resolve. This, again, spells a strong argument for a relevant regulatory agency that can make assessments independent of the private sector and the government. Such an agency can make recommendations on policy design and provide ex-ante evaluation prior to the implementation of a policy, following it up, as must be expected, with an ex-post evaluation once a reasonable period has lapsed after the introduction of the policy measure in question.

Having argued that there are a number of considerations that need to be taken into account in devising policy, we point out that it is essential to determine the significance and risk associated with certain events. These factors call for an independent agency that can advise the government and the public at large on the efficiency and welfare outcomes of policy devices. This does not obviate the need for policy reform in a country like Malaysia; if anything it stresses the need for policy reform. Having suggested what constitutes good regulation, we should, then, outline the institutional structure that has to be established so that satisfactory institutional processes are put in place so as to ensure the execution of good regulation.

As suggested, we should begin by discussing what constitutes good regulation. We would argue that good regulation would be achieved if the following criteria were to be satisfied:

1. Transparency. It should be clear how a certain policy was decided up. Further, the processes entailed by this policy should be open to all stakeholders. Finally, information should be made available to concerned parties without undue restriction.
2. Costs and benefits. The cost and benefit considerations underlying any policy initiative should be made clear. Similarly, the costs and benefits accruing to alternative policies should be clearly laid out to all stakeholders.
3. Performance criteria. There should be clear criteria to judge performance; and these criteria should be used to judge the effectiveness of the policy as well as the parties involved in the delivery of any policy. This is to enable the clear and fair audit of policy initiatives as well as to effectively assess the performance of the agents/agencies involved in implementing the policies under question.
4. Process and organisational flow. The manner of instituting policies, and the institutions and processes involved should be clearly linked, showing the interdependences between agents and their lines of connection and responsibility.

It will be clear when we investigate some of the policy experience from Malaysia later in this paper that many of the above criteria are not satisfied. While more can, perhaps, be added to the list that has been given, it seems that the minimal features of good regulation would be captured if there were to be transparency, and if criteria, processes and procedures, as well as the agents involved were clearly laid out. There are two critical points that need to be seriously considered in formulating good regulation. First, the entire process should be transparent. Second, the regulatory process should work towards achieving efficiency, or an adequate balance of the competing goals that the government seeks to achieve, as the case may be. While the question of balance in the presence of competing goals is problematic, we would argue that transparency in addition to defendable structures and processes would ensure that acceptable solutions can be derived.

In discussing the form that a stylised policy development process could take, Dee (2006) notes the necessity of several stages. The following principal stages are included in her scheme:

- Problem identification
- Agency or panel review
- Consultation process with stakeholders in economy
- Report preparation
- Report submission by Minister
- Legislation and regulation tabled

Several critical elements suggest themselves in reviewing Dee's schema. First, the regulatory process will not work effectively if there is no independent review of the policy in view. Second, a consultation process could merely serve to endorse the views of the government. It is equally likely that the consultation process is merely a motion that the government goes through. Three, for the consultation processes to be effective it is essential that the costs and benefits that are derived (or expected to be derived) from a policy be made available to the community. It is also necessary that the results from other viable options be made available for comparison.

The policy process in Malaysia seems to deeply lack some of the elements of 'good' regulation that we have been describing. While we shall illustrate what is visibly absent in the policy process in Malaysia later in the paper, it will be useful to mention, at this point, those elements that require inclusion so as to secure the appropriate institutional structures. Arguably, by building the right institutional structures as suggested by the criteria we have proposed, a transition to good regulation will be feasible.

Transparency is the most pressing issue that needs to be accommodated within the institutional structure of the policy process in Malaysia. This would have to be incorporated at all levels of the policy process, starting with problem identification, through cost-benefit analysis (CBA) calculations and up to the point of describing the projected outcomes from alternative scenarios. Obviously, there should be transparency in the implementation of the policy process: this

would imply transparency in public procurement as well as open discussions of shortcomings in the implementation of policies, and clear admissions of failures in the delivery of policies.

The second area that demands attention is the assessment and review process. Presently, there is no clear process through which assessments and evaluations are carried out. On occasion, private consultants are engaged, otherwise the process is executed internally. In both cases the independence of the assessment process comes under question. It would be preferable to have an independent body that could conduct CBA studies, design policies and review the outcomes once the proposed policies have been implemented. A possible model for such a body is the Australian Productivity Commission. It is still possible to consider the opinions of private consultants and internal assessments, and indeed such comparisons should be discussed in parliament. Without doubt, discussions that are based on views from various sources would add to the richness of debate and allow the parliament to make better-informed decisions.

Finally, it is necessary to institute an agency that can monitor and report on the organisational aspects of the policy process. The Ministries that are responsible for their respective policy implementation would monitor those aspects that are related to the implementation of a policy. The function of monitoring would encompass determining the following:

- the flow of routines in executing a policy follows recommended flows and organisational structures
- lines of responsibility are adhered to
- detecting flaws in the implementation of a policy and advising on its improvement
- whether recommended procedures and standards are followed

Since claims of mismanagement and poor governance are arise, it stands to reason that an independent monitoring agency be established. This monitoring agency will observe the implementation of policies and observe non-compliance with suggested guidelines; it will also recommend how inefficiencies in the operation of policy implementation could be improved.

We distinguish between two types of institutions that are absent in Malaysia. First, we refer to the requisite norms and conventions that support institutions. The absence of transparency falls in this category. Second, an adequate institutional structure requires that processes and procedures be clearly spelt out and their limits and functions should be well defined. Third, the relevant agencies should be established. As we discussed, two agencies seem to be necessary in the Malaysian context: one to design and evaluate policy, and the other to monitor the implementation of policy.

The limiting factors, in institutional terms, to the Malaysian policy process emerge from three possible sources:

1. Inadequate exposure to regulatory best practice
2. Vested interests that impede good regulatory practice, and
3. Rent-seeking behaviour by the government

The first issue corresponds to the economic culture that prevails in Malaysia, and symptomatic of most developing countries, there is no definite agreement on what constitutes good regulatory practice. Essentially, this relates to a poor theoretical understanding of what constitutes best practice, particularly the institutional structures that have to be established and maintained to ensure that the policy process seeks to achieve the highest possible social welfare for the economy, viewed as a whole.

The second constraining factor arises due to vested interests which, in their attempt to achieve their own goals, disrupt the efficient functioning of good regulatory practice. Here, we assume that the government does not itself actively support acts that are detrimental to the efficient functioning of institutional processes and agencies; but rather is obstructed by firms and individuals who attempt to violate good practices for their own gains. In effect, this would be due to firms and individuals, without the complicity of the government, that attempt to induce corruption or use personal influence and power so that institutional processes are made malleable to achieve individual gains.

Finally, the possibility of the government using its own offices in order to obtain rents is a threat that would be most difficult to contain. Indeed, one often reads reports of this occurring in developing countries, particularly after a change in regime. It is under this category that transparency is most important, and yet would be typically absent.

The best way to develop good institutional structures and to ensure that they are well-maintained would vary with the specific categories of institutional resistance that obtain in a country. In the Malaysian case it would make perfect sense to undertake a multiplicity of measures so as to ensure that adequate institutional structures are built.

The first category of institutional resistance relates to the lack of exposure to institutional best practice. There are instances in Malaysia that point to the lack of experience in institution-building. this relates to the first category of institutional resistance. For instance, Malaysia does not have an independent regulatory agency neither does it have a competition authority. These are examples of areas in which the country can benefit from capacity building and exposure to the experience of other countries in developing appropriate institutional structures. The second category of institutional resistance arises from political resistance due to vested interests. This type of resistance can be remedied by resorting to government-sponsored domestic institutions. At the level of organisational change this will involve establishing at least two independent institutions: one to advise on policy design and evaluation; and the other to monitor post-implementation performance and progress. The third type of institutional resistance that is a consequence of rent-seeking behaviour within the government can be remedied through private transparency institutions. These institutions would include independent think-tanks that can assess and advice on policy issues. Non-governmental organisations and civil society groups such as Transparency International can also provide input and critical analyses on policy actions taken by the government.

In the section that follows we shall attempt to explore how some of the theoretical issues that we have discussed express themselves in the empirical realm. We shall

proceed to do this in two ways: a) by discussing some of the regulatory issues that have emerged from policy decisions that have been taken in recent years, and c) by analysing areas in which policy indecisiveness has been expressed. Our primary aim will be to stress that much can be done in Malaysia in order to strengthen the institutional structures, and to emphasise that this is a significant area of concern for the government where much has to be done.

PRIVATISATION, INSTITUTIONAL FRAMEWORK AND REGULATION

Telecommunications Reforms

Privatisation initiatives were launched in Malaysia in the early 1980s. There were two reasons that prompted this move. First, the high external debt combined with the fiscal deficit during this period necessitated a strategy that would reduce the government's financial burden. Second, the government was concerned with efficiency considerations. It is in this context that reforms were carried out in the telecommunications sector.

The first move in this direction was in permitting the private sector to participate in supplying telecommunications equipment such as telephones and teleprinters, an activity that earlier was entirely within the province of Jabatan Telekommunikasi Malaysia (JTM) or the Malaysian Telecommunications Department. The private sector was allowed to participate in this line of activity because JTM was not able to meet the demand for such equipment, and the government thought that the inclusion of the private sector was a way of overcoming the problem coping with excess demand. This move was the start of a series of efforts to liberalise the telecommunications sector. With the privatisation of terminal equipment in 1983, VANs were liberalised in 1984, and this was quickly followed by the liberalisation of the radio paging and mobile cellular markets, in 1985 and 1988, respectively.

The liberalisation of pockets of the telecommunications sector ultimately led to the takeover of JTM by Syarikat Telekom Malaysia Berhad (STM) in 1987. A public listing of STM took place in 1999, and STM was renamed Telekom Malaysia Berhad (TMB). Despite this privatisation bid, the government continues to hold substantial shares (no less than 60 per cent) in TMB's equity. Liberalisation has meant entry into the fixed line and cellular services markets. The fixed line market has been more or less immune to penetration since the costs of building a fixed line are extremely prohibitive for a new entrant. Nevertheless, it may be noted that at least five licenses have been issued to new entrants into the fixed line market and it seems inconceivable that TMB's market share in this area will be contested to any significant degree.

The situation is quite different in the cellular phone services market since the barriers to entry are less stringent. The first cellular phone license was issued to NMT450 in 1984, followed by one to STM Cellular Communications in 1988. STM sold its shares in the latter company, after which the company was called Celcom Sdn Bhd. The leading competitors in the cellular market include TMB, Mobikom, Celcom, Maxis, DiGi and TIME dotCom. Similarly, the internet service provider (ISP) market has been liberalised following the initial internet service that was first provided by MIMOS, a government-owned research institute. Other licensees in the market include TMB, TIME, Maxis and Celcom. There are several companies such as Mutiara and Prismanet that have licenses to offer ISP services. With this brief overview of the telecommunications industry, we now proceed to an examination of the regulatory framework.

The telecommunications sector was regulated by the Ministry of Energy, Telecommunications and Posts (METP) until 1987. While METP assumed responsibility over the granting of licences, JTM continued to provide telecommunications services. Thus, JTM acted on instructions received from METP. The Telecommunications Act of 1950 made JTM the regulatory authority for this sector. With the passing of the Telecommunications Service (Successor Company) Act of 1985, STM was provided with the authority to take over telecommunications services from JTM.

The National Telecommunications Policy (NTP), which was released in 1994, is an important benchmark in the development of the regulatory framework for the sector. The NTP was aimed at covering broad policy directions governing the sector for the period 1994 to 2020. The main thrust of the NTP was to "encourage competition in the telecommunications sector in order to achieve efficiency and to provide excellent and quality service." (NTP, p.9) This proclaimed interest in encouraging competition was not the sole or over-riding objective of the NTP. In fact, the government retained the right to intervene and the NTP expressly endows the government with the authority to determine the number of competitors in the sector. There seems to be a contradiction here in terms of competition being the prime objective as against the functioning of the government as an arbitrator that is "empowered to determine the number of competitors that are economically viable for certain telecommunication systems/services" (NTP, p.10). The problematic that arises here is the question of the government's independence and impartiality in determining the number of competitors, and how this function will be tempered by other potentially conflicting objectives. In terms of our framework it is undesirable that the government play a dual role such as this. It would be more desirable if the government were to establish an independent agency, which, perhaps, could be answerable to the parliament.

There have been claims that the government has acted in the interests of government-linked companies (GLCs) rather than in optimising social welfare. Decisions such as this should be transparent and made solely in the interests of efficiency and productivity, but recent claims of improper interference in the making of such decisions casts aspersions on the capacity of the government to play the dual role of decision-maker and final arbitrator. There are several pertinent points that need to be raised at this juncture. First, we must bear in mind that rather than focusing on the interests of particular stakeholders, the government has a responsibility to all its citizens and all stakeholders. We have argued that the overall social welfare is the central concern, and this means that overall welfare should stand ahead of the welfare of GLCs.

The lack of distinction between the role of the government as decision-maker and arbitrator resurfaces in the Communications and Multimedia Act 1998 (CMA).

MTEP was restructured in 1998 into the Ministry of Energy, Communications and Multimedia (MECM). With this restructuring exercise the Malaysian Communications and Multimedia Commission (MCMC) was founded. Subsequent to the passing of the CMA, the MCMC is the regulatory authority for the telecommunications sector. The independence of this body is questionable because it seems to be unduly influenced by the government. Government representation on the MCMC is overwhelmingly heavy, since although there is only one member on the Commission who is a government representative all the other members are appointed by the Minister responsible for this portfolio. The independence of any regulatory structure is of utmost importance; and while one cannot deny that final decisions will be made by the relevant minister, any regulatory body must be constituted of members who do not seem to be unduly influenced by the government. Additionally, any advice that is proffered by a regulatory body should be made available on the public domain, even if it is to be eventually rejected by the government. This is essential in terms of our criteria for good institutional support, since transparency cannot be dispensed with. A careful examination of the MCMC will clearly indicate that these criteria are not abided with in spirit although in form the required institutional fabric seems to have been prepared.

The CMA bestows extensive powers upon the Minister in matters relating to regulatory policies. The Minister of Energy, Communications and Multimedia acts on recommendations made by the MCMC, and in turn directs the latter. The MCMC is a middle-level organisation that liases with industry forums on one hand, and interacts with the appeal tribunal. The Minister does not deal directly with industry operators, but does so through the mediation of the MCMC. In addition to the recommendations that MCMC makes to the Minister it also has the responsibility of administering license applications, renewals and their issuance. Yet, it is the Minister who has the final say in matters pertaining to licenses. This organisational structure leaves no doubt that the Ministry is the highest authority on the regulation of the industry. There is no independent body that can be appealed to when industry participants wish to contest a decision made by the Ministry or arbitrate when there is a difference of opinion among competing firms. Similarly, there is a need for a regulatory body that can assess the

operations of the various institutions that are under the government's umbrella besides assessing the government on the efficiency and welfare consequences of decisions taken. Among the crucial responsibilities that an appropriate institutional structure must maintain is the conduct of feasibility studies on decisions that are to be taken, with a clear exhibition of the costs and benefits that are involved, as well as making these results open for public discussion. This is completely absent in the Malaysian context, a flaw that does not escape the MCMC.

There is no doubt that there is some room for public participation through the conduct of public inquiries. This is provided for under the Communications and Multimedia Act (CMA) 1998. The MCMC has utilised provisions under the CMA to conduct public enquires, receive opinions from private operators as well as to receive public feedback on MCMC's discussion papers. Indeed, there is scope for public participation within the regulatory structure that has been laid out, but it is doubtful to what extent this feedback is incorporated within policy decisions since there is no independent agency to arbitrate on differing views. It cannot be denied that the regulatory structure as officially designed has channels for receiving public participation; but the question really is on the extent to which opposing views can be assimilated within the policy process. With the centralisation of powers in the hands of the government, there really is a need for an independent agency to decide on the validity of differing views, something that is not quite achievable under the present framework. Although MCMC is a statutory body with its own funding arrangements, the fact that it takes directives from the Minister of Energy, Communications and Multimedia must restrict its capabilities.

The CMA 1998 does provide a regulatory framework of some manner despite its limitations. Indeed, this is not available in all areas of public policy. In that restricted sense it is commendable that the CMA has distinguished four central areas for regulatory attention. These areas are as follows:

- Economic regulation
- Consumer protection

- Technical regulation, and
- Social regulation

Perhaps the most significant regulatory objective that the CMA has undertaken for itself is that of ensuring an efficient communications and multimedia industry. The CMA proposes to do this by incorporating provisions against anti-competitive behaviour. The MCMC has taken steps to ensure that the CMA's objective of establishing a competitive environment in achieved. Towards this end it is most significant that MCMC has published guidelines on procedures and processes for addressing anti-competitive conduct. The importance of MCMC's actions stands in stark relief against the absence of any national policy or comprehensive legislation on anti-competitive practices. In this sense, MCMC's recognition of the significance of competition policy and law and the dire need to address these issues is laudable. At the risk of digressing, it should be pointed out that in its attempts to improve the institutional infrastructure in Malaysia it is necessary to institute competition law and policy in all areas of commerce in Malaysia rather than confining it to the communications and multimedia industry.

The CMA 1998 is comprehensive in its coverage in that it addresses crucial aspects of consumer protection such as service quality, rate regulation and universal service provision. However, the practice of rate regulation leaves much to be desired. While the CMA provides for a market-based approach to the setting of rates, it also allows for the Minister to decide on tariffs. The provision of Ministerial intervention overturns the attempt to set prices on the basis of market signals, and in so doing disrupts attempts at achieving social welfare maximisation. Another interesting commitment that the CMA undertakes is to improve on the service quality and consumers' needs. The Act is dedicated to the forming of a Consumer Forum so as to address reasonable consumer demands.

Other areas of regulation that the CMA is concerned with include technical regulation and social regulation. The question of social regulation relates to the social values that are considered to be at the core of the Malaysian way of life; and it primarily relates to offensive content. Although the CMA does not allow

for the direct interference of the Minister in this matter, there is no doubt that his indirect control will be at play since he is involved in the issuance of licenses. Technical regulation in the context of the CMA 1998 refers to spectrum assignment, numbering and electronic addressing, and technical standards. The MCMC has an important role to play in these matters. While all of these steps are in the right direction it is preferable that there be more participation from the stakeholders, that information be publicly disseminated, and that the government's influence be moderated. The last issue is, perhaps, the most sensitive and pressing.

Privatisation of Health Support Services

The government has long been the provider for health services in Malaysia. In the pre-privatisation era, the government engaged itself in the entire gamut of health care, ranging from public health to preventive medicines and including curative and rehabilitative care. The first slivers of privatisation occurred in the early 90s, when the government decided to privatise non-medical services but not its core medical functions and services. In 1994, the Ministry of Health divested its pharmaceutical store and services; and this was followed in 1996 by the oursourcing of hospital support services and the privatisation of health examination of foreign workers in 1997.

The privatisation of the health support services in Malaysia was part of the larger attempt to launch privatisation in the health sector and to liberalise the sector. The objective, ostensibly, was to improve economic efficiency in the health sector. These developments also coincided with the Ministry of Health's intention to privatise clinical waste management services since the public hospitals did not appear to have adequate facilities. Two developments were wrestling for the attention of the government: a) the increasing costs of providing medical care, and b) the burden of providing a wide range of services for the public in connection with administrative, support, medical and preventive services. In response to these problems, first, the government decided that it would concentrate on its core health services and privatise other areas of its activities within the health sector. Second, the government was convinced that it would continue to maintain its

commitment to the civil servants and the deprived. In consonance with these views the government chose to privatise non-core activities and to liberalise the health sector. The latter implied that the private sector was encouraged to provide health care (and this really meant the opening of private hospitals) to cater for those who could afford more expensive health care and medical treatment.

Consequently, in 1993, the government began to privatise the HSS, calling for open tenders in July 1993. Thirty-one companies (both local and foreign) participated in the tender process, with the Economic Planning Unit (EPU) and the Privatisation Task Force (PTF) overseeing the process. Before the contracts were awarded, three private companies submitted their respective proposals to the EPU on the basis of recommendations made by their consultants. Several meetings were held between EPU, the Ministry of Health and the three companies before an agreement was reached on the mode of privatisation. In fact, the three companies, Faber Medi-Serve Sdn Bhd, Radicare (M) Sdn Bhd and Pantai Medivest Sdn Bhd, discussed the formulation of the Concession Agreement (Noorul: 233). These companies were allocated regions over which they had control over the market. Faber Medi-Serve was allocated the Northern Zone of Malaysia and East Malaysia; Radicare had responsibility over the Central and Eastern Zones; and Pantai was required to cover the Southern Zone. This process of allocation, in effect, made the three companies monopolies in their allocated regions. Two striking observations must be made about the three companies that were selected to provide the HSS. None of the firms had a background on the provision of the services that they were supposed to provide. Further, subsequent to the economic crisis in 1998, all three companies had to undergo a restructuring process due to mismanagement.

The following are some of the key areas that were privatised by the Ministry of Health:

1. Supply of pharmaceutical services
2. Supply of hospital support services
3. Monitoring and consultancy services, and
4. Monitoring and supervision of foreign workers health certification.

The supply of pharmaceutical services was contracted-out to a private-limited company, Pharmaniaga Logistics. Pharmaniaga received a concession period of 15 years as was accorded to most of the other services that were contracted out to private companies. It was agreed that the government would make purchases from this company at an agreed price that would be negotiated every two years. There was no one body that would act as a regulatory authority. Instead, the purchase of pharmaceutical products and services as well as pricing and other arrangements were regulated jointly by the National Pharmaceutical Bureau, the Ministry of Health and the Price Committee.

The supply of hospital support services was contracted-out to two private limited companies, Pantai Medivest and Faber Mediserve. The concession period for these companies, too, was 15 years, with the government purchasing the supply of hospital support services at a price agreed and detailed in the Concession Agreement. It was decided that Kawalselia, the Fee Review Committee and the Ministry of Health act together to regulate the purchase, price and quality of the services provided. The supply of monitoring and consultancy services was contracted out to SIHAT for a concession period of 5 years. As for the supply of hospital support services, the agencies involved in regulation were the same, with the exception of the Fee Committee, which was not involved in the supply of monitoring and consultancy services. The financing mechanism was similar to that adopted for the supply of hospital support services, payment being made by the government on the basis of services provided at the agreed rate. There was no one body that would act as a regulatory authority. The monitoring and supervision of foreign workers health certification was privatised to FOMEMA and is regulated by the Disease Control Division and the Ministry of Health. Financing in this case was borne entirely by foreign workers.

The concession agreement that was extended to the firms involved in the privatisation covered important elements relating to scope of service, quality and the like. For instance, indicators were listed which spelt out the technical requirements and performance standards that were expected. The Master Agreed Procedures (MAP) listed the practices and procedures that had to be abided. A

hospital specific implementation plan was designed to ensure that the technical requirements, performance indicators, and required practices and procedures were operationalised in hospitals. A quality assurance programme was instituted to ensure that key performance indicators were satisfied. In all these respects there is no doubt that the government attempted to safeguard the operational efficiency and quality of service offered in the hospitals. There were other areas in which the privatisation process was found wanting, and these questionable practices and processes are in need of correction since they cause cracks in the achievement of economic efficiency within the system.

It is necessary to outline the regulatory framework as conceived and implemented by the government before delving into a critical analysis of the regulatory system that was used as part of the privatisation of HSS. The concession agreement, as we have just mentioned, was collectively determined with the participation of the companies that were to be awarded the contracts. The efficacy of such a practise is questionable. The supervisory system that was devised is equally questionable.

The Ministry of Health (MoH) established Kawalselia (or the regulatory unit) with the express intention of supervising and monitoring the activities of the concessionares to ensure that the services provided by them was in accordance with the requirements stipulated by the concession agreement. Kawalselia was responsible for monitoring the activities of contractors, providing technical advice and approving consumables as well as procedures. On the other hand, SIHAT (or the Hospital System for the Monitoring of Standards) directly monitors the performance of contractors and advises the MoH as to whether the contractors are fulfilling their obligations as stipulated by the Concession Agreement (CA). SIHAT acts as an independent inspector and auditor of standards, providing input for Kawalselia and the hospital directors in all hospitals where contractors have been hired.

First, the manner in which Kawalselia and SIHAT were instituted is subject to criticism. Kawalselia was operational in 1998, about a year after the privatisation of HSS. It is unacceptable that an institutional structure was not in place prior to the launching of a privatisation. Even more objectionable is the fact that

Kawalselia, the regulatory unit, had only eight staff and was not sufficiently equipped to supervise the privatisation of HSS, its purported objective. In order to correct this deficiency in the functioning of Kawalselia, another supervisory and audit company was formed. This company, SIHAT, was meant to act as an external monitoring and evaluation agency. SIHAT was expected to monitor and supervise the contractors; and, with the input thereby obtained, provide advisory services to the Engineering Services Division of the MoH. Two observations arise from this arrangement. First, the MoH did not seem to anticipate the need for a regulatory unit while the privatisation initiative was being implemented. Second, rationality of appointing a regulatory company that lacks essential capabilities required to perform the designated function is questionable. Finally, by appointing an advisory company (SIHAT, in this case) to oversee another company (i.e. Kawalselia) promotes overlap in function, creates more friction and raises regulatory costs unnecessarily.

As we can see, the government, and in particular the Ministry of Health, lacked a clear understanding of institutional structures and regulatory reform in proceeding with the privatisation effort. There is no doubt that privatisation was, in theory, a necessary step in the development of health services in the country; but the manner in which the privatisation initiative was exercised raises serious questions on the efficacy of institutional strategies that were undertaken by the government. In fact, the manner in which microeconomic reform was carried out indicated a lack of understanding of institutional reform; and to undertake privatisation without the necessary institutional infrastructure really weakened the possible gains that could have be achieved through privatisation. To invite privatisation bids from firms with no prior experience in a particular sector raises questions as to the process that led to the selection of such concessionares. If there was some particular reason why firms with no track record in an industry were entrusted with the privatisation effort, then a transparent display of the criteria used for selection should have been made public. Equally, the government the government should have made public the standing of the other firms that made a bid and explained why some firms were chosen over others. Clearly, a well designed institutional policy and appropriate institutional structures and processes should

have been designed ahead of the privatisation effort and adhered to in the interests of maximising social welfare in its broadest sense.

Lopez's (2005) study on the privatisation of HSS reveals that the contractors did not have well-trained staff for clinical waste management. The hospitals also experienced problems with waste separation. Problems of a different sort were experienced in the case of cleaning services because the staff employed were not capable of following guidelines and procedures, particularly when it came to the handling of hazardous and potentially risky situations. Another problem that is noted is that planned preventive maintenance is not conducted in a scheduled manner and the monitoring of equipment does not follow prescribed guidelines. Finally, Lopez (2005) notes that SIHAT bases its evaluation on complaints from hospital staff. This is an inadequate system since the hospital staff is not aware of the conditions that contractors are expected to satisfy, neither is the staff briefed on the nature of the contracts. Further, the HSS contractors are known to develop relationships with hospital staff with a view to influencing their judgements.

Several, comments must be made on institutional arrangements in the context of the privatisation of HSS. First, the scenario that has been painted regarding the privatisation of HSS clearly suggests that there is a need for a regulatory authority that has overarching control over public agencies (public hospitals, in this case). Second, this agency must be independent if it is to be effective, and it should be free from the intervention of the respective ministers. While final decisions should, of course, be made at the discretion of ministers, the counsel that they receive from independent regulatory bodies should be transparent and free from government interference. The absence of such a body could avoid some of the inconsistencies that we find in the HSS case. These include the ad hoc appointment of audit companies that do not have the requisite expertise, inadequate evaluating systems and the absence of transparency. An independent authority - if there were one - would have pointed out that the fee review process as outlined in the CA has not been revised since the onset of the agreement; it would have drawn attention to the fact that the cost of HSS is increasing (exceeding RM700 million at present); and, it would have ensured that the

contractors were appointed in a transparent basis. These factors decidedly point to the urgent need of independent regulatory bodies in the health sector.

RESISTANCE TO IMPROVING INSTITUTIONAL STRUCTURES

A. Competition Policy and Law

Competition Law and Institutions

To date Malaysia, does not have a competition policy or law. This is not to say that the government does not recognise the merits of a competition policy. In 1993, the Ministry of Domestic Trade and Consumer Affairs announced its intention to draft a "Fair Trade Practices Bill. This did not materialise. Indeed, in the *Eight Malaysia Plan 2001-2005* (8MP), the most recent of the country's plan documents, there is an explicit statement accepting the need to encourage competition.

The 8MP clearly enunciates the government's recognition of the usefulness of a competition law and policy and the contribution that it can make towards the economy as a whole. This is clearly expressed in the following statement:

> "During the Plan period (2001-2005), efforts will be made to foster fair trade practices that will contribute towards greater efficiency and competitiveness of the economy. In this context, a fair trade policy and law will be formulated to prevent anti-competitive behaviour such as collusion, cartel price fixing, market allocation and the abuse of market power. The fair trade policy will, among others, prevent firms from protecting or expanding their market shares by means other than greater efficiency in producing what consumers want."

One could argue that competition policy, broadly speaking, has two components: 1) regulating the conduct of firms, and ensuring that they do not engage in anti-competitive acts; and 2) ensuring that consumers are able to enjoy the highest level of surplus possible. The Malaysian government has not disregarded

consumer welfare. The protection of consumer interests has been embedded in the following statutes:

- Money Lenders Act 1951
- Hire-Purchase Act 1967
- Trade Descriptions Act 1972
- Weights and Measures Act 1972
- Direct Sales Act 1993
- Consumer Protection Act 1999

It must be stressed that these Acts do not cover the anti-competitive conduct of firms. A further weakness of these statutes is that they are restricted in their coverage to certain sectors within the economy, viz. the distributive trade and financial sectors.

The communications and multimedia sector, however, has the advantage of competition regulation. The communications and multimedia sector is protected by the following statutes:

- Communications and Multimedia Act 1998 (CMA), and the
- Communications and Multimedia Commission Act 1998 (CMCA)

The CMA expressly prohibits rate fixing, market sharing, boycotting of competitors, and tying. This Act has under its ambit the Communications and Multimedia Commission (CMC). Two shortcomings are worthy of note. First, the CMA points out that anti-competitive conduct by firms can be tolerated if "national interest" demands it. Second, the CMC cannot make a judgement as to whether or not a firm's conduct amounts to anti-competitive behaviour. This decision is solely within the mandate of the Minister concerned.

The energy sector is served by the Energy Commission, which looks into issues relating to competition. This commission is provided for by the Energy Commission Act 2001 (ECA). The ECA points out that one of the principal duties of the commission is to promote competition. The ECA states that the function of the Energy Commission is:

> "to promote and safeguard competition and fair and efficient market conduct, or in the absence of a competitive market, to prevent the misuse of monopoly power or market power in respect of the generation, production, transmission, distribution and supply of electricity and the supply of gas through pipelines."

As it stands, only the communications and multimedia, and, energy sectors have regulation relating to competition. An approach to competition that is sectorally based and that too limited to two sectors is clearly not satisfactory. Further, as mentioned earlier, consumer protection under the various Acts is, again, confined to the financial and distributive trade sectors. This, too, needs review.

Having made these objections, it must be stressed that the Malaysian government has reiterated its support for a domestic competition policy and law. In a statement issued subsequent to the National Workshop on Competition Policy and Law, organised by the Ministry of Domestic Trade and Consumer Affairs and UNCTAD, in 2000 it is mentioned that:

> "the Ministry of Domestic Trade and Consumer Affairs (MDTCA) has prepared a draft policy paper as well as a draft law on fair trade/competition in Malaysia. The Ministry has also set up a Working Committee and a Working Group on fair trade/competition involving relevant ministries/agencies, chambers of commerce and institutions of higher education in order to determine the overall concept, needs and domestic/multilateral scope for the fair trade or competition law."

If the intention to have a competition policy and law is slow to see realisation it is because the government has several concerns. One of the considerations is to ensure that the distributive considerations voiced in the NEP are achieved. The government also wishes to pursue measures that will promote the growth of domestic firms. Finally, the government wants to protect domestic firms from the competition that will emanate from multinational corporations. In sum, the government hopes to achieve a development path that is in line with national aspirations rather than one that is based on the dictates of efficiency, fair trade and that can deliver the largest social welfare.

Although there is no published survey on the presence and extent of restrictive business practices (RBPs) in Malaysia, observation tends to support the presumption that there are adequate grounds for investigation and, perhaps, action. The following is a partial sample of such cases:

- The Federal Land Development Authority (FELDA) was established in July 1956 as a Federal Statutory Body under the Land Development Ordinance No. 20, 1956. It was originally set up to channel funds into the development of the remoter parts of the country. Since 1960 FELDA has been directly responsible for development activities that include land clearing, planting of main crops development of villages, selection and relocation of settlers, management of projects, provision of credit, processing, marketing services and facilitating social and community development. In 1980, a company called FPM was established, with Behn Meyer having significants interests in it. However, this company has received the exclusive right of providing fertilizers to FELDA. FELDA, which used to be a government-run scheme to improve the livelihoods of farmers, is, obviously, a lucrative market. Because of this exclusive arrangement, local manufacturers do not have access to the FELDA market.

- Megasteel and Titan Plastics are state-owned monopolies that produce steel and plastic for use by auto parts producers. Auto parts producers have the option of importing their inputs or of buying them locally. It is necessary to acquire import permits to purchase the required steel and plastic from overseas suppliers. This is a lengthy process that involves much red tape. The more convenient option is to buy the inputs from Megasteel and Titan Plastics, but these companies are reputed to charge prices above world prices.

- Purchasers of cars report that they are required to buy accessories that they do not wish to possess, or are restricted to the purchase of specific brands that the suppliers have exclusive arrangements. The consumers are also 'advised' to take hire-purchase loans from certain banks and buy their car insurance from

prescribed companies in order to avoid delays in the delivery of the cars. These practices constitute tied and forced selling.

Studies indicate that the prevalence of RBPs seems to bear some correlation with the level of concentration in firms. In Malaysia, the following industries in the manufacturing sector are concentrated:

- Oil and gas
- Car assembly
- Tyres and tube manufacturing
- Food and food-related products
- Plastic products
- Hydraulic cement

The oil and gas industry as well as the automotive industry are protected by the government, being national champion projects. On the other hand, the other industries mentioned are controlled by a small number of multinational corporations. Thus there are grounds to suspect and investigate the practice of RBPs, something that can be done satisfactorily if there were a competition law and authority to examine the cases brought forth.

The Way Ahead

There is a need for Malaysia to seriously examine the need to introduce a competition policy regime and the appropriate legal framework. While it is indeed true that the government has for some time now been entertaining the idea of introducing competition policy and law, not much has been accomplished in concrete terms.

There seems little doubt that the anti-competitive behaviour of firms needs to be arrested; but attendant issues need to be resolved. These include the following:

- ensuring that the competition authority is free from political influence and manipulation
- ensuring that the rights of consumers are upheld in terms of employment and equity, in addition to concerns with respect to price, breadth of choice and quality
- formulating an industrial policy that relies on the competitive strengths that the country can offer, and
- adopting a policy that does not disrupt national economic and social objectives, particularly as it affects disadvantaged communities and small scale industries .

If the government can shed more clarity on some of the above-mentioned issues, it would allay fears that competition policy and law will restrict the growth and development of the economy and act against public interest. In fact, Malaysia will be perceived as a more attractive destination for investment if it is seen to value transparency, good governance and competition.

B. Government Procurement

The Procurement Framework in Malaysia

The procurement framework in Malaysia is made up of three main components, that is: the agents involved, the legal and regulatory framework, and the tender process (APEC, 2003a,b). Accordingly, we begin by providing an outline of those entities that participate in the procurement process. The Federal government is the prime entity within the government administration and machinery. The government is composed of 24 ministries and 100 federal departments. This is followed by the 13 state governments, which in turn have 240 state departments. The state governments have a mandate to generate their own revenue and expenditure, but the Federal Government also undertakes projects at the state level, so long as it falls within the margins of the Constitution. Further to the State governments are the local authorities. The local authorities are made up of the city councils, municipalities and district councils. These bodies derive their revenue through assessments and licensing, and also from financial

grants made by the Federal government and the respective state governments. The local authorities are bound by the dictates of the general government procurement procedures, and their financial interests in respect of procurement is ultimately determined by the Council. However, they are autonomous in so far as they are free to determine their revenue and expenditure.

Particular mention must be made of statutory bodies and government companies. Both are important entities within the procurement framework. Subsequent to Malaysia's privatisation plan in the 1980s, a number of government-owned companies were privatised. These companies began operating as business ventures, but the government remained an important stakeholder. The Ministry of Finance and the Economic and Planning Unit are represented on the Board of Directors in these privatised companies. Besides, the Ministry of Finance and other government bodies own substantial shares of these companies. Aside from continuing government involvement, albeit indirectly, both as far as ownership of equity and representation in directorship are concerned, these companies are also bound by government approval in certain procurement matters. The Board of Directors do not have the ultimate authority over financial matters relating to the procurement made by their companies. In fact, Petronas, Tenaga Nasional and Telekom have to refer to the Ministry of Finance when procuring goods and services valued at or exceeding RM15 million. In the case of statutory bodies that are set up under the Statute Acts, their financial authority is vested in the hands of with the respective Chairpersons. The procurement that is carried out by statutory bodies has to abide by government procurement procedures although these agencies are otherwise autonomous.

The second element that needs discussion is the legal and regulatory framework that determines government procurement. Government procurement is regulated by two Acts, the Financial Procedure Act 1957 and the Government Contract Act 1949. The latter legislation permits Ministers to enter into contracts with regard to government procurement. Ministers can represent their respective ministries or delegate authority to appropriate officers within their respective ministries to enter into contract for and on behalf of the Government of Malaysia. The Financial Procedure Act outlines the mode of control and the management of public

finances. It also lays out procedures for the collection and payment of public monies as well as procedures for the purchase, custody and disposal of public property.

In addition, government procurements are regulated by the following instruments:
1. treasury instructions,
2. treasury circular letters, and
3. federal central contract circulars.
Treasury instructions are concerned with the financial and accounting procedures that regulate government procurement. Whenever there are amendments to policies, rules, regulations and procedures relating to government procurement they are intimated through Treasury circulars. The Central Contract Circulars contain details of items that are centrally procured. They include details of prices, suppliers and specifications. The purpose of these circulars is to provide suppliers with the necessary information so as to promote local products and local vendors.

The third component that must be addressed is the tender process. This constitutes a crucial part of the procurement policy and process. First of all, it must be noted that a tender process is called for whenever there is a purchase or goods, services or works exceeding RM50,000 in value. Only contractors already registered with the Government may participate in the tender process. The first step in the tender process is to draw up the tender specifications. The specifications are prepared by a technical committee, which takes care to strictly avoid specifications based on specific brands or biased towards particular countries. The committee attempts to provide thorough details, and these details may be in line with international standards, if so required.

The tender specifications and other relevant details (such as price schedule, delivery period, scope of work) are published in the tender documents, and distributed at a cost. The invitation to submit a local tender is advertised in at least one local newspaper printed in Bahasa Malaysia. When international vendors are expected to participate, the advertisement will appear in at least two local newspapers, one a Bahasa Malaysia daily and the other an English

newspaper. In addition, Embassies and High Commissions are informed of opportunities for international tenders.

Once the bids are received they are evaluated by the technical and financial evaluation committees. On the basis of the evaluation made by these committees, the tenders are ranked. The evaluation process takes into account the ethnic origin of the parties that submit tenders and the content of goods. Locally produced goods receive preferential treatment. There is preferential treatment for locally produced goods when they constitute up to 10 per cent of the value of contracts that are below RM10 million. For contracts that exceed RM100 million, preferential treatment will be extended if locally produced goods constitute up to three per cent of the value of contracts. There is also an ethnic bias in awarding preferential treatment to parties that tender for contracts. Bumiputera agents who make tender applications will be given preferential treatment for contracts valued between RM100,000 to RM15 million. They will not receive such treatment for purchases exceeding RM15 million.

The Government Procurement Board is responsible for the selection of successful applicants. In cases where the value of the procurement exceeds certain threshold amounts the Ministry of Finance selects the vendor who is deemed successful. The Ministry of Finance makes a decision when the threshold of the tender value is above RM15 million for works and RM7 million for supplies and services.

Transparency and Procurement

As early as in 1999 proposals were made for an Agreement on Transparency in Government Procurement (see WT/WGTGP/W/26 and WT/WGTGP/W/27). The cornerstone of the proposals was non-discrimination in transparency. This implies that each member country would accord equal status to its own suppliers and to those from other countries. In other words, all suppliers, regardless of their countries of origin will be treated equally; no supplier of any specific country will be treated more favourably neither will domestic suppliers be accorded preferential treatment. Few exceptions, if any, were pronounced under these proposals and these included the freedom to take necessary action to preserve essential security interests and the right not to disclose confidential business

information or any information that would interfere with law enforcement. Further, the proposed agreement on transparency would require compliance by adopting transparency in the following areas:

1. procurement rules and methods
2. tendering procedures
3. information on procurement opportunities
4. bid periods and documentation
5. suppliers' qualifications
6. decisions on qualification
7. domestic review procedures, and
8. dispute settlement.

The President of Transparency International Malaysia, Tunku Abdul Aziz, has voiced his concern regarding public procurement. In particular, he has indicated that military purchases, engineering and construction contracts are among areas of special concern. Tunku Aziz goes on say that:

> …Malaysia is viewed as a country that is not as transparent as it should be. Many large infrastructure projects are apparently awarded on the basis of closed door negotiations, a practice that must be changed is we want to gain and retain public confidence in our system….We are sending the wrong signal to the international business community by persisting with some of our questionable practices. (http://www.transparency.org.my/)

Some Contentious Issues in Government Procurement

While Malaysia has been, generally speaking, supportive of the need to secure transparency of information about national procurement practices, it has been more reserved about the kind of information that can be openly disclosed. It feels that complete information regarding national regulations and procedures would be too demand a task to accomplish (WTO 2002:10). Malaysia considers it sufficient to highlight the most significant aspects of a particular regulation or law.

Malaysia holds a guarded position when it comes to the scope of any potential disciplines. Malaysia contends that procurement that does not entertain foreign

bidders should not be included within a multilateral agreement. This proposal invites objection for two reasons. First, it ignores the principle that it is to the economic advantage of a government to accept the bid that provides the best price and non-price features (e.g., quality). Second, the proposal to exclude foreign suppliers from participating in certain tenders raises questions on the breadth of the scope and definition of government procurement. The scope and definition of government procurement would be excessively narrow if most contracts were limited, by definition, to domestic suppliers.

Malaysia frequently resorts to the argument of nation building as a rationale to defend its lack of transparency in government procurement. It is argued that government procurement is a necessary instrument to promote social and economic development in the country (e.g. in WT/TPR/S/31,3 November 1997). This point must be accepted, and, indeed, the importance of nation building is accepted within the GPA. As mentioned earlier, the GPA offers developing countries, for example, exceptions for industries in rural and backward areas that produce for government purchase. Having said that, transparency is not an obstacle to nation building. Proposed agreements on transparency are based on the understanding that a transparency agreement will not impose any obligation to change domestic laws and regulations governing government procurement. However, that does not mean that there should be no transparency on procurement rules, regulations and procedures if they concern only domestic suppliers. The concern that Malaysia exercises over the disadvantaged position of the Bumiputera does not mean that its national rules and regulations should be shrouded in secrecy. Transparency is more likely than not to promote competition among Bumiputera suppliers.

Foreign investors find the practice of government procurement fairly limiting. Personal interviews with trade organisations reveals that they are concerned over their lack of access to government contracts. They find the necessity to form partnerships with Bumiputera partners restrictive and not always mutually beneficial. Another complaint that surfaced was the lack of openness in tendering processes and the declaration of results. Further, the delivery system is faulted not only due to delays in awarding contracts but also because of the uncertainty that is

attached to the approval of contracts. These are important concerns for a country that is dependent of foreign direct investment. In the 70s it was possible for Malaysia to attract FDI on a package of cheap labour and tax incentives. Such a package by itself is no longer a winning formula to attract FDI. New issues such as government procurement offer opportunities for attracting foreign investment.

The Malaysian procurement system does express an interest in pursuing a policy and framework that is ethical, transparent and rule-based. Concerns have been raised against the procurement policy in Malaysia on several grounds. First, the policy is weighted in favour of local suppliers and for goods and services that have local content. This restricts the participation of foreign suppliers, and denies the advantages that could otherwise be obtained from trade on the basis of comparative advantage. Second, the procurement policy has an ethnic bias. Considering the social and political reality in Malaysia, this argument has some merit. In any case the disadvantaged position of the Bumiputera does not sufficiently justify a case for transparency in procurement.

Malaysia's stage of development does warrant some space to accommodate its national interests and socio-economic development. A time frame must, however, be proposed for Malaysia to enjoy special and differential treatment once it gains accession to the GPA. The accession to the GPA could lie further down the time horizon. While acceding to an international agreement on procurement could be a more distant matter, there is no reason why Malaysia should not set the stage for open policies on government procurement. Indeed, as a first step towards a possible GPA there is an urgent need for good institutional strategies and processes to moderate the procurement process in Malaysia. Not only will this aid in making sure that overall social welfare objectives are maximised by such a process, but it will also defeat vested corporate interests from utilising the government to achieve their own commercial interests.

There are strong arguments for transparency in institutional process. It is obvious that transparency and good institutional strategies are a good defense against rent-seeking and corruption. By implementing transparency one can hope to achieve competition and an efficient allocation of resources. This will help the

government achieve value for money in its procurement contracts. Further, transparency would help improve the perception that foreign investors have of Malaysia's procurement policy, in particular, and governance, in general. This will encourage the flow of foreign investment, something especially important for an open economy like Malaysia's.

APEC AND INSTITUTIONAL REFORM

There is a clear need for institutional reform in Malaysia. As was pointed out and as is obvious from the previous section, some of the problems in policy making in Malaysia arise from lack of exposure to policy and institutional design. Other problems arise because of internal resistance due to rent-seeking from vested interests. There are claims that government is a party to the perpetuation of bad policy. Although this is a matter that is difficult to defend, it still does make sense to ward off the possibility of government being a source of poor institutional structures. These situations can be remedied through capacity-building, government-sponsored institutions and the involvement of private NGOs as well as civil society.

We would argue that APEC is well-positioned to assist in the initiative for institutional reform because of the very nature in which APEC is organised. APEC is a loose organisation of 18 members, covering a wide range of countries, at different stages of development. a country like Malaysia can benefit from the experience of advanced countries like the United States and Canada as well as countries like Australia and New Zealand. The last two countries have had experience in the development of institutional structures that are of fairly recent origin. Typical examples include the establishment of competition policy and law and the Productivity Commission in Australia. At the same time there are countries in APEC, like Thailand and Indonesia, that are grappling with the problem of establishing the right kind of institutional structures. This diversity of experience would allow a country like Malaysia to benefit from the experience of countries like Canada or Australia, and at the same time to share from Thailand and Indonesia on how obstacles to institution-building can be overcome.

APEC is a suitable organisation to forward initiatives for institutional reform precisely because of its non-formal and non-binding arrangements. This flexibility allows countries to voluntarily cooperate, a feature that does not put pressure on member countries. Nevertheless, if the question of institutional reform is taken up as an issue by APEC, this will mobilise interest in institutional strategies and institutional reform. There are obvious gains to be achieved by putting in place the right institutional strategies to achieve institutional efficiency, but more than that it also serves as preparation for the wider goal of liberalisation.

The Bogor Declaration has resolved to "adopt the long-term goal of free and open trade and investment in Asia Pacific". In line with this resolution, it has been stated that this goal will be achieved by " pursued promptly by further reducing barriers to trade and investment and by promoting the free flow of goods, services and capital among our economies." The primary focus of APEC may be on promoting free and open trade, but by establishing appropriate institutional strategies this goal is deeply facilitated. There are several goals that are simultaneously satisfied by institutional reform. First, domestic efficiency is achieved in so far as rent-seeking behaviour is curtailed and with it the loss of welfare from unproductive rents. Second, foreign investors will be attracted to stable and predictable institutional structures and processes. Third, domestic investors will be able to operate in a more credible institutional environment, thus reducing the misallocation of resources into rent-seeking activities. In pursuance of the Bogor declaration, support for reform in institutional strategy will improve domestic productivity and diminish institutional barriers to trade.

Indeed, the proposal that APEC devise strategies directed at institutional reform in member countries in Malaysia is not entirely completely distant from APEC's existing agenda. APEC had prepared an Integrated Checklist on Regulatory Reform in 2002; and in 2004 the Seventh Workshop of the APEC-OECD Cooperative Initiative on Regulatory Reform was held in Bangkok. Much of the discussion at this workshop centred around competition, market openness, transparency and government procurement; but the issue of regulatory reform as an overarching process was not ignored. Since it is recognised that regulatory efficiency has positive macroeconomic effects, and since APEC is involved in

related initiatives, the suggestion is timely and a logical extension of existing priorities, albeit involving a broader circumference since establishing institutional structures underlies the entire policy process.

In terms of the taxonomy that was suggested APEC should work on two fronts: a) at supporting governments that are interested in institution-building and regulatory reform, and b) at empowering NGOs and think thanks in institutional issues. There would be governments that would be interested in developing their expertise in establishing institutions while there would be other governments that lack exposure to the benefits of good regulation. Clearly, APEC would have to tailor its activities to support the interests and intents of the specific governments, providing support for the introduction of appropriate institutions or offering exposure to the benefits of good regulation, as the case may be. In any case, the efforts would have to be on a voluntary, country-specific basis.

There are three broad areas that APEC could work on in its attempts to improve the institutions that support good regulation. In terms of the taxonomy that was employed, this means that APEC should concern itself with the following:

- providing capacity building on institutional reform
- establishing mechanisms for sharing experiences in institutional strategies
- organising a cooperative initiative on strategies for achieving good regulation
- initiating an APEC Course of Action on Institutional Structures for Good Regulation

Broadly, this implies that APEC needs to work on three fronts. In the first instance, APEC should provide support in exposure, capacity-building and training for governments that are keen on improving their institutional structures. Secondly, APEC should provide training, conduct exchange programmes and generally empower NGOs and think-tanks interested in issues relating to institutional reform.

CONCLUSION

We argue that competition is a crucial concern for policy makers but need not be an exclusive issue of interest in the realm of microeconomic policy. Other aspects could vie for attention and this complicates the policy response. At any rate, there is a range of responses that are appropriate and these responses vary in flexibility as well as the degree of intervention that is required from the government. Further, microeconomic policy, if it is to be effective, requires good design, regulation, implementation and evaluation. These facets of policy demand appropriate institutional strategies.

The policy experience in Malaysia suggests that adequate institutional structures are yet to be established. More precisely, there seems to be a lack of structures in Malaysia that emphasise transparency, evaluatory mechanisms, publicly defendable performance criteria, and well-defined institutional processes and organisational flow. We examined two cases to exemplify our point: reform in the telecommunications industry and privatisation in the health sector indicate a lack of institutional instruments based on transparency and good governance; and the absence of competition policy and law stresses the fact that some institutions important to economic development are yet to be put in place.

In view of the absence or the lack of institutional structures we would like to argue that a concerted effort must be expanded to adopt appropriate institutional strategies. There are three vital issues that must be addressed in this context, and they all relate to the factors constraining the development of good institutions. The obstruction to the development of institutions could be a consequence of government inexperience in the matter; it could be because of constraints imposed by vested interests; or, the resistance could arise from the government as an entity. In any case, we propose that there is a role that APEC, as a regional organisation, could play. Indeed, we would advocate that APEC is best suited to take on such a role precisely because APEC does not have legally binding institutions; voluntary participation could, actually, encourage reluctant and uncertain governments to participate in initiatives that could be organised by APEC.

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