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# Doctrine of corporate governance and competition laws: The Malaysian perspectives

Choong Kwai Fatt, Edward Wong Sek Khin\* and Priscilla Yap

Faculty of Business and Accountancy, University of Malaya, Kuala Lumpur, Malaysia.

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This study examines the issues of competition law in Malaysia. These issues had challenges not only in its goal towards a market economy, but also in its national re-engineering of the economy under Malaysia's industrialization plan. Malaysia has reached now reached that goal. The main issues were the impediments as to whether or not to introduce a structured, broader competition law in Malaysia. Often, in Malaysia, when markets were unable or unwilling to provide goods, services, or competition, the State became involved in the establishing of a free market. Malaysia has done this in its Capital Market Master plan, and the pressing challenges were on local trade issues. The trade barrier issues in Malaysia were different, as unique issues concerned culturally and historically based protection zones. Documents from several Articles (81 and 82) of the European Community Treaty, a variety of United States statutes such as The Sherman Antitrust Act, The Clayton Antitrust Act, The Federal Trade Commission Act and The Antitrust Criminal Penalty Enhancement and Reform Act of 2004, and also Malaysian government guidelines were scrutinized in studying and establishing The Doctrine of Malaysia's Competition law, with its various attributes in illustrating corporate governance. The citation of three case studies to illustrate how competition legislation worked in the EU, UK, US and Malaysia provided the foundation of the new laws dealing with competitive practices. Malaysia needed to determine its primary of focus that is the producers and suppliers or the consumers. The US model protected the producers whilst the EU model shielded the consumers. The US model was more interested in economic and econometric results while the EU model emphasized social and regional development and the political consequences as well. The EU also protect the rights of small businesses more vigorously than the American legislation and, the EU to some extent, sacrifices intellectual property rights in the name of fairness and the free movement of goods and services. In the case of Malaysia, it seemed that Malaysia was more inclined to the EU than the American models. The purpose of this study is to illustrate competition laws deemed to secure a competitive marketplace and thus protect the consumers from unfair, anti-competitive practices. Yet, competition laws had to embody the inherent conflicts in emerging markets such as those in Malaysia, as well as a system of conflict resolution.

**Key words:** Competition law, anti-competitive practices, market economy and anti-trust law.

## INTRODUCTION

Competition laws have their origins that date back to ancient Roman times. As civilization matured and market matured, this area of laws has also matured from the punitive edict under Emperor Diocletian in 301AD. Under Emperor Diocletian, the death penalty was imposed on anyone who violates a tariff system, for example, by

buying up, concealing or scheming to control the supply and price of everyday goods. That edict was a further extension of the 'Lex Julia de Annona', enacted during the Roman Republic around 50BC to protect the corn trade (Wilberforce et al., 1966). Thus, competition law has its roots not only due to liberalization of markets to allow competition but also providing social protection with an embedded public policy.

Note the close connection that competition law has with law on deregulation of market access, state aids and subsidies, the privatisation of state owned assets and the

\*Corresponding author. E-mail: [edwardwong@graduate.uwa.edu.au](mailto:edwardwong@graduate.uwa.edu.au).

establishment of independent sector regulators. The two largest and most influential systems of competition regulation are United States antitrust law and European Community competition law.

This article seeks to discuss competition law as it stands within these jurisdictions and also the UK, and its impact if introduced into Malaysian markets. A brief discussion concerning the effects on existing privatized public utilities, and the mergers and takeover of corporations in its efforts that allow Corporate Malaysia to compete globally, are included as well.

## European union

In EU law, competition law is in several Articles of the European Community Treaty. Of note and importance are Articles 81 and 82 that read as follows:

### Article 81

1. The following shall be prohibited as incompatible with the common market: All agreements between undertakings, decisions by associations of undertakings, and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:

- (a) Directly or indirectly fix purchase or selling prices or any other trading conditions;
- (b) Limit or control production, markets, technical development, or investment;
- (c) Share markets or sources of supply;
- (d) Apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (e) Make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this article shall be automatically void.

3. The provisions of paragraph one (1) may, however, be declared inapplicable in the case of: (i) Any agreement or category of agreements between undertakings, (ii) Any decision or category of decisions by associations of undertakings, (iii) Any concerted practice or category of concerted practices, which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers, a fair share of the resulting benefit, and which does not:

- (a) Impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
- (b) Afford such undertakings the possibility of eliminating

competition in respect of a substantial part of the products in question.

### Article 82

Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States. Such abuse may, in particular, consist in:

- (a) Directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- (b) Limiting production, markets or technical development to the prejudice of consumers;
- (c) Applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (d) Making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Article 81 targets trade collusion and cartels and provides for instances or examples of anti-competitive trade practices in the form of, inter alia, price fixing, imposition of unfair trade conditions and limitation of product development which prejudices consumers.

Article 82 deals with monopolies by persons or conglomerates that hold a dominant position in a market, preventing such entities from imposing unfair contractual terms to the detriment of consumers.

EU law also provides for exceptions to anti-competitive transactions as can be seen from Article 81(3). There is an EU stress that competition law does not extend to employees and things done for the benefit and well-being of the public.

## Operation of competition law in the EU and UK

An example of how competition legislation works in the EU and UK is the UK case of *Courage and Crehan* (2009). Here, the Defendant leased two licensed liquor retailers or “pubs” from a joint venture company jointly owned by the Plaintiff and a third party. One of the terms of the lease required the Defendant to obtain their beer supply from the Plaintiff at listed prices that were higher than that obtained by other pub operators. Due to the Defendant’s inability to compete with other pub operators, the Defendant’s business suffered loss. The Plaintiff then sued the Defendant for the outstanding amount on the retailer’s beer account and the Defendant counterclaimed against the Plaintiff and the joint venture company in reliance upon Article 81.

The Court of Justice in holding for the Defendant

explicitly recognized a right to damages for breaches of EC competition law. The Court stated in the operative part of the judgment:

1. "The full effectiveness of Article [81] of the Treaty and, in particular, the practical effect of the prohibition laid down in Article [81](1) would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition. Indeed, the existence of such a right strengthens the working of the Community competition rules and discourages agreements or practices, which are frequently covert, which are liable to restrict or distort competition. From that point of view, actions for damages before the national courts can make a significant contribution to the maintenance of effective competition in the Community.
2. Article 85 of the Treaty precludes a rule of national law under which a party to a contract liable to restrict or distort competition within the meaning of that provision is barred from claiming damages for loss caused by performance of that contract on the sole ground that the claimant is a party to that contract.
3. Community law does not preclude a rule of national law barring a party to a contract liable to restrict or distort competition from relying on his own unlawful actions to obtain damages where it is established that that party bears significant responsibility for the distortion of competition."

It is thus clear from the ruling of the European Court of Justice that not only is Article 81 applicable to European Union Member States but also further prescribes the right of an aggrieved party under an agreement found to be anti-competitive to seek redress in the form of damages. Based on its public policy, the EU Commission sees private litigation as a key complement to the public enforcement of the competition rules. The judgment of the European Court of Justice in the case of *Courage and Crehan* has also confirmed the availability of the remedy of damages in the national courts of respective EU member countries for breach of the competition rules as well as extending potential liability to co-contractors in certain given situations. There is no discussion in this article concerning difficulties that may arise in enforcing a party's right to claim for damages under Article 81 or Article 82 in the domestic courts of member States (Ingo, 2003).

That an aggrieved party could also seek interim relief under Article 81 even though the national laws of the member States disallow it, it is clear from the pronouncement of the European Court of Justice in *The Queen and Secretary of State for Transport, ex parte: Factortame Ltd and others* (The Queen and Secretary of State for Transport, 1990). In that case, where the House of Lords posed the question:

"Where ...the national court has no power to give interim protection to the rights, claimed by suspending the application of the national measure, pending the preliminary ruling, ...does Community law either; (a) oblige the national court to grant such interim protection of the rights claimed; or (b) give the Court power to grant such interim protection of the rights claimed?"

The European Court of Justice answered as follows:

"The Court has also held that any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of Community law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent, even temporarily, Community rules from having full force and effect are incompatible with those requirements, which are the very essence of Community law ...

It must be added that the full effectiveness of Community law would be just as much impaired, if a rule of national law could prevent a court seized of a dispute governed by Community law from granting interim relief in order to ensure the full effectiveness of the judgment to be given on the existence of the rights claimed under Community law. It follows that a court which in those circumstances would grant interim relief, if it were not for a rule of national law, is obliged to set aside that rule ... Community law must be interpreted, meaning that a national court which, in a case before it concerning Community law, considers that the sole obstacle which precludes it from granting interim relief is a rule of national law must set aside that rule."

### **United States competition law paradigm**

In the United States, the common description of competition law is 'antitrust law'. To differentiate this term from the ordinary trust law, as generally understood it is a means to defeat trusts commonly deployed by large American corporations to conceal the nature of their business arrangements. Big trusts became synonymous with big monopolies and at the time prior to antitrust legislation posed a threat to free markets.

Sources of antitrust law may be found in a variety of statutes like the Sherman Antitrust Act, Clayton Antitrust Act, Federal Trade Commission Act and Antitrust Criminal Penalty Enhancement and Reform Act 2004, and also governmental guidelines like the Merger guidelines which essentially is a set of internal rules propounded by the Antitrust Division of the United States Department of Justice in conjunction with the Federal Trade Commission.

## **Enforcement of competition law in other jurisdictions**

Countries that practice competition law have already established agencies or bodies that enforce these laws. In the United States, there is the Federal Trade Commission and in Canada, the Competition Bureau of Canada.

In the United Kingdom, competition law is within in two main statutes, the Competition Act 1998 and the Enterprise Act 2002. The establishment of the Office of Fair Trading was under the former Act while the latter Act is responsible for the establishment of the Competition Commission, an independent body responsible for investigating mergers, market shares and conditions and the regulation of firms.

In Australia, The Trade Practices Act 1974 provides for the protection of consumers and prevents some restrictive trade practices of companies. It is the key competition law in Australia and administered by the Australian Competition and Consumer Commission.

In France and Germany, the competition regulators are the 'Conseil de la Concurrence and the Bundeskartellamt' or German Federal Cartel Office.

## **Role of courts**

Where legal provisions describing anti-competition practices and monopolies are not inclusive and are limited in scope, the role played by courts is in influencing competition law by either extending or limiting the scope of its application directly or indirectly when exercising its powers in interpretation of the law or when deciding upon the applicability or constitutionality of the law cannot be underestimated.

For example, in the United States, the Noerr-Pennington doctrine is a doctrine of antitrust law propounded by the Supreme Court to the effect that the First Amendment does not bar persons or institutions from lobbying the government to change laws in a manner that would reduce competition. The expounded Noerr-Pennington doctrine was from two cases, Eastern Railroad Presidents Conference and Noerr Motor Freight, Inc. (1961) and United Mine Workers and Pennington (1965). In Noerr, the facts as they appear in the headnotes of the judgment are:

A group of trucking companies and their trade association sued under §4 of the Clayton Act for treble damages and injunctive relief against a group of railroads, a railroad association and a public relations firm, charging that the defendants had conspired to restrain trade in, and monopolize, the long-distance freight business, in violation of §§ 1 and 2 of the Sherman Act. They alleged, inter alia, that the railroads had engaged the public relations firm to conduct a publicity campaign against the truckers designed to foster the adoption and retention of

laws and law enforcement practices destructive of the trucking business, to create an atmosphere of distaste for the truckers among the general public, and to impair the relationships existing between the truckers and their customers.

The Supreme Court held that:

The Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or monopoly; and it does not apply to the activities of these railroads, at least insofar as those activities comprised mere solicitation of governmental action with respect to the passage and enforcement of laws.

The Court later in Pennington decided "...joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition."

## **Competition law in Malaysia**

The existing competition law in Malaysia is in the form of consumer protection from anti-competitive practices and monopolies and has a somewhat limited scope; appearing sporadically in various legislation as exemplified below.

The common law doctrine of restraint of trade, suggested as the direct predecessor to modern competition law (Robert, 2007), is codified in Section 29 of the Contracts Act 1950 which read as follows :

1. Sec. 28. Agreements in restraint of trade are void
2. Every agreement by which anyone is restrained from exercising a lawful profession, trade, or business of any kind, is to that extent void.

## **EXCEPTIONS**

### **Agreements not to carry on business of which goodwill is sold**

Exception 1—One who sells the goodwill of a business may agree with the buyer to refrain carrying on a similar business, within specified local limits, so long as the buyer, or any person deriving title to the goodwill from him, carries on a like business therein:

Provided that such limits appear to the court reasonable, regard being had to the nature of the business.

### **Agreements between partners prior to dissolution**

Exception 2—Partners may, upon or in anticipation of a

dissolution of the partnership, agree that some or all of them will not carry on a business similar to that of the partnership within such local limits as are referred to in exception 1.

### **Agreements during continuance of partnership**

Exception 3—Partners may agree that some one or all of them will not carry on any business, other than that of the partnership, during the continuance of the partnership.

Note that this contractual provision is limited in its operation in certain and limited situations only and subject to the exception of reasonableness.

Another piece of Malaysian legislation concerning consumer protection is the Price Control Act 1946, which provides that “any person who sells any price-controlled goods at a price or performs or offers to perform any service in relation to any price-controlled goods or hires or offers to hire any price-controlled goods at a charge which exceeds the maximum price or charge fixed” shall be guilty of an offence.

The Control of Supplies Act 1961 allows for the Minister to declare any article or food to be a controlled article or to be a rationed article or both, either generally or with reference to some specified part of Malaysia (Act of Section 5; Control of Supplies Act, 1961). The Act further provides for penal sanctions in cases where a person sells greater quantity of controlled articles than required for ordinary use (Act of Section 14; Control of Supplies Act, 1961); conceals or destroys a controlled article or withholds the same from the market (Act of Section 15; Control of Supplies Act, 1961); sells controlled articles without a license (Act of Section 16; Control of Supplies Act, 1961); falsely denies possession of, or refusing to sell, controlled articles (Act of Section 16A; Control of Supplies Act, 1961); fails or refuses to display license and list of controlled and rationed articles at specified premises (Act of Section 17; Control of Supplies Act, 1961), without due authority obtains or supplies any rationed food for household consumption (Act of Section 18; Control of Supplies Act, 1961), imposes in a sale transaction conditions which are not permitted by the Act (Act of Section 19; Control of Supplies Act, 1961), removes controlled articles from business premises or stores controlled articles in premises other than the licensed business premises (Act of Section 20; Control of Supplies Act, 1961), or unlawfully possesses controlled articles (Act of Section 21; Control of Supplies Act, 1961).

Both the aforementioned legislation regulates or controls only limited and specific business activities and limited products, goods or services. There is no clear provision that specifically prescribes the outlawing anti-competitive practices covering the entire spectrum of domestic consumer trading, and this includes the Control of Padi

and Rice Act 1994 as well.

Governmental authorities which are empowered to regulate big businesses in Malaysia such as insurance companies (both local and foreign), may impose conditions attached to insurance licenses or issue guidelines, circulars, notices relating to the conduct of insurance businesses in Malaysia which may extend to control of pricing or nature of insurance products proposed to be sold and the terms of insurance policies.

The most direct passage for the introduction of competition law into Malaysia logically would be through the enactment of legislation by Parliament. The difficulties, however, be in the form of scope and extent of competition law to be introduced and the policing and enforcement machinery. Which model of competition law, and the proper policing and the enforcement agency created are essential matters undertaken for consideration.

### **Role of Malaysian courts**

Due to similarity in the laws and legal systems in most Commonwealth jurisdictions that inherited the English common law system, Malaysian courts have long used judicial decisions of other Commonwealth countries as a guide or reference when deciding legal issues. Thus, it is not peculiar to have statutory recognition on the applicability of English legal principles, especially in commercial matters (Sections 3 and 5 of the Civil Law Act, 1956). Further, Commonwealth countries do have similar legislative provisions.

The earlier Federal Court in *Director-General of Inland Revenue and Kulim Rubber Plantations* (1981) had stated that:

“Insofar as the decisions of other courts ... are concerned, we have always treated these judgments as of only persuasive authority, but we have never lightly treated them or refused to follow them, unless we can successfully distinguish them or hold them as per incuriam. Other than for these reasons, we should as a matter of judicial comity and for the orderly development of law, pay due and proper attention to them.”

Should an issue relating to competition law arise before a Malaysian court; will that court consider its application or merely treat it as not part of the *lex loci* of Malaysia? This situation seems to be possible if certain principles of competition law find itself recognized by Malaysian courts.

### ***Is competition law suitable for developing countries?***

It is unclear whether competition policy is a sensible role

for government in developing, particularly low-income countries. In these countries, the markets are usually very small and fragmented so that developing scale sufficient to raise competitiveness and engage in international markets is a major challenge. The bigger problem is however, poor governance - in societies with wide-spread corruption, inadequate public finances, combined with a weak judiciary and oversight institutions, competition policy may become another tool for capture by vested interests - becoming in itself a barrier to entry. The evidence for this is that the many competition authorities around the developing world have achieved little anti-competitive regulatory impact. This, however, should not impede these countries from enacting a competition policy, taking cognizance of the progression in the maturity of its market, and its involvement in World Trade Organisation. Competition law is usually public policy based, thus, any sovereign power should duly consider this aspect towards the good of its public or if not, then proper allocation of its markets arising from liberalization within the global economy. Nonetheless, the intrusion of foreign markets into its own market arising from the introduction of competition law is undoubtedly a valid concern of such an economy.

The Galbraith principle of "Countervailing Power" (Galbraith, 1993), which apparently exists in near monopoly with near monophony situations of very large organizations, is not applicable to the, much smaller transactions that predominate in developing countries. To try to enforce world's best-practice trade policies using sophisticated legislation upon a developing economy, ignores many factors that make up, perhaps, the majority of commercial transactions within a community and may even transgress cultural norms, such as bargaining or haggling with the seller. These norms are what hold a community together, even if they are supporting an inefficient market, the best choice may be to make haste slowly locally, but hasten reforms nationally, particularly in large-scale operations.

## **CONCERNS OF COMPETITION POLICY IN MALAYSIA**

The fundamental concern of any competition policy is the basic principle of a fair buying price at all transaction levels. This principle has not been crystallized anywhere from the buying side, as a seller expects, if possible, to maximize sales, and in this case, sourced from a 'fair price.'

Currently, Malaysia lacks comprehensive 'fair trade' policies and their legal support mechanisms. There are various specialist legislations for telecommunications through the Communications and Multimedia Commission (CMC) ([http:// www..skmm.gov.my](http://www.skmm.gov.my)) and within the Guidelines for Regulations of Acquisition of Assets, Mergers and Take-Overs as well as the Malaysian Code

of Take-Overs and Mergers 1998, each with a separate bureaucracy.

To protect the communications market, the CMC has established two guidelines by virtue of the necessity of fair pricing of communication facilities within an almost necessity of supporting a near monopoly market situation. These two guidelines are entitled "Substantial Lessening of Competition" and "Dominate Position in a Communications Market."

This lack of a Malaysian "Fair Trade Act" led to the establishment of a forum to discuss this problem in a growing and more open and liberalized industrial economy. Important topics were raised and it was generally agreed that with the combination of a developing industrial economy and dealing with countries which had strict, in comparison with the Malaysian situation, fair trade laws which were enforced, relevant research was needed to address and recommend legislation that took into effect the transition of Malaysian businesses into the modern world of fair trading rules, while maintaining a sense of Malaysian business practices of the past. In other words, a no apology needed and a necessary compromise for modernity to join the industrialized world as a sophisticated trading equal (OECD Global Forum on Competition, 2002). The areas that required research were:

1. Exemptions and special authorizations within international limits.
2. Mergers and Acquisitions.
3. Extensive sector and regulatory framework investigation, mainly to supply information concerning what has to be changed, and what can be socially 'protected.'
4. Restrictive Business Practices, particularly those currently practiced in Malaysia deemed restrictive, and thereby an international breach of the international "rules."
5. The balance of public interest with public convenience accordingly to the scenario of restraint of introduction of competition law and non-introduction of competition law with regard to public goods and or public services.

## ***Impediments or path for road ahead to vision 2020?***

Taking cognizance issues of a developing country with aspiration towards developed status such as Malaysia, changes in the regulatory regime in protected, regulated or hybrid markets may pose concerns of threats from foreign markets or from even more fragmented markets. Fair trading legislation and international trade treaty obligations must protect both sides; the buyer and seller have to be on an equal footing, both as to rights and responsibilities. The aspect of superior market power is acceptable in a Malaysian sense, provided power is not abused, and that seems to be the Malaysian position.

However, what is an acceptable percentage of market domination must vary among industrialized and industrializing countries, and in the case of an industrializing country such as Malaysia, several problems arise as to the merger and acquisition policies of needed foreign investment. The result must be that the investor with Foreign Development Investable funds does so without exposing Malaysia to International or national "Fair Trade" laws irrespective of the Malaysian legal situation, while the complementary Malaysian legal situation supports a domestic competitive environment.

The restrictive business practices or RBPs that include all anti-competitive or even competition reducing actions by a business have a problem of identification, as what is restrictive in one sense is a normal business procedure in another. Locally, this may not matter, but if dealing with international businesses, there can be a problem. Exempting some types of business from such "fair trade" laws has a history from the "infant industries" argument for tariff protection in the past. Usually, the tariff protection lasts for an inordinate length of time and protected by the industry concerned long after the infant industry argument has expired. The real question is what damage occurs to Malaysia if exemptions or special licenses that would violate fair trade legislation if a special exemption or license were not available. Currently, Malaysian legislation in this area does not take an economic regulatory stance and it does not take into account the state of competition within any market when issuing exempting licenses. In short, Malaysia has a piece meal legislative set when it needs a broad based legislative set to advance into an industrial state.

Simplistically speaking discretionary power on any exemptive licenses should have its premise and guiding principles; such principles to enable Malaysia meets its economic competitiveness towards its industrial aspirations while balancing the public policy principles upheld by government.

There are pressures from various quarters of Malaysian industry, to protect its 'Malaysian-ness,' and is typical of industrializing states, but this view could be archaic in light of Malaysia's Vision 2020 policy and the timeline of 10 years to achieve this national goal. Even so, there are solid arguments for protective legislation, but they ought to include a 'sunset' clause, that is a set period of review and then withdrawal of protective regulations. There are risks in this area, as European Union rules may apply, or other national laws and regulation may prevent the entry into competitive foreign markets. The question of risks and rewards may support minor Malaysian industries, but a realization, appreciation and acceptance that the real world as hard and tough for everyone is a policy adopted by the industry that is to receive support. Econometrics proves that to provide protection, a subsidy is the best method. This is because a subsidy is easily removable, while tariff protection is far more difficult in an economic

sense and even more so politically. The prime duty of the government is proper allocation of resources and at the same time to protect its consumer from local laggard industries that must be competitive by having its own market as its training ground to learn resiliency, and become sustainable.

Malaysia cannot seek to be independent of world trade affairs if it desires success in world markets. However, there are political factors that Malaysia cannot ignore, irrespective of the trade advantages that Malaysia possesses. To "tailor make" a set of Malaysian specific competitive laws and regulation, runs risks, but probably can be accepted by the world, if these rules are not too restrictive. There are really two options for Malaysia. Firstly, "Get tough or die," and protect Malaysian industries from violators of the various international trade laws and regulations. The American platitude "If you succeed – congratulations, if you fail –that's too bad!" is apt here and it does work, but it is political dynamite. The second option is to recognize "special specificity," that is that Malaysian Industry ought to have government support within Malaysia; or to identify which industry that needs to improve or be absurd in its own world by its "owned" market. Malaysia can ill afford not to accept the internet and e-commerce transactions by its very own market. Illusion and eventual disillusion may later become the stark reality as the "owned" market disappears into cyber-space.

Consideration of industrial supports by the Government of Malaysia has to be a carefully considered set of policies and premises using a set of guiding principles, some are:

1. Workable or sustainable competition is the basis of the industrialization of Malaysia. Competition is not to be a destructive element of industry; it must build upon new experiences and promote long-term growth over industry as a whole.
2. Efficiency is not a static goal, once achieved it currently means a comfortable existence. Efficiency is a dynamic goal so that efficiency and change are givens and normal.
3. The velocity of industrial development is critical, and this will require a combination of competition and co-operation within all industries.
4. Profitability and re-investment of profits is encouraged.

There is a problem in Malaysia when considering the demands of investigations in the areas of internal competition leading to International standards of free and fair trade. Who or what organization is available to conduct such an all-encompassing evaluation and give unbiased definitive recommendations, and who will pay for the necessary study? There is no question that such a survey and report is necessary, as it only lacks the political will to engage with the national and international

requirements, and to pay the necessary price to advance from a developing country into a sophisticated world trader.

### **Issues to address**

1. The known problems that Malaysia faces are similar to other countries that wish to advance into the next and higher levels of international trade. Seminars, conferences, international meetings of trade ministers and other conventions, have discussed the varying policy and laws necessary for a country such as Malaysia to overcome local reticence and custom to become truly international in attitude and policy.

2. Domestically and regionally, developing countries need to examine the total scene and the advantages and disadvantages of becoming part of the trading world as an equal partner.

3. If there is to be an outsider aiding in these processes, recommended recommendation is that a culturally aware person or group who understands both sides of the problem give the necessary assistance. This is to allow the cultural values to remain, while becoming a world trader. An example is Japan, which has remained Japanese and at the same time has become a major world trader.

4. There is a danger, however, in a form of trade Xenophobia, common in all nations. The protection of local employers and employees, perhaps in a major rural industry raises political pressures that may be impossible to overcome in the short term. Perhaps it needs an international disaster affecting the country that would show the problems were almost self-inflicted. This method is a poor method of change, as it all comes all at once and since no planning for change occurred, a disaster occurs. The demographic of the Malaysian younger and literate generation and Malaysia's various industrialization plans since Vision 2020 should establish a level of self-confidence other than to fear trade liberalization via competition law in a market economy. In any event, Malaysia's capital market and taxation regulatory regime align with the developed countries regulatory regime.

Other than viewing public policy in the perspective of competition law, a question that needs to be addressed is the corporate governance measures in Malaysia's capital market master plan. This is in light of recent mergers and takeovers of conglomerates in Malaysia. If a monopoly is to exist or the ignoring of monopolistic practices along the lines of competition law, monopolistic capacity to survive may become a disincentive to improve corporate governance practice; thus deceptions occur in public policy spirited based issues for the survival of 'important' industries (Lee et al., 2009). Malaysia has a requirement to meet its needs towards path finding its destination to Vision 2020, which necessitates a balancing act of

enlarging its influence in industrial resilience and competition or to remain a situation of addressing roadblocks and impediments. A vision needs a mission, this is the underlying premise Malaysia would need to meet and ask itself in its road ahead (Edward et al., in press).

### **Malaysia's current needs**

Malaysia needs to look forward to trade legislation changes, if it is to advance as a Malaysian world trader instead of being a member of world trading nations. Japan did this and Malaysia can do this as well.

To achieve this goal, recognition of the requirements of world trade within the culture of Malaysia. This means that:

1. World quality assistance be sought for legislating the required Malaysian trade laws and policies, at the same time protecting wherever possible, Malaysian culture.

2. Establish from these policies, laws, and regulations, administrative institutions to provide the enforcement and regulation of internal and external trade matters.

3. The form of advice formed from these new legislated procedures, requires an advisor, perhaps resident in Malaysia, to guide Malaysian trade through the labyrinth of international trade regulations.

5. Recognition of the self-interests of Malaysia's international business and the reality of their political pressure. Advocates of Malaysian and other foreign interests put their cases into a situation, where channels are available.

Blocking Statutes that establish and prohibit Malaysia's legal entities from collaborating with legal procedures in other countries to the extent that this collaboration adversely affects the local export industry.

6. To address reputational jurisdictional trade entity in cross border trade entry, due to the non-existence of broad clear local competition statutes with regard to 'claw-back' provisions. Absence of such provisions may rightfully have the local courts justifiably reluctant to order the refund of any penalty payment decreed or imposed by a foreign court on a local legal entity. This is based upon Malaysia's adversarial court's Commonwealth system to abide by the endearing principles of 'Judges do not make law', and it's the elected Parliamentarians that make laws (Edward et al., in press). To identify which jurisdictional model to adopt as a guide in the event Malaysia decides to take steps towards considering the introduction of a broader firmer guide on its competition law (Edward et al., in press). To strategize and prepare for measures to countervail the 'shakeup' due to change upon the introduction of competition law in Malaysia's present market economy. The reason being the unfortunate and realistic results of unemployment and business closures.



People and firms often lack the vision, the knowledge and the wherewithal needed to support competition. They fiercely oppose this move and governments throughout the world often bow to protectionist measures.

However, one must be mindful that closing a country to competition will only exacerbate the very conditions that necessitate the opening up of its markets. At the end, such a decision makes for a worse economic 'shake up' and the forced entry of competitors in unstructured and collaborative manner, later by mergers and takeovers of its corporate giants; or alternatively, jurisdictional trade entity; cross border prejudices due to unequal level playing field on the local legislative end.

## CONCLUSIONS

The authors proffered that Malaysia needs to determine who ought to be its primary focus: the producers or the consumers. The US model protects the producers whilst the EU model shields the consumers. The US model is more interested in economic and econometric results whilst the EU model emphasizes social, regional development, and political consequences. The EU also protects the rights of small businesses more vigorously and, to some extent, sacrifices intellectual property rights in a sense of fairness and the free movement of goods and services. In the case of Malaysia, it is likely that Malaysia is inclined to the EU model.

In spite of trade, Malaysia should not shut its trade doors altogether. Malaysia should take the first step of allowing competition applied among listed entities that include the regulatory listing of foreign competitors. Malaysia may have its listed Exchange with more activities and less poor listed entities in its disclosure based regime and market economy path under its Capital Market Master Plan. This premise arises from the fact that competition can destroy the failed, the incompetent, the inefficient, the inept, and the slow to respond, as all are doomed to irrelevancy. Competitive pressures one to be more efficient, leaner and meaner. This is the very essence of capitalism. It is wrong to say that only the consumer benefits. If a firm improves itself, re-engineers its production processes, introduces new management techniques and modernizes, all in order to fight the competition, it must reap the rewards (Duygulu and Özeren, 2009). Competition benefits the economy, as a whole by a process of natural economic selection where only the fittest survive.

Issues of an un-equal level playing field is not confined to only competition between foreign and local market especially for an emerging market economy that transform itself from a regulated economy to a market economy. In many developing countries and countries in transition from communism to capitalism, competition laws are used to reward cronies or to destroy opponents.

The discriminatory and partial application of such laws and regulations would sustain networks of patronage and cement political-economic alliances.

This abuse of the Rule of Law and the regulatory regime is further compounded by the seething pathological envy that is typical of erstwhile egalitarian societies now exposed to growing income inequalities. The mob, business rivals, political parties, and the populace at large leverage competition laws to tear down businesses and humiliate entrepreneurs whose success grates on their nerves and provokes their unbridled jealousy' (: <http://samvak.tripod.com>).

What ought to be the road ahead for Malaysia? There is no answer in the present context but only with the future context of Malaysia aspiration towards the Vision 2020, as that is what is to drive Malaysia forward.

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