

LEGAL REVIEW ON CPTPP AND ITS IMPLICATION ON BUMIPUTERA'S POLICIES IN MALAYSIA GOVERNMENT PROCUREMENT

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Abstract

The Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) is an open and multi trade agreement that significantly liberalizes international procurement Trans-Pacific markets. Chapter 15 of the CPTPP is covers government procurement. Malaysia signed and eventually ratified CPTPP later in 2022 and needs to incorporate Chapter 15 into its government procurement regulations. Having said this, the question remains on how features of Chapter 15 will stand and comport with the existing protection mechanisms that are practiced by Malaysia in its government procurement regime, namely Bumiputera policy. Malaysia also has claimed some reservation and threshold amounts in the said Chapter under the Annexure 15-A of the State Schedule. Thus, the objective of this writing is, first, to review the existing legislation and regulations in Malaysia that cover government procurement. Then, it discusses how the ratification of the CPTPP will impact the existing Bumiputera policy practiced in government procurement ecosystems. Finally, this writing reviews the Government of Malaysia's action and plan on government procurement post ratification of CPTPP. This study adopts a qualitative method that mainly relies on descriptive and analytical examinations of statutory provisions and relevant authorities. It concludes that Malaysia's Bumiputera policy is still unflawed in the government procurement despite the ratification and adoption of Chapter 15 of the CPTPP. BNM as the financial policy advisor to the Government of Malaysia is not being statutorily vested with power to review and provide feedback on CPTPP to the government. This is due to the reservations and high price preferential system imposed by Malaysia for a much longer period before its finally fully incorporated and functional in Malaysia's government procurement.

Keywords: *CPTPP, Free Trade Agreement, Government Procurement, Protectionism Policy, Bumiputera*

I. INTRODUCTION

As a complex multi-themed agreement, the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) (revived from the Trans-Pacific Partnership or TPP) has a long history of multiple negotiations, discussions, and roundtables among its member countries before being cemented. Ambitiously, the TPP is intended to be a trade agreement between 12 Pacific Rim nations, including Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, Vietnam, and the United States (US).¹ In 2005, Brunei, Chile, New Zealand, and Singapore initially established the Trans-Pacific Strategic Economic Partnership Agreement. It evolved into TPPA with the addition of eight more economies, including Australia, Canada, Japan, Malaysia, Mexico, Peru, US, and Vietnam. The TPP was signed on 4 February 2016 in Auckland, New Zealand.² The condition for entry into force of the TPP required ratification by at least six of member parties accounting for 85% of the combined GDP of the 12 TPP members. There was a hiccup when then US President Donald Trump signed an Executive Order withdrawing the United States (US) from the TPPA on 23 January 2017, due to his protectionist policies.³ Without US participation, the TPP cannot enter into force as the US accounts for 60% of the combined GDP of the 12 TPP members. With the withdrawal of US, it has left to the other 11-member countries to further discuss the implementation of this trade agreement. Led by Japan under the late Shinzo Abe administration, the remaining 11-member countries engaged in further negotiation to find ways to implement the TPPA, including the provisions on intellectual property.⁴ On 9-10 November 2017 in Da Nang, Viet Nam, ministers of the 11 TPP countries reached an agreement on the core elements, the text of the agreement and a way forward to implementation of the TPPA, which was renamed as the CPTPP.⁵ CPTPP was signed by all 11 participating countries - Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Viet Nam - on 8 March 2018 in Santiago, Chile.⁶ Signing the CPTPP is an indication that the 11 countries accept the outcome of the negotiations and will start their

¹ "Malaysia's Free Trade Agreements, Ministry of International Trade and Industry," 2015, accessed February 6, 2023, https://fta.miti.gov.my/index.php/pages/view/tpp_cptpp.

² "Malaysia's Free Trade Agreements, Ministry of International Trade and Industry,"

³ "Trump's decision to kill TPP leaves door open for China, CNN Business," 2017, accessed 6 February 6, 2023, <https://money.cnn.com/2017/01/23/news/economy/tpp-trump-china/>.

⁴ "History of CPTPP and How It Will Benefit Malaysian Businesses, Industrial Malaysia," <https://www.industrialmalaysia.com.my/article/cptpp>.

⁵ "Malaysia's Freed Trade Agreement, Ministry of International Trade and Industry."

⁶ Rashmi Banga, "CPTPP: Implications for Malaysia's Merchandise Trade Balance," *SSRN Electronic Journal* (2019), <https://doi.org/10.2139/ssrn.3354836>, <https://dx.doi.org/10.2139/ssrn.3354836>.

domestic processes to enable their ratification of CPTPP in order to bring the agreement into force. By February 2019, seven out of the eleven countries had completed their ratification procedures. These countries are Mexico, Japan, Singapore, Australia, New Zealand, Canada and Viet Nam.⁷ CPTPP, with a market of 500 million people and combined economies representing 13.4 percent of global gross domestic product (GDP) from its 11 members signatories, at approximately US\$13.5 trillion, has made the CPTPP is clearly one of the broadest trade agreements in the world,⁸ along with other free trade agreement including the North American Free Trade Agreement (NAFTA) which totals approximately \$20 trillion; the European Union at \$19 trillion; South America's Mercosur at \$3.5 trillion; the Association of Southeast Asian Nations Free Trade Area (AFTA) at \$2.5 trillion; and the Common Market for Eastern and Southern Africa (COMSEA) at \$655 billion.⁹

On 30 September 2022, Malaysia ratified the CPTPP¹⁰ and became the ninth out of eleven member countries to ratify the agreement. With ratification, it has targeted total trade to increase up to \$655.9 billion in 2030.¹¹ With this ratification, Malaysia will gain opportunities to have market access to Canada, Peru and Mexico, countries where Malaysia has not had a Free Trade Agreement (FTA) before,¹² especially for its exports of palm oil, textiles and apparel, and electrical and electronic products. CPTPP covers virtually all aspects of trade among members and there are 30 chapters in total, covering among other things commitments in trade in goods, services, investment, labour mobility and intellectual property. However, for purposes of this writing, we shall focus on the government procurement chapter, namely Chapter 15. Long before the signing and ratification of the CPTPP Agreement, Malaysia had never agreed to any binding discipline on its government procurement.¹³ Between 2006-2009, an attempt to include government procurement in any preferential trade agreements had never come to fruition.¹⁴ In 2010, when Malaysia agreed to

⁷ Banga, "CPTPP: Implications for Malaysia's Merchandise Trade Balance."

⁸ "TPP 2.0: The Deal Without the US," *The Diplomat*, 2018, accessed 6 February, 2023, <https://thediplomat.com/2018/02/tpp-2-0-the-deal-without-the-us/>.

⁹ "TPP 2.0: The Deal Without the US," *The Diplomat*.

¹⁰ "Malaysia's Ratification of CPTPP to Help Increase Trade, Asian Briefing," 2022, accessed February 22, 2023, <https://www.aseanbriefing.com/news/malysias-ratification-of-cptpp-to-help-increase-trade/#:~:text=The%20Malaysian%20government%20officially%20ratified,by%20Parliament%20for%20final%20approval.>

¹¹ "Malaysia's Ratification of CPTPP to Help Increase Trade, Asian Briefing."

¹² Ministry of International Trade and Industry (MITI) MITI & PWC, PricewaterhouseCoopers Advisory Services (PWC), *Cost-Benefit Analysis on the Potential Impacts of the CPTPP on the Malaysian Economy and Key Economic Sectors* (Malaysia: PricewaterhouseCoopers, 2022).

¹³ Pierre Sauv , "Malaysia's Trade Governance at a Crossroads," *Khazanah Research Institute* (2018).

¹⁴ Sauv , "Malaysia's Trade Governance at a Crossroads."

include government procurement in the negotiating package of the initial TPP, it emerged as one of the most contentious issues for Malaysia.¹⁵ This was due to stiff resistance and a protectionist approach toward preserving measures, especially related to its Bumiputera policy, industrial and rural development, and strategic economic policies.¹⁶ This had to do with Malaysia's long colonial history, the Asian Financial Crisis in 1998, the global financial crisis (GFC) in 2010, and turmoil in the oil market in 2014 itself.¹⁷

It is first important to discuss generally what government procurement is. It can be understood as a government's purchasing goods and services from private entities, which it needs to carry out its functions.¹⁸ Factors that determine the amount of goods and services procured by governments is varied, from the breadth and depth of the legal and social obligations of governments to provide them, the level of growth in the economy, and the socio-political leanings of governments.¹⁹ Naturally, the economics of supply and demand place the value or equilibrium price on goods and services is based on the satisfaction arising from consumption.²⁰ This calculus, however, differs for the government procurement process, where due to the fact that procurement and consumption depart from one and another for the government procurement,²¹ as government is not the final consumer nor a private entity. Thus, it complicates attempts by governments to place a value or price on the goods or services it procures. This is further complicated because procurements are funded through taxpayers' money and guided by various socio-economic, industrial, or political objectives, and the value placed on the goods or services procured may differ in terms of the satisfaction gained from the purchases.²² The value placed on them by the government is typically influenced by the ability of procurement decisions to fulfil specific policy objectives rather than being guided solely by cost efficiency considerations.²³ Since procurements are funded through taxation, the spending policies are indeed the key. While government procurement expenditures also take into consideration the socio-economic and political objectives of the government,

¹⁵ Sauv , "Malaysia's Trade Governance at a Crossroads."

¹⁶ Sauv , "Malaysia's Trade Governance at a Crossroads."

¹⁷ Sauv , "Malaysia's Trade Governance at a Crossroads."

¹⁸ Steen Treumer Sue Arrowsmith, Jens, Lili Jiang, *Public Procurement Regulation: An Introduction* (Nottingham: University of Nottingham, 2011).

¹⁹ Junaidi Mansor, "Government Procurement in Preferential Trade Agreements: Key Considerations for Malaysia," in *Malaysia's Trade Governance at a Crossroads*, ed. Pierre Sauv  (Kuala Lumpur: Khazanah Research Institute, 2018).

²⁰ David Stanley Fischer and Rudiger Dornbusch. Begg, *Economics*, 5 ed. (Mcgraw Hill Book Co, 1997).

²¹ Fischer and Dornbusch, 19.

²² Fischer and Dornbusch, 19.

²³ Fischer and Dornbusch, 19.

processes have been introduced to ensure that this is undertaken in accordance with the law.²⁴ Within the government, authority for the management of public funds and procurement is delegated to executive agencies. As a result, government procurement laws and regulations reflect the administrative nature of public funds management in a government as well as good governance principles of state conduct.²⁵

Chapter 15 of the CPTPP on the government procurement will bring about a significant change to international liberalisation of Trans-Pacific procurement markets. Previous procurement-related international commitments in the region were very limited. Only four of the CPTPP signatories are bound by the plurilateral Agreement on Government Procurement (GPA). Procurement-related commitments within the ASEAN have been very limited. APEC's procurement principles have remained non-binding. Chapter 15 of the CPTPP applies to government procurement,²⁶ including everything that falls under the Article 15.1(2), specifically any government procurement by a government entity of goods or a services or both, or any combination thereof as specified in each respective member state's Schedule to Annex 15-A.²⁷ The Government Procurement Chapter sets standards for government procurement that are robust, transparent, and allow suppliers to participate fairly in the procurement processes in the member states members to the CPTPP.

Importantly, it ensures that governments do not discriminate against foreign suppliers when assessing tenders and awarding contracts. This Chapter also increased levels of transparency and greater certainty for businesses, large and small. CPTPP Parties will be required to establish a review mechanism so that suppliers, either foreign or domestic, can challenge government procurements that do not follow proper processes. In the end, Malaysia agreed to and successfully incorporated CPTPP into its Bumiputera-related procurement policies, especially on government procurement, subject to some thresholds and limitations. The procuring agencies in Malaysia shall subject to the principles laid down in Annex 15-A: Schedule of Malaysia, as Table 1 below illustrates.

²⁴ Fischer and Dornbusch, 19.

²⁵ Fischer and Dornbusch, 19.

²⁶ "Comprehensive and Progressive Agreement for Trans-Pacific Partnership," Entered into force December 30, 2018, Article 15.2(1).

²⁷ "CPTPP," Article 15.2(2)(a).

Table 1.
Annex-15 A: Schedule of Malaysia under the CPTPP Agreement

ANNEX 15-A: SCHEDULE OF MALAYSIA	
SECTION A:	Central Government Entities
SECTION B:	Sub-Central Government Entities *None
SECTION C:	Other Entities
SECTION D:	Goods
SECTION E:	Services
SECTION F:	Construction Services
SECTION G:	General Notes
SECTION H:	Threshold Adjustment Formula
SECTION I:	Procurement Information
SECTION J:	Transitional Measures

Meanwhile, Article 15.3 mentions procurement activities not covered under this CPTPP Chapter such as land acquisitions, non-contractual agreements or assistance given by the Government (such as subsidies), public employment contracts, and procurement by international development agencies and international organizations. Additionally, there are certain types of procurement which are excluded by Annex 15-A: Schedule of Malaysia, i.e., Public-Private Partnership (PPP) contractual arrangements, including Build-Operate-Transfer (BOT) contracts, procurement for religious purposes, and procurement for research and development.²⁸

There has been previous discussion and studies on Malaysia's participation in the mega-regional trade agreement, prior the establishment of CPTPP and its binding international rules on government procurement in Malaysia. Sue Arrowsmith, Steen Treumer, Jens, and Lili Jiang supported the proposition that government procurement is "designed to open up public procurement to international trade – that is, to provide for foreign suppliers, products, and services to have access to the public procurement markets of other states. These instruments either require or encourage countries to implement measures to improve foreign access to their public procurement markets."²⁹ They qualify this statement stating that most governments have "relatively closed to foreign suppliers for various reasons, most notably the fact that governments have deliberately favoured domestic industry in awarding contracts."³⁰ Some scholars suggested that Malaysia's government procurement should "follow the United

²⁸ Section G -General Notes, Annexure 15-A of the Chapter 15 of CPTPP Agreement, "Malaysia."

²⁹ Sue Arrowsmith, Steen Treumer, Jens, and Lili Jiang. "Public Procurement Regulation: An Introduction," Nottingham: University of Nottingham, 2011.

³⁰ Arrowsmith, Treumer, Jens, and Jiang.

Nations Commission on International Trade Law (UNCITRAL) Model Law Procurement Rules 2011 will not in any way cause detriment to national goods and services.”³¹ They also suggested that “once the procurement regime boasts of transparency, competition and value for money, and practises integrity in procurement and monitoring of projects, investor confidence will boost the economy, and this will in turn benefit the national players.”³² Sauvé discussed that “in 2010, Malaysia decided to participate in the TPP negotiations and agreed to include government procurement in the negotiating package. As expected, government procurement re-emerged as one of the most contentious issues for Malaysia in these negotiations, to preserve broad policy space for measures relating to its Bumiputera policy.”³³ He added that the reason for the Government of Malaysia’s interest in joining the TPP is because it wanted to “open up its government procurement market to its trading partners is that it would enjoy reciprocal terms of access. This was part of the appeal for Malaysia of joining the TPP, Malaysia successfully concluded the TPPA negotiation in 2015.”³⁴ He also suggested that “the TPP was most assuredly a game-changer for Malaysia as it sets the benchmark for future negotiations in the procurement area.”³⁵ The TPP has “shown that Malaysia is capable of making treaty commitments on government procurement and may be able to at least replicate its positions in the current trade negotiations, such as the Regional Comprehensive Economic Partnership (RCEP) negotiations between ASEAN.”³⁶

Haniff Ahamat and Nasarudin Abdul Rahman, suggested that “based on the principle of non-discrimination, the GPA seeks to enshrine the right of foreign suppliers to participate in procurement markets.”³⁷ They emphasised that this “promotes further competition by encouraging greater liberalisation of procurement markets.”³⁸ They further discussed four countries of ASEAN maintain restrictions on market access to their government procurement markets in favour of domestic suppliers, as these ASEAN countries have

³¹ Grace Xavier and John Antony Xavier, “Public Procurement in Malaysia: Is There a Need for Reform? A Look at the Objectives of Public Procurement Principles with Particular Emphasis on Transparency and Accountability”, *Proceedings Paper* 44, 974-992 (2016), https://www.ippa.org/images/PROCEEDINGS/IPPC7/Paper44_Xavier_and_Xavier.pdf, accessed on 11 January 2023.

³² *Ibid.*

³³ Sauvé, “Malaysia’s Trade Governance at a Crossroads.”

³⁴ Sauvé, “Malaysia’s Trade Governance at a Crossroads.”

³⁵ Sauvé, “Malaysia’s Trade Governance at a Crossroads.”

³⁶ Sauvé, “Malaysia’s Trade Governance at a Crossroads.”

³⁷ Haniff Ahamat and Nasarudin Abdul Rahman, “The TPP and Government Procurement in Malaysia,” in *Paradigm Shift in International Economic Law Rule-Making: TPP as a New Model for Trade Agreements?*, ed. Julien Chaisse, Henry Gao, and Chang-fa Lo (Singapore: Springer Singapore, 2017).

³⁸ Haniff Ahamat and Nasarudin Abdul Rahman.

numerous government procurement regulations, which can lead to a lack of transparency and discourage foreign firms from participating.³⁹ With regard to implicit measures, the review indicates a tendency for these ASEAN countries to use security requirements, be it bid security, or performance security, to impose additional requirements on foreign firms. For example, in Malaysia, local suppliers and contractors registered with the government are exempted from tender deposits. On the other hand, international bidders are required to deposit bid security which varies in amount depending on the value of the bid. They mentioned that the government procurement chapter of the CPTPP provides flexibility for ASEAN countries (Brunei Darussalam, Malaysia, and Viet Nam) including negotiated implementation delays that were permitted through transitional measures and were only available to those developing parties.⁴⁰

In 2019, Rashmi Banga highlighted that Malaysia joining the CPTPP is an opportunity for Malaysia to substantially increase its exports. The CPTPP will make Malaysia stretch trade liberalization beyond the existing limits and promote their exports to generate employment. It also comes at a cost, however, for policy space of governments for regulating their imports to protect their domestic industries. Banga didn't focus on how this trade liberalisation from CPTPP affects the existing policy towards protecting the domestic industry, especially on the Bumiputera's policy.⁴¹

However, Haniff and Rahman mentioned that CPTPP bring challenges of more open competition field for local players to face as they need to compete with foreign players in the region, especially in the government procurements. This could cause local players to be pushed to the side-lines if they failed to up their games. CPTPP will affect the Bumiputera issues, as it doesn't allow for special treatment in awarding contracts to Bumiputera companies. Thus, only the best supplier/company will win a government contract. However, Haniff's view was made prior to the ratification by Malaysia on 2022 and Malaysia's post-ratification of CPTPP of preferential treatment on its government procurement policy. Aun (2022) criticized this preferential policy system in the government procurement, especially in construction industry, which has its pitfalls, especially to pronounced internationally in its form and magnitude. By and large, preferential selection mechanisms have largely remained intact, and are a recurrent focus of sharp commentary and polemical discourse. Despite the magnitude of the policy, and perhaps because of its embeddedness

³⁹ Haniff Ahamat and Nasarudin Abdul Rahman.

⁴⁰ Haniff Ahamat and Nasarudin Abdul Rahman.

⁴¹ Rashmi Banga, "Cptpp: Implications for Malaysia's Merchandise Trade Balance." *SSRN Electronic Journal* (2019): 1-30. <https://doi.org/10.2139/ssrn.3354836>. <https://dx.doi.org/10.2139/ssrn.3354836>.

and seeming immutability, little research has been conducted on the pro-Bumiputera aspect of Malaysia's government procurement. Nonetheless, the combination of continuity with change underscores the timeliness and relevance of examining the state of policy implementation and outcomes at this juncture.⁴²

Jędrzej Górski opined that the CPTPP's chapter on government procurement will bring about a significant change to international liberalisation of Trans-Pacific procurement markets. Górski referred to various other procurement-related commitments like the GPA, the Asia-Pacific Economic Cooperation (APEC)'s procurement principles and also within ASEAN on a very loose and non-binding basis. Thus, it creates a less persuasive and binding obligation among members. He highlighted that CPTPP's procedural provisions largely mimic provisions of the GPA with only minor modifications. He also cautioned that the CPTPP's deficiencies include, but are not limited to, refusal of some State members to cover sub-central agencies and as well as longer transition periods for decreasing value-thresholds of procurement chapters' application to standard levels, including in Malaysia.⁴³

Junaidi Mansor stated that preferential trade agreements (PTAs) are an important tool for Malaysia to increase two-way trade and investment ties with key trading partners, enhancing the competitiveness of Malaysian exporters and expanding choices for consumers. Government procurement regimes are designed to reflect competitive market conditions to the extent that this is possible. He also mentioned that intervention by governments in procurement disciplines causes a departure from contribution towards economic efficiency from a broader macroeconomic and political economy perspective. He, however, only focuses on the differences and gaps between GPA and other relevant procurement commitments.⁴⁴

However, despite the fact that several studies on Malaysia's commitment to international multi-party trade agreements on international markets that involves the government's public procurement, there are still gaps and scarcity in the study that are yet to be explored, namely in the revision and effects of the ratification that had been made by Malaysia under Chapter 15 of CPTPP and what changes that will affect the protection towards Bumiputera policy in the government procurement. Based on the review of prior studies on government procurement issues, it is undeniable that the principles for

⁴² Haniff Ahamat and Nasarudin Abdul Rahman.

⁴³ Jędrzej Górski. "Cptpp and Government Procurement." *Transnational Dispute Management* 16, no. 5 (10/10 2019): 1-42.

⁴⁴ Junaidi Mansor. "Government Procurement in Preferential Trade Agreements: Key Considerations for Malaysia." Chap. 7 In *Malaysia's Trade Governance at a Crossroads*, edited by Pierre Sauvé, 224-68. Kuala Lumpur: Khazanah Research Institute, 2018.

government procurement play a crucial role in mitigating the impact of the problems in government procurement activities.

II. MALAYSIA'S EXISTING LEGAL FRAMEWORK ON GOVERNMENT PROCUREMENT

Malaysian government procurement adheres to a broad range of objectives alongside cost-efficient and quality-controlled allocation of contracts. Generally, the primary aim of the Malaysian Government procurement is to support Government programmes by obtaining value for money through acquisition of work, supplies, and services.⁴⁵ As of 2018, based on the WTO's Trade Policy Review of Malaysia, the size of the country's government procurement market was estimated to be around RM92.8 billion (USD20.7 billion), representing about 12.6% of its gross domestic product (GDP).⁴⁶ The benefits or value from procurement should be commensurate with the costs involved and the best procurement policy is thoroughly evaluated, well-reasoned, and justified and the Malaysian Government procurement should be based on the following policies, principles, objectives and procedures. On the surface, Malaysia does not have comprehensive legislation that deals specifically with government procurement.⁴⁷ Rather, it is regulated through various of policies, legislation, and subsidiary regulation which address different issues surrounding government procurement management in Malaysia.⁴⁸

Firstly, the Government Contracts Act 1949 [*Act 120*] provides a legal basis for ministries to represent the Government in making procurements. And then there's the Financial Procedure Act 1957 [*Act 61*], which outlines the mode of control and management of public finances and lays down procedures for the collection and payment of public monies as well as procedures for the purchase, custody, and disposal of public property.⁴⁹ The administration and management of public funding provided by the Government falls under the purview of and is regulated by the Ministry of Finance (MoF) as the main regulator for government procurement in Malaysia.⁵⁰ Through Treasury Instructions issued by MoF under the Section 6 of Act 61, from

⁴⁵ Eustace Thornton, "Malaysia's Government Procurement Regime," (2017).

⁴⁶ Thornton, 19.

⁴⁷ Haniff Ahamat and Nasarudin Abdul Rahman, "The TPP and Government Procurement in Malaysia,"

⁴⁸ Ministry of Finance Malaysia MoF, "PK1.1: Punca Kuasa, Prinsip dan Dasar Perolehan Kerajaan, Kaedah Perolehan Malaysia, Pekeliling Perbendaharaan Malaysia, Kementerian Kewangan Malaysia (in Malay)," ed. Bahagian Perolehan Kerajaan (Putrajaya, 2020).

⁴⁹ Ministry of Finance Malaysia MoF "PK1.1."

⁵⁰ Nasarudin Abdul Rahman Zuhairah Ariff Abd Ghadas, Haniff Ahamat, "Competition and Government Procurement in Malaysia," *Herald NAMSCA 1* (2018).

time to time, administration and management of government funds lays out details of financial and accounting procedures and encompasses government procurement.⁵¹ Table 2 below set out various laws and regulations relating to government procurement in Malaysia.

Table 2.
various of laws and regulations relating to government procurement in Malaysia.

Legislation	Description
Delegation of Powers Act 1956 [Act 358]	This Act provides general authority to a Ministry to delegate to any person subject to the limitations set out under this Act. In delegating this authority, the Ministry may limit the source authority or introduce conditions. The delegation must be made through a publication in the national Gazette. ⁵²
Government Contracts Act 1949 [Act 120]	Ministers and public officers may enter into contracts on behalf of the Government in accordance with the relevant authorization. This Act also indemnifies public officers against any liability arising from the contract entered into in their official capacity. ⁵³
Financial Procedure Act 1957 [Act 61]	This Act provides the authority for the Government to control and manage the public finances of Malaysia. It also provides the authority for the Government to introduce and administer financial and accounting procedures, including procedures for the collection, custody, and payment of public monies.
Treasury Instructions	These instructions are issued under Section 6 of the Financial Procedure Act 1957. The Treasury undertakes the supervision of the expenditure of all ministries, including all matters relating to accounting and financial procedures. ⁵⁴ The Treasury Instructions include the supervision of expenditures through the controlling officers for: the submission of proposals for expenditures to the Treasury; reporting of implementation and administration of programs or projects; supervisory activities by the Controlling Officers; and reporting to the Auditor General. ⁵⁵

As a result, any procurement by the government, or its agencies and entities not funded by the government are not captured under the government procurement regulatory framework administered by the MoF.⁵⁶ One prominent area is public private partnerships (PPP). The government procurement regulations in Malaysia as administered by the MoF are not applicable to procurements undertaken under the PPP programme.

⁵¹ Ministry of Finance Malaysia MoF "PK1.1."

⁵² Section 5 of the Act 358.

⁵³ Section 2 and 8 of the Act 120.

⁵⁴ Treasury Instruction 7 (Arahan Perbendaharaan 7) of MoF.

⁵⁵ Treasury Instruction 13 (Arahan Perbendaharaan 13) of MoF.

⁵⁶ Mansor. "Government Procurement in Preferential Trade Agreements: Key Considerations for Malaysia."

II. A ROLE AND FUNCTIONS OF CENTRAL BANK OF MALAYSIA (BNM) THE GOVERNMENT PROCUREMENT AND CPTPP

The Central Bank of Malaysia, also known as Bank Negara Malaysia (“BNM”), is Malaysia’s central monetary authority. It was established in 1959,⁵⁷ and governed by the Central Bank of Malaysia Act 2009 [*Act 701*]. BNM provides a conducive environment for the sustainable growth of the Malaysian economy,⁵⁸ and ensures a robust and well-functioning financial system in Malaysia. Its roles and responsibilities have evolved to meet the changing needs of the Malaysian economy.

Among the important roles and functions of BNM that is related to this paper is to act as financial adviser, banker, and financial agent of the Government.⁵⁹ As the banker and financial adviser to the Government, BNM provides advice on macroeconomic policies and the management of public debt. Additionally, BNM provides expert analysis and advice on macroeconomic policies, including monetary and fiscal policies, leading to budgetary planning by the MoF. The main issue here is that BNM does not govern and is not statutorily obligated to provide advice to the MoF on government procurement processes and policies in Malaysia. BNM, like other government statutory bodies and agencies, is subject to the same procurement rules and guidelines in purchasing goods or services because it is financed by taxpayers’ money. As such, it must follow the government procurement procedures outlined by the MoF to procure goods and services. That being said, the BNM, due to its economic expertise and research capabilities, provides insight into macroeconomic trends, financial risks, and fiscal policies that indirectly impacts procurement policies and strategies. For example, if there are economic conditions that affect the cost of goods and services, this could be relevant to procurement policies. However, in the end, the power is vested in the MoF to determine its policies on government procurement. BNM is still expected to adhere to principles of transparency, accountability, and preserving value for public money in its procurement activities.

In addition, BNM is not an international finance institution, but BNM may provide advice or analysis on the potential economic and financial implications of trade agreements, as they can have significant impact on areas such as trade balances, currency stability, and economic growth. This advice would likely be part of the information the government considers when making decisions. As

⁵⁷ Central Bank of Malaysia Act 1958 has been repealed by the Central Bank of Malaysia Act 2009 [*Act 701*].

⁵⁸ “Introduction: About the Bank,” Bank Negara Malaysia, accessed 29 June, 2023, <https://www.bnm.gov.my/introduction>.

⁵⁹ Section 5(2)(i) Act 701.

for ratification of CPTPP, it will impact Malaysia's finance, banking, and trade. However, the decision to enter into a trade agreement such as the CPTPP is ultimately decided by the government, considering a variety of implications beyond just economic and financial. These can include social, environmental, legal, and geopolitical considerations.

III. BUMIPUTERA POLICY IN MALAYSIAN GOVERNMENT PROCUREMENT PRIOR TO CPTPP

Before considering the impact of CPTPP membership, there must be a discussion of "Bumiputera Policy." The word Bumiputera is derived from a Sanskrit word, which means "for son of the soil" or referring to an indigenous person.⁶⁰ The Bumiputera policy is a socio-economic policy embedded in the sociology, politics, demography, and economy of Malaysia, all of which complicate attempts to quantify policy outcomes.⁶¹ It embodies the special position of the Malays and the natives of the States of Sabah and Sarawak by codifying a race-based affirmative action policy enshrined in Article 153(1) of the Malaysia Federal Constitution of 1957.⁶² This provision constitutionally protects the special position of the Malays and natives of the States of Sabah and Sarawak.⁶³ This has also led to craftsmen of policies that safeguard this special position. After a long history, with the new economic policy (NEP) in 1971, laid a path for the utilization of government procurement to promote Bumiputera commerce.⁶⁴ Treasury Circular Letter No.7, 1974, Treasury Circular Letter No. 3, 1982, Treasury Circular Letter No. 4, 1995, and Treasury Circular Letter No. 11, 1993 also serve as the medium for setting out such policies. Malaysia, through its various agencies, has used public procurement as a way of promoting socio-economic interests of Bumiputera in Malaysia where such policies strived to restructure the Malaysian society thorough among other things the development of Bumiputera-owned small and medium enterprises (SMEs).⁶⁵ This policy, through domestic public procurement has encouraged more participation in its economy by Bumiputera, the majority population.

⁶⁰ Abdul Aziz Bari, *Malaysian Constitution : A Critical Introduction* (Kuala Lumpur: Other Press, 2003).

⁶¹ Mansor. "Government Procurement in Preferential Trade Agreements: Key Considerations for Malaysia."

⁶² Article 4 of the Malaysia Federal Constitution 1957 stated that this Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.

⁶³ "Introduction: About the Bank." Bank Negara Malaysia.

⁶⁴ Lee Hwok Aun, "Public Procurement and Bumiputera Company Development in the Construction Industry: Reviewing Policies, Exploring Possibilities," *IDEAS* (2021).

⁶⁵ Ministry of Finance Malaysia MoF "PK1.1."

As part of its policy, Malaysia restricts participation by foreign firms in its procurement, generally requiring foreign companies to take on a local partner for their tenders to be considered. It invites independent international tenders only if goods and services are not available domestically. The government procurement regime has adopted extensive preferential treatment in favour of Bumiputera contractors. The Bumiputera interests must be considered in almost all aspects of procurement activities.⁶⁶

Furthermore, there is Government Treasury Circulars, namely “*Perolehan Kerajaan 1.5: Dasar Keutamaan Kepada Syarikat Bumiputera, Pekeliling Perbendaharaan Malaysia, (in Malay)*,” Item 2 of the Circulars had stated and defined what constituted as a Bumiputera company, as:

2.1. Bumiputera companies shall fulfilled the criteria set as below:

- i. at least 51% shares ownership by a Bumiputera person or company;
- ii. at least 51% of company’s board of directors’ membership are Bumiputera persons;
- iii. the post of Chief Executive Officer, Managing Director and other key posts positions shall be held by Bumiputera where holds at least 51% shares ownership;
- iv. at least 51% of the workforce is among Bumiputera;
- v. financial management is being controlled by Bumiputera; and
- vi. organisation chart and functional management of the companies shows the fully control by Bumiputera.⁶⁷

Additionally, it is vital to mention here that the qualification ratings of these Bumiputera companies are solely under the Authorities of the Rating of the Bumiputera, that issues a certificate of Bumiputera Status, “*Sijil Taraf Bumiputera*” (STB) to those companies. For procurement of goods and services from MoF through Contractors of Service Centres (PKK), one of the departments under the Ministry of Entrepreneurship and Cooperatives Development (MECD) is in the charge issuing STBs. The procurement of construction contracts is directly under the PKK itself. These authorities also have the power to revoke and deny approval of an STB in case any of the companies fail to comply with the said criteria of a Bumiputera company mentioned above.⁶⁸

⁶⁶ Ministry of Finance Malaysia MoF “PK1.1.”

⁶⁷ Ministry of Finance Malaysia MoF, “PK1.5: Dasar Keutamaan Kepada Syarikat Bumiputera, Kaedah Perolehan Malaysia, Pekeliling Perbendaharaan Malaysia, Kementerian Kewangan Malaysia (in Malay).”, ed. Bahagian Perolehan Kerajaan (Putrajaya, 2022).

⁶⁸ Ministry of Finance Malaysia MoF “PK1.5.”

This policy is further enshrined in procurement policy for the goods and services, where in contracts that don't exceed RM100,000.00 shall be prioritised for Bumiputera companies registered under the MoF. And for those contracts, the value of which exceed RM100,000.00, this Bumiputera companies shall be given a price preference, according to certain percentages known as margin of preference system,⁶⁹ as stated in as Table 3 below.

Table 3.
Preference System for government procurement that exceed the RM100,000.00

Tender Price Preference	Percentage (%)
Between RM100,000 and RM500,000	10%
Between RM500,000 and RM1.7 million	7%
Between RM1.5 million and RM5 million	5%
Between RM5 million and RM10 million	3%
Between RM10 million and RM15 million	2.5%
More than RM15 million	-nil-

This price preference system is based on the value of the lowest and acceptable bid from a non-Bumiputera company to be compared to the lowest price offered by a Bumiputera company. This preference calculation shall be made at the quotation or tender decision stage. This price preference shall apply to all government procurements except when the tender of supply is executed through an open tender among local manufacturers.⁷⁰

As for the procurement of supplies for manufacturer among competing Bumiputera entities,⁷¹ the price preference is set out as per Table 4 below;

Table 4.
Procurement of supplies for the manufacturer among Bumiputera

Tender Price Preference	Percentage (%)
Up to RM10 million	10%
Between RM10 million and RM100 million	5%
More than RM15 million	3%

If there is more than one manufacturer or producer among Bumiputera for the procurement of the supplies, the tender process must be carried out though restricted or limited tender among those Bumiputera only.⁷² Meanwhile, if there is only one Bumiputera manufacturer or producer, the procurement

⁶⁹ Ministry of Finance Malaysia MoF "PK1.1."

⁷⁰ Ministry of Finance Malaysia MoF "PK1.1."

⁷¹ Ministry of Finance Malaysia MoF "PK1.1."

⁷² Ministry of Finance Malaysia MoF "PK1.1."

process is through direct negotiation and a purchase can proceed.⁷³ Further, the implementation of the Central Contract Panel System⁷⁴ also takes into consideration the interests of Bumiputera companies.⁷⁵ This means that the Bumiputera companies are given preference to enter the Panel System as panel suppliers, in which items under this panel system include foodstuffs, office furniture, and vehicle spare parts and the price of the items is based on the price offered by the panel.

For procurement of work, usually consisting of building construction, roads, drainage, airports, dams, other civil works, mechanical, and electrical works.⁷⁶ Under this regime, the Bumiputera policy is illustrated in Table 5 below.

⁷³ Ministry of Finance Malaysia MoF “PK1.1.” The above priority also applies to ship owners registered with the Ministry of Finance.

⁷⁴ A Central Contract is established by the financial authority for common use items and services. The government can increase or reduce the number of contract items from time to time according to the needs. The price and specification of Central Contract item as well as the minimum supply that could be obtained from the Central Contract is normally fixed by the government. The suppliers of the Central Contract items are appointed by the government from time to time and the procurement agency may choose any appointed supplier who can offer high quality goods and services. Items under Central Contract include postal services, envelopes, A4 papers, Microsoft software, etc. Procurement through Central Contract allows the procurement agency to reduce costs by purchasing goods in bulk. These contracts can be made through open local tenders or through direct negotiations/purchases depending on the threshold values set out by the government.

⁷⁵ Ministry of Finance Malaysia MoF “PK1.1.”

⁷⁶ Ministry of Finance Malaysia MoF “PK1.1.”

Table 5.
Bumiputera policy in the public procurement of work

Work Value	Notes		
Below RM50,000.00 a year (excluding small work/ maintenance under RM50,000)	Thirty percent (30%) of the contract value is required to be allocated to Bumiputera contractors. ⁷⁷		
	For the remaining 70% of the contract value, Bumiputera contractors can take part in the tender without any preferential treatment given to them. ⁷⁸		
Below RM200,000.00 and works used rate schedule	Shall be allocated to Bumiputera contractors only. But the contract value should not be included under 30% contract values allocated to the Bumiputera as mentioned above. ⁷⁹		
Between RM200,000.00 to RM350,000.00	At least fifty percent (50%) of the contract value should be allocated to Bumiputera contractors. ⁸⁰		
Prime Cost Sum / Mechanical / Experts	Allocated to Bumiputera based on the Preference Price as stated;	Work Value	Percentage (%)
		Between RM200,000 and RM500,000	10
		Between RM500,000 and RM1.5 million	7
		Between RM1.5 million and RM5 million	5
		Between RM5 million and RM10 million	3
		Between RM10 million and RM15 million	2.5
		More than RM15 million	NIL

Priority shall also be given to a single Bumiputera importer, priority to become a franchisee, and priority to enter into a central contract.⁸¹ Bumiputera contractors who are members of the Malay Chamber of Commerce are given priority over those who are not members.⁸² In addition to this, this is the list for other Bumiputera policy in the other type of public procurement in Malaysia, as set forth in Table 6 below.

⁷⁷ Ministry of Finance Malaysia MoF "PK1.1."

⁷⁸ Ministry of Finance Malaysia MoF "PK1.1."

⁷⁹ Ministry of Finance Malaysia MoF "PK1.1."

⁸⁰ Ministry of Finance Malaysia MoF "PK1.1."

⁸¹ Ministry of Finance Malaysia MoF "PK1.1."

⁸² Ministry of Finance Malaysia MoF "PK1.1."

Table 6.
Bumiputera preferential system in the other type of procurement under the government procurement.

Type of Procurement	Categories	Notes
Quotation	Goods and services	Procurement of goods and services with the contract value of between RM50,000 and RM500,000 is done through the calling for quotes and the minimum number of quotes to be invited is five (5). All suppliers wishing to submit a quote must be registered with the Government (MOF, 2013b) with the threshold below: 1. If the procurement value is between RM50, 000 to RM100, 000 quotations will be invited among five (5) <i>Bumiputera</i> suppliers registered with the MOF. 2. If the value is between RM100, 000 to RM500, 000 quotations will be invited among five (5) <i>Bumiputera</i> and non- <i>Bumiputera</i> suppliers registered with the MOF. However, priority will be given to the <i>Bumiputera</i> companies.
Limited tender		Limited tender less than RM5 million are invited among 10 <i>Bumiputera</i> companies/local contractors registered with the Ministry of Finance for tender of supplies or services and CIDB and hold Work Procurement Certificate (SPKK) for tender of work
Consulting services		Procurement for consulting services cannot be done through calling for quotation. However, there are three types of procurement of consulting services, namely, limited tender depending on certain threshold values set out by the MoF. In the case of limited tender, the agency may select between 3 to 10 firms to be submitted to the approving authority for final approval. Companies which have more <i>Bumiputera</i> equity than non- <i>Bumiputera</i> and foreign equity will be given a more weightage in the evaluation process.

IV. BUMIPUTERA POLICY IN MALAYSIAN GOVERNMENT PROCUREMENT POST CPTPP RATIFICATION

Despite the ratification of CPTPP on 29 November 2022, Malaysia had made some reservations to preserve its right to adopt or maintain any measure that confers safeguards, provides preferences or renders assistance, benefits or other forms of rights or interests to Bumiputera in relation to government procurement not covered by Chapter 15 of CPTPP.⁸³ Malaysia also reserved the right to accord Bumiputera status to eligible companies in the procurements covered by Chapter 15 and had set forth the following measures under such Bumiputera policy, as illustrated in Table 7 below.

⁸³ Section G: General Notes, Annex 15-A Schedule of Malaysia to the CPTPP Agreement, Section 2, 18.

Table 7.
Bumiputera policy in the Malaysia covered government procurement.

Malaysia Reservation on Chapter 15: Government Procurement			
a)	set aside procurement of construction services contracts for Bumiputera up to 30 % of the total annual value of construction services contracts above the threshold from the date of entry into force of this Agreement for Malaysia; ⁸⁴ and		
b)	price preferences ⁸⁵ for:		
	Category 1: Bumiputera suppliers providing goods and services originating from any Party , according to the following schedule:		
	(i)	Procurement Value	Percentage of price preference for Category 1
		Above RM500,000 up to RM1.5 million	7%
		Above RM1.5 million up to RM5 million	5%
		Above RM5 million up to RM10 million	3%
		Above RM10 million up to RM15 million	2.5%
		Above RM15 million	NIL
		Category 2: Bumiputera suppliers providing goods and services originating from non-Parties , according to the following schedule:	
	(ii)	Procurement Value	Percentage of price preference for Category 2
		Above RM500,000 up to RM1.5 million	3.5%
		Above RM1.5 million up to RM5 million	2.5%
		Above RM5 million up to RM10 million	1.5%
		Above RM10 million up to RM15 million	1.25%
		Above RM15 million	NIL
	(iii)	Category 3: Bumiputera manufacturers that produce goods , according to the following schedule:	
		Procurement Value	Percentage of price preference for Category 3
		Up to RM10 million	10%
		Above RM10 million up to RM100 million	5%
	Above RM100 million	3%	

Given this, under Chapter 15 on government procurement, Malaysia is allowed to provide a price preference under its Bumiputera policy as set out in Table 7 above, with higher preferences applied to the lower-valued procurements, for three categories of Bumiputera companies, namely Bumiputera manufacturers that produce goods, Bumiputera suppliers providing goods, and services originating from non-state parties or any other

⁸⁴ Section G: General Notes, Annex 15-A Schedule of Malaysia to the CPTPP Agreement, Section 2(a), 17.

⁸⁵ Section G: General Notes, Annex 15-A Schedule of Malaysia to the CPTPP Agreement, Section 2(b), 17.

party. A lower preference is afforded to any procurement value for those three categories. Then, 30 percent of the total annual contract value of construction services contracts above the threshold shall be given to Bumiputera companies.

V. RECENT DEVELOPMENTS IN MALAYSIAN GOVERNMENT PROCUREMENT BY THE MOF

On 29 November 2022, the MoF issued another Treasury Circular⁸⁶ on public procurement under the Free Trade Agreement (FTA) in line with CPTPP. This was the first circular issues by the MoF pertaining to how adaptation must be made towards the CPTPP by its related agencies. It also mentioned that the Bumiputera policy is still applicable to non-covered procurements only.⁸⁷ Later, on 2 December 2022, the MoF issued Guidelines on the e-Procurement System in conjunction with the enforcement of the CPTPP.⁸⁸ These guidelines are supported by the Treasury Circular mentioned above, on the operational part of each of the agencies under the related Ministries of the Federal Government of Malaysia to use and incorporated component of the covered procurement into the e-Procurement System (eP). The guidelines shall be used as the main reference for the implementation of the covered procurement in supplies or services, so that it will be in compliance with Chapter 15 of CPTPP. Bumiputera policy in all State Governments and Local Authorities continue is still safeguarded,⁸⁹ as it does not fall under the entities of Central Government.

With this adaptation, preservation of Bumiputera on the government procurement is still intact while at the same time, it has enabled and open the access to foreign markets. With this ratification, Malaysia will have fair and non-discriminatory access to the government procurement market of most CPTPP countries at a much lower threshold.⁹⁰ These flexibilities are only available to Malaysia, Brunei Darussalam, and Vietnam. However, this flexibility is not permanent as Malaysia needs transitional measures to allow gradual adjustment to obligations in CPTPP from seven to twenty years ahead. The government needs to identify the need target group, especially the

⁸⁶ Ministry of Finance Malaysia MoF, "PK 1.3: Bab Perolehan Kerajaan Dalam Perjanjian Perdagangan Bebas (Free Trade Agreement - FTA), Pekeliling Perbendaharaan Malaysia, Kementerian Kewangan Malaysia (in Malay)," ed. Bahagian Perolehan Kerajaan (Putrajaya, 2022).

⁸⁷ Ministry of Finance Malaysia MoF, "PK 1.3."

⁸⁸ Ministry of Finance Malaysia MoF, "Garis Panduan Penggunaan Sistem ePerolehan (eP) Selaras Dengan Pelaksanaan Perjanjian Perdagangan Bebas: Comprehensive And Progressive Agreement For Trans-Pacific Partnership (CPTPP) (in Malay)," ed. Bahagian Perolehan Kerajaan (Putrajaya, 2022).

⁸⁹ MITI & PWC, PricewaterhouseCoopers Advisory Services (PWC), *Cost-Benefit Analysis on the Potential Impacts of the CPTPP on the Malaysian Economy and Key Economic Sectors*.

⁹⁰ MITI & PWC, PricewaterhouseCoopers Advisory Services (PWC), *Cost-Benefit Analysis on the Potential Impacts of the CPTPP on the Malaysian Economy and Key Economic Sectors*.

Bumiputra companies to boost the performance and sustainability of their businesses by implementing programmes especially in technologies adoption to increase their competitiveness. And for Bumiputera companies, this is a wakeup call for them to prepare themselves and to eliminate its reliance on the non-competitive environment, especially in the government procurement., as the market is eventually wide open now. With “a level playing field” coupled with transparent governance policies on the procurement it will likely lead to improved investor confidence, which could increase foreign direct investment (FDI) in Malaysia.

As this is still a new regime, and yet to be tested in the current government procurement policies in Malaysia, only time will tell whether this protectionism policies through imposing Bumiputera’s speciality and CPTPP requirements and obligations will test and assess Malaysia commitment in the international level.

VI. CONCLUDING REMARKS

Being part of CPTPP has allowed for Malaysia to penetrate market access that never being able to explore before this. CPTPP elevates the country’s competitiveness and enhances its strategic position in the Asia Pacific and even further afield. Despite having protective procurement regime of Malaysia imposed through its Bumiputera policies such as permanent price-preferences and permanent set-asides that aiming economic empowerment to Bumiputera companies in Malaysia, eventually, they will have more time to leverage on procurement advantages and increase preparations to compete with foreign companies after the ratification. BNM as the financial advisor and policies to the Government of Malaysia are not statutorily vested with powers to review and provide feedback on CPTPP to the government. CPTPP function as a tool to stop this protectionism in procurement markets in the Asia-Pacific region and thus Malaysia had no other choice than to adopt and change its preferential and protection mechanisms of Bumiputera policy in its government procurement.

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