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# ARTICLES

## Infrastructure for Commerce

*Michael B. Likosky\**

In *Unlocking the Full Potential of the Information Age*, a publication distributed to prospective foreign investors in the Multimedia Super Corridor, a high technology national development plan and foreign direct investment scheme designed to leapfrog the country into fully developed nation status by the year 2020, the Malaysian government provides the Bill of Guarantees to demonstrate the “Government's Commitment” to companies locating in the Corridor. The executive branch document explains:

Malaysia offers a set of unprecedented incentives to companies involved in the creation, distribution, integration or application of multimedia products and services within the MSC. The generous terms of the 10-point Bill reflect the commitment of the Malaysian Government to MSC-status companies -- and its willingness to remove all obstacles to nurture an environment that encourages the growth of multimedia industries.<sup>1</sup>

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<sup>1</sup> MULTIMEDIA DEV. CORP. MALAYSIA, UNLOCKING THE FULL POTENTIAL OF THE INFORMATION AGE 12, available at <http://www.mdc.com.my/package/>.

This paper concerns itself with the first guarantee, the promise to “[p]rovide a world-class physical and information infrastructure”<sup>2</sup> to MSC-status companies.

Territorially, the MSC runs from the world's largest twin towers, the Petronas Towers in Kuala Lumpur, to the new state-of-the-art Kuala Lumpur International Airport. The Corridor's construction will proceed in three stages. During the first phase, running from 1996 to 2003, the government will construct the physical infrastructure of the Corridor, launch seven flagship applications, produce cyberlaws, build two smart cities and attract world-class foreign companies to locate operations within the corridor. The second phase will run from 2004 to 2010, during which the MSC will be connected to other high technology centres, attract additional foreign companies and further develop the flagship applications. During the third phase, which will run until 2020, Malaysia will reach fully-developed nation status, establish itself as a global test bed for multimedia applications, form an International Cybercourt of Justice and attract another slew of foreign companies.<sup>3</sup>

To promote investment, the government offers a range of incentives to companies. These incentives, the Bill of Guarantees, include commitments:

1. To provide a world-class physical and information infrastructure.
2. To allow unrestricted employment of local and foreign knowledge workers.
3. To ensure freedom of ownership by exempting companies with MSC Status from local ownership requirements.
4. To give the freedom to source capital globally for MSC infrastructure, and the right to borrow funds globally.
5. To provide competitive financial incentives, including Pioneer Status (100 percent tax exemption) for up to ten years or an investment tax allowance for up to five years and no duties on the importation of multimedia equipment.
6. To become a regional leader in Intellectual Property Protection and Cyberlaws.
7. To ensure no censorship of the Internet.
8. To provide globally competitive telecommunications tariffs.
9. To tender key infrastructure contracts to leading companies willing to use the MSC as their regional hub.
10. To provide a high-powered implementation agency to act as an effective one-stop super shop.<sup>4</sup>

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<sup>2</sup> *Id.* at 7.

<sup>3</sup> *See id.* at 6.

<sup>4</sup> *See id.* at 7.

Among the cyberlaws promoted by the government are the *Digital Signatures Act*, *Computer Crimes Act*, *Copyright Amendment Act*, *Electronic Government Act* and the *Multimedia and Communications Act*.<sup>5</sup> The government also plans several high technology infrastructure projects, including, Electronic Government, the Multipurpose Card, Smart Schools, Telemedicine, Research and Development Cluster, Worldwide Manufacturing Webs and Borderless Marketing.<sup>6</sup> By 1999, 232 companies had been granted MSC status. Thirty-three of these companies are global leaders in high technology.<sup>7</sup>

To guide development of the MSC, the government has established an International Advisory Panel, comprised of global leaders in high technology. The Panel meets yearly. Among the members are Craig Barrett, President and Chief Operating Officer of Intel Corporation; Bob Bishop, Chairman of Silicon Graphics World Trade Corporation; Michael Bloomberg, President and Chief Executive Officer (CEO) of Bloomberg; Sir Peter Bonfield, CEO of British Telecom; Professor Sir Alec Broers, Vice Chancellor of Cambridge University; Larry Ellison, Chairman and CEO of Oracle Corporation; Bill Gates, Chairman and CEO of Microsoft; Nobu Yuki Idei, President and CEO of Sun Microsystems; William F. Miller, Professor of Public and Private Management, Computer Science at the Stanford University Graduate School of Business; Jun-Ichiro Miyazu, President of NTT Corporation; Dr. Kenichi Ohmae of Ohmae and Associates; and Alvin Toffler, founder of Toffler and Associates.<sup>8</sup> The MSC is promoted as the Malaysian government's "gift to the world," an "island of excellence"<sup>10</sup> comprising seventy-five of the 331,000 kilometres of the country's sovereign territory.

While the government presents the MSC as the embodiment of the future, structurally it bears remarkable resemblance to the colonial legal orders. The enclave nature of the MSC is reminiscent of the colonial dual legal orders. At the same time, the international legal and economic orders have undergone profound changes. The international legal order is now premised on sovereign absolutism and equality among nation-states. The reigning economic paradigm is high technology rather than manufacturing or the spice trade. Discussion of the continuities and discontinuities between colonial and present day transnational legal orders must thus attend

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<sup>5</sup> See *id.* at 8.

<sup>6</sup> See MULTIMEDIA DEV. CORP. MALAYSIA, SEVEN FLAGSHIP APPLICATIONS, available at <http://www.mdc.com.my/package/>.

<sup>7</sup> See Y.A. Othman, *MSC: Propelling Malaysia into the Information Era*, Paper Presentation before the International Institute of Communications Annual Meeting and Conference (July 9, 1999) (paper on file with author).

<sup>8</sup> See UNLOCKING THE FULL POTENTIAL OF THE INFORMATION AGE, *supra* note 1, at 18.

<sup>9</sup> *Id.* at 2.

<sup>10</sup> *Id.* at 5.

to a number of variables. Further, to the extent possible, rhetoric must be distinguished from practice.

Industrial and high technology enclaves require tremendous physical infrastructure. During the colonial period in Malaysia the extraction of mineral resources from tin mines necessitated the building of railroads, the construction of ports, the migration of workers, etc. Without this infrastructure, goods would have remained in mines and never made their way to international markets. Today high technology economies have infrastructure needs beyond their industrial predecessors. The Internet typically is presented as transcending time and place. However, to build successfully a high technology economy, a country must construct roads, airports, factories and power plants, lay telecommunications lines, train workers, etc. Just as during the colonial period, the creation of an infrastructure is a transnational endeavour. Both capital and skills often lie beyond a country's borders. To create infrastructure, the architects, foreign and domestic oligarchic states and compound corporations, of the transnational commercial domain draw resources selectively from the local political domain. This paper explores the MSC's facilitative infrastructure, including real estate development by Cyberview Holdings, the Kuala Lumpur International Airport, Kuala Lumpur Stock Exchange, the North-South Expressway and also Telekom Malaysia and MEASAT. Before doing so, the next section discusses infrastructure development in proto-Malaysia.

Facilitative infrastructure of the high technology economy includes airports, banking networks, fibre optic cables, power plants, railway lines, roads and satellites. The construction of each requires foreign and domestic actors. European, Japanese and US companies possess the bulk of infrastructure research and development resources. Many of these companies are the product of privatizations. Although foreign companies play a major role in infrastructure sectors, typically oligarchic governments partner with home state compound corporations to coordinate and oversee projects.

Infrastructure production in developing countries occurs at the intersection of the privatization and globalisation processes. Public and private laws facilitate and subsequently regulate infrastructure projects. As foreign and domestic and also public and private actors and laws are involved in most projects, infrastructure law is transnational. Based on the speculative or entrepreneurial nature of infrastructure construction, commentators often define the field as project finance, referring to a model of financing infrastructure projects whereby costs of building are recouped after construction through incremental user charges. Lawyers term this field "project finance law."<sup>11</sup>

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<sup>11</sup> See CLIFFORD CHANCE, *PROJECT FINANCE* (1991); SCOTT L. HOFFMAN, *THE LAW AND BUSINESS OF INTERNATIONAL PROJECT FINANCE: A RESOURCE FOR GOVERNMENTS, SPONSORS, LENDERS, LAWYERS, AND PROJECT PARTICIPANTS* (1998); GRAHAM D. VINTER, *PROJECT FINANCE, A LEGAL GUIDE* (2nd ed. 1996).

## I. PROTO-MALAYSIA

During the colonial period, integration of proto-Malaysia into the transnational commercial order depended upon facilitative infrastructure. Governments built infrastructure to shift economies away from transshipment and towards agriculture and mining. Proto-Malaysia proved rich in rubber and tin. Extraction of tin and its transportation to international markets required building mines, importing labor, laying railroads lines and constructing ports. In the late nineteenth century, the British laid vast stretches of rail lines throughout the world. In proto-Malaysia foreign public and private actors partnered with domestic Malay and Chinese political and commercial elites to build railways. In addition, railway construction and operation required large labor pools. The colonial government dictated macro-strategy and the British Residents carried out construction at the state level.

The proto-Malaysian infrastructure projects faced similar challenges as present-day project financiers face. Infrastructure projects required mobilizing the support of multiple political jurisdictions and private corporate actors. Support provided was financial and political. Tasks and risks were spread over multiple parties. Projects faced political, commercial and environmental risks. Typically statutorily-created government departments coordinated and carried out projects under the Crown prerogative. Using prerogative powers, the government created public corporations to guide projects. Also, governments passed an array of legislative enactments to remove impediments to the projects and to ensure project policies would carry the force of law. The following subsections discuss colonial infrastructure projects, focusing on banks, railways and tin mines.

### A. Banks

The financing of overseas enterprises required establishing a banking network. In the mid-nineteenth century, the British undertook overseas banking in earnest. Depreciation of domestic monetary rates forced banks to journey overseas in search of more productive employment of resources. For this reason, entrepreneurs in overseas territories found infrastructure financing readily available. According to A. S. J. Baster, "Cheap and easy money for overseas borrowers was at any rate a striking characteristic of the period in which the first Empire banks were founded."<sup>12</sup> Initially, chartered companies controlled overseas banking.

For the first half of the eighteenth century, the East India Company enjoyed monopoly rights by Crown charter over banking in large regions of the Far East. The Company opened its own banks and granted several private enterprises the right to carry out banking activities. Company control over banking was short lived. From 1829 to 1832 a number of banks failed.

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<sup>12</sup> A.S.J. BASTER, *THE IMPERIAL BANKS* 2 (1929).

The sole survivor was the Bank of Bengal, which the Company owned and appointed three of nine directors. Nonetheless, the Company continued to guard its monopoly position, a position that eroded as exchange banks entered the East Asian region.

In expanding into the Far East, exchange banks had to contend not only with the Company but also the Chinese government. China took an unfriendly stance towards incursion of British Banks into its political sphere. The Chinese stance was in part a protective response on behalf of its own banking networks. Throughout the nineteenth century, an extensive network of Chinese banks spread throughout Asia. Nonetheless, proceeding on a piecemeal basis, exchange banks progressively made inroads into the Chinese territory.

Chinese banking houses financed much of the entrepreneurial activity of Overseas Chinese communities throughout East Asia.<sup>13</sup> Reflective of the range of commercial enterprises undertaken by Overseas communities, banks financed farming, insurance, shipping, tin-mining and trade.<sup>14</sup> These banks also acted as intermediaries for European banks. Raj Brown explains the intermediary system:

These Chinese business houses also recruited funds from Western banks and Indian capitalists. Western banks preferred to deal with intermediaries rather than with the community at large and here the Chinese presented themselves as useful agents. For example the Hongkong Bank injected funds into the domestic capital markets by providing loans to Chinese capitalists or bank compradores who then on-lent them to merchants, producers and specialized remittance houses. This limited risk in lending, and overcame the difficulties inherent in westerners' imperfect knowledge of the local population. The Chinese compradore-capitalist link hence channelled capital from Europe and elsewhere into the local market.<sup>15</sup>

Intermingling of the colonial commercial enterprises with Chinese banking houses involved compounding of public and private law functions. For instance, colonial governments regularly granted to Chinese banks and entrepreneurs the public law powers of taxation and monopoly rights.

A small and influential group of Chinese families controlled the banking network. The families interpenetrated East Asian economies. A single family often controlled several sectors of the nominally British colonial economy. For instance the Khaw group played a dominant role in Penang:

The Khaws were based in the British colony of Penang and had strong connections with the elite in neighbouring Siam [Thailand]. The family's fortunes from opium farming were invested in an insurance company and in the Koh

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<sup>13</sup> See Raj Brown, *Chinese Business and Banking in (Southeast) Asia Since 1870*, in *BANKS AS MULTINATIONALS* 173 (Geoffrey Jones ed., 1993).

<sup>14</sup> See *id.* at 174.

<sup>15</sup> See *id.* at 175.

Guan Trust. ... These trustees later invested in Eastern Shipping (1907) and in Eastern Smelting (1907). ... By 1920 it had 40 sailing vessels (sold in 1923 to the Straits Steamship Company for \$2m). Eastern Smelting, which smelted ore from the Khaw tin mines of southern Siam, accounted for 18 per cent of all smelting ore shipped from Penang by 1908. Two years later this had increased to 29 per cent. Obviously Khaw Soo Cheang's appointment as Governor of Southern Siam in the 1890s, and his close liaison with the British authorities in Penang, contributed to the influence of the firm in Siam, Malaya, Sumatra and even Burma.<sup>16</sup>

Importantly, the *Treaty of Nanking* signed in 1842 established five treaty ports that permitted foreign banks. When several East India Company banks declared bankruptcy, the Crown, in spite of staunch Company opposition, in 1834 chartered the Oriental Banking Corporation.<sup>17</sup>

The Oriental Banking Corporation enjoyed unparalleled prestige in the region even as new entrants proliferated during the nineteenth century. The Bank managed a 13% annual average return on investments from its founding until the crash of 1866.<sup>18</sup> Its board of directors was comprised of leading London bankers and persons well connected to the East India Company.<sup>19</sup> During the nineteenth century the Bank established an extensive network of branches throughout Asia. Branches existed in Bombay, Calcutta, Cape Town, Colombo, Durban, Foochow, Hiogo, Hong Kong, Kandy, Madras, Mauritius, Melbourne, Port Elizabeth, Sydney, Point de Galle, Shanghai and Yokohama. In 1884 a number of national crises and management problems precipitated the liquidation of the Company banks. In the wake of the crisis, the Eastern Exchange Banks, a network of British Banks operating in the East, Southeast and South Asia, emerged.<sup>20</sup>

Eastern Exchange Bank branch locations were located in many British-controlled East Asian territories. As Geoffrey Jones notes, "There was an obvious correlation with the boundaries of British Empire, with the bank holding prominent positions in the major centres of British political and commercial influence in the East: Hong Kong, Singapore, Calcutta and Bombay."<sup>21</sup> Colonial governments held accounts in the exchange banks.<sup>22</sup> Also banks were involved in the range of commercial enterprises comprising the colonial economy. To meet this need, banks offered varied prod-

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<sup>16</sup> See *id.* at 175-176.

<sup>17</sup> See A.S.J. BASTER, *THE INTERNATIONAL BANKS* 160-161 (1935).

<sup>18</sup> Baster, *supra* note 18, at 163.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 163-164.

<sup>21</sup> Geoffrey Jones, *Lending and the HRM Strategies of British Multinational Banks in Asia Before 1960*, in *DISCUSSION PAPERS IN INTERNATIONAL INVESTMENT AND BUSINESS STUDIES*, at 2-3 (University of Reading Department of Economics, Series B, Vol. VI, No. 178 1993/94).

<sup>22</sup> See *id.* at 3-4.

ucts, including investment, retail and service.<sup>23</sup> Although banks projected an image of staunch lending conservatism, the financing of the colonial economy necessarily involved financial innovation and experimentation.

Bankers experimented with innovative techniques to facilitate lending to financially successful and socially closed ethnic groups. For instance, Chinese business communities were notoriously guarded with information concerning internal affairs. Jones explains, "Dependence on Asian business provided a constant temptation to 'sin', or to relax the tenets of British banking orthodoxy."<sup>24</sup>

Eastern exchange banks did not limit lending to clients able to put up appropriate security and to demonstrate liquidating assets. Investments were made in infrastructure and long-term speculative enterprises. For instance, the treaty ports in China, Bangkok and Manila were all financed by the Hongkong Bank. Also, banks invested in utilities and manufacturing.<sup>25</sup> Jones notes that the banks "were certainly intimately associated, through interlocking directorships and long-standing business relationships, with the other British interests in Asia: the trading companies, agency houses, shipping companies and mines and plantation enterprises which played such an important role in parts of the Asian economies."<sup>26</sup> Since enterprises were carried out through colonial political structures, lending patterns mirrored political patterns.

Banking and commercial networks utilised ethnic intermediaries. Just as the system of indirect rule depended upon an indigenous elite to mitigate political risk, so did the Exchange banks. The same paradoxes engendered by this intermediary system characteristic of the political order were also manifest in the financial sector. Foreign capital was instrumental in aggrandising the position of politically-favored elites. By throwing financial support behind these elites, British bankers became stakeholders in the maintenance of local elites' political positions. A similar set of relationships characterises the building of tin mines and railways.

#### B. Rails and Tin

Railways and tin mines existed throughout proto-Malaysia.<sup>27</sup> Construction and operation of railways occurred on the advice of the British Resident. The federal government and various state governments financed the railways. In a ceremonial speech at the opening of a railway linking Klang and Kuala Lumpur, Rajah Laut of Kuala Lumpur paid verbal tribute

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<sup>23</sup> See *id.* at 2.

<sup>24</sup> *Id.* at 13.

<sup>25</sup> See *id.* at 4.

<sup>26</sup> *Id.* at 5.

<sup>27</sup> Rubber also figured prominently in the colonial economy. COLIN BARLOW *THE NATURAL RUBBER INDUSTRY: IT'S DEVELOPMENT, TECHNOLOGY AND ECONOMY IN MALAYSIA* (1978).

to the role of the Governor of the Straits Settlement in effectuating the project:

From the fulness of our hearts we bid you welcome to this our country, and make known to Your Excellency that it affords us great pleasure, as also all the merchants and Malay inhabitants of the State, to observe the light of your countenance by day and by night in this unenlightened place; having been enlightened now thereby, we are now enabled to bask in the sunshine of your presence, therefore we the merchants, traders and general inhabitants feel very much elated at the arrival of Your Excellency on this great occasion. . . . Previous to the British Government affording us its advice in placing a Resident here to look after the welfare of Selangor, we felt like one wandering in the jungle, our way beset by thorns and thickets. If we were not careful how we guided our footsteps we should inevitably have stepped on the thorns and wounded our feet. Therefore since the arrival of the British Resident in the country, we have felt as one elevated up and placed between Earth and Sky. So great has been the change from our previous to our present condition.<sup>28</sup>

The other speeches at the railway opening also suggest, through their flowery prose and effusive mimicry of British imperial purpose, that sovereignty was created through symbolic acts of tribute.<sup>29</sup> Along these lines, Laut goes on to congratulate the British for achieving all of the imperial goals:

The first and most important change is that now peace and prosperity reign throughout and confusion is unknown, so that all can dwell in peace and safety. The second is that foreigners and strangers now come in crowds, much to the profit of the country. Thirdly – all the laws are just, therefore everyone is settled in peace. Fourthly – the country has been opened up and improved by means of roads so that all can easily come and go. Fifthly – This our railway is now made in order to facilitate our means of transport and to assist in the development of this State, in order that the traders and others may work with profit to themselves and to the Government. Places that were far away have now been brought near, and goods that were dear have now become cheap.<sup>30</sup>

From the sound of things, progression to the higher plane had been effectuated. A narrative of progress underscoring the relationship between civilization and commerce characterises the opening ceremonies of each railway.

Railways linked the vast territories comprising the British Empire. Connections among distinct political units had already been forged through

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<sup>28</sup> FEDERAL MALAY STATES RAILWAYS, FIFTY YEARS OF RAILWAYS IN MALAYA, 1885-1935 11 (1935).

<sup>29</sup> See ARTHUR S. KELLER, OLIVER J. LISSITZYN, AND FREDERICK J. MANN, CREATION OF RIGHTS OF SOVEREIGNTY THROUGH SYMBOLIC ACTS: 1400-1800 49-99 (1938) (discussing the relationship between transfers of sovereignty and symbolic acts).

<sup>30</sup> FIFTY YEARS OF RAILWAYS IN MALAYA, *supra* note 26, at 11.

shipping lines. However, railways created further synergies and deepened the reach of the British in overseas territories. The laying of rail also facilitated the building of ports and the multiplying of mines in the inland territories. Often, rails crossed politically distinct sovereign units and integrated territories for common commercial purposes. For instance, connections among the Federated and Unfederated Malay States and the Straits Settlements were laid through rail lines and bridges.<sup>31</sup> As each political territory maintained a modicum of sovereignty over its internal affairs under the British Resident System, the coordination of rail plans required inter-state coordination. In fact, money was often lent from one state to another as capital was pooled to make such an ambitious undertaking possible.

The construction of rails occurred through the exercise of the crown prerogative. The Crown created a public compound company, the Railway Administration, to oversee the planning, building and operating of railways. The Crown empowered the Administration to undertake a range of enterprises, including laying rail, building houses, warehouses, offices, constructing schools and overseeing inter-state negotiations. The colonial government monitored the Administration.<sup>32</sup> As well, the Administration could be sued as an independent corporation.<sup>33</sup>

Railways facilitated the transport of tin from mines to ports. Tin extraction required, among other things, the construction of mines and amendment of labor and land laws. In addition, the operation of mines required a steady flow of water. Thus, the power of the Residents to issue licenses to use waterways proved important. The government controlled all rivers, streams and waterways within its territories. Also, the Resident controlled the land over which water pipes would run. This power grew in importance as in the 1840s and 1850s speculators discovered large amounts of tin in the inland territories.<sup>34</sup>

In the early twentieth century, three quarters of the world's tin was drawn from proto-Malaysia.<sup>35</sup> Up until 1911, control over the mines was vested in state governments.<sup>36</sup> According to C. J. Alford, in practice: "These states are nominally under native rulers, but are in fact governed by the British Political Residents appointed to each native State and acting un-

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<sup>31</sup> See AMARJIT KAUR, *BRIDGE AND BARRIER: TRANSPORT AND COMMUNICATIONS IN COLONIAL MALAYA* 31 (1983).

<sup>32</sup> CHARLES J. ALFORD, *MINING LAW OF THE BRITISH EMPIRE* 6 (1906).

<sup>33</sup> See *id.* at 23.

<sup>34</sup> See KAUR, *supra* note 29, at 6.

<sup>35</sup> See ALFORD, *supra* note 30, at 69.

<sup>36</sup> See *id.* at 71 ("Subject to the provisions of this Enactment the Resident may from time to time on behalf of the Ruler of the State lease State land for mining purposes"); *id.* at 73 ("Renewals of such exemption may, at the discretion of the Resident, be granted in like manner"), and *id.* at 79, ("This lease is granted by the Sultan of Pahang, acting on the advice of the British Resident").

der the supreme control of the Government of Singapore.”<sup>37</sup> After 1911, with the consolidation of the Federated Malay States, mining was federalized and was governed by the *Mining Enactment, 1911*.<sup>38</sup> Mining was undertaken through a concessionary system. Companies were granted concessions that afforded public law powers such as policing and also fee and tax collection.<sup>39</sup> Also, the state continued to work on behalf of companies,<sup>40</sup> and it typically retained the right to expropriate the mine upon payment of due compensation.<sup>41</sup>

Rails were laid to transport tin resources from mines to ports. The first tin mines were built in Taiping. To bring tin to the nearest port, Port Weld, the British built the first railroad in the region connecting the two areas. This railway line ran eight and one half miles.<sup>42</sup> As tin was discovered elsewhere, additional rail lines were laid. For instance, the government connected through rail Klang and Kuala Lumpur (1886), Seremban and Port Dickson (1891), Teluk Anson and Tapah Road (1893) and Prai and Bukit Mertajam (1899).<sup>43</sup> While lines extended in a piecemeal fashion and in response to practical needs, in 1903 all lines were connected to one another. In the early nineteenth century, railroads were built linking Singapore and mainland Malaysia. This link superceded the ferry system that had previously transported persons and goods across the waterway.<sup>44</sup>

The laying of rails often preceded the extraction of mineral resources.<sup>45</sup> Lines were considered an essential facilitative investment and constituted an early form of project finance. Financing decisions were based on projected value. Financing was forthcoming if the bank decided that the rail lines would be used in large enough volume to recoup the capital invested and to turn a profit. For example, the building of a rail connecting Kamunting and Kuala Kangsar was advocated by the Resident Engineer and Traffic Manager of the proposed project on the basis of its expected profitability.<sup>46</sup> The Taiping-Port Weld line's reduction in transport cost was used as a yardstick to judge the proposed rail's profitability. In his annual report, the engineer pointed out that it was “cheaper to send a load of rice from Port Weld to Taiping (8 miles) than from Taiping to Kamunting (3 1/2

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<sup>37</sup> See ALFORD, *supra* note 30, at 69.

<sup>38</sup> See 7 GILBERT STONE, *THE MINING LAWS OF THE BRITISH EMPIRE AND OF THE FOREIGN COUNTRIES: FEDERATED MALAY STATES, MINING ENACTMENT OF 1911* 3-4 (1925).

<sup>39</sup> See *id.* at 5.

<sup>40</sup> See *id.* at 7.

<sup>41</sup> See *id.* at 5, 88.

<sup>42</sup> FIFTY YEARS OF RAILWAYS IN MALAYA, *supra* note 26, at 27.

<sup>43</sup> *Id.* at 28-29, 32-33.

<sup>44</sup> J.A. STANISTREET, *THE MALAYAN RAILWAY* 5-6 (1973).

<sup>45</sup> Prior to the railways, tin was transported via the waterways. See Kaur, *supra* note 29, at xvi.

<sup>46</sup> See FIFTY YEARS OF RAILWAYS IN MALAYA, *supra* note 26, at 27-28. For a discussion of the use of statistics, see Stanistreet, *supra* note 45 at 17-21.

miles).”<sup>47</sup> According to the engineer, the cost of transport impeded “the opening up and working of mines in the Kamunting District and beyond.” The cost of the line was justified on the basis of expected income even though it “might not prove immediately remunerative.”<sup>48</sup>

The Crown chartered a public corporation, The Federated States Railway (F.M.S. Railway), to lay rails.<sup>49</sup> While early construction projects were carried out by contract, over time it proved more profitable and efficient for the Corporation itself to complete projects. The contractual means of building railroads caused such difficulties that a proposed line connecting Ipoh and Tapah road was cancelled. The Resident Engineer for Railways urged a shift to governmental construction:

I think I may safely say that experience has shown that in Perak it is not advisable to let the Railways by contract. My experience of Railway work, at the Cape, in Ceylon and here, is conclusive that, with an efficient staff, a Government can construct its own Railways more economically and expeditiously, and ensure better work, than if a contractor is employed.<sup>50</sup>

The provision of public goods within the colony was afterwards undertaken by the F.M.S. Railway.<sup>51</sup> While the F.M.S. Railway directed the projects, state governments typically financed them. When rail construction over-taxed state budgets, colonial governments stepped in with loans.<sup>52</sup>

Construction required not only a tremendous expenditure of money but also workers. The division of labor fell along ethnic lines. High-ranking officials were of European descent and construction was carried out by Chinese and Malay workers.<sup>53</sup> During the opening ceremony of the Klang-Kuala Lumpur Line in 1886, Mr. Roger, the Resident of the State of Selangor, thanked “two of the principal members of our Chinese community, the Captain China, and Towkay Ah Yok, who, on recently hearing that there was great difficulty in obtaining a sufficient labor force, came forward in the most public spirited manner and supplied the government with 300 mining coolies.”<sup>54</sup> In providing assistance, Chinese leaders drew from their mining workforce, inspiring Mr. Rogers to commend them for providing workers “at a time when such assistance was of the utmost value in accelerating the progress of the works, and although the removal of so large a body of men from the mines must have caused them serious inconvenience, more

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<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> See the Railway Ordinance, Malayan Union No. 8 (1948).

<sup>50</sup> Stone, *supra* note 26, at 28.

<sup>51</sup> *Id.* at 29.

<sup>52</sup> *Id.* at 10.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 10.

especially having regard to the present high price of tin.”<sup>55</sup> Ultimately, the Chinese leaders profited from the railways that facilitated quicker and more efficient shipment of tin.

To meet this need, the construction and operation of railways also required technical expertise. Engineers were contracted from London.<sup>56</sup> Also, technical skills were necessary to run a railway. For this reason the government invested in educational institutions in proto-Malaysia, founding the Government Technical School, a two-year program. In addition, an extensive apprenticeship programme was instituted, comprising a five-year training course at the Central Workshops and evening classes in machine drawing and workshop mechanics.<sup>57</sup>

Railway construction involved the coordination of political jurisdictions within proto-Malaysia. In addition, the projects had to contend with many of the risks typical of present-day project finance endeavours. For example, an economic crisis in 1921 meant aborting a segment of the railway and a planned hotel at one of the rail stops.<sup>58</sup> In addition, environmental risks were faced. Floods were inevitable and caused loss of human lives and property damage.<sup>59</sup>

Commercial development of the colonies also involved the building of ports to transport goods. The F.M.S. Railway built, owned and operated a number of ports in proto-Malaysia. These ports included Port Weld, Klang, Port Swettenham, Port Dickson, Tumpat, Kota Bharu, Palekbang and Penang. As technological developments allowed, several ports were upgraded from wood to steel superstructures.<sup>60</sup> Many of the same infrastructure concerns manifest in proto-Malaysia recur during the present era.

## II. HIGH TECH INFRASTRUCTURE

Despite the rhetoric of newness and virtual existence, the information economy depends upon physical infrastructure. Telecommunications and satellites, for instance, are required for information to travel from one computer to another. While discussion of infrastructure is often limited to fibre-optic cables, telephone lines, satellite feeds and cellular telephones, these connectors are just the tip of the iceberg. For example, not all high technology goods travel over the Internet. In e-commerce transactions, while contracts may be entered into and payment transfers occur over the Internet, the promised goods must often be physically delivered from the buyer to the seller. This delivery depends upon well-functioning and efficient trans-

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<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 11.

<sup>57</sup> *Id.* at 3-5.

<sup>58</sup> *Id.* at 47.

<sup>59</sup> *Id.* at 49-51.

<sup>60</sup> *Id.* at 51-53.

portation systems, including airports, roads and seaports. In addition, manufacturing of the goods in the first place requires infrastructure. This infrastructure is traditional and includes power plants and factories. In many developing countries historically reliant on natural resource extraction, power supplies are severely inadequate. Also, workers must be trained to staff factories. As a country moves up on the international high tech value chain, labor needs change. To meet these new needs, governments must train knowledgeable workers. This training requires staffing university departments, promoting worker training abroad and an incentive scheme to ensure that foreign-trained workers return home.

Developing countries often lack the necessary expertise or pools of finance capital to create infrastructure for the new economy. In the U.S., much of the research spurring infrastructure development has taken place within the universities. During the Cold War, the government invested tremendous amounts of money in university science departments. The result was the Internet, innovations in telecommunications and advances in aeroplane development. Prior to the disintegration of the Soviet Union, governments began to privatise and increasingly promote the commercialisation of these Cold War public goods. Thus, privatization in the U.S. involved not only the transfer of public services and the recession of the welfare state, but also the placing of public research and development assets into private hands.

In the late 1970s and early 1980s, the U.K. and U.S. embarked on privatization programmes. Through privatization, the provision of previously government-provided public services was transferred into private hands. Telephone companies, roads, prisons and a range of other publicly owned and controlled services were privatized. Privatization not only provided companies with the opportunity to turn a profit from public service, but it also meant that increasingly publicly-financed and publicly-held research and development assets were placed in private hands. Thus, expertise that had accumulated throughout the Cold War to fuel the military industry could be sold on the open market. While the public at large had financed a tremendous accumulation of wealth in the form of technology, it was now disproportionately controlled by a small group of private companies.

Privatization was not a one-off deal in the 1980s. The growth of the military during the Cold War occurred through a range of legal mechanisms. Often through licensing and subsidies, governments invested in private firms and universities. Agreements sometimes stipulated that technology produced by public funds would be owned by the government. However, frequently, the right to pursue commercial applications for the subsidised technology remained in private hands. This commercialisation of high technology products accelerated during the 1970s and 1980s.

As companies consolidated domestic holdings and matured business plans, contemporaneous privatizations began abroad in developing countries. Ownership or control of many of the same industries transferred into

private hands. Importantly, developing countries did not possess the expertise of their modernised counterparts so privatization in developing countries involved not only the transfer of assets but also the transfer of monopoly rights over the provision of yet-to-be-built public services into private hands.<sup>61</sup> For example, if a country did not possess a satellite of its own, privatization could not involve the transfer of pre-existing satellites. Instead, the power to build, control, sometimes own and certainly to profit from a to-be-built satellite transferred into private hands.

Since expertise in high tech infrastructure resided primarily in the hands of companies in Europe, Japan and the U.S., privatization in developing countries included a foreign component. Newly created or commercialised companies in developing countries sought the expertise of foreign companies to build telecommunications lines, to launch satellites and to construct airports. So, privatization and globalization travelled together. As a country privatized an industry, it purposively opened itself up to foreign companies. Since foreign companies were the primary repository of infrastructure expertise, developing countries ran a risk of foreign-ising their public sector through privatization programs.

To hedge against the possibility of a wholesale transfer of public assets to foreign private hands, developing countries instituted a range of legal mechanisms to control privatization processes. Counter to the rhetoric of privatization, the process was not simply the transfer of ownership from public to private hands. Ownership transfers might be only partial, and they included changes in equity, limited term concessions agreements and a shift to a stock market intermediary. Often, ownership was retained and the transfer was of control through contract or licensing. For instance, in Malaysia, the government retains a "right of compulsory acquisition" over privatization projects.<sup>62</sup> Nonetheless, privatization is often presented as a *fait accompli* with public ownership transferred to private hands in one legislative act. An understanding of the actual legal mechanisms employed in privatization is necessary to judge the reality of the privatization rhetoric.<sup>63</sup>

Malaysia's privatization process involves a tremendous array of legal mechanisms. Shortly after privatization in the U.K. and the U.S., Malaysia initiated its privatization policy in 1983.<sup>64</sup> Malaysia was one of the first developing countries to embark on privatization. It also has been an innovator in privatization techniques. Further, the success of Malaysia in nurturing a high technology economy has been facilitated by this now decades old pri-

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<sup>61</sup> This approach resembles the newly-independent states' approach to planning.

<sup>62</sup> "Malaysia" (9/1994) Project and Trade Finance 84.

<sup>63</sup> See Meredith M Brown *Privatisation: A Foretaste of the Book* in Meredith M Brown and G Ridley, (eds.), *PRIVATISATION: CURRENT ISSUES* (1994) xv. For a nuanced definition in the UK context see CG Veljanovski *SELLING THE STATE: PRIVATISATION IN BRITAIN* (1987).

<sup>64</sup> Privatization Master Plan, 1988.

vatization process. Current studies on the information economy do not adequately account for the place of these privatizations of the 1980s and the role of law therein.

In 1983, the Prime Minister announced Malaysia Inc. as the principle that would guide the country's orientation towards national development. Malaysia Inc. was an explicit reference to Japan Inc., a term derogatorily applied to the Japanese approach to development during the 1970s.<sup>65</sup> The concept was a component of a broader *Look East Policy* initiated by the Prime Minister.<sup>66</sup> This *Policy* was premised on emulating the successful development policies of Japan. According to Jomo K. S., the strategy was more cynical: "The real thrust of the campaign appears to be the promotion of labor discipline through organising industrial relations to promote company loyalty (e.g. propaganda campaigns, company welfarism, in-house unions), increase productivity (e.g. work ethics, more 'incentive payments') and reduce losses (e.g. quality control circles, 'zero defect' groups)."<sup>67</sup>

This framing of the country's approach to economic development with an eastern hue also underpins the public international law controversy over universal human rights and Asian values.

Malaysia was one of the first developing countries to institute a privatization process and has been a global leader in innovative financing techniques. Malaysia Inc. conceives of the relationship between the public and private sectors as based on close collaboration and mutual understanding.<sup>68</sup> Through strategic partnership, the two sectors cohere into one giant corporation. This oligarchic concept also provides an indication of Malaysia's approach to privatization. By employing the Malaysia Inc. concept, Malaysia makes clear that, even when a public good is transferred into private hands, the government will continue to play a proactive regulatory role on behalf of the privatized industry.<sup>69</sup> Mahathir described the functions of the government under Vision 2020:

The government will be proactive to ensure healthy fiscal and monetary management and the smooth functioning of the Malaysian economy. It will escalate the development of the necessary physical infrastructure and the most conducive business environment – consistent with its other social priorities.

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<sup>65</sup> MAHATHIR MOHAMAD A NEW DEAL FOR ASIA (1999).

<sup>66</sup> The Look East Policy and its relationship to social developments in Malaysia is discussed at length in the political science literature. See, e.g., Richard Robinson and David S.G. Goodman, *The New Rich in Asia: Economic Development, Social Status and Political Consciousness*, in *THE NEW RICH IN ASIA: MOBILE PHONES, McDONALD'S AND MIDDLE CLASS REVOLUTION 1* (Richard Robinson & David S. G. Goodman eds., 1996); MICHAEL R. J. VATIKIOTIS, *POLITICAL CHANGE IN SOUTHEAST ASIA: TRIMMING THE BANYAN TREE* (1996).

<sup>67</sup> K.S. JOMO, *GROWTH AND STRUCTURAL CHANGE IN THE MALAYSIAN ECONOMY* 203 (1990).

<sup>68</sup> MAHATHIR MOHAMAD A NEW DEAL FOR ASIA (1999).

<sup>69</sup> K.S. Jomo *Privatization*, in *MALAYSIA'S ECONOMY IN THE NINETIES* 203 (1994).

And where absolutely necessary the government will not be so completely bound by its commitment to withdraw from the economic role, that it will not intervene. It will play its role judiciously and actively.<sup>70</sup>

The government typically retains an ownership share in the privatized enterprises and benefits from a thirty-five percent tax on all enterprise.<sup>71</sup>

From independence in 1957 until the initiation of privatization in 1983, the government carried out public sector projects using public enterprises.<sup>72</sup> Prior to the initiation of its Malaysia, Inc. concept, compound companies in Malaysia were generally public corporations proper. With the shift to Malaysia, Inc., compound corporations persisted albeit with a different composition. The Malaysian government has established compound corporations to carry out a range of enterprises.<sup>73</sup> These enterprises exist in many sectors of the economy, including, agriculture, banking, commerce, finance, industry, primary industries, and public utilities.<sup>74</sup> Under the National Economic Policy, the government established public corporations for the purpose of redistributing economic opportunity to the Bumiputras.<sup>75</sup> These federal government ventures are typically either statutory bodies<sup>76</sup> or government

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<sup>70</sup> MAHATHIR, *Inauguration Speech of the Malaysian Business Council*, in MALAYSIA'S VISION 2020: UNDERSTANDING THE CONCEPT, IMPLICATIONS AND CHALLENGES, 397, 410-411 (A. Sarji ed., 1997).

<sup>71</sup> Privatization Master Plan, 1988.

<sup>72</sup> See M.P. JAIN, ADMINISTRATIVE LAW OF MALAYSIA AND SINGAPORE 827-850 (3rd ed. 1997).

<sup>73</sup> The actions of these companies have a legislative quality and may be viewed as an instance of subsidiary legislation. Subsidiary legislation is "any order in council, proclamation, rule, regulation, order, notification, by-law, or other instrument made under any Ordinance, Enactment, or other lawful authority and having legislative effect." Interpretation and General Clauses Act, No. 7-88 (1948) (Malayan Union).

<sup>74</sup> JAIN, *supra* note 64, at 445.

<sup>75</sup> This was the rationale for establishing Perbadanan Nasional Berhad (PERNAS) in 1969. PERNAS was a private company registered in 1969. It was a joint enterprise formed by the government and several other governmental bodies. The purpose was to promote the participation of Malays in industry. In order to carry out this mission, PERNAS established a number of subsidiary companies. By 1976 there were 64 subsidiary companies. *Id.* at 443-44.

<sup>76</sup> For instance, Bintulu Port Sdn Bhd, The Commodities Trading Commission, Employees Provident Fund, Farmers Organisation Authority, Federal Agricultural Marketing Authority, Federal Land Consolidation and Rehabilitation Authority, Federal Land Development Authority, Fisheries Development Authority of Malaysia, Forest Research Institute of Malaysia, Johor Port Authority, Klang Port Authority, The Kuala Lumpur Commodity Exchange, Kuala Lumpur Future Market, Kuala Lumpur Stock Exchange, Kuantan Port Authority, Kuching Port Authority, Malaysia Agricultural Research and Development Institute, The Malaysian Cocoa Board, Malaysia External Trade Development Corporation, The Malaysian Highway Authority, Malaysian Industrial Development Authority, Malaysian Pineapple Industry Board, Malaysian Rubber Development Corporation, Malaysian Rubber Exchange and Licencing Board, Malaysian Rubber Research and Development Board, Malaysian Timber Industry Board, The Mines Research Institute, National Tobacco Board, Palm Oil Registration and Licencing Authority, Palm Oil Research Institute of Malaysia,

owned or controlled corporations.<sup>77</sup> In addition many state statutory bodies are in existence, enabled by a federal act, the *Incorporation (State Legislatures Competency) Act of 1962*<sup>78</sup>, which empowers state governments to establish public corporations.<sup>79</sup> Ultimately, however, these corporations are formally under the control of the federal government.<sup>80</sup>

Public corporations are created either through an act of Parliament or under the *Companies Act*. When established by statute, oversight mechanisms are provided through the terms of the constitution and company financing. Those corporations requiring funds from Parliament must notify Parliament of estimates of expenditures, and of major capital expenditures, and also to submit annual reports.<sup>81</sup> When a company is incorporated under private law, government control is generally exercised through private law ownership mechanisms. Public corporations are generally granted a number of advantages. If the company is entrusted with carrying out a particular commercial or industrial activity, then it may be granted monopoly rights. To encourage efficiency, public corporations may hire their employees under private law. Thus, they are exempt from civil servant requirements,<sup>82</sup> but liable under contract and tort.<sup>83</sup>

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Penang Port Sdn Bhd, Pepper Marketing Board, Pilgrims Management and Fund Board, Railway Asset Corporation, Rubber Industry Smallholders' Development Authority, Rubber Research Institute of Malaysia, Sabah Electricity Board, Sarawak Electricity Supply Corporation, Securities Commission, Tin Industry (Research and Development) Board, & Urban Development Authority.

<sup>77</sup> For instance, KTM Berhad, Malaysian Industrial Development Finance Berhad, Malaysian Industrial Estates Sdn Bhd, Malaysian International Shipping Corporation Berhad, Malaysian Technology Development Corporation Sdn Bhd, MIMOS Berhad, National Paddy and Rice Company Limited, Petroleum Nasional Berhad, Pos Malaysia Berhad, Syarikat Telekom Malaysia Berhad, & Tenaga Nasional Berhad.

<sup>78</sup> Incorporation (State Legislatures Competency) Act, No. 15-3 (1962). (Fdn. of Malaysia).

<sup>79</sup> These include, Johor Corporation—En. 4 of 1968, Kedah State Development Corporation—En. 5 of 1965, Kelantan State Economic Development Corporation—En. 10 of 1966, Malacca State Development Corporation—En. 1 of 1971, Negeri Sembilan Development Corporation—En. 4 of 1969, Pahang State Development Corporation—En. 12 of 1965, Penang Development Corporation—En. 10 of 1971, Perak State Development Corporation—En. 3 of 1967, Perlis State Economic Development Corporation—En. 6 of 1973, Selangor State Development Corporation—En. 4 of 1964, Terengganu State Economic Development Corporation—En. 3 of 1965, Sabah Economic Development Corporation—En. 21 of 1981 & Perbadanan Pembangunan Ekonomi Sarawak—Cap. 35.

<sup>80</sup> The federal government may exercise control over these state corporations in a variety of manners. The Prime Minister appoints three federal representatives as members of the respective corporation. Incorporation (State Legislatures Competency) Act 1962, Act 380, Second Schedule (5). The Minister of Finance also exercises influence on activities involving assets and investment and borrowing. *Id.* at (13) & (14) respectively.

<sup>81</sup> R.H. HICKLING, MALAYSIAN PUBLIC LAW 211 (1996).

<sup>82</sup> Civil servant requirements are laid out in Part X of the Constitution.

<sup>83</sup> HICKLING, *supra* note 73 at 213.

In Malaysia, oversight of public corporations is limited in a number of respects. For a company created by an act of Parliament, most of the control is exercised at the point of inception. However, once the company is created, the exercise of control becomes more difficult. Although ministers are often granted powers over the companies by statute, once the company is formed, the relevant minister is not responsible to parliament for its actions. Oversight is limited to broad policy issues and does not extend to the daily operations of the company. However, the Minister does retain certain rights. Since the Minister may have the power to appoint members to the board of the company, she also has the power to remove them.<sup>84</sup> The Minister does retain a number of powers over the direction of the public corporation, but rarely exercises them. Intervention by the Minister is generally limited to regulations made for the company or to approve the regulations made by the company.<sup>85</sup>

Since the mandate of a company is typically stated in broad terms, judicial oversight is rarely exercised. At creation, public corporations are given a fair degree of latitude. The rationale for this latitude is to provide the necessary flexibility for commercial endeavours. Although an order of *mandamus* could apply to enforce duties, the vagueness of the constitution generally forecloses this possibility because of the difficulty in determining concrete duties.<sup>86</sup>

In Malaysia, the courts have rarely treated the issue of the legal status and privileges and liabilities of public enterprises. However, in a 1993 Supreme Court case, the Court enumerated the rationale for establishing such enterprises:

The main reason for vesting of ownership of any form of industries, public utilities, industrial and commercial enterprises in statutory bodies ... instead of continuing to bring them within the framework of normal departmental administration is to encourage a competitive spirit of initiative and enterprise. The civil service ethos, would, it was thought, inhibit the managerial staff of the industry enterprises from making untried experiments in new fields, it would induce an excess of caution and addiction of precedents, all manner of orders and circulars. Officials would always be looking over their shoulders, apprehensive of parliamentary inquisition in the form of examination of expenditure before the public accounts committee or the auditor-general.<sup>87</sup>

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<sup>84</sup> *Id.* at 213, n. 135.

<sup>85</sup> HICKLING, *supra* note 73 at 213.

<sup>86</sup> *Id.*

<sup>87</sup> *Penang Development Corporation v. Teoh Eng Huat & Anor*, [1993] MLJ 97 (Supreme Court (Kuala Lumpur)) 54-55. R. H. Hickling makes a similar point regarding public corporations in Malaysia:

If the public corporation is to engage in commercial activities, it can employ its own staff, employees who are outside the scope of Part X of the Constitution. In this manner, the corporation is free of the red tape and bureaucracy common to the civil service,

The Court went on to state the principles, which must guide the activities of these companies:

All statutory bodies are expected to conduct their affairs in a business-like manner and carry out their undertakings as commercial and industrial undertakings, operating in the public interest, and to be self-supporting over a period of time. In brief, the corporation has to be business-minded and the thinking must be business-orientated in order to survive and succeed in the competitive world of business and should not depend on government grants throughout for their expenditure and survival.<sup>88</sup>

Although the courts have not explicitly addressed whether these exemptions from public law scrutiny and requirements are legally valid, this passage seems to suggest so.

In effect then, the executive branch has succeeded in placing these governmental actions outside of the public control. (Of course, private enterprises are nonetheless regulated, and must adhere to a litany of governmental requirements.) At the same time, as the High Court in Penang notes, since these companies are profit-making and thus accountable to the expectations of their shareholders, they must "take their place like any other company under the Malaysian sun."<sup>89</sup> The sparse case law on this matter suggests that public corporations are not popular plaintiffs or defendants in court. Further, when disputes arise, the courts typically address discrete claims against the corporations and do not strike at the heart of the activities undertaken.

According to the government's *Second Outline Perspective Plan*, a shift occurred away from public enterprises with privatization:

The impetus of the rapid growth achieved during the decade of the Seventies came as a result of a high level of public sector involvement in the economy. Such a high public sector profile arose from the need to continue with the social and physical infrastructure begun since Independence. It also arose because of the overriding need to achieve the objectives of the NEP in the face of a comparatively underdeveloped private sector. As a result, public sector investment as a proportion of total investment increased steadily from 32 per cent in 1970 to a peak of 50 per cent by 1982. Despite improvements in the domestic savings rate, the increasingly high level of such investments had to be financed by external debt.

While we have been successful in achieving growth targets and in meeting many of the country's socio-economic goals, dependence on the public sector was found to be unsustainable. In addition, high public sector involvement in

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and can therefore act with greater expedition and (it might be hoped) efficiency. HICKLING, *supra* note 73, at 212.

<sup>88</sup> *Id.* at 55.

<sup>89</sup> *Dai-Ichi Electronics (M) Sdn Bhd v. Tenaga Nasional Bhd*, 1996 MLJ LEXIS 1070, 16 (High Court (Penang)).

direct productive activities, especially by the non-financial public enterprises had not yielded the results that were expected of them. Indeed their performance in most instances was dismal, very much the way state-run enterprises in other countries disappointed their protagonists.<sup>90</sup>

So the privatization strategy has been devoted not only to transferring government-owned enterprises to the private sector,<sup>91</sup> but also to developing a private sector. As Mahathir put it, "today we consider the public and private sectors as a team that work together to develop the country."<sup>92</sup>

Although it is not a socialist country, Malaysia does have a planned economy. Governments in planned economies issue regular national development plans. Since independence in 1956, the Malaysian government has issued two long-term plans, called Outline Perspective Plans, for the years 1971-1990 and 1991-2000. The *National Economic Policy* was a cornerstone of the *First Outline Perspective Plan*. In 1969 ethnic riots in Malaysia resulted in a declaration of national emergency and the instituting of the *Policy*, which was an affirmative action programme designed to accomplish the wholesale redistribution of wealth within the society.<sup>93</sup> With the *Second Outline Perspective Plan*, the *National Development Policy* has superseded the *National Economic Policy*. This *Development Policy* continues to carry out the redistribution goals of its predecessor but also puts forth the government's *Vision 2020 Plan*. *Vision 2020* lays out the path to fully developed nation status, which the country hopes to achieve by the year 2020.<sup>94</sup> Several developing countries have imitated Malaysia's *Vision 2020 Plan*, including Botswana, El Salvador, Colombia, Nigeria and Venezuela.<sup>95</sup>

As components of its Outline Perspective Plans, the government issues sub-plans. During the course of the *Second Outline Perspective Plan*, the government issued the *Sixth* and *Seventh Malaysia Plans*, covering 1991-1995 and 1996-2000 respectively. All of these plans are conceived in the executive branch. The Economic Planning Unit is responsible for drafting the plans, with the Implementation and Coordination Unit in charge of operationalizing the plans.<sup>96</sup> Many of the ties between the public and private sectors are formally integrated through the Malaysian Business Coun-

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<sup>90</sup> M. Mohamad, *The Second Outline Perspective Plan, 1991-2000 in MALAYSIA'S VISION 2020: UNDERSTANDING THE CONCEPT, IMPLICATIONS, AND CHALLENGES* 420 (Relenduk Publications ed., 1997).

<sup>91</sup> See M.P. JAIN *Administrative Law of Malaysia and Singapore*, 3 Malayan L.J. 853, 853-861 (1997).

<sup>92</sup> Quoted in A.A. Rahman 'The Malaysia Incorporated Concept' in *Asian Strategy and Leadership Institute*, in *MALAYSIA TODAY: TOWARDS THE NEW MILLENNIUM* 49, 55 (ASEAN Academic P. London ed., 1997).

<sup>93</sup> MAHATHIR 1997I 499.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> MOHAMAD, *supra* note 82, at 21.

cil. The Prime Minister established the Council in 1991 at the inception of the *Second Outline Perspective Plan*.<sup>97</sup>

In 1985, Malaysia issued the *Guidelines on Privatisation* that would direct the process and set forth modes of implementation.<sup>98</sup> This document initiated a dramatic overhaul of the domestic legislative environment to facilitate a shift to private sector-led growth. Controversies surrounding privatization projects led the government to issue and disseminate publicly a *Privatisation Master Plan* in June of 1988.

Foreign actors played a significant role in producing this *Plan*.<sup>99</sup> The British government provided funding and a team of international accountants, bankers and lawyers drafted the *Plan*.<sup>100</sup> It assesses past privatizations and then discusses future trends. In doing so, the *Plan* outlines the various legal mechanisms employed to undertake privatization. However, it does not identify these mechanisms as law *per se*, instead relegating the designation 'law' to passive regulatory measures.

The Malaysian government defines privatization as "the transfer to the private sector of activities and functions which have traditionally rested in the public sector."<sup>101</sup> Privatized projects range from the transfer of pre-existing public enterprises into private hands to the creation of new enterprises in pursuit of what would previously have been considered public sector projects.

Malaysia employs a number of legal mechanisms to effectuate privatization, including sale of assets or equity, lease of assets, management contracts, corporatization, build-operate-transfer and build-operate techniques.<sup>102</sup> Often several of these techniques are employed in a single instance of privatization. Also, synergies develop among privatization projects. Privatization requires amending pre-existing laws, employment of private company law, granting government licenses and issuing executive decrees.

The sale of assets or equity involves transferring management responsibilities, assets and personnel. Often sales result in a partial privatization and allow a certain percentage of foreign equity ownership.<sup>103</sup> The government encourages the sales also as a way of promoting the growth of the national stock markets.<sup>104</sup> Many of the companies sold are required to list themselves on the Kuala Lumpur Stock Exchange.

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<sup>97</sup> *Id.*

<sup>98</sup> *Guidelines on Privatisation*, 1985.

<sup>99</sup> *Privatization Master Plan*, 1988 Introduction paragraph [3].

<sup>100</sup> *Id.* at 3.

<sup>101</sup> *Id.* at Conceptual Framework, Number 19.

<sup>102</sup> *Id.* at 35.

<sup>103</sup> *Id.* at 36.

<sup>104</sup> *Id.* at 49-50.

The lease of assets involves the fixed term transfer of assets away from the government. This privatization mechanism is concerned with control over assets rather than ownership, as the government retains the ownership interest throughout the privatization period. Also, the ultimate end point of this privatization mechanism is public ownership and control. To raise to the level of privatization, transfers must involve significant amounts of assets. The government has privatized seaports and airports through this legal mechanism.<sup>105</sup>

Management contracts, also known as “contracting-in,” involve the hiring of outside professional managers to run state enterprises. Like the lease, this technique effectuates transfers of control not ownership. The amount of control transferred depends upon the relationship between managers and the sole shareholders and board of directors of the public enterprise. Typically the shareholder is the government and the board of directors comprises a blend of public and private actors.<sup>106</sup>

Many of Malaysia's high profile privatization projects have been undertaken through a mix of BOT and build-operate techniques. Malaysia was the first Southeast Asian country to use these techniques for undertaking large-scale projects. Like the lease and management techniques, BOT and build-operate technique involve a fixed term transfer of control. These techniques are used to undertake projects with no pre-existing material assets. The government grants a license to the project company conferring monopoly powers. For instance, the government might grant a private individual the right to build a road. Although no pre-existing material assets exist, these licenses are tremendously valuable goods. Their value derives from expectation of profits and the scarcity of licenses.<sup>107</sup> Under the BOT technique, the project company builds the facility, is granted a concession to operate it for a period and then must transfer the built facility in good condition to the government. During the concession period, the project company recoups sunk costs and extracts a profit. The projects undertaken typically involve public utilities or roads for which a guaranteed customer base exists.

These privatization techniques are carried out through amendments of statutes, regulatory action and executive law-making. For instance, the Malaysian government has amended the *Pensions Act, 1980*, the *Telecommunications Act, 1950*, the *College and Universities Act*, the *Port Authorities Act, 1963* and many other laws.<sup>108</sup> In addition, regulatory frameworks have been dramatically transformed to encourage market forces. Also, through licensing, the awarding of state contracts, granting of incentives, creation of

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<sup>105</sup> *Id.* at 37.

<sup>106</sup> *Id.* at 38.

<sup>107</sup> *Id.* at 39.

<sup>108</sup> *Id.* at 47.

publicly-backed private companies and a number of other techniques, the executive branch has used its discretionary powers to drive much of the privatization process. Further privatization has often been subsumed under preexisting patronage arrangements. E. T. Gomez and K.S. Jomo note:

Given the highly politicised access to business opportunities for Malaysia's corporate sector since the 1980s with UMNO's enhanced political hegemony, the privatisation policy was bound to have an impact on politics. Some claimed that the private sector--and not the public enterprises--now the main vehicle for economic development, political influence on the economy through public enterprise, especially for patronage, would be checked. This argument is flawed. Substantial corporate stock had been captured through political patronage and was controlled by an elite few connected with one UMNO leadership by the late 1980s; this often also ensured privileged and continued access to patronage, especially with privatisation; thereby reinforcing their positions in the party and in business. Politicians who had exploited their political influence to help businessmen expand their corporate interests and those who had cultivated close ties with members of the business community found they had an advantage over other aspiring politicians, especially during elections. As Craig has noted, given its rather unique 'political/bureaucratic/business complex', privatisation in Malaysia is unlikely to be more than a rearrangement of economic and political power.<sup>109</sup>

The following sections examine several facilitative infrastructure projects, including real estate, airports, stock exchanges, expressways and communication.

#### A. Real Estate

The development of the MSC requires transforming oil and palm estates into the fifteen by forty kilometre high technology corridor. To do so, land must be cleared and construction projects undertaken on an ambitious scale. To expedite the process, the Prime Minister's Office issued a certificate of urgency, nationalising private and state lands under the *National Land Code*. Most of the land was owned by the state government of Selangor, which became a major stakeholder in Cyberview Holdings, along with the largest private sector real estate holder in the region, Golden Hope Plantations.

Cyberview Holdings is a publicly incorporated company, with a range of public and private owners. It handles real estate investment within the MSC and is responsible for developing Cyberjaya, an MSC smart city and the new site for the Malaysian government. A compound company, this real estate holding company is an international consortium comprised of Setia Haruman Sdn Bhd (55%), Japan's Nippon Telegraph and Telephone (15%), Golden Hope Plantation Bhd (15%), Parmodakan Nasional Bhd

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<sup>109</sup> E.T. GOMEZ AND K.S. JOMO, MALAYSIA'S POLITICAL ECONOMY: POLITICS, PATRONAGE AND PROFITS 81 (Cambridge UP New York 1997).

(5%), the Selangor State government (5%) and the Multimedia Media Development Corporation (10%).<sup>110</sup> Foreign participation in the company helps attract international capital. The participation of Japan's Nippon Telegraph and Telephone provides high profile legitimacy and makes the real estate development consortium a more attractive destination for foreign finance money. Similarly, foreign and domestic actors are involved in airport construction within the Corridor.

### B. Airports

Realizing that the Corridor must be linked to major world cities, the government decided to build the Kuala Lumpur International Airport, referred to as KLIA. International airports are a central feature of the high technology development plan. Integrating Malaysia into the transnational commercial order depends upon mobility of persons and goods. While shipping remains an important means of transport, airports facilitate the speed of travel necessary in the faster paced high technology economy. The faith in the promise of air transport was reaffirmed during the East Asian currency crisis. Investment in airports did not dry up during the crisis and investors aggressively sought new opportunities in this sector at the time.<sup>111</sup> The sustained support for airports by the project finance community throughout the crisis reflected a confidence in the long-term prospects of the East Asian region.<sup>112</sup>

Traditionally airports have been publicly owned and operated. Since the 1980s airports around the world have been privatized. Through privatizations, airports have dramatically transformed their internal organization and operation.<sup>113</sup> At the same time, new airports have been constructed internationally.<sup>114</sup> Airport privatizations proceed through a range of legal means including public ownership and operations with commercial orientation, regional ownership and operations, public ownership with private operators (joint ventures, partial/majority divestitures, management contracts, build-operate-transfer, etc.) and private ownership and private operations.<sup>115</sup>

To accomplish the KLIA, both foreign know-how and capital were required. Once again, foreign direct investment and project finance went

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<sup>110</sup> See generally, V. Ho, *Mahathir Opens Malaysia's Silicon Valley*, JAPAN ECONOMIC NEWSWIRE, July 8, 1999. I found this source on LEXIS so there were not page numbers.

<sup>111</sup> Mary Watkins, *Asia's Near Miss*, PROJECT FINANCE, January 7, 1988, at 43.

<sup>112</sup> P. Bennett, *A New Thirst for Energy*, PROJECT FINANCE, January 8, 1999, at 29.

<sup>113</sup> On airport privatization, see e.g. D.N. Powers and L.A. Freiman, *Airport Privatization: A New Frontier in Project Finance*, February 1999, Practicing Law Institute: Corporate Law and Practice Handbook Series (PLI Order No. B0-00GZ).

<sup>114</sup> O. Betancor and R. Rendeiro, *Regulating Privatized Infrastructures and Airport Services*, World Bank Policy Research Working Paper 2180 at 12 (Governance, Regulation, and Finance, World Bank Institute, Washington, D.C. (1999)).

<sup>115</sup> *Id.* at 14-15.

hand in hand. The Malaysian government awarded airport-building contracts and provided a good deal of the project financing. Importantly, it also furnished executive backing by awarding the contract in the first place. The government signed a contract with an international consortium, comprising Tamen Corporation, a Japanese company; Sapura Holdings, Sdn Bhd, a Malaysian company; and Harris Airport System, an American company. Money for this project came from Malaysian sources, Japanese soft money and Islamic banks.<sup>116</sup> The laws facilitating this financing come from many legal traditions and systems and were coordinated for the purpose of the project. Further, the Malaysian government, through guaranteed loans committed support to the endeavour. This support meant the aid of a friendly state regulator. To ensure close government involvement in the project, the International Airport Berhad was established. This public compound company was responsible "for the construction and commissioning of the airport."<sup>117</sup>

### C. Stock Exchanges

The success of Malaysia's infrastructure projects relies in part on the strength of the country's domestic capital market. Many of its large projects are sourced domestically. During the East Asian currency crisis, the country's ability to sustain many of the projects resulted from their domestic portfolio.<sup>118</sup> The fact that projects were financed using domestic currency meant international exchange rate fluctuations devaluing local currency did not affect project financing adversely. In fact foreign banks were able to purchase Malaysian projects at a discounted rate during the crisis. The strength of the domestic capital markets is a recent phenomenon, the result of a government strategy designed to make Malaysia's economy less reliant on foreign capital markets.<sup>119</sup>

In addition to Malaysia's unusually strong domestic capital market, it has also been a leader in Islamic project financing.<sup>120</sup> As a result, Malaysia has funded many projects in part through Middle Eastern investments.

Malaysia's domestic investments are dominated by the Employee Provident Fund, a government controlled retirement scheme with a manda-

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<sup>116</sup> K. Richards, *New Airports; New Challenges*, AIRPORT REV., January 1, 1999.

<sup>117</sup> *Id.*

<sup>118</sup> *Malaysia*, PROJECT AND TRADE FINANCE, September 1994, at 84.

<sup>119</sup> L.S. Hoon, *The Gradation of Malaysian Banks*, PROJECT AND TRADE FINANCE, July 1995, at 36.

<sup>120</sup> On Islamic financing, see G. Bilal, *Islamic Finance: Alternatives to the Western Model*, 23 THE FLETCHER FORUM OF WORLD AFFAIRS 145 (1999).

tory contribution by Malaysian workers of 10% of their income.<sup>121</sup> The government used the fund to rescue troubled projects during the crisis.<sup>122</sup>

A successful capital market depends upon the creation of secondary markets. If an investment begins to falter, company debt is often sold at a discounted rate. The ability of a company to make regular payments to its financiers is often uncertain in the project finance field. Since many project finance deals require tremendous outlays of capital and involve taking large risks, project payments sometimes are not forthcoming. Even if a project is unable to make payments, value may still reside in the project. Interested investors determine the residual value of the project and purchase the debt from the initial investor at an agreed price. Purchases often occur through derivative markets. For this reason, Malaysia has developed derivatives, or secondary, markets.<sup>123</sup>

For a secondary market to function efficiently, independent ratings agencies must be established to value debt. Realising this need, the Malaysian government established two ratings agencies. The Ratings Agency Malaysia is charged with rating infrastructure projects.<sup>124</sup> In 1995, Malaysia established the Kuala Lumpur Options and Financial Futures Exchange.<sup>125</sup> Also, it is in the process of establishing a secondary market in Labuan, an offshore banking haven.<sup>126</sup> In addition, the government is experimenting with a dollar-based secondary market.<sup>127</sup> This market will include an Islamic secondary market.<sup>128</sup> Malaysia has funded road building through its domestic capital markets.<sup>129</sup>

#### D. Expressways

Whilst commentators often convey the image of the information economy as timeless and de-territorialised, the functioning of the Internet requires traditional infrastructure such as roads. For example, as mentioned earlier, while e-commerce transactions occur over the Internet, purchased goods must be shipped from the seller to the buyer. Also, the mobility of

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<sup>121</sup> *Id.*

<sup>122</sup> L. S. Hoon, *Malaysia Tests the Boundaries*, PROJECT AND TRADE FINANCE, July 1995, at 32, 33. Throughout the crisis Malaysia retained a high sovereign rating. D. Simpson, *Asia Pacific Overview*, PROJECT FINANCE, March 2000, at 7.

<sup>123</sup> Ministry of Finance *Economic Report 1998/99* 183-184 (1998).

<sup>124</sup> R. Kelsey, *Malaysian Project Finance Trades Up*, PROJECT AND TRADE FINANCE, May 1996, at 36.

<sup>125</sup> Ministry of Finance *Economic Report 1998/99* (1998).

<sup>126</sup> See Michael S. Bennett *Banking Deregulation in Indonesia* 16 U. PA. J. INT'L BUS. L. 443, 474-475 (1995).

<sup>127</sup> K. T. Tan *The Breath of Life* MALAYSIAN BUSINESS November 1, 1999.

<sup>128</sup> See generally, *Political Uncertainty Casts Shadow over Upbeat Economic Outlook* INTERNATIONAL MONEY MARKETING, June 6, 2001.

<sup>129</sup> HENRY A. DAVIS, *Malaysian North-South Expressway*, in PROJECT FINANCE: PRACTICAL CASE STUDIES 199 (Beverly Lester ed., Euromoney Publications PLC 1996).

the workforce depends upon an adequate transportation system. Before the 1980s the road system of Peninsular Malaysia was substandard.

Realising the need for a well-functioning road in its development plans, in 1988 the government began constructing an expressway. In the early 1980s the government established the Malaysian Highway Authority, a compound company, to carry out the planning and building of a road. As the road was being constructed a young Malaysian entrepreneur proposed the idea of a more extensive transportation project. Under his plan, the road would run the entire length of Peninsular Malaysia from Thailand to Singapore.<sup>130</sup>

The tendering process raised eyebrows in Malaysia. This entrepreneur submitted a proposal to the government. Under the government's privatization policy at the time, if the government was interested in the proposed project, it granted a six-month period during which the applicant could develop a project exclusively. Due to controversies surrounding the tendering process of the North-South Expressway, the government changed its policy. Before this change, the interested party proposed the privatization of a certain industry or sector. Now, the government first identifies the areas targeted for privatization and then proposals are submitted. According to the government, "This will enable interested parties to study and make offers which will be considered on the basis of comparative merit."<sup>131</sup> Further, while previously the interested party was granted a period of exclusivity during which to hone his or her proposal, the new privatization guidelines marked a shift. Now, exclusivity will be exceptional and, even when granted, conditions will be placed upon it.<sup>132</sup>

The applicant who submitted the tender had strong connections with the Prime Minister's Office and his company, United Engineers. United Engineers was a sub-corporation of Hatibuti Sdn Bhd, a company owned by the ruling party coalition, UMNO. The applicant had no track record in construction projects and used his political connections as currency to establish an international consortium with more experienced contractors. This consortium included Mitsui (Japan), Taylor Woodrow (UK) and Dragages (France). Together they submitted the tender. Also, foreign advisers were hired to oversee the engineering and toll roads operation. In addition, Morgan Grenfell of the UK was retained as a financial adviser,<sup>133</sup> working with the Malaysian Commerce International Merchant Bankers.<sup>134</sup>

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<sup>130</sup> *Id.*

<sup>131</sup> Privatization Master Plan 1988.

<sup>132</sup> Privatization Master Plan 1988, Foreword.

<sup>133</sup> Henry A. Davis, *supra* note 132, at 201.

<sup>134</sup> L.S. Hoon, *The Gradation of Malaysian Banks*, PROJECT AND TRADE FINANCE 36 (July 1995). Since most BOT contracts are awarded to single contractors, he disbanded the consortium.

By internationalizing the tender and including experts in a number of fields, this young entrepreneur was successful in capitalizing on his reputation and legitimating his application.<sup>135</sup> Given the size of the project and the potentially controversial awarding of the contract to an inexperienced and politically connected entrepreneur, the executive decided that the project should be submitted to an open tender process. A four-month period was granted. However, this entrepreneur retained a competitive advantage because he had strong political connections and was familiar with the design. In the end, the entrepreneur was awarded the contract despite the fact that “[t]wo of the other five contenders offered lower cost bids and projected smaller toll collections.”<sup>136</sup>

The leader of the opposition party, Lim Kit Siang, sought an injunction against the project,<sup>137</sup> claiming that the signing of a letter of intent with United Engineers amounted to an offence under Section Two of the *Essential Powers Ordinance*.<sup>138</sup> This *Ordinance* criminalizes bribery and corruption by government officials.<sup>139</sup> While the tender ultimately withstood this legal challenge, the case drew attention to the privatization process, increased the need to justify the road based on public purposes and created an expectation that the road would benefit the entire population.<sup>140</sup>

The Expressway construction was the largest BOT project ever embarked on in Asia. The concession to United Engineers was granted until the year 2018. At that point, the right to collect tolls would expire and control over the road would transfer back to the government. The construction of the road involved 205 contracts, including forty-seven civil works, eleven toll plaza contracts, five equipment contracts, eleven street lighting contracts, one communications network contract, fifty-five topographical survey contracts and seventy-five ground investment contracts.<sup>141</sup>

Most of the large contracts were made with leading road construction firms in the Asian region. Many smaller contracts were awarded to Malay-

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<sup>135</sup> On the use of various forms of international capital see Y. Dezalay and B.G. Garth, *Dollarizing State and Professional Expertise: Transnational Processes and Questions of Legitimation in State Transformation 1960-2000*, TRANSNATIONAL LEGAL PROCESSES (M.B. Likosky ed., Butterworths, London forthcoming).

<sup>136</sup> R.S. Milne, *Privatization in the ASEAN States: Who Gets What, Why, and With What Effect*, 65(1) *Pacific Affairs* 7, 17 (1992).

<sup>137</sup> *Siang v. United Engineers* 2 M.L.J. 12 (1988).

<sup>138</sup> *Essential Powers Ordinance* No. 22 of 1970.

<sup>139</sup> L.K. Siang, *North-South Highway Scandal* (Democratic Action Party, Kuala Lumpur 1987).

<sup>140</sup> The road building controversy was part of an ongoing political crisis in the country. See T.S. Abas, SIR JOHN FOSTER GALAWAY MEMORIAL LECTURE: THE ROLE OF THE INDEPENDENT JUDICIARY (Promarketing Publications, Kuala Lumpur, Malaysia 1989) and K.B. Teik, *Between Law and Politics: The Malaysian Judiciary Since Independence*, in LAW, CAPITALISM AND POWER IN ASIA 205 (K. Jayasuriya ed., Routledge 1999).

<sup>141</sup> Davis, *supra* note 114, at 200-03.

sian companies.<sup>142</sup> Capital financing for the large contracts was not difficult to raise given the reputation of the subcontractors. Raising money to finance the carrying out of the smaller contracts was often more difficult, and successful tapping of international capital markets depended upon oligarchic government guarantees. These guarantees took the form of agreements to supplement, if necessary, the cash flow from low toll areas and insurance against currency fluctuations for foreign capital markets.<sup>143</sup> Ultimately, the funding for the project was raised almost entirely in the domestic capital markets. When the project was first tendered, it did not appear that the capital markets would be able to finance such a large project. However, by the time the litigation was settled and the project initiated, the capital markets were sufficiently developed.<sup>144</sup>

#### E. Telecommunications and Satellites

The clearest physical manifestation of the Internet is the telecommunications lines that link computers. These connections may take on a number of forms, including fibre-optic cables, telephone lines, satellite transmissions, etc. A central feature of telecommunications policy is access. Given the expense of telecommunications infrastructure and the variable quality of services, governments often prioritize service provision and offer different levels of service to different persons. Realising that telecommunications were central to Malaysia's development plan, in the 1980s the government turned its attention to developing a telecommunications strategy. The *Seventh Malaysia Plan* indicates:

Priority will be accorded to development of a world-class telecommunications infrastructure comprising fibre optics, satellite and wireless technology, and services. The development of the information superhighway through the telecommunications infrastructure will be accelerating during the Plan period. With a total planned investment of about RM 25.4 billion, in addition to RM 20.3 billion already spent on satellites, fibre optics and broadband technology by private operators, is envisaged that the telecommunications infrastructure will enable the mass application of IT nationwide. A Telecommunications Master Plan will be formulated to provide guidelines, among others, on interconnection and standards of services in order to promote greater efficiency and accessibility. Telecommunications operators will be encouraged to upgrade and improve services to further support the development of interactive multimedia and IT. In addition, the launching of Malaysia's own satellites, MEASAT I and II, will provide immediate and simultaneous, point-to-point and point-to-multipoint telecommunications and broadcasting services throughout the country.<sup>145</sup>

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<sup>142</sup> *Id.* at 203.

<sup>143</sup> *Id.* at 203-04.

<sup>144</sup> *Id.* at 199-207.

<sup>145</sup> Seventh Malaysia Plan 465.

The laying of telecommunications cables and the launching of satellites require a tremendous amount of capital and technical expertise. To facilitate an influx in technological know-how and the requisite financial capital, the government privatised the telecommunications industry in the 1980s. The privatization process was carried out in two steps. Prior to privatization, a government department, the Ministry of Energy, Telecommunications and Post, provided telecommunications services. This Ministry was established in 1978 and telecommunications were managed within it by Jabatan Telekom Malaysia. In 1984, as the first step in the privatization of telecommunications, the government established a public compound corporation, Telekom Malaysia, which took on the functions of Jabatan Telekom Malaysia. In turn, Jabatan Telekom Malaysia was charged with regulating the telecommunications industry. The second stage of telecommunications privatization occurred in 1990 as Telekom Malaysia was partially privatized.<sup>146</sup> After privatization, the Ministry of Finance retained a 76% shareholding with domestic shares comprising sixteen percent and foreigners holding eight percent.<sup>147</sup>

Although Malaysia has not legislated a public monopoly of telecommunications, until 1993 Telekom Malaysia enjoyed a *de facto* monopoly. In the absence of formal rules governing the telecommunications sector, the Prime Minister's Office is accorded discretionary power over licensing. Often the Prime Minister will issue a license privately, the news of which will not be made public for several months. Most commentators view this discretionary power retained by the executive as an impediment for Telekom Malaysia. For instance, John Ure suggests that this discretion leaves the company open to the Prime Minister's policy whims.<sup>148</sup> Heather Hudson argues that Telekom Malaysia suffers from government influences damaging its incentive structure.<sup>149</sup> While executive control over Telekom Malaysia does indeed make it subject to abuses of the executive prerogative, this control also results in positive discrimination on the company's behalf.

Positive legislative discretion on behalf of Telekom Malaysia results in a considerable competitive advantage for the company. Since telecommunications are of strategic importance, the government has a strong interest in ensuring the profitability of the company. Also, the privatization of many public functions in the 1980s caused political unrest in the country. Opposition party members and, at times, the media expressed public disapproval of the ruling party for its awarding of contracts to party patrons. These allegations were squelched through a variety of means, including opposition

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<sup>146</sup> G. Cheah, *Malaysia*, THE ASIA L GUIDE TO TELECOMMUNICATIONS 78.

<sup>147</sup> John Ure *Telecommunications in ASEAN and Indochina* TELECOMMUNICATIONS IN ASIA: POLICY, PLANNING AND DEVELOPMENT (ed. John Ure) 49, 57 (1997).

<sup>148</sup> See *supra* note 150.

<sup>149</sup> H.E. HUDSON, GLOBAL CONNECTIONS: INTERNATIONAL TELECOMMUNICATIONS INFRASTRUCTURE AND POLICY 211 (Van Nostrand Reinhold, New York 1997).

party jailing under the *Internal Security Act* and also the removal of judges.<sup>150</sup> However, the Prime Minister's Office had come under such intense scrutiny that the success of privatization was a necessity to retain its supremacy over the legislature and the courts. All eyes were on the privatization process.

In the case of Telekom Malaysia the privatization was a commercial success. The company is one of the most profitable Malaysian companies, second only to the state-owned oil company, PETRONAS.<sup>151</sup> Telekom Malaysia plays a central role in the government's high technology development plans and has been contracted to complete the MSC telecommunications infrastructure. Also, it holds a position on the Board of Directors of the Multimedia Development Corporation, the agency established by the government to oversee the development of the MSC.<sup>152</sup> Telekom Malaysia's position on the Corporation's Board affords it privileges in the policy-making of the MSC.

Telekom Malaysia also has an ownership interest in many of the MSC's development projects including Cyberview Holdings, the company charged with the land development and urban construction of the MSC discussed earlier in this paper.<sup>153</sup> In addition, the company operates the Multimedia University, which trains knowledge workers for the MSC.<sup>154</sup> These equity holdings ensure that the company will profit from the success of the MSC and also that it will receive lucrative infrastructure contracts.

As the primary telecommunications provider for the MSC, Telekom Malaysia receives contracts for a range of government-instigated projects. The MSC itself will be wired with fibre-optic cables connecting government and businesses. Since the government intends these services to be state-of-the-art, research and development by Telekom Malaysia is heavily subsidized.

Government support for Telekom Malaysia also contributes to the Company's international position. In addition to the government subsidising of research and development, the company also receives government contracts to link the MSC to other high technology centres. In addition, the government is intent on improving the Company's international economic

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<sup>150</sup> TS Abas Sir John Foster Galaway Memorial Lecture: The Role of the Independent Judiciary (1989).

<sup>151</sup> On PETRONAS, see V.K. Moorthy, *The Malaysian National Oil Corporation—Is it a Government Instrumentality?*, 30 INT'L & COMP. L.Q. 638 (1981) and Jaginder Singh, *The Legal Structure and Attendant Problems of the National Petroleum Corporation of Malaysia*, 18 MALAYSIA L. REV. 125 (1976).

<sup>152</sup> Multimedia Development Corporation Articles of Incorporation (on file with author).

<sup>153</sup> See *supra* Part II.A.

<sup>154</sup> On knowledge workers and the MSC see N.A. MAZELAN, M. HARNEVIE AND A.C. VALIDA, *MULTIMEDIA SUPER CORRIDOR: A JOURNEY TO EXCELLENCE IN INSTITUTIONS OF HIGHER LEARNING* 19-23 (ASEAN Academic P London 1999).

standing. Therefore, the government works on behalf of the company to arrange contracts for telecommunications provision in neighboring countries.

While foreign ownership of Telekom Malaysia is capped at 33% percent, it carries out its business in collaboration with foreign capital interests.<sup>155</sup> For instance, it often raises money through project financing. For example, recently, it financed an equipment transaction under Islamic law with financing coming from the Middle East. Legal services for this deal were provided by the British law firm of Norton Rose.<sup>156</sup>

Telekom Malaysia thus benefits tremendously from its favored position with the Prime Minister's Office. At the same time, Ure and Hudson are correct in their assessment of the liabilities tied to this position. A company that lives by executive discrimination also may die, or at least be damaged, by it. For instance, while up until 1993 Telekom Malaysia enjoyed a *de facto* monopoly over fixed-wireline services, its position is dependent upon continuing to receive government contracts and licenses. Its monopoly position has eroded as many of the recent licenses in mobile phone services and related information infrastructure have been granted to close relations of the party.<sup>157</sup> So, the government may shift the country away from the technologies in which Telekom Malaysia has specialized. As the Company specialises in fixed wire-line services, the government's recent encouraging of cellular telephones and satellite services presents a threat to its position.

Telecommunications services will also be offered in Malaysia through satellite transmission, including international gateways and digital services. Malaysia has three of its own satellites, MEASAT-1, MEASAT-2 and MEASAT-3, in orbit and will use these satellites to provide services. These satellites are the private property of Binariang Sdn Bhd, which is owned by MAI Holdings.<sup>158</sup> Both are the property of Malaysian oil tycoon T. Ananda Krishnan. Like many of the Malaysian high tech entrepreneurs, Krishnan was educated at foreign institutions. Krishnan is a graduate of the University of Melbourne and the Harvard Business School.<sup>159</sup> Also, Krishnan and his company have close ties with the government. Krishnan is a long-time friend of the Prime Minister. He was the director of the government's Bank Negara and of PETRONAS, the government-owned oil company.<sup>160</sup> In addition, the government holds a 15% equity stake in his satellite television broadcasting company, which broadcasts over the MEASAT satellites.

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<sup>155</sup> John Ure, *supra* note 151, at 56-59.

<sup>156</sup> *Legal Advisers on Telekom Malaysia's \$60 Million Leasing Facility*, LAW MONEY, October 14, 1999.

<sup>157</sup> John Ure, *supra* note 151, at 56-57.

<sup>158</sup> See generally, *Malaysia's Binariang Plans to Launch Third Satellite* ASIA PULSE, June 9, 2000.

<sup>159</sup> See generally *Entertainment*, BROADCASTING BUSINESS WEEKS, March 24, 1997.

<sup>160</sup> On Krishnan, see GOMEZ & JOMO, *supra* note 98, at 159-65.

In the case of Binariang, the executive prerogative to grant licenses is also a source of positive discrimination on the company's behalf. One of the main services offered by Binariang is satellite television and radio through its subsidiary Astro.<sup>161</sup> Binariang was licensed to launch Measat-1 and Measat-2 to transmit satellite services. Measat 1 and Measat 2 were built by Hughes Space and Communications of the US and launched by Arianespace, the European launch consortium. Several foreign media broadcasting companies transmit services over Astro.<sup>162</sup>

### III. CONCLUSION

This paper has discussed the development of infrastructure during the colonial period and the present era. Infrastructure building must precede any economic development plan. In both proto-Malaysia and present-day Malaysia most of this infrastructure has been concentrated within the transnational commercial domain. This infrastructure was produced by compound corporations in conjunction with oligarchic states.

When the foreign high tech TNCs enter the picture, they find many of their infrastructure needs already met. Thus the creation of the MSC is traceable to the privatizations of the 1980s and 1990s. The promotional literature, which is distributed to high technology companies celebrates the merits of the existing infrastructure. With the infrastructure taken for granted, companies are able to get onto further business.

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<sup>161</sup> See generally, *Edgewise* THE EDGE (Malaysia), October 1, 2000.

<sup>162</sup> Sharifah Al-Attas, *Blast Off!* NEW STRAITS TIMES, December 27, 1999.