

**EFFECTIVE CARTEL ENFORCEMENT:
GETTING MALAYSIA READY FOR WHAT LIES AHEAD**

Yasmeen Yasim

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MATRIX OF COMPETITION RELATED PROVISIONS IN REGIONAL TRADE AGREEMENTS BETWEEN DEVELOPED AND DEVELOPING COUNTRIES BASED ON WTO'S REGIONAL TRADE AGREEMENT DATABASE (AS OF MAY 2012)

REGIONAL TRADE AGREEMENTS BETWEEN DEVELOPED AND DEVELOPING COUNTRIES AS LISTED ON WTO WEBSITE (AS OF MAY 2012)

COMPETITION ACT 2010, MALAYSIA

EXECUTIVE SUMMARY

Cartel enforcement is challenging, particularly for developing countries with young competition enforcement regimes as cartels are illicit in nature and competition authorities are faced with connected firms that sometimes enjoy close links with policy makers. So, why should developing countries be concerned with effective cartel enforcement? This thesis answers the question by explaining it from international perspective – international cartel enforcement via regional trade agreements between developed and developing countries. This work argues that in order to encourage the utilisation of competition related provisions in regional TAs there are prerequisites to be satisfied. One of the prerequisites is there has to be incentives for the regional TA signatories to cooperate in international cartel enforcement by invoking the competition related provisions under regional trade agreements. Incentives arise out of the existence of credible competition enforcement regimes and the strength of trade relationship between the regional trade agreement partners. Without domestic competition law in place, there is no legal basis for cooperation. Even if there is a competition law in place, the absence of a credible competition enforcement regime would not incentivise a developed country with an advanced competition jurisdiction to invoke competition related provisions in a regional trade agreement to address cross border competition infringements. Therefore, it is important for trade reliant developing countries to have a credible competition enforcement regime in place, lest international cartels continue to thrive and adversely impact the domestic market of developing countries and international trade. This includes ensuring that effective cartel enforcement exists in their jurisdiction. In this regard, this work focuses on Malaysia to illustrate how it can be done. Malaysia, a middle income developing country which had fairly recently adopted a competition law with the enactment of the Competition Act 2010. Although the law is already in place, Malaysia is yet to formulate a coherent and formal cartel enforcement policy for the country. The policy is important for effective cartel enforcement because it complements the law and provides clarity and transparency in regard to legislative implementation. In determining an appropriate cartel enforcement policy for Malaysia, the discussion encompasses the following aspects: an appropriate cartel enforcement policy for Malaysia; exemptions of horizontal agreements; limitations of the Competition Act 2010 in light of tougher cartel enforcement. These are the pivotal aspects in cartel enforcement which ought to be focused on to facilitate Malaysia in formulating its cartel enforcement policy. At the end of the discussion, this work suggests the form and contents of Malaysia's cartel enforcement policy which account for Malaysia's limitations as a middle income developing country with a young competition jurisdiction. The work also finds that there is insufficient empirical evidence available on market concentration in Malaysia and therefore recommends the necessary studies which ought to be undertaken in order to facilitate the competition authorities to formulate an accurate competition enforcement policy.

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least, my gratitude goes to my parents who had instilled in me the importance of education for as long as I can remember.

This thesis is dedicated to my dearly beloved son Sany – follow your bliss and success will be yours.

LIST OF ABBREVIATIONS

ASEAN - Association of South East Asian Nations

CARICOM – Caribbean Community

CARIFORUM –Caribbean Forum

EC – European Community

ECN – European Competition Network

EU - European Union

ICN – International Competition Network

MITI – Ministry of International Trade and Industry

MLTIC - Malaysian Legal and Tax Information Centre

MyCC - Competition Commission, Malaysia

NAFTA - North American Free Trade Agreement

NCA – National Competition Authority

OECD - Organisation for Economic Co-operation and Development

Regional TA - Regional Trade Agreement

RM - Ringgit Malaysia

SACU - Southern African Customs Union

TFEU - Treaty on the Functioning of the European Union

UK - United Kingdom

UNCTAD - United Nations Conference on Trade and Development

US - United States of America

USD - United States Dollar

WTO - World Trade Organisation

CHAPTER 1:

INTRODUCTION

1.1. SETTING THE SCENE

Although competition law is essentially focused on the regulation of domestic markets, there are also international dimensions in competition - those which involve cross border issues such as international cartels¹. The international dimension is particularly significant for countries which are trade reliant due to the interaction between trade and competition. International cartel activities expand across at least two or more jurisdictions whereby the cartel agreement may be executed in a foreign market and one or all of the cartel member firms may not have office in the country in question at all. However, the domestic market is the one which bears the brunt of the negative impact of the cartel's anti-competitive agreement and there may not be any evidence available in the domestic jurisdiction because decisions and communications pertaining to the cartel infringement were executed in foreign jurisdictions. On the other hand, anti-competitive conducts of domestic cartels such as export cartels and domestic firms

¹ International cartels may be categorised into three types, namely, 1) hard core cartels - made up of private producers of at least two countries who engages in price control and allocation of markets shares worldwide; 2) private export cartels - independent of the state and engages in price fixing or market allocation in export markets but not in their domestic market; and 3) state run export cartels. See Evenett, S.J. *et al*, 'International Cartel Enforcement: Lessons from the 1990's', *The World Economy* Vol.24 Issue 9 (2001) 1221-1245, p.1222

which have entered into international cartel agreement may negatively impact foreign markets or both domestic and foreign markets².

Cross border competition issues such as international cartel enforcement are not easily addressed due to their multijurisdictional nature and because of the slow progress in reaching a coherent solution on the best modality and instrument in solving issues regarding international cartel enforcement³. This is because multijurisdictional enforcement involves differences in the standards of legislation, which in turn are interpretations of the respective jurisdictions' values and interests. These include level of development, economic and trade interests and socio-economic ideology of the countries. Arguably, multijurisdictional enforcement is best addressed via a multilateral legislative framework under a supranational entity, such as the proposal for a multilateral competition framework put forth by the EU under the WTO. However, since the idea was opposed by developing countries and unsupported by the US⁴, countries are resorting to other alternative instruments to address cross border competition issues such as international cartel enforcement⁵. These include bilateral competition cooperation agreements; utilising competition related provisions in regional trade agreements (regional TAs) and regional competition agreements.

² For a detailed discussion on export cartels, see: Martyniszyn, M., 'Export Cartels: Is it Legal to Target Your Neighbour? Analysis in Light of Recent Case Law', *Journal of International Economic Law*, 1 – 42 (2012), Oxford University Press

³ See: discussion in Chapter 2 of this thesis

⁴ Bhattacharjea, A., 'The Case for a Multilateral Agreement on Competition Policy : A Developing Country Perspective', *Journal of International Economic Law*, (2006) 9(2), 293-323, p. 293

⁵ See discussion in Chapter 2 of this thesis

Why should international trade reliant countries be concerned about international cartel enforcement? From the perspective of developed countries, coherent international cartel enforcement protects their investments in developing countries. Therefore, it is in the interests of such developed countries with mature competition jurisdiction such as the US, the EU, Japan and Australia to assist developing countries who are their strategic trading partners to establish and enhance the latter's cartel enforcement competency. For developing countries, it would be in their interest to engage in cooperation in international cartel enforcement in order to protect their vulnerable markets from the exploitation of international cartels to the detriment of their domestic producers and consumers⁶. In both instances, coherent international cartel enforcement would also facilitate the dismantling of private barriers to entry which have replaced barriers to entry set up by states (such as include tariffs; import quotas and licensing), in light of trade liberalisation .

Regional TAs, regional competition agreements and bilateral competition agreements would not work if developing countries do not view international cartel enforcement as a priority; there are inconsistencies in cross border competition enforcement; and there are lack of incentives and legal commitment in cooperation⁷. Incentives are elements or considerations which drive countries to enter into such accords which facilitate cooperation in international cartel enforcement but more importantly to carry out or

⁶ See: Levenstein, M.C. and Suslow, V.Y., 'Contemporary International Cartels and Developing Countries: Economic Effects and Implications for Competition Policy', *Antitrust Law Journal* Vol.71 No.3 (2004) 801-852

⁷ See detailed discussion in Chapter 2 of this thesis.

implement their obligations under specific accords. As such, incentives concern interests and benefits to the countries involved. In order for incentives to exist, there must not only be strong or strategic trade relations between the countries involved but also each jurisdiction must accept the principles of competition policy; and adopt the necessary laws and institutions, in order for international enforcement to be possible. Otherwise, it would not be beneficial for the jurisdiction with more advanced or established competition law regime to solely or predominantly bear the obligation to carry out cross border enforcement works under the accord; unless the trade and investment benefits to the country with the advanced competition jurisdiction far outweigh the costs of enforcement works. This view is supported by Dabbah's argument that a likely consequence of developing countries' lack of credibility in enforcing competition issues with extra-territorial content may jeopardise their chances of entering into bilateral cooperation agreements with developed countries who may view the former as not worthy partners in this respect⁸. In other words, there is less incentive (if at all) for developed countries with effective competition enforcement regime to enter into accords such as regional TAs with such developing countries. Therefore, in order to facilitate international cartel enforcement, it is necessary to focus on establishing and strengthening the credibility and competency of competition law enforcement in developing countries.

⁸ Dabbah, M., 'Competition Law and Policy in Developing Countries: A Critical Assessment of the Challenges to Establishing an Effective Competition Law Regime', *World Competition* 33, No. 3 (2010) 457-475, p. 473

Why should cartels be prohibited by developing countries? Cartels are formed to restrict competition and enable cartelists to profiteer. Hard core cartel infringements such as price fixing, market allocation and bid-rigging lead to inefficient allocation of resources and facilitate rent seeking activities to the detriment of consumers because they affect consumer access and the choices of goods and services available in the market. This in turn affects growth and development. Economic development essentially refers to improvement in the standard of living of the population. It encompasses the processes and policies implemented by each country to improve the economic, political and social well-being of the people⁹. Economic development is not just improvements in the standard of living in the material sense but also an improvement of the state of mind¹⁰. Thus, in the context of competition policy, improvements in the standard of living would include not only increase in income but also in the choices of goods and services available in the market. Therefore, when cartels fix prices; or create barriers to entry; or restrict sharing of technology, resources could not be utilised or distributed efficiently to facilitate better access to and wider range of goods and services to consumers¹¹. International cartels which are mostly based in developed countries have also detrimentally affected the markets of developing countries. These include the vitamin cartel which resulted in overcharges borne by developing countries estimated at

⁹ O' Sullivan, A. and Sheffrin, S.M, *Economics Principles in Action*, Pearson Prentice Hall (2003), p.471

¹⁰ Sen argued that development should not just aim for economic growth but it has to be more focused on enhancing the quality of life not just in terms of commodities consumption but the capability or freedom one has in terms of choice of "functionings". Todaro, M.P. and Smith, S.C., *Economic Development*, Tenth Edition (2009), Pearson Education, pp.16-19

¹¹ See examples of harmful effects of price fixing and market allocation on the standard of living of the people in developing countries as explained by Chowdhury in Chowdhury, M., 'The Political Economy of Law Reform in Developing Countries', Sixth ASCOLA Conference – New Competition Jurisdictions: Shaping Policies and Building Institutions (July 2011), King's College London, pp.5-6

USD1.71 billion¹²; estimation based on 1997 data that developing countries imported USD54.7 billion of good from nineteen (19) industries with price fixing conspiracies during the 1990's¹³ - which represented 5.2 per cent of total imports and 1.2 per cent of gross domestic product of developing countries¹⁴. These also illustrate that international cartels transfer wealth from developing countries to countries where cartels are based, which mostly are located in developed countries.

Thus, there is a need for cartels to be prohibited by developing countries. However, more importantly, in view of the above, there is also a need for developing countries with competition legislation to adopt cartel enforcement policies which account for their limitations and facilitate their developmental needs. Inappropriate or unsuitable policy and legislation would lead to ineffective enforcement due to operational issues arising out of differences between the standards and substance of the legislation and the jurisdiction's resources, lack of experience; and socio-economic ideology which is not receptive of competition. In discussing this notion, this work focuses on Malaysia, a middle income developing country which has recently adopted a competition law after nearly 20 years¹⁵ of consultations with the industry, consumer associations and

¹² Yu, Y., 'The Impact of Private International Cartels on Developing Countries', Honors Thesis, Stanford University (May 2003), pp. 9-11 at http://economics.stanford.edu/files/Theses/Theses_2003/Yu.pdf

¹³ Levenstein, M., *et al*, 'International price Fixing Cartels and Developing Countries: A Discussion of Effects and Policy Remedies', Political Economy Research Institute (PERI), University of Massachusetts Amherst, Working Paper Series No.53 (2003), abstract, at http://scholarworks.umass.edu/cgi/viewcontent.cgi?article=1040&context=peri_workingpapers

¹⁴ *Ibid*

¹⁵ Malaysia had targeted to table a Draft Competition Bill in 1995 which indicates that efforts to introduce competition law in Malaysia were initiated from the early 1990's. See Aminah, A. R. and Sinnasamy, S., 'Competition Regulation Within the APEC Region: Commonality and Divergence Competition Policy in

government agencies; road shows; and participation in various awareness programmes and international forums on competition policy. Malaysia finally enacted its competition legislation in 2010, namely the Competition Act 2010 and the Competition Commission Act 2010. Malaysia has announced that the Competition Act 2010 will be gradually enforced¹⁶. Malaysia's cautious attitude to competition law and policy is not unfounded considering the fact that there is yet to be any conclusion to the debate on whether competition fosters development¹⁷; young competition jurisdictions and developing countries face many issues and challenges in implementing competition law¹⁸; and the concept of competition is novel to developing countries due to lack of competition culture¹⁹.

Although the competition law has been enacted in Malaysia, formal policies of implementation such as a cartel enforcement policy are yet to be formulated by

Malaysia' in Green, C.J. and Rosenthal D.E. (eds), *Competition Regulation in the Pacific Rim*, Oceana Publications Inc. (1996), p.318

¹⁶ As outlined by the Minister of Domestic Trade, Co-operatives and Consumerism in his speech to the *Dewan Rakyat* (House of Representatives), Malaysian Parliament on 20 April 2010, Hansard Report (Malay version), pp.151-152

¹⁷ For a summary of literature discussion on this, see Voigt, S., 'The Effects of Competition Policy on Development – Cross-Country Evidence Using Four New Indicators', *Journal of Developmental Studies*, Vol. 45, No.8, (September 2009) 1225-1248, pp.1227-1231

¹⁸ See: International Competition Network (ICN), 'Lessons to be Learnt From the Experiences of Young Competition Agencies', Competition Policy Implementation Working Group Report (Subgroup 2), ICN, Cape Town, South Africa (May 2006) at

<http://www.internationalcompetitionnetwork.org/library.aspx?search=&group=13&type=0&workshop=0>; Gal, M.S., 'The Ecology of Antitrust Pre-conditions for Competition Law Enforcement in Developing Countries', in *Competition, Competitiveness and Development: Lessons from Developing Countries*, United Nations Publication (2004), UNCTAD/ DITC/CLP/2004/1, pp.20-38 at http://www.unctad.org/en/docs/ditcclp20041ch1_en.pdf

¹⁹ For issues and challenges faced by young competition agencies which include those of developing countries, see International Competition Network (ICN), 'Lessons to be Learnt From the Experiences of Young Competition Agencies', Competition Policy Implementation Working Group Report (Subgroup 2), ICN, Cape Town, South Africa (May 2006), p.48 at

<http://www.internationalcompetitionnetwork.org/library.aspx?search=&group=13&type=0&workshop=0>

Malaysia. Adoption of an appropriate cartel enforcement policy is paramount to prevent disjunctions between the objectives of the law and its legislative provisions and their implementation. Such a situation would lead to ineffective cartel enforcement which in turn would not facilitate international cooperation in international cartel enforcement.

1.2. WHY MALAYSIA?

It is appropriate to focus on Malaysia because firstly, this work discusses the importance of cartel enforcement from the perspective of developing countries where international trade significantly contributes to the economy. Malaysia is a middle income developing country which relies on international trade as one of the engines of economic growth²⁰. A middle income developing country is chosen because the more advanced the level of development, the higher the potential for competition law enforcement²¹. Secondly, despite the fact that Malaysia's decision to adopt its competition law is entirely based on its own economic development aspirations²² (unlike

²⁰ Yusoff, M.B., 'Malaysia Bilateral Trade Relations and Economic Growth', *International Journal of Business and Society* Vol. 6 No.2 (2005) 55-68; Minister of International Trade and Industry, Malaysia, 'Malaysia's Trading Nation Status Remains. Net Trade Influences Cyclical Economic Development and Long Term Growth Potential', Ministry of International Trade and Industry, Malaysia (MITI) (May 2012), MITI's website at http://www.miti.gov.my/cms/content.jsp?id=com.tms.cms.article.Article_b1bdb34f-c0a8156f-67ec67ec-23d4494c accessed on 11/1/ 2013

²¹ Waked, D.I., 'Antitrust Enforcement in Developing Countries: Reasons for Enforcement & Non-Enforcement Using Resource-Based Evidence', 5th Annual Conference on Empirical Legal Studies Paper (2010), p.15 at SSRN: <http://ssrn.com/abstract=1638874> or <http://dx.doi.org/10.2139/ssrn.1638874> . See also Mateus, A.M., 'Competition Law and Development: What Competition Law Regime?', (October 2010) at <http://dx.doi.org/10.2139/ssrn.1699643> who found that countries with higher GDP per capita are able to enforce a more effective competition regime.

²² The Minister of Domestic Trade, Co-operatives and Consumerism in his speech to the *Dewan Rakyat* (House of Representatives), Malaysian Parliament on 20 April 2010, Hansard Report (Malay version), pp.145-147

most developing countries which adopted competition law because of external pressures²³), as a young competition jurisdiction, Malaysia is vulnerable to the operational and implementation challenges in enforcing competition law. These particularly include cartel enforcement which involves anti-competitive activities that are hard to detect due to the illicit nature of cartels and the inexperience of the competition agencies²⁴; lack of competition culture in Malaysia; and limited resources in the implementation of competition law. Lack of competition culture in Malaysia may be inferred from the fact that advocacy and awareness programmes have been prioritised even before the adoption of the Competition Act 2010 and they continue to be prioritised by the Malaysian Competition Commission (MyCC) to date²⁵. Limitations in resources is one of the main challenges usually faced by new competition agencies particularly in developing countries where public funds is limited as compared to developed countries²⁶ and competition enforcement activities would have to compete with developmental and economic growth programmes in securing resources. Malaysia is no different and in this regard, its competition authorities would have to prove their worth

²³ External pressures include as a condition attached to financial bailout schemes by the IMF and the World Bank and as a precondition to or one of the terms of regional trade agreements. See Marcos, F., 'Do Developing Countries Need Competition Laws and Policy?', (September 2006), p.3 at SSRN <http://ssrn.com/abstract=930562> or <http://dx.doi.org/10.2139/ssrn.930562>

²⁴ Lavoie, C., 'South Africa's Corporate Leniency Policy: A Five Year Review', World Competition Vol. 33(1) (2010), 141-162, p.143

²⁵ Advocacy and awareness programmes which have been held by the MyCC include: APEC Training Course on Competition Policy - Effective Mechanism Against Cartel Offences, 10-12 October 2011, Penang, Malaysia; The Competition Act 2010 – Impact, Issues and Challenges, 13 October 2011, Science University of Malaysia, Penang; Seminar on Competition Law and Consumer Welfare, 3 November 2011, Kuala Lumpur; briefings/dialogue sessions with stakeholders. See MyCC website at http://www.mycc.gov.my/234_179_179/Web/WebEvent/Events/Upcoming-Events.html accessed on 28/12/2011

²⁶ International Competition Network (ICN), 'Lessons to be Learnt From the Experiences of Young Competition Agencies', Competition Policy Implementation Working Group Report (Subgroup 2), ICN, Cape Town, South Africa (May 2006), p.22 at <http://www.internationalcompetitionnetwork.org/library.aspx?search=&group=13&type=0&workshop=0>

first by utilising the limited resources available. Therefore, a study which proposes an appropriate cartel enforcement policy for Malaysia is indeed relevant to the country.

Moreover, studies on cartel enforcement from the perspective of developing countries are lacking and works such as this is indeed relevant contribution to scholarship. This is because it is not easy to convince developing countries that cartel enforcement is beneficial to developing countries. Deterring anti-competitive cartel activities sometimes does not sit well with developmental concerns of developing countries due to the argument that in certain circumstances cooperation between firms and limiting competition between the few players in the industry are pertinent in achieving long term productivity objectives²⁷. In other words, competition should foster economic development and when there is conflict between competition policy and other policies such as industrial policy, some have argued that competition policy should be made subservient for the sake of long term growth and development²⁸; and such a policy which have proved successful for Japan and South Korea ought to be a model for developing countries²⁹. Furthermore, as mentioned earlier, it also does not help the case for cartel enforcement when the debate on the link between competition and

²⁷ See: Singh, A., 'Competition and Competition Policy in Emerging Markets: International and Developmental Dimensions', G-24 Discussion Paper Series, UNCTAD (2002)

²⁸ See: Singh, A. and Dhumale, R., 'Competition Policy, Development and Developing Countries', South Centre Working Papers 7 (November 1999) at http://southcentre.org/index.php?option=com_content&view=article&id=315%3Acompetition-policy-development-and-developing-countries-&catid=56%3Aother-issues-related-to-trade-negotiations&Itemid=67&lang=en

²⁹ See: Singh, A. and Dhumale, R., 'Competition Policy, Development and Developing Countries', South Centre Working Papers 7 (November 1999) at http://southcentre.org/index.php?option=com_content&view=article&id=315%3Acompetition-policy-development-and-developing-countries-&catid=56%3Aother-issues-related-to-trade-negotiations&Itemid=67&lang=en

development is yet to settle and that there is yet to be conclusive evidence that competition fosters development³⁰. How can the citizens of a developing country be convinced that more resources and effort should be allocated to cartel enforcement when it has to compete with programmes which directly contribute to improvements in the standard of living and development such as poverty eradication, job creation, health and food security. Thus, it is hard to “sell” the benefits of competition policy which are often long term and hard to accurately quantify. The discussion in this thesis illustrates that by implementing an appropriate cartel enforcement policy, it is possible to address such concerns.

From the Malaysian perspective, cartel enforcement is relevant because: there has been evidence of market concentration in Malaysia³¹; anti-competitive conducts have been detected in Malaysia³²; there is evidence of rent seeking activities such as through political patronage³³; and the implementation of competition law in Malaysia need to account for non-competition considerations which are entrenched in the Federal Constitution and feature significantly in Malaysia’s socio-economic ideology.

³⁰ For a summary of literature discussion on this, see Voigt, S., ‘The Effects of Competition Policy on Development – Cross-Country Evidence Using Four New Indicators’, *Journal of Developmental Studies*, Vol. 45, No.8, (September 2009) 1225-1248, pp.1227-1231

³¹ See: Muhammad Ridhuan, B. and Suhaila, A.J., ‘Industrial Structure and Concentration in the Malaysian Manufacturing Industry’, *International Journal of Management and Strategy* 13 (Special Issue) (2006) 83-101

³² Such as collusion in the Pangkor – Lumut Ferry case as cited by Lee, C., ‘Competition Policy in Malaysia’, (2004), Working Paper Series, Paper No.68, Centre on Regulation and Competition, University of Manchester, p.5-6

³³ See: Gomez, E.T. and Jomo, K.S., *Malaysia’s Political Economy: Politics, Patronage and Profit*, Cambridge University Press (1999); Jomo, K.S., ‘Industrialisation and Industrial Policy in Malaysia’, in Jomo, K.S. (ed.), *Malaysian Industrial Policy*, National University of Singapore (NUS) Press Singapore (2007)

Malaysia is an open state led economy where the government role in economic decision making continues to be lessened³⁴ and based on international standards, Malaysia's economy is already open³⁵. However, several studies on the manufacturing industry had found evidence of market concentration. An empirical study on the manufacturing industry in 2006³⁶ discovered that: due to Malaysia's relatively small economy, economies of scale is the cause for market concentration in Malaysia; foreign firms owned or controlled significant share of the local industry and they have an upper hand in the market as compared to local firms because of their technology, marketing skills and R & D development which may deter entry of local firms into the market or lead to their winding up or bankruptcy that in turn would increase market concentration; market concentration of the Malaysian manufacturing industry is rather high as compared with most other countries; however, competition in certain sectors of the industry had increased over time. The findings of this study have been consistent with other seminal empirical studies on the Malaysian manufacturing industry³⁷. Additionally, the findings

³⁴ See: Beeson, M., 'Mahathir and the Markets: Globalisation and the Pursuit of Economic Autonomy in Malaysia', *Pacific Affairs* Vol. 73 No. 3 335-351 (Fall 2000), p.340; and The World Bank, *Malaysia Overview*, (2012) at <http://www.worldbank.org/en/country/malaysia/overview> Examples of liberalisation include: the banking sector continues to be liberalised since 2009; 17 services subsectors were liberalised from January 2012. Malaysia has also embarked on privatisation of nationalised firms and sectors since the early 1980's.

³⁵ The World Bank, *Malaysia Overview* (2013) at <http://www.worldbank.org/en/country/malaysia/overview> accessed on 8/4/2013

³⁶ Muhammad Ridhuan, B. and Suhaila, A.J., 'Industrial Structure and Concentration in the Malaysian Manufacturing Industry', *International Journal of Management and Strategy* 13 (Special Issue) (2006) 83-101

³⁷ Seminal works on market concentration in the manufacturing industry include: Rugayah M., 'The Measurement of Market Concentration and Profitability in Malaysian Manufacturing', *The Malaysian Economic Review* (1992) 23(1): 1-11 Yusuf, Z. A. and Phang H. E., 'Industrial Market Structure in Malaysia 1979-1990: A Profile', *Bank Negara Malaysia*, Discussion Paper No. 21 (1993); Nor Ghani M. N., Z. Osman, A. Z. Abdullah, and Jun C. Y., 'Trends in the Malaysian Industrial Market Structures', *Jurnal Ekonomi Malaysia* (2000) 34: 3-20 ; Nor Ghani M. N., A. Z. Abdullah and S. D. Applanaidu, 'Advertising Intensity, Concentration and Profitability in Malaysian Manufacturing Revisited: A Simultaneous Equation Approach', *International Journal of Management Studies* (2004) 11(2): 45-53

of a 2004 empirical study by Nasser Katib on the market structure and performance in the Malaysian banking industry suggests that market concentration determines profitability in the Malaysian banking industry³⁸. However, the empirical findings found that market structure was not consistently correlated with profitability of price due to the constant industrial monitoring conducted by *Bank Negara Malaysia* (the Central Bank of Malaysia), which ensured competition in the market³⁹. The study also found that the market share of the three (3) largest banks is forty five (45) per cent. This is based on the share of total bank deposits in the market in 1995. Although this study was based on dated data, it should be noted that the industrial consolidation exercise in the Malaysian banking sector which has been ongoing since the onset of the new millennium in order to create six (6) domestic financial groups in the industry have led to even higher market concentration level⁴⁰. Anecdotal evidence based on media reports also indicates that there may be market concentration in the cement industry⁴¹. The said findings from empirical studies and anecdotal indications give rise to the possibility that there may be market concentration in other industries in Malaysia, particularly those with markets with oligopolistic tendencies.

³⁸ Nasser Katib, M., 'Market Structure and Performance in the Malaysian Banking Industry: A Robust Estimation', 8th Capital Markets Conference, Indian Institute of Capital Markets Paper (2004) at SSRN: <http://ssrn.com/abstract=872266> or <http://dx.doi.org/10.2139/ssrn.872266>

³⁹ Nasser Katib, M., 'Market Structure and Performance in the Malaysian Banking Industry: A Robust Estimation', 8th Capital Markets Conference, Indian Institute of Capital Markets Paper (2004), p.13 at SSRN: <http://ssrn.com/abstract=872266> or <http://dx.doi.org/10.2139/ssrn.872266>

⁴⁰ The mergers of Malaysian banks have been on the advice on the Central Bank of Malaysia (*Bank Negara Malaysia*) as a response to market liberalisation. See The Star Malaysia, Bank Negara Explains Rationale for Bank Mergers, (11 August 1999) at http://mir.com.my/lb/econ_plan/contents/press_release/110899merge.htm accessed on 5/1/2013

⁴¹ See: The Star newspaper report, *Probe Warranted if Cement Makers have Pact to Raise Prices*, (3/8/2012) at <http://biz.thestar.com.my/news/story.asp?file=/2012/8/3/business/11786336&sec=business> accessed 13/1/2013

There have also been findings and also anecdotal evidence of anti-competitive cartel activities in Malaysia. These include: collusion in the Pangkor – Lumut Ferry case⁴²; price fixing by the *Cameron Highlands Floriculturist Association* - where the MyCC is reported to be about to deliver its first decision⁴³; and possible market allocation and abuse of dominance by Malaysia Airlines and Air Asia which resulted in Air Asia ceasing its low cost operations in several routes to the detriment of consumers⁴⁴. Furthermore, several firms have also submitted application for exemptions with the MyCC⁴⁵.

As with most East Asian nations, there is close interconnections between politics and economy⁴⁶. However, the uniqueness of Malaysia lies in the fact that the government exploits the market forces to create more “authentic” capitalists⁴⁷ not only to balance the inter-ethnic wealth distribution but also to develop and enhance national champions and Malaysian owned or controlled businesses. However, despite the relative openness of the economy; continuous efforts to liberalise markets; and government exploitation of

⁴² Lee, C., ‘Competition Policy in Malaysia’, (2004), Working Paper Series, Paper No.68, Centre on Regulation and Competition, University of Manchester, p.5-6

⁴³ MLTIC website at <http://mycompetitionlaw.info/news/mycc-to-deliver-its-first-decision-under-competition-act-277.html> accessed on 7/8/2012

⁴⁴ The Star Online, MyCC *to Investigate if AirAsia-MAS Share Swap has Made Airfares Go Up*, (4 January 2012) at <http://biz.thestar.com.my/news/story.asp?file=/2012/1/4/business/10199177&sec=business> accessed on 7/8/2012; Channel News Asia, *AirAsia and Rival Malaysia Airlines Cancel Share Swap*, (2 May 2012) at http://www.channelnewsasia.com/stories/afp_asiapacific_business/view/1198610/1.html accessed on 7/8/2012.

⁴⁵ The Star Online, Malaysia, *Four Parties Apply for Exemption from Competition Act*, (26 April 2012) at <http://biz.thestar.com.my/news/story.asp?file=/2012/4/26/business/11176730&sec=business>

⁴⁶ Beeson, M., ‘Mahathir and the Markets: Globalisation and the Pursuit of Economic Autonomy in Malaysia’, *Pacific Affairs* Vol. 73 No. 3 335-351 (Fall 2000), p.339.

⁴⁷ Beeson, M., ‘Mahathir and the Markets: Globalisation and the Pursuit of Economic Autonomy in Malaysia’, *Pacific Affairs* Vol. 73 No. 3 335-351 (Fall 2000), p.339. Although this work is dated and is focused on the administration of the former Malaysian Prime Minister, the focus on market forces exploitation in the creation of capitalists in government intervention in the economy persists.

market forces, government involvement in economic activities particularly through Government Linked Companies (GLCs)⁴⁸; and inappropriate implementation of some policies such as “Malaysia Incorporated Policy” and “*Bumiputera* Commercial and Industrial Community (BCIC)” has resulted in political patronage which leads to rent seeking⁴⁹. This is because creation of the “authentic capitalists” (which include individuals and bodies corporate) by the government is not always based on sound economic justifications but more often than not it is based on arbitrary and discretionary factors such as political affiliation and close relations with decision makers⁵⁰. Thus, not all of these created capitalists have been able to “authenticate” themselves in riding the waves of market forces. These include, for instance, the failure of some heavy industries projects such as PERWAJA in the steel industry; and the lack of competitiveness of PROTON, Malaysia’s national car maker which resulted in protectionism policy continually being implemented by the government in the automotive industry albeit with gradual liberalisation⁵¹.

Evidence of market concentration; evidence of anti-competitive practises in the Malaysian markets; and rent seeking activities through political patronage give rise to competition concerns. Additionally, Malaysia’s cartel enforcement policy has to account

⁴⁸ GLCs are companies with primarily commercial objectives despite the Malaysian government holding direct controlling stakes - Wei, I. K.T. and Hooi, H.L., ‘Capital Structure of Government Linked Companies in Malaysia’, *Asian Academy of Management Journal of Accounting and Finance* Vol.7, No.2 (2011) 137-156, p.138 at <http://web.usm.my/journal/aamjaf/vol%207-2-2011/7-2-6.pdf>

⁴⁹ For examples of political patronage and rent seeking in Malaysia see: Gomez, E.T. and Jomo, K.S., *Malaysia’s Political Economy: Politics, Patronage and Profit*, Cambridge University Press (1999)

⁵⁰ See Jomo, K.S., ‘Industrialisation and Industrial Policy in Malaysia’, in Jomo, K.S. (ed.), *Malaysian Industrial Policy*, National University of Singapore (NUS) Press Singapore (2007)

⁵¹ See: Malaysia’s National Automotive Policy at Prime Minister’s Office, Malaysia website at <http://www.pmo.gov.my/?menu=page&page=1701>

for *bumiputera* rights⁵² and its related policies such as the BCIC because *Bumiputera* rights are entrenched in the Federal Constitution, which is the supreme law of the land. This element may be labelled as a public interest of Malaysia because it is very much related to issues of socio-economic development and fairer distribution of economic wealth which is closely linked with the country's unity and politics. However, such public interest elements need to be systematically assessed and weighed against competition considerations in the implementation of the country's cartel enforcement.

Nevertheless, this work is not promoting for the Malaysian market to be immediately subject to total *laissez faire* from the get go of implementation of its competition law, but this work argues that cartel enforcement in Malaysia should account for its limitations and developmental and socio-economic needs without jeopardising the competition agenda. Moreover, it is never too early for a developing country with a new competition jurisdiction like Malaysia to identify the foreseeable issues related to cartel enforcement in order to anticipate and be sufficiently prepared to deal with them more efficiently. It is also prudent to ensure that all pre-conditions for effective cartel enforcement are in place without waiting a few years or even decades down the line to address the issues when the jurisdiction has reached "sufficient level of maturity" and anti-competitive behaviours have become ingrained in the competition environment and thus, more complex to be dealt with. In short, there is a need for cartel enforcement in Malaysia and being sufficiently prepared to deal with anti-competitive cartel issues may facilitate

⁵² See: explanation on *bumiputera* rights below.

new competition jurisdictions to “catch-up” with older and more mature competition jurisdictions and exit the doldrums of nascent competition jurisdictions earlier – hence contributing to the enhancement of market environment which facilitates international cartel enforcement.

1.3. RESEARCH QUESTIONS

This thesis answers two (2) overarching research questions; namely: “why should developing countries be concerned with effective cartel enforcement?”; “what is an appropriate cartel enforcement policy for Malaysia?” The first overarching research question is answered by discussing the incoherence in international cartel enforcement and the harmful impact on developing countries. This highlights the relevance and importance of competition law to developing countries especially economies which significantly rely on trade for income and growth. The need for developing countries to equip themselves with credible cartel enforcement regime is explained in terms of incentives between developed and developing countries signatories in regional TAs. This leads to the second overarching research question which is answered by focusing on Malaysia. It is appropriate for Malaysia to be selected as a case study in answering the research question the findings in relation to the first overarching research question need to be assessed based on a jurisdiction with an economy where trade is significant and at a level of development where: competition policy and law could facilitate growth and development; and where competition law enforcement is possible.

The other research questions of this thesis are; 1) are regional trade agreements a viable alternative for developing countries in addressing international cartel enforcement issues?; 2) what are the factors which have caused the under-utilisation of regional trade agreements in facilitation of international cartel enforcement?; 3) what are the steps to be undertaken to enable and encourage active participation of developing countries such as Malaysia in cross-border cooperation in international cartel enforcement; 4) how to determine an appropriate cartel enforcement policy for Malaysia?; 5) what are the general principles in developing an appropriate cartel enforcement policy for Malaysia?; 6) what are the lessons to be learned from South Africa in regard to cartel enforcement?; 7) what are the factors which influence proper implementation of exemptions in developing countries?; 8) could EU style exemption mechanism be adapted and applied in Malaysia?; 9) could EU style exemptions mechanism be workable in Malaysia?; and if so, 10) what are the necessary elements to be included in the implementation framework for the granting of exemptions in Malaysia?; 11) how could tougher cartel enforcement bring about the problem of tacit collusion through mergers of firms?; 12) would the current provisions of the Competition Act 2010 be adequate to address tacit collusion?; and 13) how best to address tacit collusion which becomes more feasible due to mergers in light of tougher cartel enforcement in Malaysia? These and the minor research questions are discussed in detail in the respective chapters.

1.4. RESEARCH METHODOLOGY AND LIMITATIONS

In so far as the research methodology adopted in answering the aforementioned two over-arching research questions, the discussion is approached from a legal policy viewpoint and is mainly focused on cartel enforcement from the perspective of an upper middle income developing country, namely Malaysia. The thesis discussion commences in Chapter 2 by looking at one of the main unresolved issues in regard to cartel enforcement and developing countries; which is international cartel enforcement. This is done by analysing cartel enforcement from an international perspective in order to illustrate the importance of establishing effective cartel enforcement in the domestic jurisdiction of developing countries first before international cartel enforcement could be facilitated. In this regard, the discussion does not only refer to currently available literature but also the author's own analysis of the content of 59 regional TAs texts⁵³ between developed and developed countries which are in force and have been notified to the WTO as of May 2012. The regional TAs analysed are only those with significant⁵⁴ competition related provisions. In the context of this work, regional TAs include bilateral and multilateral trade agreement involving individual countries or regional groups or development and trade bloc. This work focuses on regional TAs between partners at

⁵³ The number of regional TAs between developed and developing countries which have been notified to the WTO with significant competition related provisions and are in force and available on the WTO website as of May 2012. See http://www.wto.org/english/tratop_e/region_e/region_e.htm

⁵⁴ Only agreements with a dedicated Chapter or Sub-Chapter on competition related provisions.

dissimilar levels of development⁵⁵ because the main point of contention argued by developing countries against the EU's proposal for a multilateral agreement on competition under the WTO was that they do not account for the needs of developing countries⁵⁶.

Since one of the main premise of this work is that there has to be effective cartel enforcement in the jurisdictions of developing countries before cross-border cooperation in international cartel enforcement could be facilitated, this work looks at the domestic aspect of cartel enforcement in Malaysia in Chapter 3 after initially discussing facilitation of cross-border cooperation in international cartel enforcement in Chapter 2. In this regard, the meaning of effective cartel enforcement in the Malaysian context is clarified and the general principles in formulating an appropriate cartel enforcement policy for Malaysia are identified. Malaysia's cartel enforcement policy should be tailor made to Malaysia's competition; socio-economic; and development whilst referring to a suitable competition law jurisdiction for insights. In this regard, based on the recommendation by Fox pertaining to the virtues of South African competition jurisprudence in regard to developing countries⁵⁷, the achievements of the South African competition regime in cartel enforcement and also some similarities shared between Malaysia and South

⁵⁵ Specifically, the focus of the discussion is on regional TAs between developed and middle income developing countries as per the World Bank Classification as of July 2012 at <http://muse.jhu.edu/about/order/wdi2012.pdf>

⁵⁶ Bhattacharjea, A., 'The Case for a Multilateral Agreement on Competition Policy : A Developing Country Perspective', *Journal of International Economic Law*, (2006) 9(2), 293-323, p. 296-298

⁵⁷ Fox, E.M., 'In Search of a Competition Law Fit for Developing Countries', *New York University Law and Economics Research Paper No.11-04* (2011) at SSRN: <http://ssrn.com/abstract=1761619> or <http://dx.doi.org/10.2139/ssrn.1761619>

Africa, the discussion mainly refers to the South African competition jurisprudence and experience for insights. The general principles for developing an appropriate cartel enforcement in Malaysia are identified by discussing the limitations faced or would likely be faced by the MyCC in cartel enforcement. This discussion is interwoven with insights from the South African competition law enforcement experience.

Ensuring effective cartel enforcement also includes implementing an appropriate exemption mechanism for anti-competitive horizontal agreement to ensure the achievement of Malaysia's competition objectives without jeopardising development. The discussion in Chapter 4 focuses on the EU exemption mechanism because Malaysia has adopted EU style exemptions legislative provisions. Some references are also made to: the Japanese exemption mechanism because of its experience in granting cartel exemptions throughout the years since 1950's when it was still a developing country to date: and also the South African exemption mechanism because of its similar development status with Malaysia and the receptive nature of its competition law to inclusive development⁵⁸. However, references are more focused on the EU experience in the granting of exemptions due to the similarity of legal provisions.

Although Malaysia is still in the nascent stage of competition law enforcement and tougher cartel enforcement is yet to be implemented, the foreseeable outcomes of tougher cartel enforcement is explained in Chapter 5 by referring to the findings of

⁵⁸ See: discussion in Chapter 4 of this thesis

relevant research in the literature and empirical evidence available thus far. Hence, the discussion in this chapter is essentially a theoretical discussion on the anticipated impact of tougher cartel enforcement and the limitations of the current competition legislative framework in dealing with tacit collusion, which is identified as one of the anticipated outcomes of tougher cartel enforcement in Malaysia. The focus of the discussion in Chapter 5 is not on whether Malaysia needs to include competition dimension in the country's merger control regime but it discusses the adequacy of the Competition Act 2010 in dealing with collusion. In answering the research questions in Chapter 5, significant reference is made to EU jurisprudence. This is because the provisions on anti-competitive agreements (Section 4) and abuse of dominance (Section 10) under the Competition Act 2010 are modelled on their EU equivalent; Articles 101 and 102 TFEU, respectively. References are also made to: literature on the theories and concepts of tacit collusion; empirical economic studies on the Malaysian manufacturing and banking industries; and available literature on the links between tougher cartel enforcement and mergers; and the impact of change in market structure on factors which enable tacit collusion. Chapter 6 summarises the discussions in this thesis and proposes appropriate policy recommendations in terms of the way forward for Malaysia in cartel enforcement before the thesis discussion concludes.

It has to be highlighted that due to the very recent implementation of cartel enforcement in Malaysia (and a gradual one at that), it is not possible to focus on actual cases of cartel enforcement in Malaysia. However, this work discusses the areas in cartel

enforcement which: should be focused by Malaysia as a young competition jurisdiction in a developing country; and also those which would enhance the discussions on the legal policy aspects in competition literature. In this regard, the findings of relevant researches and the experiences of other countries are referred to. These experiences are analysed and applied to Malaysia. Hence, this work is essentially a theoretical micro study of the areas which are anticipated to impact cartel enforcement in Malaysia as a developing country with a young competition jurisdiction. The research method adopted for each chapter is explained in detail in each respective chapter.

1.5. MOTIVATION AND NOVELTY

The motivation for this study is to illustrate the importance of the implementation of an appropriate cartel enforcement policy to developing countries which are trade reliant. In this regard, the novelty does not only lie in the fact that the Competition Act 2010, Malaysia is a fairly recent piece of legislation which is yet to be fully implemented but also that this work contributes to the debate on the significance of consensus in international cartel enforcement to the furtherance of international trade from a legal policy perspective of developing countries, particularly Malaysia. Moreover, available literature which approaches the question of lack of utilisation of competition related provisions in regional TAs to address international cartel infringements is lacking. Leading works on regional TAs include those contained in the seminal publication by UNCTAD, "Competition Provisions in Regional Trade Agreements: How to Assure

Development Gains?"; Sokol⁵⁹, Gal and Wassmer⁶⁰; and Marsden and Whelan⁶¹. These works focus on competition related provisions in regional TAs, whilst Marsden and Whelan discuss the aspect of lack of cooperation in cross border competition enforcement under bilateral trade or competition agreements by the signatories. Although the work by Gal and Wassmer is regarding regional competition agreements, essentially such accords are actually a more evolved or detailed form of competition related provisions under regional TAs. These works do not focus solely on cartel enforcement and do not discuss the lack of utilisation of competition related provisions in international accords from the perspective of incentives. Meanwhile, works on international cartels are also lacking, particularly from the perspective of developing countries due to lack of data on cartel activities in developing countries. Empirical research on cartels and developing countries is limited due to the difficulty in obtaining data and information on cartels particularly in developing countries because sometimes cartels such as export cartels are exempted or allowed by the law⁶² and empirical research on the impact of international cartels in developing countries have been based

⁵⁹ Sokol, D.D., 'Order Without (Enforceable) Law: Why Countries Enter Into Non-Enforceable Competition Policy Chapters in Free Trade Agreements', *Chicago-Kent Law Review*, Vol. 83 (2008) 101-163

⁶⁰ Gal, M.S. and Wassmer, I.F., 'Regional Agreements of Developing Jurisdictions: Unleashing the Potential', in *Competition Policy and Regional Integration in Developing Countries*, Bakhoun, M. *et al* (eds), Edward Elgar (2012)

⁶¹ Marsden, P. and Whelan, P., 'The Contribution of Bilateral Trade or Competition Agreements to Competition Law Enforcement Cooperation between the EU and Mexico', *The British Institute of International and Comparative Law* (2005) at <http://ssrn.com/abstract=980527> or <http://dx.doi.org/10.2139/ssrn.980527>; Marsden, P. and Whelan, P., 'The Contribution of Bilateral Trade or Competition Agreements to Competition Law Enforcement Cooperation between Canada and Chile', *The British Institute of International and Comparative Law* (2005) at <http://ssrn.com/abstract=980525> or <http://dx.doi.org/10.2139/ssrn.980525>; Marsden, P. and Whelan, P., 'The Contribution of Bilateral Trade or Competition Agreements to Competition Law Enforcement Cooperation between Canada and Costa Rica', *The British Institute of International and Comparative Law* (2005) at <http://ssrn.com/abstract=980526> or <http://dx.doi.org/10.2139/ssrn.980526>

⁶² See: Evenett, S.J. *et al*, 'International Cartel Enforcement: Lessons from the 1990's', *The World Economy* Vol.24 Issue 9 (2001) 1221-1245

on the data available from developed countries such as the US, EU or supra-national competition bodies⁶³. Thus, it is not surprising that most of the seminal works on the subject matter are also dated. They include those by Evenett *et al*⁶⁴; and Levenstein and Suslow⁶⁵.

As for ensuring the establishment of credible competition law enforcement regime in developing countries, with Malaysia as a case study; there are foreseeable issues, limitations and challenges which may be encountered by Malaysia in enforcing anti-competitive cartel provisions under the law. Additionally, there are also uncertainties which need to be addressed due to the fact that all necessary supporting guidelines are yet to be enacted. Uncertainties include issues related to gradual enforcement; and reconciling Malaysia's socio-economic concerns with competition concerns. Research which specifically discusses cartel enforcement in developing countries with young competition agencies is rather lacking. Most of the leading works on competition law enforcement and young competition jurisdictions or developing countries are based on the general perspective of enforcement which includes issues and challenges in competition law enforcement⁶⁶ and pre-conditions to competition law implementation⁶⁷.

⁶³ Such as: Levenstein, M.C. and Suslow, V.Y., 'Contemporary International Cartels and Developing Countries: Economic Effects and Implications for Competition Policy', *Antitrust Law Journal* Vol.71 No.3 (2004) 801-852

⁶⁴ Evenett, S.J. *et al*, 'International Cartel Enforcement: Lessons from the 1990's', *The World Economy* Vol.24 Issue 9 (2001) 1221-1245

⁶⁵ Levenstein, M.C. and Suslow, V.Y., 'Contemporary International Cartels and Developing Countries: Economic Effects and Implications for Competition Policy', *Antitrust Law Journal* Vol.71 No.3 (2004) 801-852

⁶⁶ Such as International Competition Network (ICN), 'Lessons to be Learnt From the Experiences of Young Competition Agencies', *Competition Policy Implementation Working Group Report (Subgroup 2)*,

It is also observed that very rarely are these findings applied at a micro level in order to assess their viability in relation to a specific country.

1.6. THESIS STRUCTURE

In summary, the issues discussed in this thesis are: the need to prohibit cartels, particularly by developing countries; the need for cooperation because markets transcend national borders; the need for developing countries to have a credible cartel enforcement regime in order to facilitate international cartel enforcement; and a credible cartel enforcement regime requires competition law to be complemented by an appropriate cartel enforcement policy. As such, this thesis consists of a series of six chapters with four essays. The substantive discussion of this thesis commences in Chapter 2 - Implementing International Cartel Enforcement via Regional Trade Agreements: A Likely Second Best Option for Partners at Different Levels of Development? This chapter establishes the need for cartels to be addressed comprehensively at both the domestic and international level and the importance for developing countries of developing countries' participation in international cartel enforcement. The other chapters are: Chapter 3 - Lessons from South Africa for the Development of an Appropriate Cartel Enforcement Policy in Malaysia; Chapter 4 -

ICN, Cape Town, South Africa (May 2006) at

<http://www.internationalcompetitionnetwork.org/library.aspx?search=&group=13&type=0&workshop=0>

⁶⁷ Such as Gal, M.S., 'The Ecology of Antitrust Pre-conditions for Competition Law Enforcement in Developing Countries', in *Competition, Competitiveness and Development: Lessons from Developing Countries*, United Nations Publication (2004), UNCTAD/ DITC/CLP/2004/1, pp.20-38 at http://www.unctad.org/en/docs/ditcclp20041ch1_en.pdf

Towards an Appropriate Implementation Framework on Horizontal Agreements Exemptions in Malaysia; and Chapter 5 - Limitations Of the Competition Act 2010 in Light of Tougher Cartel Enforcement - Focus on Tacit collusion. The thesis discussion concludes in Chapter 6 – The Way Forward for Malaysia. Chapter 2 discusses the need for developing countries to be actively involved in international cartel enforcement and the obstacles which exists in terms of competition related provisions in regional TAs. Chapter 3 discusses an appropriate cartel enforcement policy for Malaysia with insights from South Africa based on their competition law enforcement experience; whilst Chapter 4 argues the importance of exemptions in ensuring that developmental and crucial socio-economic considerations are accounted for in cartel enforcement in Malaysia without compromising competition law objectives. Chapter 5 discusses the limitations of the Competition Act 2010 as cartel enforcement progresses in Malaysia, with focus on tacit collusion. Chapter 6 recommends a Roadmap for Cartel Enforcement in Malaysia together with other complementary cartel enforcement tools and instruments; implementation of the regulatory approach and advocacy to complement the behavioural approach; and immediate and relevant studies to be undertaken.

1.7. MALAYSIA IN BRIEF

Before the substantive discussion in this thesis commences, it is appropriate to discuss Malaysia in brief in order to provide a better understanding of the country's historical, cultural and economic environment. Malaysia is a commonwealth member country

which gained its independence from Great Britain on 31 August 1957. The country was formerly known as Malaya until 1963 when Malaysia was formed with the inclusion of Singapore, and two Borneo states, namely Sabah and Sarawak. However, in 1965 Singapore opted out of Malaysia to form its own republic. Today, Malaysia is made up of thirteen states and three federal territories with a population of 28.86 million as of 2011⁶⁸ and per capita income of USD9, 977 in 2011⁶⁹. Malaysia is a middle income economy with a vision to achieve developed nation status by the year 2020⁷⁰. It is a multiracial nation consisting of Malays (the majority), Chinese, Indians, Indigenous peoples, Eurasians and others. Malaysia is a parliamentary democracy whereby the government of the day is led by the Prime Minister with a constitutional monarch as the head of state. The Malaysian legal system is based on the British common law.

The British colonial administration policies in Malaya confined each race to specific economic activity. Malays, who are the majority group and the original inhabitants (*bumiputera*)⁷¹ of the Malay Peninsula, were mainly confined to agriculture and fisheries in rural, coastal and inland areas. The British had brought in Chinese and Indians to work in tin mines and rubber estate respectively. The Chinese were involved in mining and commerce and were based in the suburbs and major towns, whilst the Indians were mainly working in rubber estates. This created disparity in the distribution of economic

⁶⁸ The World Bank at <http://data.worldbank.org/country/malaysia> accessed on 11/1/2013

⁶⁹ The World Bank at <http://data.worldbank.org/indicator/NY.GDP.PCAP.CD> accessed on 11/1/2013

⁷⁰ As per Vision 2020 Policy, Malaysia.

⁷¹ *Bumiputera* literally means “sons of the soil”. The Malays and natives of Sabah and Sarawak are conferred *bumiputera* rights by the Federal Constitution by virtue of Article 153 Federal Constitution, Malaysia.

wealth between the different races and resulted in distrust and dissatisfaction particularly among the Malays who felt that they were lagging behind the migrant races. These culminated in the 13 May 1969 social unrest. Consequently, the New Economic Policy (NEP) was implemented from 1971 till 1990. The main objective of this policy was to address the unequal economic wealth distribution between the races and eradication of poverty⁷². These objectives continue to feature significantly in subsequent development policies in Malaysia.

The Malays and natives of Sabah and Sarawak are conferred *bumiputera* rights by the Federal Constitution by virtue of Article 153 Federal Constitution, Malaysia. These rights are part of the social contract negotiated between the representatives of the major races with the British in gaining independence in 1957. In return for the *bumiputeras* agreeing to the conferring of citizenships to the migrant races, the *bumiputera* rights were granted. This is a peculiar feature of the Malaysian socio-economic and political set up which is often misunderstood by foreigners. Since *bumiputera* rights are conferred by the Federal Constitution which is the supreme law of the land, all policies and legislation have to account for the said rights. These rights are mainly reservation of quotas in respect of federal public service; permits; scholarship; educational or training privileges or special facilities accorded by the Federal Government and business and trade permit or license. These rights are granted to safeguard the special position of *bumiputeras* and are granted to them in addition to other rights granted to all Malaysian citizens.

⁷² Abdul Halim, S. *et al*, *Malaysia Kita*, Institut Tadbiran Awam Negara (INTAN) (1991), p.737

These rights are positive discrimination which is pertinent in upholding the racial harmony in Malaysia. However, this does not mean that the interests of other races are disregarded particularly in the past few years because the Malay middle class has increased in numbers and the poor in Malaysia now does not only largely consist of Malays⁷³. This is reflected in the current development policy, the New Economic Model (2010-2020) wherein inclusiveness is one of the main thrusts of the policy.

Malaysia is rich in natural resources and has been a major producer of palm-oil, rubber and tin in addition to petroleum and liquefied petroleum gas. The country is also a major manufactured goods exporter⁷⁴. The focus of Malaysia's industrial policy shifted from import substitution to export oriented industries commencing from the late 1960's⁷⁵. As such, international trade is one of the major contributors to the country's economic growth⁷⁶. Malaysia's total trade in 2011 was recorded at Ringgit Malaysia (RM) 1.269 trillion⁷⁷, an increase of 8.7 per cent compared to 2010⁷⁸. Malaysia's gross domestic product (GDP) in 2011 was at USD287.9 billion⁷⁹.

⁷³ Roslan, A.H., 'Income Inequality, Poverty and Development Policy in Malaysia', paper presented at the International Seminar on "Poverty and Sustainable Development", Université Montesquieu-Bordeaux IV and UNESCO-Paris, France (22-23 November 2001).

⁷⁴ Gomez, E.T. and Jomo, K.S., *Malaysia's Political Economy: Politics, Patronage and Profit*, Cambridge University Press (1999), p.1. In 2010, the manufacturing sector contributed 27.7 per cent to Malaysia's real GDP. See MITI, Malaysia, *Malaysia International Trade and Industry Report 2010*, MITI (2011), p.36

⁷⁵ Athukorala, P.C. and Menon, J., 'Export-Led Industrialisation, Employment and Equity: The Malaysian Case' (1996), p.5 at <http://www.crawford.anu.edu.au/acde/publications/publish/papers/wp1996/965.pdf>

⁷⁶ Yusoff, M.B., 'Malaysia Bilateral Trade Relations and Economic Growth', *International Journal of Business and Society* Vol. 6 No.2 (2005) 55-68

⁷⁷ At 31/12/2011 the exchange rate was USD1 = RM3.17

⁷⁸ Malaysian External Trade Development Corporation (MATRADE), 'Malaysia's Trade Performance 2011', MATRADE website at <http://www.matrade.gov.my/en/malaysia-exporters-section/155/1916-malaysias-trade-performance-2011> accessed on 11/1/2013

⁷⁹ The World Bank at <http://data.worldbank.org/country/malaysia> accessed on 11/1/2013

1.8. THE COMPETITION ACT 2010 AND ITS ADMINISTRATION FRAMEWORK

The Malaysian competition legislation consists of two statutes; namely, the Competition Act 2010 and the Competition Commission Act 2010. The former is the legislation which governs competition across the board in Malaysia whilst the latter concerns the administration and establishment of the Malaysian Competition Commission and the appointment of Commissioners. The Competition Act 2010 applies to any commercial activity within Malaysia and also activities outside Malaysia which has anti-competitive impact on Malaysia's domestic market⁸⁰. However, "commercial activity" under the Competition Act 2010 does not include "... any activity, directly or indirectly in the exercise of governmental authority; any activity conducted based on the principle of solidarity; and any purchase of goods or services not for the purposes of offering goods and services as part of an economic activity⁸¹. There are also sectors and types of activities which are excluded from the remit of the Malaysian competition law⁸². These include: the communications and multimedia sector and the energy sector which are subject to their own sectoral legislation which have some form of competition dimension⁸³; and "... conduct engaged in order to comply with a legislative requirement; collective bargaining activities; revenue producing monopoly; and enterprise entrusted with the operation of services with general economic interests"⁸⁴. The discussions in this thesis focus on the Competition Act 2010. The objectives of the Competition Act 2010

⁸⁰ Sections 3 (1) and 3 (2) Competition Act 2010, Malaysia.

⁸¹ Section 3 (4) Competition Act 2010, Malaysia.

⁸² See: Section 3, Section 13, the First Schedule, the Second Schedule Competition Act 2010, Malaysia.

⁸³ Respectively, the Communications and Multimedia Act 1998 and the Energy Commission Act 2001.

⁸⁴ Second Schedule Competition Act 2010, Malaysia.

are: promotion of economic development; protecting the process of competition; and consumer protection⁸⁵. A finding of any infringements under Part II, Competition Act 2010 is liable to a financial penalty not exceeding ten (10) per cent of the worldwide turnover of the firms throughout the infringement period⁸⁶. For the moment, criminal sanctions have not been included under the Competition Act 2010. However, private action is provided for by virtue of Section 64, Competition Act 2010.

The main legislative provisions concerning cartels are Sections 4⁸⁷ and 5⁸⁸ Competition Act 2010, Malaysia. By virtue of section 4 Competition Act 2010, price fixing, market

⁸⁵ See: Preamble, Competition Act 2010, Malaysia.

⁸⁶ Section 40 (4) Competition Act 2010.

⁸⁷ *Section 4 Competition Act 2010 – Prohibited Horizontal and Vertical Agreement*

(1) *A horizontal or vertical agreement between enterprises is prohibited insofar as the agreement has the object or effect of significantly preventing, restricting or distorting competition in any market for goods or services.*

(2) *Without prejudice to the generality of subsection (1), a horizontal agreement between enterprises which has the object to —*

(a) fix, directly or indirectly, a purchase or selling price or any other trading conditions;

(b) share market or sources of supply;

(c) limit or control—

(i) production;

(ii) market outlets or market access;

(iii) technical or technological development; or

(iv) investment; or

(d) perform an act of bid rigging,

is deemed to have the object of significantly preventing, restricting, or distorting competition in any market for goods or services.

(3) *Any enterprise which is a party to an agreement which is prohibited under this section shall be liable for infringement of the prohibition.*

⁸⁸ *Section 5, Competition Act 2010 – Relief of Liability*

Notwithstanding section 4, an enterprise which is a party to an agreement may relieve its liability for the infringement of the prohibition under section 4 based on the following reasons:

(a) there are significant identifiable technological, efficiency or social benefits directly arising from the agreement;

(b) the benefits could not reasonably have been provided by the parties to the agreement without the agreement having the effect of preventing, restricting or distorting competition;

(c) the detrimental effect of the agreement on competition is proportionate to the benefits provided; and

sharing, barriers to entry and bid rigging are deemed to have the object of significantly preventing competition. Once proven, these types of anti-competitive agreements are prohibited. Thus, it may be concluded that hard core cartel activities are easier to be proven under Section 4 Competition Act 2010, Malaysia because they are *per se* prohibited. However, such *per se* prohibitions may still be considered for exemption by virtue of section 5 Competition Act 2010. Thus, it may be argued that the *per se* prohibition of hard core cartel agreements under the Competition Act 2010 is unlike the total prohibition of such agreements under the US competition legislation but it is more akin to the EU competition law which provides exemptions for prohibited agreements subject to qualification after considering the pro and anti-competitive effect of the agreement in question. Therefore, theoretically, this includes even hard core cartel agreements.

Enforcement of the Competition Act 2010 is done by the Malaysian Competition Commission (MyCC). The MyCC does not only investigate and prosecute but it also decides on cases under the competition law. Appeals of decisions made by the MyCC shall be heard by the Malaysian Competition Tribunal. Appeals of the Malaysian Competition Tribunal decisions on matters of law shall be made to the High Court. This is unlike the South African framework whereby the Competition Commission only investigates and prosecutes cases under the Competition Act 1998, South Africa but adjudication of cases is carried out by the South African Competition Tribunal and

(d) the agreement does not allow the enterprise concerned to eliminate competition completely in respect of a substantial part of the goods or services.

appeals are heard by the Competition Appeal Court⁸⁹. The MyCC has been established as an agency under the Ministry of Domestic Trade, Cooperatives and Consumerism Malaysia and the Minister responsible for the administration of the law is the Minister of Domestic Trade, Cooperatives and Consumerism. The Competition Commissioners are appointed by the Prime Minister upon recommendation by the Minister.

1.9. PRELIMINARY OBSERVATIONS ON THE STATE OF COMPETITION IN MALAYSIA

Based on the above, the following preliminary observations may be made on the state of competition in Malaysia:

- i. although Malaysia's economy and markets are already open by international standards, there are some competition concerns, namely: market concentration in some industries and political patronage and cronyism;
- ii. due to Malaysia's small domestic economy, empirical studies on the manufacturing industry found that economies of scale has been the cause for market concentration in the manufacturing industry;

⁸⁹ See: Competition Act 1998, South Africa

- iii. industrial regulation of the Malaysian banking sector has been effective in ensuring competition in the market;
- iv. political patronage and cronyism is a significant concern for competition in Malaysia;
- v. cartels exist in the Malaysian markets;
- vi. the main development concerns for Malaysia is social unity through fairer distribution of economic wealth; and
- vii. the international dimension in cartel enforcement should be a concern for Malaysia due to the economy's reliance on international trade.

CHAPTER 2:

IMPLEMENTING INTERNATIONAL CARTEL ENFORCEMENT VIA REGIONAL TRADE AGREEMENTS: A LIKELY SECOND BEST OPTION FOR PARTNERS AT DIFFERENT LEVELS OF DEVELOPMENT?

2.1. INTRODUCTION

International cartels⁹⁰ are thriving in an environment with opportunities for private undertakings to engage in anti-competitive conducts. This is due to the dismantling of trade barriers which encourages cross border transactions and increases competition in the market⁹¹. However, there is not much progress in dealing with anti-competitive conducts of international cartels for there is yet to be any coherent consensus reached in regard to their enforcement⁹². Many have argued that ideally international cartels enforcement should be regulated via a supranational body such as the World Trade

⁹⁰ International cartels may be categorised into three types, namely, 1) hard core cartels - made up of private producers of at least two countries who engages in price control and allocation of markets shares worldwide; 2) private export cartels - independent of the state and engages in price fixing or market allocation in export markets but not in their domestic market; and 3) state run export cartels. See Evenett, S.J. *et al*, 'International Cartel Enforcement: Lessons from the 1990's', *The World Economy* Vol.24 Issue 9 (2001) 1221-1245, p.1222. International cartels activities therefore, expand across at least two or more jurisdiction whereby the cartel agreement may be executed in a foreign market and one or all of the cartel member firms may not have office in the country in question at all. However, the domestic market is the one which bears brunt of the negative impact of the cartel's anti-competitive agreement. On the other hand, anti-competitive conducts of domestic firms which have entered into international cartels agreement may negatively impact foreign markets or both domestic and foreign markets.

⁹¹ Evenett, S.J. *et al*, 'International Cartel Enforcement: Lessons from the 1990's', *The World Economy* Vol.24 Issue 9 (2001) 1221-1245

⁹² See: Evenett, S.J. *et al*, 'International Cartel Enforcement: Lessons from the 1990's', *The World Economy* Vol.24 Issue 9 (2001) 1221-1245

Organisation (WTO)⁹³. However, the European Union's proposal for a multilateral agreement on competition under the WTO failed to be accepted particularly due to the strong opposition by most developing countries and the ambivalence of the United States of America (US)⁹⁴. In the meantime, international cartels continue to exist in a global environment without coherent enforcement framework, to the detriment of vulnerable countries such as developing countries without effective competition regulatory regimes⁹⁵. Therefore, in such a situation it would be prudent to consider alternative methods in dealing with issues in international cartel enforcement.

One of the possibilities is to utilise regional trade agreements (regional TAs) with competition related provisions. Regional TAs are trade pacts between countries or a group of countries which accord preferential treatment to their signatories usually in terms of tariff reduction whereby it is lower than the WTO's most favoured nation rate⁹⁶. The number of regional TAs continues to rise⁹⁷ and a number of developing countries have willingly entered into regional TAs with competition related provisions which sometimes are beyond the anti-cartels provisions as laid out in the EU's proposal for a

⁹³ See for example, Taylor, M., *International Competition Law: A New Dimension for the WTO?*, Cambridge University Press (2006)

⁹⁴ Bhattacharjea, A., 'The Case for a Multilateral Agreement on Competition Policy : A Developing Country Perspective', *Journal of International Economic Law*, (2006) 9(2), 293-323, p. 293

⁹⁵ See: Levenstein, M.C. and Suslow, V.Y., 'Contemporary International Cartels and Developing Countries: Economic Effects and Implications for Competition Policy', *Antitrust Law Journal* Vol.71 No.3 (2004) 801-852

⁹⁶ See: Bhagwati, J. *et al* (eds), *Trading Blocs: Alternative Approaches to Analyzing Preferential Trade Agreements*, Massachusetts Institute of Technology (1999), p.xiii - xiv

⁹⁷ As of 15 January 2012 some 511 regional TAs (counting goods and services separately) have been notified to the WTO. See The World Trade Organisation website at http://www.wto.org/english/tratop_e/region_e/region_e.htm

multilateral agreement on competition⁹⁸. However, regional TAs signatories have not been actively implementing the competition related provisions to address cross border cartel issues. This is evident from not only the fact that to date, there is limited data and publicly available information on the use and implementation of competition related provisions by regional TAs signatories⁹⁹ but also competition related provisions in regional TAs have rarely been used in addressing extraterritorial anti-competitive conducts. Instead, regional TA member countries are more likely to utilise trade disciplines such as anti-dumping and safeguards to address anti-competitive practices which create barriers to trade¹⁰⁰. Additionally, the International Competition Network

⁹⁸ Bhattacharjea, A., 'The Case for a Multilateral Agreement on Competition Policy : A Developing Country Perspective', *Journal of International Economic Law*, (2006) 9(2), 293-323, p. 294

⁹⁹ There are a number of works in relation to regional TAs with competition related provisions which have been conducted especially by organisations such as the OECD, the World Bank and UNCTAD. See Brusick, P. *et al* (eds), *Competition Provisions in Regional Trade Agreements: How to Assure Development Gains?*, United Nations Publication (2005), UNCTAD/DITC/CLP/2005/1, p.7 at http://www.unctad.org/en/docs/ditcclp20051_en.pdf . However, they are rather dated and do not focus on the status of implementation or utilisation of competition related provisions in regional TAs. The implementation aspect has been studied by Marsden and Whelan in their survey on bilateral trade or competition agreements between EU – Mexico, Canada – Chile and Canada – Costa Rica, (2005). Among others, they found that there is a lack of literature and publicly available official reports on bilateral cooperation agreements. See: Marsden, P. and Whelan, P., 'The Contribution of Bilateral Trade or Competition Agreements to Competition Law Enforcement Cooperation between the EU and Mexico', *The British Institute of International and Comparative Law* (2005) at <http://ssrn.com/abstract=980527> or <http://dx.doi.org/10.2139/ssrn.980527> ; Marsden, P. and Whelan, P., 'The Contribution of Bilateral Trade or Competition Agreements to Competition Law Enforcement Cooperation between Canada and Chile', *The British Institute of International and Comparative Law* (2005) at <http://ssrn.com/abstract=980525> or <http://dx.doi.org/10.2139/ssrn.980525> ; Marsden, P. and Whelan, P., 'The Contribution of Bilateral Trade or Competition Agreements to Competition Law Enforcement Cooperation between Canada and Costa Rica', *The British Institute of International and Comparative Law* (2005) at <http://ssrn.com/abstract=980526> or <http://dx.doi.org/10.2139/ssrn.980526>

¹⁰⁰ Cernat, L., 'Eager to Ink, but Ready to Act? RTA Proliferation and International Cooperation on Competition Policy' in P. Brusick *et al* (eds), *Competition Provisions in Regional Trade Agreements : How to Assure Development Gains?*, United Nations Publication (2005), UNCTAD/DITC/CLP/2005/1, p.18 at http://www.unctad.org/en/docs/ditcclp20051_en.pdf

(ICN) also reported that regional TAs seem to have played a very limited role in international cartels enforcement cooperation¹⁰¹.

Therefore, this work attempts to: look into the factors which discourage the utilisation of competition related provisions in existing regional TAs by the signatory countries; identify the pre-requisite elements to enable cooperation in international cartel enforcement between developed and developing countries; and suggest the elements recommended to be included in regional TAs which may encourage the signatories to invoke them in international cartel enforcement. In doing so, the potential for the competition related provisions in regional TAs to be utilised as another alternative method in dealing with international cartel enforcement issues between developed and developing countries is assessed. Thus, the research questions addressed in this chapter are: 1) are regional trade agreements a viable alternative for developing countries in addressing international cartel enforcement issues?; 2) what are the factors which have caused the under-utilisation of regional trade agreements in facilitation of international cartel enforcement?; 3) what are the steps to be undertaken to enable and encourage active participation of developing countries such as Malaysia in cross-border cooperation in international cartel enforcement. In answering the research questions, the discussion does not only refer to currently available literature

¹⁰¹ International Competition Network (ICN) Annual Conference Report, Moscow (May 2007), p. 15 at <http://www.internationalcompetitionnetwork.org/uploads/library/doc348.pdf>

but also my own analysis of the content of 59 regional TAs texts¹⁰² between developed and developed countries which are in force and have been notified to the WTO as of May 2012. The regional TAs analysed are only those with significant¹⁰³ competition related provisions. In the context of this work, regional TAs include bilateral and multilateral trade agreement involving individual countries or regional groups or development and trade bloc. This work focuses on regional TAs between partners at dissimilar levels of development¹⁰⁴ because the main point of contention argued by developing countries against the EU's proposal for a multilateral agreement on competition under the WTO was that they do not account for the needs of developing countries¹⁰⁵.

Part 2 briefly explains regional TAs and discusses the rationale for considering regional TAs with competition related provisions as a measure to implement international cartels enforcement between the signatories. Factors which contribute to the under utilisation of competition related provisions in regional TAs in international cartel enforcement is discussed in Part 3. In Part 4, the content analysis of 59 regional TAs texts between developed and developed countries which are in force and have been notified to the

¹⁰² The number of regional TAs between developed and developing countries which have been notified to the WTO with significant competition related provisions and are in force and available on the WTO website as of May 2012. See http://www.wto.org/english/tratop_e/region_e/region_e.htm

¹⁰³ Only agreements with a dedicated Chapter or Sub-Chapter on competition related provisions. Agreements with competition provisions which have evolved into regional competition agreements such as the Caribbean Community and Common Market Agreement (CARICOM) are excluded.

¹⁰⁴ Specifically, the focus of the discussion is on regional TAs between developed and middle income developing countries as per the World Bank Classification as of July 2012 at <http://muse.jhu.edu/about/order/wdi2012.pdf>

¹⁰⁵ Bhattacharjea, A., 'The Case for a Multilateral Agreement on Competition Policy : A Developing Country Perspective', *Journal of International Economic Law*, (2006) 9(2), 293-323, p. 296-298

WTO as of May 2012 is discussed. Recommendations and proposals follow in Part 5 before the discussion concludes. This work finds that the factors which have adversely affected the utilisation of competition related provisions in regional TAs by signatory countries in international cartel enforcement are: lack of incentives for countries to invoke cross border competition enforcement by virtue of regional TAs; lack of sufficient legal commitments in cooperation; developing countries do not view international cartel enforcement as a priority; and inconsistencies in cross border competition enforcement. In this regard, regional TAs is a viable option as an instrument in international cartels enforcement between middle income developing countries and developed countries provided that all the regional TA signatories have a credible competition enforcement regime in place, there are close trade relations between the signatories, the governments are committed to curb anti-competitive international cartel activities and the cooperation modality set in place under the regional TAs accounts for the limitations of all the signatories involved. This work also suggests that a suitable modality for cooperation is one which allow for the details of the implementation of cooperation to be determined in detail by the respective competition authorities and also includes the proposed minimum elements which are deemed necessary to encourage and enable cooperation in international cartel enforcement under regional TAs.

2.2. WHY REGIONAL TRADE AGREEMENTS?

Contrary to its name, regional TAs does not necessarily mean in the geographical sense because there are regional TAs between partners from different regions - such as EU-South Africa; US-Singapore; EFTA-Mexico; and Canada-Israel, and partners at different levels of economic development, such as Canada-Costa Rica; EU-Morocco; Japan-Malaysia; and NAFTA. It is referred to as regional TAs due to their discriminatory nature which creates a group or regionalism as opposed to multilateralism¹⁰⁶. It has been argued that regional TAs distort trade liberalisation because they accord preferential treatment to the signatories rather than free trade for all¹⁰⁷. Whatever the argument, as explained earlier, countries continue to enter into regional TAs in order to facilitate trade with strategic trade partners and accelerate trade and market liberalisation.

By virtue of Article XXIV of the General Agreement on Tariffs and Trade (GATT) 1994, regional TAs are allowed under the WTO provided that:- they lead to total tariff elimination between regional TA partners based on a specified schedule; the regional TA does not increase trade barriers with non regional TA partners; and the regional TA will be phased out on a definite time table. Regional TAs also have to be notified to the

¹⁰⁶ Bhagwati, J., 'Regionalism and Multilateralism : An Overview' in Bhagwati, J., *et al* (eds), *Trading Blocs : Alternative Approaches to Analyzing Preferential Trade Agreements*, Massachusetts Institute of Technology (1999), pp.1-5

¹⁰⁷ Viner explains that regional TAs can result in both beneficial trade creation among regional TA members and trade diversion at the expense of trade with non member countries which may be cheaper to source from. See Viner, J., *The Customs Union Issue*, Carnegie Endowment for International Peace (1950)

WTO. Regional TAs may also be notified to the WTO by virtue of Article V of the General Agreement on Trade and Services (GATS) or the WTO Enabling Clause. The latter allows for special and differential treatment to developing countries. The WTO's policy on regional TAs is they should be complementary to WTO's trade liberalisation efforts and not a substitute to the multilateral trading system¹⁰⁸.

As has been mentioned before, developing countries repeatedly invoked the development dimension in their argument against a multilateral agreement on competition under the WTO because they felt that the proposals do not account for their limited resources, lack of experience and development needs in so far as competition is concerned¹⁰⁹. In addition, developing countries were and still are wary of the proposal for a multilateral agreement on competition under the WTO because of the belief that it may be used as a market access tool by developed countries¹¹⁰. Nevertheless, developing countries acknowledge the harm caused by international cartels¹¹¹ and what is more interesting to note is that developing countries continue to enter into regional TAs which sometimes include competition related provisions which are beyond the anti-cartel provisions as proposed by the EU under the WTO¹¹². However, although the

¹⁰⁸ Pascal Lamy's speech in the Annual Memorial Silver Lecture at Columbia University, New York, (31 Oct 2006) available at http://www.wto.org/english/news_e/sppl_e/sppl46_e.htm

¹⁰⁹ Bhattacharjea, A., 'The Case for a Multilateral Agreement on Competition Policy : A Developing Country Perspective', *Journal of International Economic Law*, (2006) 9(2) 293-323, p. 296-298

¹¹⁰ Singh, A., ' Competition and Competition Policy in Emerging Markets : International and Developmental Dimensions', G-24 Discussion Paper Series No.18 (September 2002), United Nations, p.19

¹¹¹ Bhattacharjea, A., 'The Case for a Multilateral Agreement on Competition Policy : A Developing Country Perspective', *Journal of International Economic Law*, (2006) 9(2) 293-323, p. 296-297

¹¹² Such as provisions relating to abuse of dominant positions, state monopolies etc. See Evenett, S.J., 'What Can We Really Learn from the Competition Provisions of RTA?' in Brusick, P. *et al* (eds),

number of regional TAs continues to rise, those featuring competition related provisions have declined after 2002 when discussions on a multilateral agreement on competition at the WTO broke down¹¹³. These facts indicate that developing countries are willing to work towards establishing coherence in international cartels enforcement albeit outside the ambit of the WTO. The decline in the number of regional TAs with competition related provisions should not be a deterrent in discussing the possibility of implementing international cartel enforcement via the utilisation of competition related provisions in regional TAs. This is because the basic framework already exists and the popularity of regional TAs continues to grow since the 1990s¹¹⁴. Furthermore, in 2005, the World Bank reported that more than forty (40) per cent of world trade are transacted through preferential TAs¹¹⁵. Hence, the higher the volume of international trade, the more opportunities there are for international cartels to engage in anti-competitive behaviour so long as there is no effective enforcement mechanism in place.

The inclusion of competition related provisions in regional TAs is also a way to advance the competition agenda globally. Regional TAs are accords between states and by “piggy-backing” competition provisions in regional TAs, it paves the way for establishing

Competition Provisions in Regional Trade Agreements : How to Assure Development Gains?, United Nations Publication (2005), UNCTAD/DITC/CLP/2005/1 pp. 41-42 at http://www.unctad.org/en/docs/ditcclp20051_en.pdf

¹¹³ Cernat, L., ‘Eager to Ink, but Ready to Act? RTA Proliferation and International Cooperation on Competition Policy’ in P. Brusick et al (eds), *Competition Provisions in Regional Trade Agreements : How to Assure Development Gains?*, United Nations Publication (2005), UNCTAD/DITC/CLP/2005/1 pp. 5-6 at http://www.unctad.org/en/docs/ditcclp20051_en.pdf

¹¹⁴ Solano, O. and Sennekamp, A., ‘Competition Provisions in Regional Trade Agreements’, OECD Trade Policy working paper no. 31 (2006), p. 5 available at [http://www.oecd.org/officialdocuments/displaydocumentpdf?cote=com/daf/td\(2005\)3/final&doclanguage=en](http://www.oecd.org/officialdocuments/displaydocumentpdf?cote=com/daf/td(2005)3/final&doclanguage=en)

¹¹⁵ The World Bank, *Global Economic Prospects 2005*, (2005), Washington DC, p. 27.

or strengthening cross border cooperation between the competition authorities of the countries involved. This is because any cooperation between jurisdictions would have to be preceded by some sort of accord between states in order for such cooperation to be authorised. Granted that competition authorities could initiate cooperation between them on their own but the degree of commitment and legality which comes from a formal accord between states is absent in such cases. Thus, the incentive to pursue such cooperations in cross border competition enforcement may not be as strong particularly when it involves countries at different levels of development and competition regulatory advancement.

For a developing country like Malaysia which is also a trading nation, it is relevant for the regional TAs alternative in terms of international cartel enforcement to be looked into because Malaysia actively continues to enter into regional TAs with its trading partners¹¹⁶. It is also because Malaysia is still in the early days of implementation of its competition legislation. Additionally, a regional competition agreement set-up is a less possible alternative at present for Malaysia due to the fact that ASEAN member countries are at different levels of advancement in terms of competition law and policy¹¹⁷. Thus, there is no harm in assessing the suitability of utilising regional TAs as a

¹¹⁶ According to the Ministry of International Trade Malaysia's website, as of July 2012, Malaysia has entered into 11 Free Trade Agreements and is currently negotiating Free Trade Agreements with 5 more countries or groups. See http://www.miti.gov.my/cms/content.jsp?id=com.tms.cms.section.Section_8ab55693-7f000010-72f772f7-46d4f042

¹¹⁷ See: Gal, M.S. and Wassmer, I.F., 'Regional Agreements of Developing Jurisdictions: Unleashing the Potential', in *Competition Policy and Regional Integration in Developing Countries*, Bakhom, M. *et al* (eds), Edward Elgar (2012)

vehicle for international cartel enforcement in preparation for advancement in the country's competition law enforcement regime.

Regional TAs with competition related provisions are a form of bottom-up approach which is arguably a less cumbersome way to address substantive and procedural differences between the laws and legal system of all countries involved; differences in terms of institutional and economic development; and political environment. Negotiations of regional TAs are just between the proposed signatories, therefore there are fewer issues to be discussed and agreed upon as opposed to a multilateral negotiation. Additionally, countries enter into trade agreements for strategic reasons in pursuit of trade enhancement. Therefore, through the negotiations and bargaining process, the competition agenda could be furthered by using trade incentives and vice versa. This may be observed from some of the regional TAs between countries with advanced competition jurisdictions and developing countries with competition law whereby the terms in the regional TA provides for the approximation of the laws of the developing country to the standards of those of the developed competition jurisdiction with regard to the implementation of the competition related provisions¹¹⁸. Through such approximation, regional TAs with competition related provisions also have the potential to gradually integrate the differences in international cartel enforcement and encourage formal and structured cooperation between competition authorities of regional TA

¹¹⁸ This is particularly the case in regional TAs entered into with the EU. For example, see the regional TAs between: EU – FYR Macedonia, EU – Turkey, EU - CARIFORUM

partners through direct negotiations between the signatories¹¹⁹. In a multilateral set-up such as the WTO, progress in negotiations is slow due to the existence of many countries or economies with various interests and at different levels of market liberalisation and economic development. Any agreements will be based on the average standards of all WTO members, therefore considerations and interests of countries which are below par or above par of such standards are not best served.

Undeniably, organisations such as the ICN, United Nations Conference on Trade and Development (UNCTAD) and the Organisation of Economic Cooperation and Development (OECD) should also be utilised in the effort to improve the present state of international cartels enforcement framework but their recommendations are not binding. Additionally, there are other types of implementation instruments which could be utilised to advance international cartel enforcement; such as via regional competition agreements or bilateral agreements. However, cooperation through the ICN network and OECD has its limitations because it does not involve legally binding accords and addressing international cartel enforcement through regional competition agreement may neither be an available nor suitable option for some countries¹²⁰. Moreover,

¹¹⁹ Some may argue that such requirements is a new form of “colonisation” by developed countries of developing countries but the trade agreements accords preferential treatment to the developing country by the developed country which is better than MFN status as provided for under the WTO. Furthermore, special considerations are also accorded to the developing country signatory such as in relation to state aid and sensitive sectors such as agriculture and fisheries (see regional TAs between: EU – Albania, EU – Bosnia Herzegovina, EU – FYR Macedonia).

¹²⁰ See: Gal, M.S. and Wassmer, I.F., ‘Regional Agreements of Developing Jurisdictions: Unleashing the Potential’, in *Competition Policy and Regional Integration in Developing Countries*, Bakhoun, M. *et al* (eds), Edward Elgar (2012)

regional competition agreements in the context of the work by Gal and Wassmer¹²¹ are actually enabled through regional TAs but the competition provisions have evolved into a more detailed form of cooperation agreement between the signatories which sometimes have resulted in the establishment of regional competition authorities such as the Caribbean Community and Common Market Agreement (CARICOM). Moreover, regional competition agreements usually involve signatories in the same region. As for bilateral agreements, it has to be preceded by some form of accord or understanding between the state first before the competition agencies could discuss the possibility of entering into bilateral accords on cooperation in competition issues. This is not to say that utilising regional TAs is a better alternative than the aforementioned two other regimes of cooperation but what this work puts forth is that it is another available alternative which may be utilised and suitable for some developing countries. However, since competition related provisions in regional TAs are not being actively utilised by the signatory countries in addressing issues relating to anti-competitive international cartels, therefore, it is pertinent to discuss the issues in international cartel enforcement before the ways in which to encourage the utilisation of competition related provisions in regional TAs may be identified.

¹²¹ Gal, M.S. and Wassmer, I.F., 'Regional Agreements of Developing Jurisdictions: Unleashing the Potential', Bakhoun, M. *et al* (eds), Edward Elgar (2012)

2.3. WHY ARE COMPETITION RELATED PROVISIONS IN REGIONAL TRADE AGREEMENTS UNDER-UTILISED?

It is submitted that competition related provisions in regional TAs are under-utilised because of four main factors; namely:- 1) lack of incentives for countries to invoke cross border competition enforcement by virtue of regional TAs; 2) lack of sufficient legal commitments in cooperation; 3) developing countries do not view international cartel enforcement as a priority; and 4) inconsistencies in cross border competition enforcement.

There is lack of incentives for the regional TAs signatories to invoke competition related provisions to address cross border competition enforcement issues. More often than not, developing countries lack resources and competent competition enforcement authorities. Therefore, in cases where there are cross border competition issues if there is to be any form of enforcement, only the developed country regional TAs partners would have the resources and competency to undertake enforcement actions. However, if the cross border infringements do not affect the interests of the developed country, logically, there is no incentive for the said country to invoke the competition related provisions in regional TAs to address them. Additionally, incentives are also very much dependent on the strength of trade relationships between the countries and also their

trade interests in each other¹²². Thus, in order for competition related provisions in regional TAs to be considered as a viable alternative to address international cartel enforcement, the prerequisites are:- all regional TA signatories need to have credible¹²³ competition authorities and competent competition law enforcement¹²⁴; and there is strong trade relationships between the regional TA partners. These prerequisites are pertinent in order to create and strengthen the incentive for regional TA partners to invoke competition related provisions in international cartel enforcement.

The next obstacle in the utilisation of competition related provisions in regional TAs in international cartel enforcement is the weak legal commitments in cooperation under regional TAs. Most of the regional TAs analysed contain very broad provisions on competition matters and cooperation in enforcement. In addition, some regional TAs expressly exclude the competition chapter from being subject to the general disputes settlement mechanism under the regional TA. In such instances, there is either no

¹²² Cernat's study found that the more integrated the trade relationship between regional TA partners, the more comprehensive the competition related provisions in their regional TAs would be. This is an indication that the strength of trade relationship between regional TA partners is a determinant for incentives to cooperate in cross border competition enforcement. See Cernat, L., 'Eager to Ink, but Ready to Act? RTA Proliferation and International Cooperation on Competition Policy' in Brusick, P. *et al* (eds), *Competition Provisions in Regional Trade Agreements : How to Assure Development Gains?*, United Nations Publication (2005), UNCTAD/DITC/CLP/2005/1, pp.16-17 at http://www.unctad.org/en/docs/ditccclp20051_en.pdf

¹²³ In the context of this work, this means the existence of a competition enforcement regime which is functioning, independent and adequately resourced.

¹²⁴ Dabbah argued that a likely consequence of developing countries' lack of credibility in enforcing competition issues with extra-territorial content may jeopardise their chances of entering into bilateral cooperation agreements with developed countries who may view the former as not worthy partners in this respect. In other words, there is less incentive (if at all) for developed countries with effective competition enforcement regime to enter into accords such as regional TAs with such developing countries. See Dabbah, M., 'Competition Law and Policy in Developing Countries: A Critical Assessment of the Challenges to Establishing an Effective Competition Law Regime', *World Competition* 33, no. 3 (2010) 457-475, p. 473

recourse for disputes settlement¹²⁵ or disputes shall only be discussed through consultations¹²⁶. These indicate low level legal commitments in the regional TAs which may be viewed as “soft law” obligations¹²⁷. However, such soft law commitments are not without merit because they facilitate cooperation between competition agencies outside of a formal framework, whereby disputes are resolved at inter-agency level based on best practices guided by soft law organisations such as UNCTAD, ICN and OECD¹²⁸. Still, the success of implementation of soft law commitments in this regard would very much depend on the strength of relationship between the competition agencies in question¹²⁹ and also whether there are sufficient incentives for the agencies to cooperate.

International cartel enforcement is not viewed as a priority by developing countries. This may be due to three main factors, namely; lack of awareness of the adverse impact of anti-competitive cartel activities on the economy; lack of experience and resources; and trade and economic interests trumping competition concerns¹³⁰. Based on empirical estimation, international cartels potentially bring negative impact on developing countries particularly because most international cartel members are producers from

¹²⁵ For example, the Australia-Chile Free Trade Agreements; EU- FYR Macedonia Free Trade Agreement

¹²⁶ For example, the EFTA-SACU Free Trade Agreement; EFTA-Tunisia Free Trade Agreement; EU-Albania Free Trade Agreement

¹²⁷ As termed by Marsden and Whelan in their presentation on ‘The Contribution of Bilateral Trade or Competition Law Agreements to Competition Law Enforcement Cooperation between: Canada-Chile, Canada-Costa Rica and EU-Mexico’, Paris (October 2005)

¹²⁸ Sokol, D.D., ‘Order Without (Enforceable) Law: Why Countries Enter Into Non-Enforceable Competition Policy Chapters in Free Trade Agreements’, *Chicago-Kent Law Review*, Vol. 83 (2008) 101-163, p.136-139

¹²⁹ *Ibid*, p.136

¹³⁰ See: Sokol, D.D. and Stephan, A., ‘Prioritizing Cartel Enforcement in Developing World Competition Agencies’, forthcoming in *Competition Law and Development*, Stanford University Press (2012)

developed countries but conduct their business in countries where there is no competition law or with weak competition law regulatory regimes¹³¹. Developing countries also import and rely heavily on raw materials which can be easily cartelised such as chemicals in fertilizer production¹³². Producers from developing countries may also face market foreclosure by cartels made up of producers from developed countries through tariff or non tariff barriers such as by misleading the government to impose anti-dumping duties or quotas on the import of producers from developing countries¹³³. However, all these fail to be viewed as harmful by developing countries perhaps because it is not an illegal conduct which is glaringly obvious in the eyes of the public. Therefore, it is not of great concern to the public than for example the offence of hoarding necessities by traders. Furthermore, available evidence on the impact of international cartels on developing countries such as those discussed by Levenstein and Suslow¹³⁴ may be argued to be unreliable estimates due to the difficulty in obtaining data and information.

¹³¹ See: Levenstein, M.C. and Suslow, V.Y., 'Contemporary International Cartels and Developing Countries: Economic Effects and Implications for Competition Policy', 71 Antitrust Law Journal No.3 (2004) 801-852

¹³² This may be observed from the lysine cartels case. Lysine is used in the production of animal feed and also vitamins. The estimation of damages to consumers due to the cartel price fixing was estimated at US\$200 million. See Levenstein, M.C. and Suslow, V.Y., 'Contemporary International Cartels and Developing Countries: Economic Effects and Implications for Competition Policy', 71 Antitrust Law Journal No.3 (2004) 801-852, p.820

¹³³ Levenstein, M.C. and Suslow, V.Y., 'Contemporary International Cartels and Developing Countries: Economic Effects and Implications for Competition Policy', 71 Antitrust Law Journal No.3 (2004) 801-852, pp.820-826

¹³⁴ Levenstein, M.C. and Suslow, V.Y., 'Contemporary International Cartels and Developing Countries: Economic Effects and Implications for Competition Policy', 71 Antitrust Law Journal No.3 (2004) 801-852

Developing countries' lack of experience and resources in competition law enforcement means that enforcement efforts would be concentrated on domestic competition issues and thus, international cartel enforcement which involve more complex issues involving multiple jurisdictions are not a priority to developing countries. Additionally, in cases involving international cartels, there is also a broader problem related to gathering of evidence and enforcement of decisions. Evidence needed for an investigation will physically be located in another jurisdiction. Where a firm sells in a jurisdiction but does not own any assets there, it is also difficult to enforce any infringement decision or court order. For both of these, cooperation with the host jurisdiction is necessary. However, the host will generally be reluctant to help other jurisdictions punish their domestic firms or multinational firms which generate income and create jobs in the economy¹³⁵; particularly if enforcement actions pushes such firms to leave the market.

The inability or reluctance of developing countries to implement international cartel enforcement brings a very important issue, which is “who then, should police international cartels?” Based on the principles of comity and sovereignty alone developed competition jurisdictions should not be entrusted with the task¹³⁶. It is submitted that international cartel enforcement should be a joint effort between all the jurisdictions involved. However, in view of the limitations faced by developing countries, the tasks in investigating, prosecuting and penalising international cartels ought to be

¹³⁵ For a discussion on how multinational corporations generate income and jobs in developing countries, see Qianlivan, G., ‘Sustainable Development: The Role of Multinational Corporations’, Carnegie Mellon University (2001) at www.andrew.cmu.edu/course/73-371/UN_article.doc

¹³⁶ Sokol, D.D. and Stephan, A., ‘Prioritizing Cartel Enforcement in Developing World Competition Agencies’, forthcoming in *Competition Law and Development*, Stanford University Press (2012), p.3

divided between the jurisdictions accordingly. The interplay between trade and competition interests between regional TA signatories may help create the incentive for cooperation between the regional TA partners in international cartel enforcement. For example, country A, a developed country with advanced competition enforcement regime is a major investor in country B, a developing country with a young competition jurisdiction. In such a case, it would be beneficial to country A to not only assist in building the capacity of the competition enforcement regime of country B but also assist and cooperate in cross border competition issues with country B in order to ensure a conducive market environment for undertakings to operate, hence safeguarding country A's trade and investment interests in the market of country B. Even if the firms behaving anti-competitively in B are doing so to the benefit of shareholders in Country A, if provisions on comity and consultations are available under the regional TA between the two countries, then such avenues would be available to be pursued by country B. If the competition related provisions under the regional TA include dispute settlement mechanism, such infringements would be able to be addressed more effectively. Competition related provisions are discussed in detail later in this chapter.

Inconsistencies in the current international cartel enforcement framework also limit the utilisation of competition related provisions in regional TAs. The inconsistencies are chiefly due to the issues which arise out of interactions between trade and competition; existing international and supranational legal frameworks are not developing at the

same pace as globalisation and trade liberalisation; and differences in substantive and procedural legislative provisions.

It should be noted that competition law regulates domestic markets and therefore, the jurisdiction of competition authorities do not extend extra-territorially except in some cases where anti-competitive agreements between foreign undertakings in foreign jurisdictions have negatively impacted their own domestic market¹³⁷. Unfortunately, in this regard, anti-competitive practices of international cartels extend across two or more countries and the impact of international cartels' anti-competitive actions are borne by developing countries although the offending firms are more often than not based in developed countries¹³⁸. Ideally, effective international cartel enforcement requires the impact of such anti-competitive activities to be accounted for regardless of jurisdictional borders. However international law principles such as sovereignty and comity have to be acknowledged.

Trade law regulates trade between states and not private undertakings, whilst competition law essentially regulates domestic private undertakings. In international cartel cases the delineation between competition and trade law and policy is often blurred or non-existent. This has resulted in regulatory disjunction in overlapping areas

¹³⁷ See the explanation of the "Effects Doctrine" in *F. Hoffmann-La Roche Ltd. vs. Empagran S.A.*, 123 S. Ct.2359 (2004)

¹³⁸ A sample based on EU cartel decisions completed between 1974 – 2010 clearly shows that international cartel membership involve firms based in developed countries. See Sokol, D.D. and Stephan, A., 'Prioritizing Cartel Enforcement in Developing World Competition Agencies', forthcoming in *Competition Law and Development*, Stanford University Press (2012)

between trade and competition where they are either under-regulated or over-regulated¹³⁹. In cases of under-regulation, domestic regulations do not include areas where there are no effects on its domestic market or the domestic regulation applies standards which are below globally optimal level such as in export cartels cases which do not impact the domestic market, undertakings and consumers¹⁴⁰. On the other hand, over-regulation is a situation where there is an overlap between domestic laws of different countries such as in cases of international mergers or application of leniency by cartels. This may lead to undertakings incurring transaction and compliance costs in order to comply with laws in multiple jurisdictions and also system frictions between the jurisdictions involved which may result in inconsistent decisions¹⁴¹. All these create uncertainties and bring added costs in cross border commercial dealings.

The fact that existing international and supranational legal frameworks are not developing at the same pace as globalisation and trade liberalisation has resulted in gaps and lack of coherence in the enforcement of international cartel cases. Such *lacunae* in the international regulatory framework are being taken advantage of by international cartels. For example, trade liberalisation may be abused by firms already established in the domestic market to force new entrants out of the market. This may be by colluding to fix prices by reacting passively to increasing imports in order to demonstrate harm to the local industry and therefore convince the state to use anti-

¹³⁹ Taylor, M., *International Competition Law A New Dimension to the WTO?*, Cambridge University Press (2006), p. 1-2

¹⁴⁰ *Ibid*, pp. 44 - 46

¹⁴¹ *Ibid*, p. 46 - 49

dumping measures against the imported goods of the entrant firm. This is what happened in the case of American ferrosilicon producers' cartel which was formed in 1989¹⁴². In this case, the three (3) largest US ferrosilicon producers who dominated the US and European ferrosilicon production markets conspired to drive ferrosilicon producers from China and South America out of the US and European markets. New entrants into the markets were due to the reduction in tariffs created by trade liberalisation treaties. They engaged in typical cartel behaviour by maintaining the cartel price and withdrew capacity from the market. In time, this created the illusion that producers from China and South America were dumping ferrosilicon into the US and European market. The cartel members filed anti-dumping complaints against the non-cartel producers with the authorities and they succeeded¹⁴³. This example also illustrates that trade liberalisation needs to be supported by competition law and policy to ensure that elimination of trade barriers and not replaced by anti-competitive conducts such as those engaged in by international cartels.

Differences in procedural and substantive laws also have led to inconsistencies in international cartels enforcement. This is a usual conundrum in multi-jurisdictional enforcement issues. Arguably, international cartels enforcement would be easier if the legislation in all countries involved deem the same anti-competitive conduct as illegal. Even if all the jurisdictions involved have a competition law in place but if the anti-

¹⁴² For a detailed discussion on the case, see: Pierce, R.J. Jr., 'Anti-dumping Law as a Means of Facilitating Cartelization', 67 Antitrust L.J. (1999-2000) 725-743

¹⁴³ Pierce, R.J. Jr., 'Anti-dumping Law as a Means of Facilitating Cartelization', 67 Antitrust L.J. (1999-2000) 725-743, pp.726-727

competitive conduct of the cartel in question is exempted or allowed by the law of one or some of the jurisdictions involved, it is not going to be easy for authorities from the jurisdiction which wishes to take action against the cartel to seek assistance from the other to cooperate. This is the case for export cartels. Export cartels may be legal in the country of origin but illegal in the country which suffered the harmful effects of the export cartel. Moreover, an export cartel transfers wealth from other countries into the economy. Therefore, there is yet to be a unified call to ban export cartels¹⁴⁴. Hence, the reasons for the difficulty in obtaining the cooperation could range from the fact that there has been no information or data collected on the said international cartel because the law is not concerned with their conducts or because the anti-competitive conduct is allowed under the law for the sake of development or other non competition consideration which may be important to that country¹⁴⁵.

Another example is regarding criminalisation of cartel offences. Apart from the US, there are few jurisdictions which impose criminal penalties such as incarceration of culpable executives working with the undertakings involved in anti-competitive cartel conducts; and only in some countries that do, the criminal offence is extended beyond bid rigging

¹⁴⁴ For detailed discussions on export cartels see Martyniszyn, M., 'Export Cartels: Is it Legal to Target Your Neighbour? Analysis in Light of Recent Case Law', *Journal of International Economic Law*, 1 – 42 (2012), Oxford University Press; Sokol, D.D., 'What Do We Really Know About Export Cartels and What is the Appropriate Solution?', *Journal of Competition Law and Economics*, Vol. 4, pp. 967-982 (2008), University of Florida Levin College of Law Research Paper No. 2009-05 at <http://ssrn.com/abstract=1144003>; Becker, F., 'The Case for Export Cartels Exemptions: Between Competition and Protectionism', *Journal of Competition Law & Economics* 3(1): 97-126 (2007), Oxford University Press

¹⁴⁵ Evenett, S.J. *et al*, 'International Cartel Enforcement: Lessons from the 1990's', *The World Economy* Vol.24 Issue 9 (2001) 1221-1245, p.1232

in public procurement¹⁴⁶. Such differences impact cooperation between countries in international cartels enforcement¹⁴⁷. For instance, in the Implementing Agreement of the Competition Chapter of the regional TA between Japan and Peru, the parties expressly stipulate that any information shared shall not be used for criminal proceedings and even if a party wishes to do so, it has to put the request through the proper diplomatic channels and not by virtue of the regional TA¹⁴⁸.

This brings us to the critical stumbling block in international competition enforcement, which is information sharing¹⁴⁹. Cooperation is also hampered by limitations in information sharing which usually only allows for exchange of publicly available or non-confidential information¹⁵⁰. The laws in each jurisdiction interpret the term differently.

¹⁴⁶ Nevertheless, the number of countries which have adopted criminalisation of cartel offences is increasing. These include Australia, Austria, Brazil, Canada, Chile, Croatia, France, Germany, Greece, Ireland, Israel, Italy, Japan, Mexico, Norway, Slovak Republic, South Africa, South Korea, Switzerland, the United Kingdom and the United States of America. This is an updated list based on Beaton Wells' list in Beaton-Wells, C.Y., 'The Politics of Cartel Criminalisation: A Pessimistic View from Australia', *European Competition Law Review* Vol. 29 (3) (2008).

¹⁴⁷ Evenett, S.J. *et al*, 'International Cartel Enforcement: Lessons from the 1990's', *The World Economy* Vol.24 Issue 9 (2001) 1221-1245, p.1236

¹⁴⁸ Article 19, Implementing Agreement of the Competition Chapter of the regional TA between Japan and Peru

¹⁴⁹ Evenett, Levenstein and Suslow referred to the exchange of confidential business information as a "critical stumbling block" in most bilateral cooperations. See Evenett, S.J. *et al*, 'International Cartel Enforcement: Lessons from the 1990's', *The World Economy* Vol.24 Issue 9 (2001) 1221-1245, p.1239

¹⁵⁰ Based on the findings of the study by Marsden and Whelan on bilateral trade or competition agreements between EU – Mexico, Canada – Chile and Canada – Costa Rica, most officials surveyed believe that limitations in information sharing is the chief limitation on cooperation. See Marsden, P. and Whelan, P., 'The Contribution of Bilateral Trade or Competition Agreements to Competition Law Enforcement Cooperation between the EU and Mexico', *The British Institute of International and Comparative Law* (2005) at <http://ssrn.com/abstract=980527> or <http://dx.doi.org/10.2139/ssrn.980527> ; Marsden, P. and Whelan, P., 'The Contribution of Bilateral Trade or Competition Agreements to Competition Law Enforcement Cooperation between Canada and Chile', *The British Institute of International and Comparative Law* (2005) at <http://ssrn.com/abstract=980525> or <http://dx.doi.org/10.2139/ssrn.980525> ; Marsden, P. and Whelan, P., 'The Contribution of Bilateral Trade or Competition Agreements to Competition Law Enforcement

What may be considered as non-confidential information in one jurisdiction may be considered as confidential information in another. In such a case, investigations and prosecution of cartel infringements with international dimensions would be very difficult. This can be seen in the graphite electrode cartel case. The cartel was only prosecuted in the US, Canada and EU. Korea tried to prosecute the cartel but was unable to obtain much information from the jurisdictions in which the cartel was prosecuted. Therefore, Korea encountered difficulty in developing its own case against the cartel¹⁵¹. Furthermore, competition jurisdictions are often reluctant to share confidential business information with competition authorities from other jurisdictions lest the information be leaked to rival firms or used inappropriately¹⁵². Additionally, firms applying for leniency against cartel prosecution in one jurisdiction are not guaranteed that they will also obtain leniency in the other jurisdictions involved. Unless there is a guarantee that they will be accorded leniency in all the jurisdictions involved, firms who are international cartel members are discouraged from applying for leniency and sharing their insider information¹⁵³.

The discussion in this section has established the reasons why competition related provisions in regional TAs are under-utilised. Next, the discussion proceeds to analyse

Cooperation between Canada and Costa Rica', The British Institute of International and Comparative Law (2005) at <http://ssrn.com/abstract=980526> or <http://dx.doi.org/10.2139/ssrn.980526>.

¹⁵¹ Jenny, F., 'International Cooperation on Competition : Myth, Reality and Perspective', The University of Minnesota Law School Conference on Global Antitrust Law and Policy (2002), p.13 at <http://www.ijl.org/courses/documents/HC2003.Jenny.pdf>

¹⁵² Evenett, S.J. *et al*, 'International Cartel Enforcement: Lessons from the 1990's', The World Economy Vol.24 Issue 9 (2001) 1221-1245, p.1239

¹⁵³ See: Sokol, D.D. and Stephan, A., 'Prioritizing Cartel Enforcement in Developing World Competition Agencies', forthcoming in *Competition Law and Development*, Stanford University Press (2012), pp.4 - 5

the competition related provisions in regional TAs to determine the extent of inclusion of elements which are considered pertinent to the facilitation of international cartel enforcement.

2.4. THE PRESENT STATE OF COMPETITION RELATED PROVISIONS IN REGIONAL TRADE AGREEMENTS

The discussion in this section is based on the content analysis of regional TA texts between developed and developing countries with competition related provisions. 59 regional TA texts between developed and developing countries which are in force and available on the WTO website as of May 2012 were examined. As of May 2012, the total texts of regional TAs which were in force and available on the WTO website was 230. Out of the 230 texts publicly available online, 90 regional TAs are between developed and developing countries. As of May 2012, 59 regional TAs between developed and developing countries which are publicly available online contain competition related provisions. The matrix is as per **Annex - Matrix Of Competition Related Provisions in Regional Trade Agreements Between Developed and Developing Countries based on WTO'S Regional Trade Agreement Database (As Of May 2012)**.

The analysis is two-fold. First, the general observations and second, the texts are assessed based on the inclusion of elements which are deemed as pertinent to enable

and encourage international cartel enforcement between regional TAs partners by virtue of competition related provisions in regional TAs. In determining which elements are relevant, the factors which have hindered the utilisation of competition related provisions in regional TAs for international cartel enforcement are considered. In this regard, the elements which have been identified as relevant are : the requirement to adopt and maintain competition law measures; description of anti-competitive practices; cooperation in competition law enforcement; whether trade measures are allowed to be invoked for breach of any of the competition related provisions; information sharing; comity; dispute settlement; inclusion of anti-competitive mergers under the ambit of the regional TAs; exemptions; and special and differential treatment. The relevance of each element and their presence in regional TAs currently in force is discussed in this Part.

In general, more than two thirds of the regional TAs between developed and developing countries have included competition related provisions¹⁵⁴. The majority of developing countries which have entered into regional TAs with competition related provisions are upper middle income countries with the exception of a few such as Albania, Egypt, India, Indonesia, Morocco, Philippines and Vietnam. This is an indication that cross border competition issues which affect trade are of concern to upper middle income

¹⁵⁴ 66.29 per cent to be precise. 59 regional TAs with significant competition related provisions out of 89 regional TAs between developed and developing countries listed on the WTO website as of May 2012. See Annexes - Matrix Of Competition Related Provisions in Regional Trade Agreements Between Developed and Developing Countries based on WTO'S Regional Trade Agreement Database (As Of May 2012); Regional Trade Agreements between Developed and Developing Countries as Listed an WTO Website (As Of May 2012).

developing countries. Similar to the 2005 OECD study¹⁵⁵, it is also observed from the texts analysed that most regional TAs involving European countries or blocs such as the EC, EU and EFTA emphasises on substantive rules whilst agreements involving the Americas emphasises on coordination and cooperation. Agreements which fall under the former category generally describe the type of anti-competitive agreements and conduct which are deemed as incompatible with the regional TA in so far as they affect trade between the signatories¹⁵⁶ or require the approximation of the competition law of the country to EC's¹⁵⁷. In regional TAs which emphasise on substantive rules there is less focus on coordination and cooperation¹⁵⁸. However, this is not a hard and fast rule as there are also agreements with hybrid types of emphasis particularly when they involve inter-regional parties in the geographical sense¹⁵⁹.

Among the most minimal competition related provisions are in the ASEAN, Australia and New Zealand Free Trade Agreement (AANZFTA). The AANZFTA only has competition provisions focusing on cooperation and capacity building despite the fact that the signatories, particularly ASEAN and Australia, are close trading partners¹⁶⁰.

¹⁵⁵ Solano, O. and Sennekamp, A., 'Competition Provisions in Regional Trade Agreements', OECD Trade Policy working paper no. 31 (2006), p. 15 available at [http://www.oecd.org/officialdocuments/displaydocumentpdf?cote=com/daf/td\(2005\)3/final&doclanguage=en](http://www.oecd.org/officialdocuments/displaydocumentpdf?cote=com/daf/td(2005)3/final&doclanguage=en)

¹⁵⁶ This is similar to the wordings of Section 101 TFEU.

¹⁵⁷ See Article 70 EC – Albania Free Trade Agreement.

¹⁵⁸ Solano, O. and Sennekamp, A., 'Competition Provisions in Regional Trade Agreements', OECD Trade Policy working paper no. 31 (2006), p. 15 available at [http://www.oecd.org/officialdocuments/displaydocumentpdf?cote=com/daf/td\(2005\)3/final&doclanguage=en](http://www.oecd.org/officialdocuments/displaydocumentpdf?cote=com/daf/td(2005)3/final&doclanguage=en)

¹⁵⁹ *Ibid*

¹⁶⁰ Australia is one of ASEAN's top 10 trading partners whilst trade relations between ASEAN and New Zealand are gaining strength whereby the volume of trade between ASEAN and New Zealand in 2011

This is to account for the fact that ASEAN member countries are at varying degrees of competition development¹⁶¹. This supports the argument that strong trade relations and competent and credible enforcement regime incentivise the utilisation of competition related provisions in regional TAs. Without the two factors, there is no motivation to even include competition related provisions in regional TAs, if at all. There are also developing countries which had entered into regional TAs with competition related provisions despite the fact they had yet to adopt a domestic competition law or yet to actively enforce competition law at that point in time. Examples are the Japan – Malaysia Economic Partnership Agreement (JMEPA)¹⁶² and the Comprehensive Economic partnership Agreement between the Republic of Korea and the Republic of India. Nevertheless, the lack of credible and competent competition enforcement regime in both Malaysia and India to date may likely be the reason that the required further actions and cooperation in competition enforcement are yet to be undertaken.

The requirement to adopt and maintain competition law measures is relevant because in order to enable international cartel enforcement via regional TAs first and foremost, the countries involved should already have a competition law in place. The requirement to adopt and maintain competition law measures is pertinent because if the regional TA partners do not have laws which regulate competition or is not serious about enforcing

increased to USD8.23 billion from USD6.75 billion in 2010. Source: Department of Foreign Affairs and Trade, Australia at http://www.dfat.gov.au/trade/focus/081201_top10_twoway_exports.html ; and ASEAN Secretariat website at <http://www.aseansec.org/5826.htm>

¹⁶¹ Article 1, Chapter 14 Agreement Establishing the ASEAN – Australia – New Zealand Free Trade Area: 2. *The parties recognise the significant differences in capacity between ASEAN Member States, Australia and New Zealand in the area of competition policy.*

¹⁶² However, the agreement is subject to the yet to be drafted implementing agreement.

the law, then there is no legal basis to the cooperation between them in international cartels enforcement. In this regard, the competition related provision shall be no more than just a provision without any legal basis for enforcement in the country without the said legislative provision¹⁶³. If all or at least one of the regional TA signatories is yet to adopt competition law, then the requirement for competition law to be adopted in the near future should be ‘hardwired’ into the provisions of the regional TA just like in the U.S. – Singapore Free Trade Agreement¹⁶⁴.

A description of what amounts to an anti-competitive infringement or what shall be deemed illegal under the competition related provisions of the regional TA is also crucial to ensure that all the regional signatories are “talking the same language” so to speak. This is also to clarify the kind of infringements which are of concern to all the signatories involved. Clarifying the meaning of anti-competitive behaviour or conduct under the regional TA would also facilitate to iron out any differences in the substantive laws of each signatory.

Cooperation in enforcement is an important element which should be present in competition related provisions under regional TAs. The main challenge in international cartel enforcement is dealing with extraterritorial issues because it does not only involve different substantive and procedural law but also different legal systems, national

¹⁶³ Cernat, L., ‘Eager to Ink, but Ready to Act? RTA Proliferation and International Cooperation on Competition Policy’ in P. Brusick *et al* (eds), *Competition Provisions in Regional Trade Agreements : How to Assure Development Gains?*, United Nations Publication (2005), UNCTAD/DITC/CLP/2005/1, pp.23-24 at http://www.unctad.org/en/docs/ditcclp20051_en.pdf

¹⁶⁴ See Articles 12.1 and 12.2, US-Singapore Free Trade Agreement

interests and regulatory and political culture. Cooperation in enforcement is usually executed in the form of notifications, consultations, exchange of information and technical assistance. The cooperation may not necessarily include all of the aforementioned forms and some regional TAs expressly provide that cooperation is very much dependent on available resources and discretion of the requested party¹⁶⁵ which seem to water down the level of commitments of the parties involved.

Closely related to cooperation in enforcement are the elements of information sharing and comity. As mentioned earlier, among the major stumbling blocks in cooperation in cross border competition issues is information sharing. In general only publicly available or non-confidential information may be shared between regional TA signatories and it is always subject to qualifications. The examples of limitations on sharing of information include provisions which only allow for publicly available information¹⁶⁶, or subject to limitations imposed by the requirements of professional and business secrecy¹⁶⁷, or subject to the prevailing laws on confidentiality¹⁶⁸. These qualifications do not facilitate international cartels enforcement efforts for they may jeopardize investigation and successful prosecution of international cartels which involve collection of extraterritorial evidence and information. Hence, such limitations should be revisited without jeopardising legitimate interests of the undertakings involved and signatories

¹⁶⁵ Such as Article 167, Japan-Chile Strategic Economic Partnership Agreement.

¹⁶⁶ For example, Australia-Chile Free Trade Agreement; US-Chile Free Trade Agreement; US-Peru Free Trade Agreement

¹⁶⁷ For example, EFTA-Egypt Free Trade Agreement; EU-Algeria Free Trade Agreement; Turkey-Croatia Free Trade Agreement

¹⁶⁸ For example, EFTA-Chile Free Trade Agreement; EFTA-Colombia Free Trade Agreement; Republic of Korea-Chile Free Trade Agreement

concerned. Comity is another relevant element which facilitates international cartel enforcement between regional TA signatories, however it is not always included in the regional TAs analysed¹⁶⁹. Comity may either be positive¹⁷⁰ or negative¹⁷¹. Comity ensures that the interests and sovereignty of regional TA partners are accounted for in competition infringements with extraterritorial aspects.

Some of the regional TAs analysed provide for trade measures to be invoked to remedy any adverse effects on the domestic market of any of the regional TA signatories which may be created by anti-competitive activities originating from the actions of undertakings based in the jurisdiction of their regional TA partners¹⁷². A good example would be export cartels. Export cartels may be either private or public undertakings and most of the times are authorised by the state and are rarely made subject to domestic competition laws. When the fixed low prices of export cartels adversely impact the domestic competition and urgent action is needed to protect competition in the domestic market, the easier way would be to invoke trade measures. Arguably, if competition regulatory mechanisms are effectively implemented, there would be no need to resort to trade related measures. However, export cartels may not be based in the domestic

¹⁶⁹ Comity is only expressly present in 15 regional TAs texts analysed.

¹⁷⁰ Positive comity allows a party whose interests are affected by anti-competitive activities occurring in whole or in part in the jurisdiction of another party to request the latter to take appropriate enforcement action against the anti-competitive activity in question. See Marsden, P. and Whelan, P., 'The Contribution of Bilateral Trade or Competition Agreements to Competition Law Enforcement Cooperation between Canada and Costa Rica', *The British Institute of International and Comparative Law* (2005) at <http://ssrn.com/abstract=980526> or <http://dx.doi.org/10.2139/ssrn.980526>, p.19

¹⁷¹ Negative comity is an assurance that the interests of other signatories to the agreement shall be accounted for in the enforcement action undertaken by their fellow signatory country. This is based on the definition provided by the Institute of Competition Law at <http://www.concurrences.com/anglais/droit-de-la-concurrence-150/Glossary-Competition-Law-Terms/comity?lang=en>

¹⁷² 22 regional TAs out of the 59 analysed.

jurisdiction and it would not be easy to obtain information and data in cartel investigation particularly when the export cartel undertakings are authorised by the jurisdiction of their country of origin. Hence, in such cases, invoking trade measures would be a better alternative. However, as explained earlier in this chapter, such measures may sometimes be abused by the domestic undertakings to preserve their anti-competitive cartel arrangements¹⁷³. Therefore, trade related measures such as anti-dumping, countervailing duties and safeguards ought to be complimented by remedies under competition law to safeguard against abuse.

The inclusion of dispute settlement mechanism is advisable to ensure issues arising out of international cartels enforcement between regional TA signatories are solved amicably regardless whether disputes are to be subject to the regional TA's general dispute settlement mechanism or specific dispute settlement mechanism under the Competition Chapter or subject to a specific agreement between the competition agencies of the signatories. Most importantly the mechanism prescribed needs to be adhered to and possible to be effectively implemented. A dispute settlement mechanism which calls for cumbersome and costly modalities would be difficult to be implemented by the regional TA partners. Thus, it is necessary to ensure the procedures involved are not cumbersome, the administration costs are kept to a minimum and the responsibilities of each country are clearly identified and delineated. Still, nearly all of the regional TAs analysed (except 2) either have expressly ruled out matters under the

¹⁷³ See ferrosilicon producers' cartel case as explained earlier.

competition chapter from being subject to the general disputes settlement mechanism¹⁷⁴ or are silent in regard to the settlement of disputes for competition matters. Another variation is the provision of partial exception from the general dispute settlement mechanism¹⁷⁵.

Cartels often resort to mergers when it has become more costly to operate as cartels due to anti-competitive cartels enforcement¹⁷⁶. Therefore to achieve effective international cartels enforcement under the regional TA framework, competition related provisions pertaining to anti-competitive merger control should also be included. There are some agreements which expressly list anti-competitive mergers as one of the types of anti-competitive behaviour subject to the regional TA¹⁷⁷. Mergers involving international cartels may be between undertakings based in one particular country or between undertakings from different countries. The impact of the merger, however, may affect the market or interests of one, several or all of the regional TA signatory countries. However, anti-competitive mergers may not be included under the scope of the regional TA if they are not subject to the competition laws of the signatory countries.

¹⁷⁴ In some regional TAs, there are provisions for disputes to be discussed through consultations via a joint committee. However, in such cases there is no finality or conclusiveness pertaining to the resolution of disputes because discussions through consultations means there is merely a best endeavour commitment by the signatories involved in solving disputes. See for example Article 15 (3) EFTA-SACU Free Trade Agreement.

¹⁷⁵ Such as the free trade agreements between the US-Peru and the US-Chile. Under these agreements, only monopolies, state enterprises and information requests may be subject to the general dispute settlement mechanism under the preferential TA. In addition, for Chile, pricing differences are also included.

¹⁷⁶ Mehra, P., 'Choice Between Cartels and Horizontal Merger', (2007), at SSRN: <http://ssrn.com/abstract=1081844> or <http://dx.doi.org/10.2139/ssrn.1081844>

¹⁷⁷ Such as the Free Trade Agreements between Australia – Chile; Panama – Singapore; Thailand - Australia

Without a legal basis in the domestic laws of the countries involved, it will not be possible to include mergers under the competition chapter of the regional TA. This is also the case with Malaysia because there is no competition dimension under the Malaysian merger regulation¹⁷⁸. Only nine (9) of the regional TAs analysed have included anti-competitive mergers.

In order to encourage the international cartel enforcement under regional TAs, the limitations of the developing countries would also have to be accounted for. In this regard, elements which provide flexibilities to developing countries such as exemptions and special and differential treatments ought to be included. From the analysis, twenty (20) regional TAs provide for exemptions. Some of the types of exemption allowed are: exemption of specific measures or sectors such as in the Thailand – Australia Free Trade Agreement¹⁷⁹; and state aid in agriculture and fisheries¹⁸⁰. Examples of special and differential treatment are such as those included under the competition chapter of some regional TAs between the EU, EFTA and developing countries such as Albania and Jordan. Under those agreements, flexibilities are accorded to the developing countries in relation to state aid due to their developing nation status¹⁸¹. However, it is not accorded in perpetuity and subject to periodical review¹⁸². Indeed, such flexibilities

¹⁷⁸ See Chapter 5 of this thesis for detailed discussion on the likely outcomes of tougher cartel enforcement in Malaysia in light of the lack of merger control with a competition dimension.

¹⁷⁹ See: Article 1204, Thailand – Australia Free Trade Agreement

¹⁸⁰ See for example EC-Albania Stabilisation and Association Agreement

¹⁸¹ See: Article 71 (7) EC-Albania Stabilisation and Association Agreement

¹⁸² Article 53 (4) EC-Jordan Euro-Mediterranean Agreement

should not be accorded in perpetuity lest they invite complacency and perhaps also abuse.

2.5. PROPOSALS AND RECOMMENDATIONS

The difference in levels of development should not be a hindrance in cross border enforcement cooperation of competition cases under regional TAs, However, there are prerequisites which have to exist before competition related provisions in regional TAs could be considered as a suitable alternative for international cartel enforcement by any country. First, there ought to be incentives for the regional TA signatory countries to cooperate in international cartel enforcement by invoking the competition related provisions thereunder. Second, the limitations of each country should be recognised. Third, there has to be government commitment in eradicating the adverse impact of anti-competitive international cartel activities on trade liberalisation and competition.

As discussed earlier, the two factors which create incentives for the inclusion and utilisation of competition related provisions in regional TAs are the existence of credible competition enforcement regimes and the strength of trade relationship between the regional TA partners. Without domestic competition law in place, there is no legal basis for cooperation. Even if there is a competition law in place, the absence of a credible competition enforcement regime would not incentivise a developed country with an advanced competition jurisdiction to invoke the competition related provisions in the

regional TA to address cross border competition infringements such as international cartels. As for the strength of trade relationship between the regional TA partners, the incentives are created based on the defensive and offensive trade interests of each country and the interplay between trade and competition considerations in the negotiations between the regional TA partner countries. The incentives to use regional TAs to facilitate international cartel enforcement therefore may be created by each country meeting the concerns of their regional TA partners accordingly in exchange for its own concerns being met. Furthermore, the higher level of trade between the regional TA partners would lead to more cross border competition issues, including anti-competitive international cartel activities. Hence, the stronger the incentive to include and invoke competition related provisions in regional TAs by the signatories.

The second prerequisite is that the limitations of all the countries involved are recognised. This is to ensure that whatever modality of cooperation provided for under the regional TA is possible to be implemented. This therefore has to account for the level of development of each country, availability of resources and competition culture. These factors in turn would determine the form, structure and substance of competition related provisions to be included in the regional TA. For instance, it will be a futile exercise to impose a cooperation structure which is beyond the funding abilities of developing countries or to provide for the powers to investigate and prosecute international cartels mainly to the mature competition authorities of developed countries. Another example is pertaining to exemptions and special and differential treatment to

developing countries. Sometimes, regional TA signatories, regardless of level of economic development, have sensitive activities; industries; or markets to protect which could be because of socio-economic issues; development; security; or economic interests. For, example, the automotive industry is a sensitive industry for Malaysia; agriculture is a sensitive sector for most countries including the EU, Australia and New Zealand. Developing countries such as Albania; Egypt; and Jordan have been accorded flexibilities for state aid and agriculture in their regional TAs with the EU. Without such exemptions or flexibilities being provided for in the regional TAs, it may be difficult to reach a consensus and finalise the terms of the agreements in the negotiation process.

The last prerequisite is regarding the government's commitment. Including competition related provisions in regional TAs is not enough to address international cartel enforcement issues and prevent anti-competitive international cartel activities. The governments through their respective competition authorities must be serious in their commitment to invoke and implement competition related provisions in regional TAs and pursue cooperation in cross border competition enforcement via their respective competition authorities. If governments in developing countries turn a blind eye to anti-competitive activities of firms such as multinational corporations who are international cartel members simply because of the market power, income generation and employment opportunities which they create, then there could be no effective cooperation in international cartel enforcement under any sort of accord or modality.

The discussion now arrives at the recommended structure of competition related provisions in regional TAs and the minimum elements which ought to be included to encourage the utilisation of competition related provisions in international cartel enforcement. In the context of this work, encourage means incentivising and facilitating the regional TAs signatories to utilise competition related provisions in the regional TAs to cooperate in international cartel enforcement.

The structure recommended is for the broad provisions on competition to be included in the regional TA and for the details of the cooperation to be provided under an implementing agreement between the competition authorities involved. This is similar to the implementing agreements for each relevant chapter under regional TAs which are being practised by Japan. Such a structure allows for the details regarding the implementation of the competition related provisions to be thrashed out between the experts, namely the respective competition authorities without affecting the execution of the overall regional TA itself and bundling competition commitments with trade commitments that may be deemed as too restricting by the signatories¹⁸³. In a way, it can be said that this recommended structure actually allows for the implementation agreement to be determined between the competition agencies and this could pave the way to the creation of a competition accord between the signatories which may evolve into an integrated competition agreement.

¹⁸³ See: Sokol, D.D., 'Order Without (Enforceable) Law: Why Countries Enter Into Non-Enforceable Competition Policy Chapters in Free Trade Agreements', *Chicago-Kent Law Review*, Vol. 83 (2008) 101-163, p.136

The minimum required elements which are necessary to facilitate the utilisation of competition related provisions under regional TAs may be divided into four categories; namely, advancement of the competition agenda, bridging the difference in legal standards, addressing the interaction between trade and competition, certainty and flexibilities. Under advancement of competition, the elements are: the requirement to adopt and maintain competition law measures; cooperation in competition law enforcement. Bridging the difference in legal standards requires the following elements: description of anti-competitive practices; information sharing; and comity. The elements necessary to address the interaction between trade and competition are: whether trade measures are allowed to be invoked for breach of any of the competition related provisions; and inclusion of anti-competitive mergers under the ambit of the regional TAs. Certainty requires the dispute settlement element to be included and exemptions; and special and differential treatment are those elements which provide for flexibilities to account for the limitations of developing countries.

The requirement to adopt and maintain competition law enforcement measures is necessary particularly in regional TAs with developing country signatories without competition law or with weak or young competition enforcement regimes. The absence of this element in the competition related provisions would not facilitate cooperation in international cartel enforcement under the regional TA unless the countries involved already have competition laws and credible competition enforcement regimes in place.

Similarly, cooperation in enforcement also has to be included to authorise cross border competition enforcement between the signatories. Cooperation in enforcement ought to be in a transparent manner based on international law principles and include consultation, notification, exchange of information, coordination and technical assistance. The absence of any one of these would render cooperation in competition enforcement more difficult. This is because multijurisdictional enforcement between the authorities of different countries requires among others, sharing of information, coordination and consultation. No one country could act on its own be it due to jurisdictional constraints or lack of resources.

In solving issues of differences in legal standards and substance, the usual recommendation put forth is harmonisation. However, harmonisation denotes the need to conform to universal standards, something along the lines of a multilateral agreement. This does not only involve the requirement for countries with lower or undeveloped standards in competition policy and law to conform to higher standards as those of developed countries but it also means developed countries with higher and more established standards in competition policy and law are required to meet developing countries half way by sometimes lowering their standards. Such a solution would be unfair to both developed and developing countries and also mean a step backwards for developed countries with advanced competition law regimes¹⁸⁴. This

¹⁸⁴ This was also the US's argument which resulted in their ambivalence to the EU's proposal for a multilateral agreement on competition under the WTO. See Bhattacharjea, A., 'The Case for a Multilateral Agreement on Competition Policy : A Developing Country Perspective', *Journal of International Economic Law*, 9(2) 293-323 (2006), p. 293

issue also relates to legal culture and convention – matters which are not likely to be harmonised. Therefore, in regard to regional TAs it should be a case of working along the lines of what is mutually acceptable to all the signatories, i.e. not harmonisation but identification and development of mutually acceptable standards and elements.

On the other hand, if the competition related provisions which currently exists in the regional TAs are already the extent to which signatories are willing to agree to; and under-utilisation of the provisions are not because of any other reasons but only because of the disparity in legal standards and substance; if the incentives are there and the governments are committed to the prevention of the anti-competitive international cartels; then there should be no hesitation on the part of the signatories to endeavour to iron out the differences through consultations. Legal standards are translations of policies. Therefore, the key in addressing the differences is to address the aspects where domestic laws and competition policies differ most which would affect international cartels enforcement between the regional TA's partners¹⁸⁵. Hence, the glaring policy differences would have to be addressed and once a mutual agreement is reached, they will be translated accordingly in the law. Hence, what is being recommended here is not the requirement for developing countries to adopt the legal standards and substance of their developed regional TA partners and vice versa, unless the objective of the regional TA is market integration. What is being suggested

¹⁸⁵ This argument is along the lines of Drexel's argument in discussing the possibility of a WTO competition law based on different principles than those originally proposed by the EC. He posits that harmonisation of legal standards alone do not guarantee equally effective enforcement See Drexel, J., 'International Competition Policy After Cancun : Placing a Singapore Issue on the WTO Development Agenda', World Competition Journal 27(3): 419-457 (2001), pp. 447-449

however is continuous coordination in cooperation and clarification of differences in competition policies and law through direct consultation between the relevant competition regulators and policy makers.

In terms of definition of what is deemed as anti-competitive activities under the regional TA, it is necessary for the regional TA partners to mutually agree on what should be included under the scope of the regional TA. It is proposed that instead of including as many types of anti-competitive conducts under the ambit of the definition, it would be better to only include those priority areas or types of conducts which are of concern to the regional TA signatories based on the objective of the agreement. Provided that such conducts are also disallowed under the respective domestic competition laws. For instance, anti-competitive cartel activities ought to be included but due to the focus of the trade relations between the regional TA partners which could be in agricultural goods, perhaps only international cartels in food and agricultural sector should be initially included as one of the anti-competitive conducts under the regional TA. Another example is if mergers are not included under the competition law of any of the regional TA signatory country, then it should be excluded for the time being.

The ability to share information is crucial in international cartel enforcement. The limitations usually imposed in sharing confidential business information in investigation, prosecution of cartels and calculation of damages have been a major stumbling block in

achieving progress in international cooperation efforts¹⁸⁶. In order to overcome this stumbling block perhaps a clear interpretation of “confidential business information” and the types of information which could be shared ought to be clearly prescribed and a more secure and structured method in sharing such information should be agreed upon by the parties involved. A possible example is the provision on information sharing in the Canada-Costa Rica Free Trade Agreement which provides that information shared are confidential and only to be used for purposes of enforcement as per under the notification¹⁸⁷. In this way, the competition authorities involved have the discretion to determine what is confidential and could be shared and there is also a safeguard to ensure that the information shall not be used for any other purpose. In addition, the country whose competition authority possesses the information which is crucial to the development of a case against an international cartel by another jurisdiction may also be persuaded to share provided they are convinced that there are mutual benefits to doing so or if some trade-offs are made with trade interests.

The fact that there is yet to be a “one-stop” solution in terms of leniency applications by cartel members whose anti-competitive activities span several jurisdictions is also an obstacle to information sharing and detection of international cartels. This is indeed not an issue which could be easily solved. It would be unfair to tell other countries which have suffered the impact of the anti-competitive activities of the international cartel in

¹⁸⁶ Evenett, S.J. *et al*, ‘International Cartel Enforcement: Lessons from the 1990’s’, *The World Economy* Vol.24 Issue 9 (2001) 1221-1245

¹⁸⁷ See: Article XI.4 Canada-Costa Rica Free Trade Agreement

question to just be content with the enforcement action undertaken by the authorities of another country. So long as enforcement action is not undertaken in all the jurisdictions involved, there is a possibility that the cartel may still continue their infringements in the jurisdiction where they are yet to face the consequences of their actions. Furthermore, ideally, the quantum of fines imposed would have to also account for the adverse effect on all the jurisdictions involved but in reality this is not so. Thus, it is proposed that the regional TA signatories should address this significant gap in international cartel enforcement through a modality of consultation and coordination which is akin to a “one stop” solution in handling leniency applications and facilitating sharing of relevant information between the competition authorities involved. A good example would be the ECN Model Leniency Programme (the ECN Model)¹⁸⁸ implemented in the EU. The ECN Model is labelled as a “soft harmonisation” of different leniency procedures implemented in the respective jurisdiction of EU member states¹⁸⁹. “Soft harmonisation” in the ECN Model involves triggering harmonisation of existing leniency programmes and facilitate the adoption of leniency programme by the few member states which are yet to adopt one¹⁹⁰. Even if such “soft harmonisation” is not required under or is absent from the terms of the regional TAs in question, the common elements between the leniency programmes implemented in the respective jurisdictions of the regional TAs’ signatories could be derived with earnest negotiations and consultations by endeavouring to address the glaring disparities first. Glaring disparities include the lack of leniency

¹⁸⁸ Available at http://ec.europa.eu/competition/ecn/mlp_revised_2012_en.pdf

¹⁸⁹ See the ECN Model Leniency Programme Explanatory Notes, para. 7

¹⁹⁰ *Ibid*

programme in one or some of the signatories' competition regime or the difference in the standard of evidence required to apply for leniency. This proposal does sound like a big ask to all those concerned but if the regional TA signatories are seriously committed about curbing international cartel activities, then the effort has to be made.

The differences between the enforcement capacity and legal standards in competition law between the regional TA signatories also call for the element of comity to be included in the competition related provisions of regional TAs. Comity enables the regional TA partners to assist each other in terms of enforcement action without undermining their sovereignty. Again in this regard it is proposed for such differences to be solved through coordination and cooperation¹⁹¹. For example, perhaps the appropriate domestic authority should be allowed to investigate the case however, the results of the investigation are later transferred to the most appropriate enforcer¹⁹². In such an instance, the competition authorities of the countries involved would have to discuss and map out each other's strengths and weaknesses before deciding on which authority would be best to undertake which aspect in order to ensure successful investigation and prosecution of international cartels cases. Hence, comity should be included in order to affirm all the signatories that the sovereignty of all regional TA partners are respected and due consideration will be accorded to each other's interests in the enforcement of the international cartels between the jurisdictions.

¹⁹¹ See: Drexel's argument in regard to Podszun's suggestion on procedural law on international cartel competition in Drexel, J., 'International Competition Policy After Cancun : Placing a Singapore Issue on the WTO Development Agenda', *World Competition Journal* 27(3): 419-457 (2001), pp. 453

¹⁹² *Ibid*

The next category is addressing the interaction between trade and competition. In order to address such issues such as those brought about by export cartels, trade related measures ought to also be included as a possible remedy for international cartel infringements with trade dimensions. However, the invocation of trade measures such as anti-dumping, countervailing duties and safeguards would have to be coupled with consultations between the competition authorities of the relevant regional TA signatories. This is to ensure that the trade measures are not abused to safeguard anti-competitive cartel arrangements. However, it is foreseeable that most developing countries would be reluctant to couple such significant trade measures with competition remedies due to the interests of their own export cartels. Nevertheless, the premise of the discussion in this chapter is encouraging the utilisation of regional TAs in international cartel enforcement and in order to facilitate an effective cooperation in international cartel enforcement, this element is recommended. Failure to include it in the competition related provisions of regional TAs will not facilitate the narrowing of the gaps in international cartel enforcement.

Another element is the inclusion of anti-competitive mergers under the purview of the regional TA. The caveat here is this is only possible if mergers are included in the competition laws of all the regional TA signatories. If merger control with competition dimensions is included in the laws of all the regional TA signatories, then such provision should be included. This is because deterrence of international cartels requires a comprehensive approach in order to deter anti-competitive merger of international

cartels which may result in abuse of dominance if allowed¹⁹³. Again, in this instance, information sharing between all the authorities involved is the key.

The next category is clarity which calls for a clear provision on the modality for disputes settlement. In regional TAs currently enforced and notified to the WTO, disputes under the competition chapter in the regional TA are either subject to the general disputes settlement mechanism of the regional TA; or expressly excluded altogether from the general regional TA dispute settlement mechanism or; a specific dispute settlement mechanism may be provided under the competition chapter. A clear provision of dispute settlement mechanism for competition related provisions under regional TAs signifies commitment to cooperation in cross border competition enforcement by the signatory countries because it provides clarity and certainty as to the resolution of any disputes between the signatories in regard to the implementation of the competition related provisions under the accord. Indeed the strongest form of commitment would be for the dispute settlement of matters under the competition chapter to be subject to the dispute settlement mechanism of the regional TA; however, it may not be preferred by many countries regardless of their development status¹⁹⁴. Therefore, the second best alternative recommended is subjecting disputes of matters arising out of the competition chapter to the disputes settlement modality prescribed by the respective competition

¹⁹³ See: Evenett, S.J. *et al*, 'International Cartel Enforcement: Lessons from the 1990's', *The World Economy* Vol.24 Issue 9 (2001) 1221-1245, pp.1221-1222.

¹⁹⁴ For example, the US stance in regard to inclusion of a competition chapter under regional TAs is that it does not oppose to the inclusion so long as the chapter remains non-binding and the regional TA partners deem the inclusion of competition chapter is important. See Sokol, D.D., 'Order Without (Enforceable) Law: Why Countries Enter Into Non-Enforceable Competition Policy Chapters in Free Trade Agreements', *Chicago-Kent Law Review*, Vol. 83 (2008) 101-163, p.129

agencies under implementing agreement in order to ensure that disputes are settled based on their competitive effects rather than the basis of discriminatory legislation alone¹⁹⁵. The prescribed modality may also be in the form of consultations and negotiations stipulated in a best endeavour language rather than say disputes resolution via a tribunal. Such low level commitment allows more freedom and discretion for the competition agencies to develop norms and through best practices guided by organisations such as UNCTAD, ICN and OECD¹⁹⁶. Nevertheless, the downside is that such forms of soft law obligations are non-binding.

The strengths and limitations of all regional TAs signatories have to be recognised in order to enable international cartel enforcement cooperation under regional TAs. For example, in consideration of the developing countries' development needs and limitations, competition related provisions in regional TAs ought to allow flexibilities to be accorded to developing countries. This is to encourage more developing countries to agree to the inclusion of a competition chapter under preferential TAs with developed countries particularly, flexibilities such as exemptions and special and differential treatment should be included in the competition related provisions on a non-reciprocal basis. However, such flexibilities need not be granted automatically to developing countries for it would depend on the level of development and needs of the country.

¹⁹⁵ These are the distinct concerns between trade and competition. See Sokol, D.D., 'Order Without (Enforceable) Law: Why Countries Enter Into Non-Enforceable Competition Policy Chapters in Free Trade Agreements', *Chicago-Kent Law Review*, Vol. 83 (2008) 101-163, p.135

¹⁹⁶ Sokol, D.D., 'Order Without (Enforceable) Law: Why Countries Enter Into Non-Enforceable Competition Policy Chapters in Free Trade Agreements', *Chicago-Kent Law Review*, Vol. 83 (2008) 101-163, p.137-139

Upper middle income developing countries such as Mexico and Chile may not require as much flexibilities as lower middle income developing countries such as Kenya or Egypt. The flexibilities also should not be accorded in perpetuity and subject to periodical review in order to phase them out over time. Perhaps during the period when such flexibilities are in place, developed and developing countries regional TAs signatories should focus on activities such as technical assistance and capacity building.

Apart from the aforementioned prerequisites, structure and elements to be included, it is also pertinent to note that links with existing networks in international competition such as OECD, ICN, UNCTAD, World Bank and the WTO are also necessary and useful. The guidelines, recommendations and works which have been conducted under the said organisations are good reference points in international cartel enforcement¹⁹⁷. Thus, in the implementation of competition related provisions in regional TAs, these organisations may be consulted by the signatories particularly in matters of best practices, clarification and disputes settlement.

¹⁹⁷ These include : OECD's *Best Practices for the Formal Exchange of Information Between Competition Authorities in Hard Core Cartels Investigations* (2005); ICN's *Report on Cooperation Between Competition Agencies in Cartel Investigations* (2007)

2.6. CONCLUSION

Perhaps some groups in the global competition fraternity are not very keen on the idea of pursuing a solution for international competition enforcement under trade foras or via trade instruments. Whilst such concerns are appreciated, the competition fraternity have to acknowledge that first, issues in international cartel enforcement are yet to be effectively resolved. Second, bilateral cooperation between competition authorities could not be initiated as fast as the rate of regional TAs being entered into by countries. Therefore, there is no harm in “piggy-backing” the competition agenda onto trade frameworks such as regional TAs. Third, although initiatives and works on international cartels enforcement under ICN and also OECD are pertinent to the development of an effective international cartels framework on competition, they are not legally binding and are mere recommendations.

The factors which have adversely affected the utilisation of competition related provisions in regional TAs by signatory countries in international cartel enforcement are: lack of incentives for countries to invoke cross border competition enforcement by virtue of regional TAs; lack of sufficient legal commitments in cooperation; developing countries do not view international cartel enforcement as a priority; and inconsistencies in cross border competition enforcement. This work finds that, regional TAs is a viable option as an instrument in international cartels enforcement between middle income developing countries and developed countries provided that all the regional TA

signatories have a credible competition enforcement regime in place, there are close trade relations between the signatories, the governments are committed to curb anti-competitive international cartel activities and the cooperation modality set in place under the regional TAs accounts for the limitations of all the signatories involved. A suitable modality for cooperation is one which allow for the details of the implementation of cooperation to be determined in detail by the respective competition authorities and also includes the proposed minimum elements which are deemed necessary to encourage and enable cooperation in international cartel enforcement under regional TAs.

In connection to the elements recommended to be included in regional TAs, what needs to be highlighted is that despite the fact that current works have argued that letters of the law such as the limitations imposed on information sharing are the biggest stumbling block in cross border cooperation in competition law enforcement, what has been observed is that the main obstacle in pursuing international cartel enforcement under regional TAs provisions is the regional TA signatories themselves. At the end of the day, if the countries are serious about addressing anti-competitive international cartel activities in their regional jurisdictions, they have to show their commitments. Letters of the law such as competition related provisions in regional TAs can be changed. However, if there are so many reservations from the regional TA signatories, then it just will not work.

The solution to implement international enforcement under competition related provisions in regional TAs is neither an idealistic one nor is it without limitations. However, it is one of the possible ways forward in achieving better clarity and coherence in the international cartels enforcement framework. Governments and the international competition fraternity in particular should be open to suggestions in relation to international cartels enforcement even when it involves utilising available trade frameworks as a facilitating measure and links with existing supranational organisation on competition such as ICN, UNCTAD and the OECD are recommended.

Data and information on the implementation of cross border competition enforcement under regional TAs, both anecdotal and empirical are still lacking. Therefore there is plenty of room for future research on the subject matter such as on jurisdictional issues in its implementation, for example in cases where more than one regional TA apply in a particular international cartel case. A possible answer may be dependent on having to do some sort of analysis on which regional TA would involve cheaper costs, less cumbersome procedures and higher probability of successfully uncovering and prosecuting the cartel. Such a question is indeed pertinent and warrants research in the future.

CHAPTER 3:

LESSONS FROM SOUTH AFRICA FOR THE DEVELOPMENT OF AN APPROPRIATE CARTEL ENFORCEMENT POLICY IN MALAYSIA

3.1. INTRODUCTION

Chapter 2 explains how regional TAs could be a viable instrument to strengthen international cartel enforcement. The discussion in Chapter 2 argues that one of the main pre-requisites to enable cross border competition enforcement by virtue of regional TAs is that the all the signatories must have a legislative instrument which illegalise or deters cartels. Additionally, the incentive to include competition under the scope of regional TAs and utilisation of competition related provisions in international cartel enforcement requires the existence of a credible cartel enforcement regime in the jurisdictions of the signatories. Credible cartel enforcement regimes require the adoption of a suitable competition law to be complemented by an appropriate cartel enforcement policy in order to affect effective cartel enforcement. Thus, now the discussion of this thesis moves to the challenges Malaysia faces domestically in developing an effective enforcement regime and the elements which should be included in an appropriate cartel enforcement policy for Malaysia. As explained earlier in Chapter 1 of this thesis, Malaysia is chosen because of its middle income developing country status and also the significant role of international trade in its economy.

Cartels are illicit in nature and thus, are not easily detected without adequate resources, knowledge and experience on the part of competition law enforcers. It is therefore of no surprise that young competition jurisdictions of developing countries perceive cartel enforcement as difficult and somewhat daunting. Infact, some jurisdictions like South Africa choose to focus on mergers and acquisitions in the first five years of their competition law enforcement whereby few cartels were investigated and prosecuted under the Competition Act 1998, South Africa throughout the said period because of such perception¹⁹⁸. In addition, competition authorities in developing countries have to also contend with clashes with developmental concerns and lack of competition culture in their jurisdiction¹⁹⁹. Malaysia, as a developing country with a young competition jurisdiction also faces these challenges in dealing with cartel enforcement. Thus, it is pertinent for Malaysia to identify a suitable cartel enforcement policy which would not only facilitate the competition agenda but also prevent disjunctions with other non-competition policies and considerations which are pertinent to the country's development. This is so that Malaysia is not stuck in the doldrums of "nascent stage of competition law enforcement" for an unnecessarily long time due to implementation issues.

¹⁹⁸ See Lavoie, C., 'South Africa's Corporate Leniency Policy: A Five Year Review', World Competition Vol. 33(1) (2010), 141-162, pp.142-143

¹⁹⁹ International Competition Network (ICN), 'Lessons to be Learnt From the Experiences of Young Competition Agencies', Competition Policy Implementation Working Group Report (Subgroup 2), ICN, Cape Town, South Africa (May 2006) at <http://www.internationalcompetitionnetwork.org/library.aspx?search=&group=13&type=0&workshop=0>

So, the question now is “how to determine an appropriate cartel enforcement policy for Malaysia?” In order to determine the answer, this work argues that it should be tailor made to Malaysia’s competition agenda; socio-economic ideology; and development needs whilst referring to a suitable competition law jurisdiction for insights. In this regard, Malaysia’s competition agenda is determined based on its competition concerns and competition law objectives; whilst Malaysia socio-economic ideology is very much based on fair economic wealth distribution between all the different groups in society. Malaysia’s development needs is not just based on material standard of living, namely to achieve high income economy status by the year 2020 but also in terms of access to better quality of life and availability of options to its citizens²⁰⁰. Hence, as a trading nation, Malaysia’s development needs are very much dependent on trade and industry. Therefore, this work argues that South Africa is a suitable competition jurisdiction for Malaysia to refer to for insights because of: similarity in terms of development level and socio-economic issues; success in cartel enforcement²⁰¹; and the inclusion of the public interest element in its competition jurisprudence which is sympathetic to inclusive development²⁰².

²⁰⁰ See Malaysia’s New Economic Policy and also the development concept based on Sen’s argument in Todaro, M.P. and Smith, S.C., *Economic Development*, Tenth Edition (2009), Pearson Education, pp.16-19.

²⁰¹ South Africa is among the newer competition jurisdictions outside the E.U., U.S.A and Canada which have marked increased rates of cartel detection over the last ten years. See Connor, J.M., ‘Cartel Detection and Duration Worldwide’, *Competition Policy International Antitrust Chronicle*, (September 2011) (2)

²⁰² See: Fox, E.M., ‘In Search of a Competition Law Fit for Developing Countries’, New York University Law and Economics Research Paper No.11-04 (2011), p.11 at SSRN: <http://ssrn.com/abstract=1761619> or <http://dx.doi.org/10.2139/ssrn.1761619>; Hodge, J. *et al*, ‘Public Interest Provisions in the South African Competition Act: A Critical Review’, in Moodaliyar, K. And Roberts, S. (eds), *The Development of Competition Law and Economics in South Africa*, Human Sciences Research Council South Africa (2012), pp.2-15

The next research question is “what are the general principles in developing an appropriate cartel enforcement policy for Malaysia?” This work argues that Malaysia should aim for effective cartel enforcement. Therefore, the chapter identifies what ought to be effective cartel enforcement in the Malaysian context. The general principles for developing an appropriate cartel enforcement in Malaysia are identified by discussing the limitations faced or are would likely be based by the MyCC in cartel enforcement. This discussion is interwoven with insights from the South African competition law enforcement experience. This work argues that the general principles for developing an appropriate cartel enforcement policy for Malaysia should account for the limitations of the competition authorities and the country’s developmental concerns without compromising competition. The last research question addressed in this chapter is “what are the lessons to be learned from South Africa in regard to cartel enforcement?” What effective cartel enforcement in the Malaysian context should refer to ; the general principles for developing an appropriate cartel enforcement policy for Malaysia; and the lessons to be learned from South Africa would be relevant to the formulation of Malaysia’s cartel enforcement policy which is discussed in Chapter 6 of this thesis.

The research method adopted in this discussion is not only based on the relevant literature but also reference to the South African experience in competition law enforcement. References are also made to the competition legislation of South Africa and Malaysia. Publications of the South African competition authorities and also those of supranational bodies such as ICN, OECD and UNCTAD are also referred to. The

findings in this chapter are relevant to the formulation of an appropriate cartel enforcement policy for Malaysia.

The motivation for this work is not only because of Malaysia's lack of an official policy on cartel enforcement since it is still early days for competition law enforcement; but also because of the fact that public interest is significantly featured in the South African Competition Act 1998²⁰⁴ and the argument by Fox regarding South African competition jurisprudence which the author finds interesting and feels that the idea should be assessed by determining whether there are any useful insights which may be gained by Malaysia from the South African competition law enforcement experience. According to Fox, the South African competition jurisprudence reflects the challenges in integrating feasible enforcement in light of "... scarce resources of the authority, well-endowed adversaries, and historically privileged dominant firms, with the need to formulate and apply sound principles that promote competition and do not handicap efficiency"²⁰⁵. Hence, the South African jurisprudence is useful reference for countries concerned with inclusive development²⁰⁶. As such, this work is a novelty because there is yet to be any study conducted on effective cartel enforcement in Malaysia and the insights which may be gained by Malaysia from South Africa; albeit theoretically due to the early days of competition law enforcement in Malaysia. Most of the works on cartel enforcement in

²⁰⁴ Public interest is stated in the preamble and purpose of the Competition Act 1998, South Africa and stipulated as a consideration in the assessment of exemptions and mergers of the same.

²⁰⁵ Fox, E.M., 'In Search of a Competition Law Fit for Developing Countries', New York University Law and Economics Research Paper No.11-04 (2011), p.11 at SSRN: <http://ssrn.com/abstract=1761619> or <http://dx.doi.org/10.2139/ssrn.1761619>

²⁰⁶ *Ibid*

young competition jurisdictions are included under the more general discussion on competition law enforcement and leading works on effectiveness are usually from the economic²⁰⁷ or policy perspectives²⁰⁸. Although the findings of this work are specifically catered for Malaysia, it is hoped that it could also be useful reference for other middle income developing countries with young competition jurisdictions and contribute to the enhancement of the scholarship on development of developing countries' competition law jurisprudence.

The remainder of this chapter is organised as follows: Part 2 explains why South Africa has been chosen as a reference to Malaysia. Part 3 discusses effective cartel enforcement in the Malaysian context. The general principles of developing an appropriate cartel enforcement policy are discussed and identified in Part 4. Part 5 discusses the lessons to be learned from the South African competition law enforcement experience before the discussion concludes.

²⁰⁷ Such as Schinkel, M.P., 'Effective Cartel Enforcement in Europe', *World Competition: Law and Economics Review* Vol.30 (2007) 539-572

²⁰⁸ Such as United Nations Conference on Trade and Development (UNCTAD), 'Foundations of an Effective Competition Agency – Note by the UNCTAD Secretariat', Intergovernmental Group of Experts on Competition Law and Policy, Eleventh Session, Geneva, UNCTAD (19-21 July 2011) at http://unctad.org/en/Docs/ciclpd8_en.pdf

3.2. DETERMINING AN APPROPRIATE CARTEL ENFORCEMENT POLICY FOR MALAYSIA - WHY SOUTH AFRICA?

The laws of each country have to be tailor made to their own prevailing socio-economic ideology and development needs, among others²⁰⁹. Therefore, it is not wise to simply copy and adopt the legal provisions of foreign jurisdictions without any prior assessment of their suitability for the country or without adaptations made. The same argument would also apply to formulation and adoption of policies because policies complement legislation in the implementation of the law. In determining an appropriate cartel enforcement policy for Malaysia, the country needs to formulate its own policy based on what is relevant to the country in achieving the objectives of competition law without compromising its development objectives and ensuring that the policy is workable in the Malaysian environment and acceptable by society²¹⁰. In this regard, Malaysia ought to also refer to the experience of other competition jurisdictions. However, the international standards in competition law are predominantly influenced by those of the US and EU which may not fit the developmental needs and limitations of developing countries without adaptation²¹¹.

²⁰⁹ See: Gal, M. S., 'The 'Cut and Paste' of Article 82 of the EC Treaty in Israel: Conditions for a Successful Transplant', NYU Law and Economics Research Paper No. 08-03 (2008) at SSRN: <http://ssrn.com/abstract=1082035>

²¹⁰ See: Gal, M. S., 'The 'Cut and Paste' of Article 82 of the EC Treaty in Israel: Conditions for a Successful Transplant', NYU Law and Economics Research Paper No. 08-03 (2008) at SSRN: <http://ssrn.com/abstract=1082035>; Fox, E.M., 'In Search of a Competition Law Fit for Developing Countries', New York University Law and Economics Research Paper No.11-04 (2011), p.8 at SSRN: <http://ssrn.com/abstract=1761619> or <http://dx.doi.org/10.2139/ssrn.1761619>

²¹¹ Fox, E.M., 'In Search of a Competition Law Fit for Developing Countries', New York University Law and Economics Research Paper No.11-04 (2011), p.8 at SSRN: <http://ssrn.com/abstract=1761619> or <http://dx.doi.org/10.2139/ssrn.1761619>

In determining a suitable competition jurisdiction for Malaysia to refer to for insights on cartel enforcement, this work argues that the jurisdiction : should be an upper middle income developing economy just like Malaysia; is actively implementing its competition law and have achieved acknowledged achievements in cartel enforcement; and lastly, possesses features which are sympathetic to inclusive development. In this regard, South Africa is deemed as a suitable competition jurisdiction for Malaysia to refer to. This is because it is an upper middle income developing country like Malaysia; it has achieved acknowledged achievements in cartel enforcement; it shares similar socio-economic challenges and concerns as Malaysia; and arguably it is the only competition jurisdiction in the world where inclusive development is prominently featured in its jurisprudence.

It is relevant for Malaysia to refer to the experiences of South Africa, a fellow upper middle income developing country²¹² to see what are the enforcement tools and strategies which have worked in South Africa within the limits of resources and expertise available in a country at the upper middle income level. The South African cartel enforcement regime has managed to account for the limited resources of the competition agencies by being innovative and resorting to basic techniques in cartel investigation²¹³. Whilst advocacy has been strategically implemented in garnering public

²¹² See: the World Bank Classification as of July 2012 at <http://muse.jhu.edu/about/order/wdi2012.pdf>

²¹³ See: Roberts, S., 'Screening for Cartels – Insights from the South African Experience', From Collusion to Competition, Competition Policy International, Monthly Cartel Column, 2nd Issue (2012) at https://www.competitionpolicyinternational.com/second-issue-from-collusion-to-competition?utm_source=CPI+Subscribers&utm_campaign=b89330024c-Thursday_September_27_2012&utm_medium=email

support and demand for cartel enforcement; which in turn, facilitates cartel enforcement against well endowed and historically privileged dominant firms²¹⁴.

Additionally, South Africa is an upper middle income developing country where the majority of its population is black but the economy is largely dominated by whites. The marginalisation of its non-white population from the colonisation era was exacerbated by the infamous racial segregation policy, apartheid. The end of apartheid in the early 1990's resulted in legislative reforms which included the adoption of the Competition Act 1998 and also implementation of the Black Economic Empowerment (BEE) Policy. Malaysia too is a middle income developing country²¹⁶ where the natives of the land, and also the majority group (largely the Malays) in society were also economically marginalised by British colonial policies²¹⁷ and which still continues to this day whereby the country's economy is largely controlled by the Chinese whilst political power is controlled by *bumiputeras*. Hence, the Malaysia's development policies since the 1970's aim for fairer distribution of economic wealth between the different races in society and the policies have been implemented against the backdrop of the Federal Constitution which provides for special position of the *bumiputeras* particularly in terms of reservation of quotas in respect of federal public service; permits; scholarship;

²¹⁴ Stricter cartel enforcement such as criminalisation of cartels was implemented as a result of public support and demand for stricter enforcement. See Lavoie, C., 'South Africa's Corporate Leniency Policy: A Five Year Review', *World Competition* Vol. 33(1) (2010), 141-162, p.159

²¹⁶ See: the World Bank Classification as of July 2012 at <http://muse.jhu.edu/about/order/wdi2012.pdf>

²¹⁷ See: discussion in Chapter 1 of this thesis.

educational or training privileges or special facilities accorded by the Federal Government and business and trade permit or license²¹⁸.

It is also warranted for Malaysia to refer to South Africa's cartel enforcement experience because of its achievements. South Africa is among the newer competition jurisdictions outside of the leading competition jurisdictions which have achieved significant increase in the rate of cartel detection over the last ten years²¹⁹. Its efforts in cartel enforcement have made a significant positive impact on the level of competition in South Africa. From 1999 till March 2009 the number of complaints, consent orders and settlements under Sections 4 (1) (a) and 4 (1) (b) referred to the Competition Tribunal markedly increased from only 1 in 1999/2000 to 18 in 2008/2009²²⁰. In addition, substantial increase in administrative penalties imposed by the Competition Tribunal has been largely due to the uncovering of hard core cartels such as the 250 Million Rand fine imposed on *Sasol Chemical Industries*²²¹. The South African Competition Commission has managed to increase " ... competition in various industries and improved consumer access to product choice at competitive prices"²²² despite being that of a developing country and the fact that competition law has only been actively implemented in South Africa from

²¹⁸ See Article 153, Federal Constitution Malaysia. Also see discussion in Chapter 1 of this thesis.

²¹⁹ South Africa is among the newer competition jurisdictions outside the E.U., U.S.A and Canada which have marked increased rates of cartel detection over the last ten years. See Connor, J.M., 'Cartel Detection and Duration Worldwide', *Competition Policy International Antitrust Chronicle*, (September 2011) (2)

²²⁰ *Ten Years of Enforcement by the South African Competition Authorities – Unleashing Rivalries 1999-2009*, Competition Commission, Competition Tribunal, South Africa (2009), Figure 6, p.41 at <http://www.compcom.co.za/10-year-review> accessed on 20/10/2011

²²¹ *Ibid*, Table 5, p.42

²²² Lavoie, C., 'South Africa's Corporate Leniency Policy: A Five Year Review', *World Competition* Vol. 33(1) (2010), 141-162, p.141

1999. Additionally, South Africa's progress in implementing its competition law have been recognised by the global competition fraternity via the good reviews it received from the OECD (2003), World Bank (2005) and Global Competition Review (2008)²²³.

In terms of level of development and achievements in cartel enforcement, it may be argued that South Africa is not that different from other competition jurisdictions in developing countries such as Chile and Mexico which are actively enforcing their competition law. However, the elements which distinguish South Africa from the others as a suitable reference for Malaysia are the emphasis on similar socio-economic issues in terms of distribution of wealth between different groups in society and the fact that public interest has been expressly provided for in the Competition Act 1998, South Africa. Public interest is expressly provided for in the preamble and purpose of the Competition Act 1998²²⁴ and also extended in the assessment of exemptions and

²²³ See: *Ten Years of Enforcement by the South African Competition Authorities – Unleashing Rivalries 1999-2009*, Competition Commission, Competition Tribunal, South Africa (2009), p.3 at <http://www.compcom.co.za/10-year-review> accessed on 20/10/2011

²²⁴ PREAMBLE -

The people of South Africa recognise:

That apartheid and other discriminatory laws and practices of the past resulted in excessive concentrations of ownership and control within the national economy, inadequate restraints against anti-competitive trade practices, and unjust restrictions on full and free participation in the economy by all South Africans.

That the economy must be open to greater ownership by a greater number of South Africans.

That credible competition law, and effective structures to administer that law, are necessary for an efficient functioning economy.

That an efficient, competitive economic environment, balancing the interests of workers, owners and consumers and focused on development, will benefit all South Africans.

IN ORDER TO –

provide all South Africans equal opportunity to participate fairly in the national economy;
achieve a more effective and efficient economy in South Africa;

mergers under the Competition Act 1998²²⁵. Therefore, the law requires consideration of public interest which go beyond competition boundaries. For example, exemption may be granted to agreements which contribute to "... promotion of the ability of small businesses, or firms controlled or owned by historically disadvantaged persons, to become competitive"²²⁶. Public interest in the South African competition law context refers to non-competition considerations which are economic in nature such as trade and industry interests and non-economic in nature such as equity and fairness²²⁷. Public interest has largely been considered in merger cases²²⁸. In the assessment of cases under the Competition Act 1998, South Africa, public interest is to be assessed with other competition considerations and it has to be substantive²²⁹. Although the Malaysian competition law has not been as expressive in providing for such non-competition considerations under the Competition Act 2010, non-competition considerations such

provide for markets in which consumers have access to, and can freely select, the quality and variety of goods and services they desire;
create greater capability and an environment for South Africans to compete effectively in international markets;
restrain particular trade practices which undermine a competitive economy;
regulate the transfer of economic ownership in keeping with the public interest;
establish independent institutions to monitor economic competition; and
give effect to the international law obligations of the Republic.

²²⁵ Hodge, J. *et al*, 'Public Interest Provisions in The South African Competition Act- A Critical Review', Competition Policy, Law and Economics Conference (2009), p.3

²²⁶ Section 10 (3) (b) (ii) Competition Act 1998, South Africa.

²²⁷ Hodge, J. *et al*, 'Public Interest Provisions in the South African Competition Act: A Critical Review', in Moodaliyar, K. And Roberts, S. (Eds), *The Development of Competition Law and Economics in South Africa*, Human Sciences Research Council South Africa (2012), p.4

²²⁸ See: Hodge, J. *et al*, 'Public Interest Provisions in The South African Competition Act- A Critical Review', Competition Policy, Law and Economics Conference (2009); Boshoff, W. *et al*, 'The Economics Of Public Interest Provisions In South African Competition Policy', Sixth Annual Competition Law, Economics and Policy Conference, South Africa (2012) at <http://www.compcom.co.za/assets/Uploads/events/Sixth-Annual-Competition-Law-Economics-and-Policy-Conference-in-South-Africa-2012/NewFolder-3/The-economics-of-public-interest-provisions-in-South-African-competition-policy.pdf>

²²⁹ The Competition Act 1998, South Africa however does not clarify what is "substantive". See Hodge, J. *et al*, 'Public Interest Provisions in The South African Competition Act- A Critical Review', Competition Policy, Law and Economics Conference (2009), p.8

as “significant identifiable technological, efficiency and social benefits” are justifications for application for exemptions under Section 5, Competition Act 2010. So long as the detrimental effect of the agreement on competition is proportionate to its benefits. Hence, in the assessment of exemptions under the Competition Act 2010, the MyCC has to account for non-competition considerations with significant identifiable technological, efficiency and social benefits which may include trade and industrial policies and socio-economic considerations such as *bumiputera* rights, which is a socio-economic ideology that is entrenched in the Federal Constitution, the supreme law of the land²³⁰.

Public interest or non-competition considerations have to be accounted for in the implementation of competition law particularly in developing countries with new competition jurisdictions. This is to accommodate economic development²³¹ and also to prevent disjunctions between competition and other policies that are relevant to the country’s economic development²³² and ingrained in the socio-economic ideology of the country. Otherwise, it may compromise public support for effective competition law enforcement. Therefore, although public interest has largely been considered in merger cases in South Africa, it would be useful for Malaysia to refer to South African

²³⁰ See discussion in Chapter 1 of this thesis.

²³¹ Sometimes, competition should be restricted to accommodate innovation and investment for the sake of development. See: Singh, A. and Dhumale, R., ‘Competition Policy, Development and Developing Countries’, South Centre Working Papers 7 (November 1999) available at http://southcentre.org/index.php?option=com_content&view=article&id=315%3Acompetition-policy-development-and-developing-countries-&catid=56%3Aother-issues-related-to-trade-negotiations&Itemid=67&lang=en; and discussion on the theory on the relationship between competition and innovation in Chapter 4 of this thesis.

²³² Lewis, D., ‘The Role of Public Interest in Merger Evaluation’, ICN, Merger Working Group, Naples (28-29 September 2002)

competition jurisprudence to examine how public interest factors are balanced with competition considerations and the issues related to it. This in turn determines the lessons to be learned for cartel enforcement in Malaysia.

The study of South African competition jurisprudence on public interest and inclusive development has also been recommended in available literature. Fox suggested six choices for possible competition law model for developing countries²³³. The idea for this discussion is partly based on Model 4 – a model which combines the laws of developing countries which have developed a compass and which prominently feature the South African competition jurisprudence, one of the most developed among developing countries²³⁴. The South African competition jurisprudence reflects the challenges in integrating feasible enforcement in light of “... scarce resources of the authority, well-endowed adversaries, and historically privileged dominant firms, with the need to formulate and apply sound principles that promote competition and do not handicap efficiency”²³⁶. . These elements are indeed relevant to Malaysia in cartel enforcement in view of the limitations in resources faced particularly by the MyCC as a young competition authority²³⁸; the existence of well endowed firms where some enjoy the

²³³ Fox, E.M., ‘In Search of a Competition Law Fit for Developing Countries’, New York University Law and Economics Research Paper No.11-04 (2011) at SSRN: <http://ssrn.com/abstract=1761619> or <http://dx.doi.org/10.2139/ssrn.1761619>

²³⁴ *Ibid*, p.11

²³⁶ *Ibid*

²³⁸ As a new agency under the Ministry of Domestic Trade, Consumerism and Co-operatives which is dependent on government funding, the MyCC would need to prove their worth before additional funding could be channelled to it.

benefits of political patronage²³⁹; and the significance of inclusive development agenda in Malaysia's development policies²⁴⁰.

It ought to be noted that South Africa adopted the Competition Act 1998 as part of the country's regulatory reform in order to address excessive concentration and control in the South African economy and the negative impact on development²⁴⁴ due to the inequality exacerbated and created under apartheid; and also to facilitate the opening up of its previously "closed" economy due to the embargo imposed by the international community. In contrast, Malaysia's Competition Act 2010 was adopted with the aim to facilitate the country's development via a more competitive and efficient market, in light of its target to be a high income country by 2020. In Malaysia's case, its competition law is not part of a legislative reform but an instrument to facilitate development. This is because unlike the Competition Act 1998, South Africa, the Competition Act 2010 was adopted at a time when Malaysia's economy and market were already relatively open by international standards²⁴⁵ and Malaysia's economy is significantly reliant on international trade²⁴⁶. Perhaps this may be a back of the envelope way of justifying the

²³⁹ For a detailed discussion on the link between economy and politics and instances of political patronage in Malaysia, see: Gomez, E.T. and Jomo, K.S., *Malaysia's Political Economy: Politics, Patronage and Profit*, Cambridge University Press (1999); Jomo, K.S., 'Industrialisation and Industrial Policy in Malaysia', in Jomo, K.S. (ed.), *Malaysian Industrial Policy*, National University of Singapore (NUS) Press Singapore (2007).

²⁴⁰ See discussion in Chapter 1 of this thesis.

²⁴⁴ See: Foreword from the Minister of Trade and Industry, Ten Years of Enforcement by the South African Competition Authorities – Unleashing Rivalries 1999-2009, Competition Commission, Competition Tribunal, South Africa (2009) at <http://www.compcom.co.za/10-year-review> accessed on 20/10/2011.

²⁴⁵ The World Bank, *Malaysia Overview*, at <http://www.worldbank.org/en/country/malaysia/overview> accessed on 8/4/2013

²⁴⁶ Yusoff, M.B., 'Malaysia Bilateral Trade Relations and Economic Growth', *International Journal of Business and Society* Vol. 6 No.2 (2005) 55-68; Minister of International Trade and Industry, Malaysia,

exclusion of merger control from the remit of the Malaysian competition law. That is, due to Malaysia's open economy, the need for a structural remedy in addressing anti-competitive conducts under the Competition Act 2010 is less "pressing" as compared to South Africa. However, it has to be highlighted that economic development is the aim of competition laws of both South Africa and Malaysia and that both countries adopted competition law based on internal reasons and not external pressures such as a condition for financial bailouts by the International Monetary Fund or the World Bank or a prerequisite to trade agreements²⁴⁷.

Based on the above, it can be said that Malaysia and South Africa are at the same level of development and share some similarities in regard to development and socio-economic concerns. Although the competition law of both countries are concerned with development, Malaysia's competition law does not include structural remedies. Therefore, in addressing anti-competitive cartels, under the current competition law framework in Malaysia, cartel enforcement could not be complemented by merger control²⁵⁸. The similarities shared with Malaysia, South Africa's achievements and experiences in cartel enforcement as explained above; and also the fact that the South African competition jurisprudence is sympathetic to inclusive development, justify

'Malaysia's Trading Nation Status Remains. Net Trade Influences Cyclical Economic Development and Long Term Growth Potential', Ministry of International Trade and Industry, Malaysia (MITI) (May 2012), MITI's website at http://www.miti.gov.my/cms/content.jsp?id=com.tms.cms.article.Article_b1bdb34f-c0a8156f-67ec67ec-23d4494c accessed on 11/1/ 2013

²⁴⁷ Marcos, F., 'Do Developing Countries Need Competition Laws and Policy?', (September 2006), p.3 at SSRN <http://ssrn.com/abstract=930562> or <http://dx.doi.org/10.2139/ssrn.930562>

²⁵⁸ See Chapter 5 of this thesis for further discussion.

Malaysia to refer to the South African competition law enforcement experience for insights in determining an appropriate cartel enforcement policy for Malaysia.

3.3. EFFECTIVE CARTEL ENFORCEMENT IN THE MALAYSIAN CONTEXT

Effective cartel enforcement is a ubiquitous term in competition literature; however it may be argued that it is not easy to define for it is rather subjective. This is because what may be effective for one country may not be so for another. Nevertheless there are elements which are universally applicable in assessing whether cartel enforcement has been effectively implemented. For example, independence of the competition authorities is universally applicable for without it, the credibility of the competition authorities could not be established. This section discusses effective cartel enforcement in the Malaysian context.

Effectiveness in cartel enforcement should be assessed in a comprehensive manner. This is because effective cartel enforcement cannot be adequately assessed based on indicators such as the number of cases investigated or adjudicated or the amount of fine imposed because sometimes there are small and low profile cases which may be of significant impact to competition law development²⁵⁹. Furthermore, advocacy programmes may also contribute to the effectiveness competition agency by facilitating

²⁵⁹ United Nations Conference on Trade and Development (UNCTAD), 'Foundations of an Effective Competition Agency – Note by the UNCTAD Secretariat', Intergovernmental Group of Experts on Competition Law and Policy, Eleventh Session, Geneva, UNCTAD (19-21 July 2011), pp.5-6 at http://unctad.org/en/Docs/ciclpd8_en.pdf

awareness²⁶⁰, which impact could not be reflected in terms of numbers but more appropriately, it may be reflected for instance, in the increase in the level of support for competition law enforcement. Additionally, in the case of cartel enforcement, it also has to be supported by market and economic statistics such as the price trends and level of market concentration in each industry or sector. This is because cartel prices are set above the competitive level in order to gain near monopoly profit. An analysis of the price level in the sector or industry pre and post cartel enforcement may be used as an indicator for effective cartel enforcement, as is the level of market concentration.

Additionally, effective cartel enforcement ought to also account for appropriate use of resources. UNCTAD outlined in its report on 'Foundations of an Effective Competition Agency'²⁶¹ that effective enforcement means the competition agency or authority achieves its objectives through appropriate use of resources. This may be determined through evaluation and the preparation of annual reports and also peer reviews. Although the UNCTAD report concerns the overall effectiveness of a competition agency, proper utilisation of resources is still relevant in effective cartel enforcement, particularly in the context of developing countries where access and availability of resources is more limited as compared to developed countries. Why is proper

²⁶⁰ *Ibid*, p.6

²⁶¹ United Nations Conference on Trade and Development (UNCTAD), 'Foundations of an Effective Competition Agency – Note by the UNCTAD Secretariat', Intergovernmental Group of Experts on Competition Law and Policy, Eleventh Session, Geneva, UNCTAD (19-21 July 2011) at http://unctad.org/en/Docs/ciclpd8_en.pdf

management of resources important to effective cartel enforcement in the context of developing countries? It is because cartel enforcement requires significant resources to be focused on it as it involves well endowed foes of competition authorities who would go to any lengths necessary to conceal their activities. Thus their discovery requires expertise, time and adequate number of people to focus on investigative works. Proper management of resources means the ability of the competition authority to function and produce results by utilising the limited available resources.

Effective cartel enforcement arises when there is a credible threat of detection and imposition of heavy penalties – which in turn leads to uncovering of cartels and deters anti-competitive cartel arrangements. Due to the illicit nature of cartels, being effective requires focussing on weaknesses of cartels which would destabilise their illicit arrangements and take away their main incentive, which is anti-competitive profit. The weaknesses of cartels relate to: coordination; monitoring and preventing new entrants into the market²⁶². Cartels are more likely to succeed in concentrated markets because it renders coordination between the cartel members easier. This does not mean that cartels cannot exist in unconcentrated markets but in such markets, there is more reliance on coordination in the guise of trade associations²⁶³. Cartels also need to be able to monitor their cartel members in order to deter cheating due to the incentive of increasing individual firm's profit. Hence, cartels invests their resources in monitoring

²⁶² Levenstein, M.C. and Suslow, V., 'What Determines Cartel Success?', *Journal of Economic Literature* Vol.44 (1) (March 2006) 43-95, p.44

²⁶³ *Ibid*

mechanisms such as joint sales agencies and information sharing or even more sophisticated mechanisms over time such as a hierarchical system in their decision making²⁶⁴. Additionally, cartels may also adopt punishment mechanisms to deter cheating such as via price wars. The potential for new entrants to enter the market increases over time as the incumbent firms are able to respond to high cartel prices²⁶⁵. Cartels that survive are those which are: able to adjust to changes in the market and overcome challenges pertaining to coordination; monitoring and market entry; and exist in markets with features that facilitate collusion²⁶⁶. Therefore, competition authorities should invest their resources on enforcement tools and mechanisms which operate by taking away the incentive for cartels to collude and creating incentives for cartel members to cheat on each other rather than just relying on purely investigative works in uncovering cartels.

In the context of developing countries, there is also an extra dimension to be considered; - effective cartel enforcement need to also account for cartels with gains which trump their anti-competitive benefits. This is to ensure that effective cartel enforcement would not hamper or become an obstacle to development and accounts for significant elements in the prevailing socio-economic ideology of the country in order to

²⁶⁴ See Stigler, G., 'A Theory of Oligopoly', *Journal of Political Economy* 72 (1) (1964) 44-61; Levenstein, M.C. and Suslow, V., 'What Determines Cartel Success?', *Journal of Economic Literature* Vol.44 (1) (March 2006) 43-95; Griffin, J.M., 'An Inside Look at a Cartel at Work: Common Characteristics of International Cartels', *Fighting Cartels- Why and How?*, Swedish Competition Authority (2001) at <http://www.kkv.se/upload/filer/eng/publications/3rdnordic010412.pdf#page=29>

²⁶⁵ Levenstein, M.C. and Suslow, V., 'What Determines Cartel Success?', *Journal of Economic Literature* Vol.44 (1) (March 2006) 43-95, p.45

²⁶⁶ *Ibid*, p.57

facilitate acceptance of competition law. Without such flexibilities, it would be difficult to even implement competition law in the jurisdiction, let alone facilitating effective cartel enforcement.

In view of the above, it may be summed that effective cartel enforcement in Malaysia is achieved when credible competition authorities and competent competition law enforcement are established. Credible means the existence of a competition enforcement regime which is able to function within its limited resources; independent; and accepted by society. Whilst competent competition law enforcement means the ability of the competition authorities to detect, investigate and prosecute cartels under the law which in turn creates credible risk of discovery and punishment to cartels without compromising development gains to the country.

In the next section, the general principles of developing an appropriate cartel enforcement policy are discussed with insights from the South African competition law enforcement experience. The insights from South Africa illustrate how the jurisdiction has addressed the elements which have been deemed by this discussion as relevant to effective cartel enforcement in the Malaysian context, throughout the years.

3.4. GENERAL PRINCIPLES OF DEVELOPING AN APPROPRIATE CARTEL ENFORCEMENT POLICY FOR MALAYSIA WITH INSIGHTS FROM SOUTH AFRICA

The aim of Malaysia's cartel enforcement policy should be effective cartel enforcement as per the Malaysian context which is explained in the previous section. As such, under this section, the general principles of developing Malaysia's cartel enforcement policy are determined through a discussion on the limitations faced or would be faced by the MyCC in cartel enforcement in achieving effective cartel enforcement as explained in the previous section. The limitations are explained in terms of the challenges faced by the MyCC and interwoven with insights from the South African competition enforcement experience.

A study conducted by the ICN in 2006 illustrates the challenges faced by young competition authorities in enforcing competition law in their respective jurisdictions²⁶⁷. The challenges identified include lack of competition culture, limited financial and human resources and inadequate legislative provisions. Malaysia, as a developing country with a young competition jurisdiction would also be facing challenges in enforcing its competition law, which includes cartel enforcement. Since competition law

²⁶⁷ International Competition Network (ICN), 'Lessons to be Learnt From the Experiences of Young Competition Agencies', Competition Policy Implementation Working Group Report (Subgroup 2), ICN, Cape Town, South Africa (May 2006), p.38 at <http://www.internationalcompetitionnetwork.org/library.aspx?search=&group=13&type=0&workshop=0>

will be gradually implemented in Malaysia²⁶⁸, some challenges are immediate whilst some are soon to come. The immediate challenges include lack of competition culture, limited financial and human resources and untrained judiciary. Whilst the ones which are soon to come are those which may arise as cartel enforcement in Malaysia progresses and these include inadequate legislative provisions and clashes between competition and developmental policies and political interference.

Competition culture refers to an environment where there is awareness of the rules of competition law among the stakeholders such as the business community, governmental agencies, non-governmental agencies, the judiciary, the media and the general public and also of their responsibility to ensure that such rules are adhered to in the interest of competition and overall economic development²⁶⁹. There is a lack of awareness of the competition concept in Malaysia and ignorance breeds unwarranted fear and suspicion. The Malaysian business community and industries have been wary and suspicious of competition law because they view it as government interference in their freedom to do business²⁷⁰. This is hardly surprising because business communities in other countries such as South Africa shared a similar view when competition law was adopted by their countries due to their lack of awareness and understanding of

²⁶⁸ As outlined by the Minister of Domestic Trade, Co-operatives and Consumerism in his speech to the *Dewan Rakyat* (House of Representatives), Malaysian Parliament on 20 April 2010, Hansard Report (Malay version), pp.151-152

²⁶⁹ International Competition Network (ICN), 'Lessons to be Learnt From the Experiences of Young Competition Agencies', Competition Policy Implementation Working Group Report (Subgroup 2), ICN, Cape Town, South Africa (May 2006), p.38 at

<http://www.internationalcompetitionnetwork.org/library.aspx?search=&group=13&type=0&workshop=0>

²⁷⁰ This is based on feedback gathered from briefings to businesses and industries which the author participated in as an officer in the Ministry of Domestic Trade and Consumer Affairs (1997-2003).

competition law²⁷¹. There was lack of competition culture in South Africa when the Competition Act 1998 was first implemented and this is hardly surprising considering the fact that the law was introduced as a regulatory reform to address the socio-economic imbalances created by policies of the past where the industries were highly concentrated and businesses were protected or owned by the state and some cartels were even sanctioned by the state under the apartheid era²⁷².

It is not only perceived government interference which may detrimentally affect their commercial freedom that businesses fear but also that cartel enforcement would detrimentally affect the economic rent which they have been enjoying from their profiteering prior to the introduction of competition law. The South African competition authorities were up against well-endowed and historically privileged firms²⁷³ who were resisting the new legislation which was threatening their business operation²⁷⁴ and without a doubt, also their enjoyment of economic rent. Businesses which have been enjoying economic rent before the introduction of competition law in the jurisdiction may likely form rent preserving alliances to influence the decision makers to ensure that their

²⁷¹ International Competition Network (ICN), 'Lessons to be Learnt From the Experiences of Young Competition Agencies', Competition Policy Implementation Working Group Report (Subgroup 2), ICN, Cape Town, South Africa (May 2006), pp.38-39 at <http://www.internationalcompetitionnetwork.org/library.aspx?search=&group=13&type=0&workshop=0>

²⁷² 'Ten Years of Enforcement by the South African Competition Authorities – Unleashing Rivalries 1999-2009', Competition Commission, Competition Tribunal, South Africa (2009), p.1-2 at <http://www.compcom.co.za/10-year-review> accessed on 20/10/2011.

²⁷³ Fox, E.M., 'In Search of a Competition Law Fit for Developing Countries', New York University Law and Economics Research Paper No.11-04 (2011), p.11 at SSRN: <http://ssrn.com/abstract=1761619> or <http://dx.doi.org/10.2139/ssrn.1761619>

²⁷⁴ International Competition Network (ICN), 'Lessons to be Learnt From the Experiences of Young Competition Agencies', Competition Policy Implementation Working Group Report (Subgroup 2), ICN, Cape Town, South Africa (May 2006), p.38 at <http://www.internationalcompetitionnetwork.org/library.aspx?search=&group=13&type=0&workshop=0>

interests are not jeopardised by competition law enforcement²⁷⁵. An example of how such rent preserving alliance operates can be seen from the passing of the much watered down Hong Kong Competition Ordinance which was finally enacted on 14 June 2012²⁷⁶. The MyCC too may face resistance from rent seeking alliance who may lobby against competition law enforcement and this may lead to political interference in cartel enforcement and decisions made not in the best interest of the public²⁷⁷. It is not uncommon for key players in the industry to have close relationships with decision makers such as government officials and political masters. This includes instances when firms are also owned by cronies and families of the decision makers²⁷⁸. Furthermore, some of the government policies which have been implemented since the 1980's such as "Bumiputera Commercial and Industrial Community (BCIC)" and "Malaysia Incorporated" and the more recently implemented "Malaysia 2020" have also created political patronage and closer relations between large corporate groups and political leaders²⁷⁹ and these may facilitate rent seeking activities²⁸⁰.

²⁷⁵ Chowdhury, M., 'The Political Economy of Law Reform in Developing Countries', Sixth ASCOLA Conference – New Competition Jurisdictions: Shaping Policies and Building Institutions (July 2011), King's College London, p.2

²⁷⁶ Angela Wang & Co., Introducing the New Competition Law in Hong Kong, Global Legal Resources (12 September 2012) at <http://www.hg.org/article.asp?id=28210>

²⁷⁷ See Stigler, G., *The Theory of Economic Regulation* (1971), Dahl, R.A. et al (eds.), *The Democracy Sourcebook*, MIT Press (2003), pp.393-397 at <http://wxy.seu.edu.cn/humanities/sociology/htmledit/uploadfile/system/20110322/20110322171107276.pdf#page=406>

²⁷⁸ See: Fraser, D.R. et al, 'Capital Structure and Political Patronage: The Case of Malaysia', *Journal of Banking and Finance* 30 (2006) 1291-1308; Johnson, S. and Mitton, T., 'Cronyism and Capital Controls: Evidence from Malaysia', Working Paper 8521, National Bureau of Economic Research (NBER) (2001) at <http://www.nber.org/papers/w8521>

²⁷⁹ See: Jomo, K.S., 'Industrialisation and Industrial Policy in Malaysia', *Malaysian Industrial Policy*, NUS Press Singapore (2007), pp. 18-19; Fraser, D.R. et al, 'Capital Structure and Political Patronage: The Case of Malaysia', *Journal of Banking and Finance* 30 (2006) 1291-1308; Johnson, S. and Mitton, T., 'Cronyism and Capital Controls: Evidence from Malaysia', Working Paper 8521, National Bureau of Economic Research (NBER) (2001) at <http://www.nber.org/papers/w8521>

Thus, without instilling awareness among the business community, government officials, political masters and the public at large of the harms of anti-competitive cartel activities and the benefit which comes with effective enforcement, enforcement actions may not achieve the desired outcomes especially when they involve those which are dependent on insider information and industrial self reporting²⁸¹ such as leniency and compliance programmes. Lack of awareness and respect for competition law and its objectives also would not bring about the support and demand needed for cartel enforcement²⁸². Without support for cartel enforcement, it may result in curtailment of competition agency powers, criticism of enforcement actions and budgetary restrictions²⁸³. These in turn would adversely affect cartel enforcement.

In this regard, the South African Competition Commission focused on enhancing public awareness of the Competition Act 1998 and its implications in the first five (5) years of

²⁸⁰ For a discussion on how economic rent seeking activity is facilitated through political patronage in Malaysia, see Gomez, E.T. and Jomo, K.S., *Malaysia's Political Economy: Politics, Patronage and Profit*, Cambridge University Press (1999)

²⁸¹ Refer to the Tunisian Competition Authority experience - see Competition Policy Implementation Working Group Report (Subgroup 2), 'Lessons to be Learnt From the Experiences of Young Competition Agencies', ICN, Cape Town, South Africa (May 2006), p.10

<http://www.internationalcompetitionnetwork.org/library.aspx?search=&group=13&type=0&workshop=0>

²⁸² For detailed discussion on generating demand for competition law enforcement see: Chowdhury, M., 'The Political Economy of Law Reform in Developing Countries', Sixth ASCOLA Conference – New Competition Jurisdictions: Shaping Policies and Building Institutions (July 2011), King's College London; and Gal, M.S., 'The Ecology of Antitrust Pre-conditions for Competition Law Enforcement in Developing Countries', in *Competition, Competitiveness and Development: Lessons from Developing Countries*, United Nations Publication (2004), UNCTAD/ DITC/CLP/2004/1

²⁸³ Chowdhury, M., 'The Political Economy of Law Reform in Developing Countries', Sixth ASCOLA Conference – New Competition Jurisdictions: Shaping Policies and Building Institutions (July 2011), King's College London, p.13

competition law implementation in South Africa²⁸⁴. Public demand and support for cartel enforcement could be generated through the enhancement of public awareness of the adverse effect of anti-competitive cartel activities such as price fixing of essentials on consumers and the economy in general. Thus, competition advocacy and awareness programmes are useful in combating the lobbying efforts of rent seeking pressure groups against competition law and cartel enforcement²⁸⁵ by triggering a paradigm shift in the competition culture of the country. The South African Competition Commission has been implementing strategic competition advocacy by engaging in awareness programmes which explain the benefits of cartel enforcement such as dialogues and consultation with the business community, public and also the international competition fraternity in regard to cartel enforcement²⁸⁶. The South African Competition Commission is also provided with a mandate to advocate their views to other relevant regulatory and public agencies under the Competition Act 1998²⁸⁷. The Commission have also been savvy in using the media to highlight the uncovering of cartels especially in the prioritised sectors. This has resulted in increased public awareness on the harmful effect of cartel conducts on consumers and economic growth which manifested in

²⁸⁴ Minister of Trade and Industry, South Africa, Foreword, Annual Report 2003-2004, Competition Commission, South Africa, p.1 at <http://www.compcom.co.za/assets/Files/annual-report-2003-2004.pdf> accessed on 20/10/2011

²⁸⁵ For the detailed discussion on the concept of demand and supply to explain the development stages of competition law in developing countries, see Chowdhury, M., 'The Political Economy of Law Reform in Developing Countries', Sixth ASCOLA Conference – New Competition Jurisdictions: Shaping Policies and Building Institutions (July 2011), King's College London.

²⁸⁶ See: *Ten Years of Enforcement by the South African Competition Authorities – Unleashing Rivalries 1999-2009*, Competition Commission, Competition Tribunal, South Africa (2009), pp.73-80 at <http://www.compcom.co.za/10-year-review> accessed on 20/10/2011

²⁸⁷ See: Section 82 Competition Act 1998, South Africa.

members of the public becoming informants for the Commission²⁸⁸; and public calls for sanctions to be imposed not just on firms but also individuals involved in cartel activities²⁸⁹. Criminal sanctions against cartel offences were introduced in South Africa with public support²⁹⁰.

Limited resources, namely trained human resources and adequate fund; are also major obstacles faced by developing countries in cartel enforcement where public fund is small as compared to developed countries. As a young competition jurisdiction in a developing country, Malaysia too faces this challenge. In Malaysia at the moment, the MyCC receives funding from the government via the Ministry of Domestic Trade, Co-operatives and Consumerism. Thus, any application for budget increase and expenditure is subject to the rules, regulations and procedures as set out by the Ministry of Finance and would have to be strongly justified by proving the MyCC's competency in carrying out their functions thus far. Such justification would involve performance and impact measurements. If inadequate budget is allocated, then it will hamper cartel enforcement and adversely impact performance of the MyCC. This is a pertinent point to be highlighted particularly in view of the fact that Section 16 (3) (b), Competition Act 2010 provides that the MyCC has the discretion to close an investigation if in its opinion, continuing the investigation would not constitute the making the best use of the MyCC's

²⁸⁸ See: *Ten Years of Enforcement by the South African Competition Authorities – Unleashing Rivalries 1999-2009*, Competition Commission, Competition Tribunal, South Africa (2009), p.46 at <http://www.compcom.co.za/10-year-review> accessed on 20/10/2011

²⁸⁹ Lavoie, C., 'South Africa's Corporate Leniency Policy: A Five Year Review', *World Competition* Vol. 33(1) (2010) 141-162, p.159

²⁹⁰ *Ibid*

resources. Although the meaning of the phrase “would not constitute the making the best use of the [MyCC’s] resources” is yet to be interpreted, the author is of the opinion that it could be a double edged sword. This is because the provision may be abused to unduly influence or pressure the MyCC to close an investigation without sound justifications or the abuse may even be by the MyCC itself to ensure targets are met and complex cases which detrimentally affect the MyCC’s performance targets are closed. On the other hand, the provision could be utilised by the MyCC to be innovative in managing its limited resources via prioritisation. In this regard, it would be useful to refer to the measures which had been adopted by South Africa in addressing the issue of enforcing competition law with limited resources.

South Africa also faced issues with limited resources in implementation of competition law in the country²⁹¹. In order to attain effective enforcement, adequate resources have to be allocated to the competition agencies. Conducting awareness and advocacy programmes; training human resources to carry out cartel enforcement work; training the judiciary to adjudicate cartel cases; offering attractive remuneration packages in order to employ people with the required expertise and carrying out investigative work and prosecuting cartels are part of effective cartel enforcement regime. Effective cartel enforcement requires specific and trained competition officials to focus on cartel detection, investigation and prosecution. Needless to say, all the aforementioned

²⁹¹ International Competition Network (ICN), ‘Lessons to be Learnt From the Experiences of Young Competition Agencies’, Competition Policy Implementation Working Group Report (Subgroup 2), ICN, Cape Town, South Africa (May 2006), pp. 24 and 31 at <http://www.internationalcompetitionnetwork.org/library.aspx?search=&group=13&type=0&workshop=0>

require adequate staffing and financial resources. In order to overcome the challenges which come with lack of resources, South Africa has been strategic and innovative in enforcing the Competition Act 1998 by streamlining their enforcement processes through prioritisation²⁹²; adopting utilising basic techniques and enforcement tools which facilitate the uncovering of cartels – which lessen enforcement costs; strong powers of investigation; and heavy penalties for cartels. The bottom line is to establish: a perception of credible threat of detection to cartels; the threat of heavy penalty being imposed; and It is necessary to implement at reasonable costs, enforcement tools which may ensure a reasonable degree of compliance with the law²⁹³ in order to facilitate effective cartel enforcement.

In order to create credible threat of detection, the South African Competition Commission adopted basic techniques in cartel detection which is complemented by legislative provisions that provide for strong enforcement powers and which are simple to administer – these accommodate the limited experience of enforcement officials in carrying out cartel enforcement; adopted enforcement tools which utilised the weaknesses of cartels which maximised the impact and adopted a selective approach in regards to the industries to be focused on in cartel enforcement; and the penalties imposed on cartel infringements are also quite severe.

²⁹² *Ibid*, p. 24

²⁹³ Based on Posner's theory on enforcement. See Posner, R.A., *Antitrust Law* (Second Ed.), The University of Chicago Press (2001), Chapter 10 – The Problem of Enforcement.

The basic techniques in cartel detection utilised by the South African Competition Commission involves both structural and behavioural approaches²⁹⁴. The focus was on industries which have been identified under the prioritisation framework as prone to cartels, such as concentrated markets with homogenous products. Whilst behavioural screening involves observations of price and quantity data which can be readily collected and understanding how firms interact in making pricing and supply decisions. The adoption of basic techniques in cartel detection may give rise to the criticism that they would result in type I²⁹⁵ and/or type II²⁹⁶ enforcement errors because enforcement could be based on insufficient data and information²⁹⁷. However, where developing countries are concerned, sometimes second best options or the lesser between two evils would have to be adopted. Cartel enforcement has to start somewhere and if it was only to commenced after everything is nearly perfect, then it may take years before competition law or cartel enforcement could be implemented in that jurisdiction – rendering the law as “toothless” and a mockery. Therefore, competition authorities in jurisdictions with limited resources would have to solve this conundrum by adopting

²⁹⁴ Roberts, S., ‘Screening for Cartels – Insights from the South African Experience’, From Collusion to Competition, Competition Policy International, Monthly Cartel Column, 2nd Issue (2012), pp.3-6 at https://www.competitionpolicyinternational.com/second-issue-from-collusion-to-competition?utm_source=CPI+Subscribers&utm_campaign=b89330024c-Thursday+September+27+2012&utm_medium=email

²⁹⁵ Schinkel and Tuinstra defined it as “ ... finding an industry that is competitive liable of anti- competitive behaviour.” See Schinkel, M.P. and Tuinstra, J., ‘Imperfect Competition Law Enforcement’, CeNDEF Working Paper No. 04-07 (June 2004), p. 6 at <http://www1.fee.uva.nl/fm/PAPERS/maartenpieter.pdf>

²⁹⁶ Schinkel and Tuinstra defined it as “ ... acquitting companies that have in fact acted anti-competitively.” See Schinkel, M.P. and Tuinstra, J., ‘Imperfect Competition Law Enforcement’, CeNDEF Working Paper No. 04-07 (June 2004), p. 6 at <http://www1.fee.uva.nl/fm/PAPERS/maartenpieter.pdf>

²⁹⁷ Such as “ ... firm costs, consumer demand, prices, sales, potential efficiency gains, and possible collusive agreements.” Schinkel, M.P. and Tuinstra, J., ‘Imperfect Competition Law Enforcement’, CeNDEF Working Paper No. 04-07 (June 2004), p. 5 at <http://www1.fee.uva.nl/fm/PAPERS/maartenpieter.pdf>

measures which lessens incidences of errors in enforcement or errors which are less detrimental. In this regard, Schinkel and Tuinstra argued that in a simple cartel setting, competition authorities with limited budgets should weigh investigation costs against the fine level. Therefore, cartel enforcement efforts should be focused on traditional and stable industries and more lenient towards high paced venture industries²⁹⁸. In the former, the industry and its market behaviour are well understood by industry specialists²⁹⁹; therefore, there is sufficient information to base enforcement actions on which in turn would lessen the probability of erroneous enforcement.

Under the South African cartel enforcement regime, the Competition Commission is vested with strong powers of investigation such as the power to search and enter premises³⁰⁰ and issue summons to a person who is believed to be able to assist in the investigation by providing information and documents³⁰¹. These strong powers of investigation are complemented by simple judicial administration in so far as hard core cartel offences are concerned. Hard core cartel offences are *per se* offences under the South African competition legislation. *Per se* offences are arguably easier to be enforced because once they are proven, there are no defences available. There will not be any need to consider the pro and anti-competitive benefits of the conduct in question, unlike in cases involving the rule of reason standard. This is arguably a favourable method for young competition agencies without much enforcement

²⁹⁸ Schinkel, M.P. and Tuinstra, J., 'Imperfect Competition Law Enforcement', CeNDEF Working Paper No. 04-07 (June 2004), pp.25-26 at <http://www1.fee.uva.nl/fm/PAPERS/maartenpieter.pdf>

²⁹⁹ *Ibid*, p. 25

³⁰⁰ Sections 46-49 Competition Act 1998, South Africa

³⁰¹ Section 49A Competition Act 1998, South Africa

experience. In addition, hard core cartel offences such as price fixing, market allocation and bid rigging are the more serious offences which impact directly onto consumers. Therefore these are the type of cartel offences the public could relate to which in turn would help to garner support and demand for cartel enforcement in developing countries with new competition authorities.

The MyCC too is vested with strong powers of investigation and enforcement under the law. Infact, in some aspects, the powers are wider and stronger than those of the South African Competition Commission as provided for by the Competition Act 1998. For example, under the Competition Act 1998, South Africa, searches without warrant may not be conducted on a private dwelling³⁰². Searches with or without warrant may only be conducted during the day unless a night time search is necessary and justifiable³⁰³. Furthermore, in cases of searches with warrant, the judge or magistrate who issued the warrant has authorised a night time search³⁰⁴. The South African Competition Commission may also compensate those who suffered damage due to forced entry onto the premise when no one responsible for the premises was present³⁰⁵. However, under the Malaysian Competition Act 2010, searches with or without warrant may be carried out at any reasonable time day or night and does not exclude private dwellings³⁰⁶. In addition, even if the search warrant is defective, it shall still be admissible³⁰⁷ and no

³⁰² Section 47 (1) Competition Act 1998, South Africa

³⁰³ Sections 46 (4) and 47 (3) Competition Act 1998, South Africa

³⁰⁴ Section 46 (4) Competition Act 1998, South Africa

³⁰⁵ Section 49 (9) Competition Act 1998, South Africa

³⁰⁶ See Sections 25 and 26 Competition Act 2010, Malaysia

³⁰⁷ Section 28 Competition Act 2010, Malaysia

costs or damages shall be recoverable in relation to the seizure of document or data unless it was executed without reasonable excuse³⁰⁸. In terms of the standard of proof for hard core cartels, although the Competition Act 2010 does not expressly use the term *per se*, hard core cartel infringements are easier to prove because they are deemed to have an object to restrict competition and thus do not require any further assessment of their effect³⁰⁹. Thus, hard core cartels are also arguably easier to be administered by the MyCC under the Competition Act 2010.

Limited resources do not allow for optimum enforcement. In this regard, this work argues that such jurisdictions would have to be selective in their cartel enforcement work. It is better to enforce few but significant industries and markets effectively rather than stretching limited resources thin through across the board enforcement which may lead to increase in erroneous enforcement³¹⁰. Being selective may also be argued as gradual implementation in terms of cartel enforcement. Implementing a gradual but dynamic cartel enforcement approach means allowing time for not only the authorities to gain adequate experience before implementing full enforcement but also enable them to adjust enforcement works being carried out with available resources and allowing businesses and other stakeholders to adjust to the new “rules of the game” under the competition law. These entail: prioritising industries with tendencies to collude, costs of production are fairly easily monitored and “... investigation is both reasonably

³⁰⁸ Section 31 Competition Act 2010, Malaysia

³⁰⁹ See Section 4 Competition Act 2010, Malaysia

³¹⁰ Schinkel, M.P. and Tuinstra, J., ‘Imperfect Competition Law Enforcement’, CeNDEF Working Paper No. 04-07 (June 2004), pp.25-26 at <http://www1.fee.uva.nl/fm/PAPERS/maartenpieter.pdf>

inexpensive and efficient ...”³¹¹; going for blatant cartel infringements such as industries which have been historically accorded with protection by the state; implementing a reactive strategy in lesser prioritised industries (i.e. those which would involve “high investigation costs relative to the fine level and the margin of assessment errors is substantial”³¹²); and focusing on competition advocacy and awareness programmes particularly in the early days of cartel enforcement.

The cartel prioritisation framework implemented in South Africa prioritises sectors and industries based on: impact on poor consumers; contribution to accelerated and shared growth in terms of national economic policy; and likelihood of substantial competition concerns³¹³. As a result, in 2008 four priority sectors were identified, namely; food and agro-processing, infrastructure and construction, intermediate industrial products and financial services³¹⁴. The prioritisation framework is essential to South Africa because of the need to manage the limited resources available for competition law enforcement. Developing countries such as South Africa lack resources in enabling effective enforcement against anti-competitive activities, therefore informed choices would have to be made. Nevertheless, the prioritisation of the four sectors does not mean that action would not be taken against anti-competitive offences in other areas. This is

³¹¹ *Ibid*, p.25

³¹² *Ibid*

³¹³ *Ten Years of Enforcement by the South African Competition Authorities – Unleashing Rivalries 1999-2009*, Competition Commission, Competition Tribunal, South Africa (2009), Box 7, p.39 at <http://www.compcom.co.za/10-year-review> accessed on 20/10/2011.

³¹⁴ *Ibid*

evident from the fact that leniency applications continue to be received even from other sectors of the economy³¹⁵.

The Corporate Leniency Policy (CLP) which was introduced in 2004³¹⁶ brought significant impact in cartel enforcement in South Africa³¹⁷. In South Africa, the CLP is an enforcement tool adopted to facilitate the detection and prosecution of cartels by the Competition Commission under Section 4 (1) (b) of the Competition Act 1998 and is only available to collusive horizontal agreement offences. The CLP operates as leverage for the Competition Commission in presenting a strong and credible threat to firms suspected of being involved in cartel arrangements, i.e. that it is better for the firm to confess and blow the whistle on their co-conspirators than facing the risk of substantial financial penalty and that their immunity from prosecution is assured³¹⁸. In order to qualify and apply for immunity, first, the applicant firm has to be the first through the door. This is an important feature of CLP which rewards the first firm which is willing

³¹⁵ Lavoie, C., 'South Africa's Corporate Leniency Policy: A Five Year Review', *World Competition* Vol. 33(1) (2010), 141-162, pp.154-155

³¹⁶ Notice 195 of 2004, Government Gazette No. 25963 of 24 February 2004.

³¹⁷ The applications for leniency under the CLP showed marked increase when improvements were made to the CLP in 2007. From April 2007 to March 2012 more than 350 applications were received under the CLP. See Roberts, S., 'Screening for Cartels – Insights from the South African Experience', From Collusion to Competition, Competition Policy International, Monthly Cartel Column, 2nd Issue (2012), Figure 1. Number of CLP Applications, by Broad Sector, p.2 at https://www.competitionpolicyinternational.com/second-issue-from-collusion-to-competition?utm_source=CPI+Subscribers&utm_campaign=b89330024c-Thursday_September_27_2012&utm_medium=email

³¹⁸ In other words it is very much based on the Game Theory's 'prisoner dilemma' concept. The penalty for anti-competitive cartel activities under the Competition Act 1998 is '... not exceeding ten per cent of firm's annual turnover in the Republic and its exports from the Republic during the firm's preceding financial year' as provided under Section 59 (2) Competition Act 1998, South Africa.

to cooperate and disclose information on the cartel activities which it is involved in³¹⁹. Second, the cartel activity in question would have had an impact on the South African market, regardless of the location where the activities have taken place. Immunity granted by competition authorities in other countries pertaining to the cartel activity in question does not automatically qualify the applicant firm for immunity under the Competition Act 1998 in South Africa. Immunity is given severally to each contravention reported unless it is not possible to do so³²⁰. Immunity from prosecution under the CLP is given on a conditional basis until full and final determination of the case is made by the Competition Tribunal³²¹. This is to ensure full cooperation from the applicant firm³²². The CLP was reviewed and improved in 2008³²³. This was to increase the effectiveness of CLP as an enforcement tool. From the implementation of the amendment there is more certainty in the decision to grant immunity to applicant firm whereby immunity will be given so long as all the conditions attached to the immunity are fulfilled by the firm. Ringleaders and instigators are now also eligible for immunity and the marker procedure was also introduced. Under the marker procedure, an applicant firm is able to reserve their place in the queue of applicants to allow the firm to gather information and evidence for the formal application for leniency. All these are whilst the investigation into

³¹⁹ Lavoie, C., 'South Africa's Corporate Leniency Policy: A Five Year Review', World Competition Vol. 33(1) (2010), 141-162, p.144

³²⁰ *Ten Years of Enforcement by the South African Competition Authorities – Unleashing Rivalries 1999-2009*, Competition Commission, Competition Tribunal, South Africa (2009), p.47 at <http://www.compcom.co.za/10-year-review> accessed on 20/10/2011.

³²¹ For the conditions see *Ten Years of Enforcement by the South African Competition Authorities – Unleashing Rivalries 1999-2009*, Competition Commission, Competition Tribunal, South Africa (2009), p.47 at <http://www.compcom.co.za/10-year-review> accessed on 20/10/2011.

³²² Lavoie, C., 'South Africa's Corporate Leniency Policy: A Five Year Review', World Competition Vol. 33(1) (2010), 141-162, p.149

³²³ Notice 628 of 2008, Government Gazette No. 31064 of 23 May 2008

the cartel by the Competition Commission is ongoing. Under the amendment, oral submissions are also allowed in order to protect the disclosing firm from the discovery of documents being used against it in other jurisdiction. The Commission is vested with discretionary powers to accommodate potential firms in their disclosure. This is a form of incentive to encourage disclosure of cartel activities under the CLP. Nevertheless this does not completely negate the need for submission of written submissions for immunity.

In Malaysia, the Competition Act 2010 specifically provides for a leniency regime³²⁴. Although leniency is one of the main features of cartel enforcement in South Africa, it is not specifically provided for under the Competition Act 1998, instead, it is in the form of a policy. Under the Malaysian competition legislation, different percentage of reduction of penalties are allowed depending on whether the applicant firm is the “first through the door” or the stages at which admission or cooperation was made or any other circumstances based on the discretion of the MyCC. The advantage of leniency being specifically provided for under the law is that there is legal certainty in the provision of immunity to co-operating cartel members.

The existence of credible risk of cartel detection has to be coupled with deterrent penalties³²⁵. The cartel enforcement regime ought to be able to deter firms in engaging

³²⁴ Section 41 Competition Act 2010, Malaysia

³²⁵ The penalty for anti-competitive cartel activities under the Competition Act 1998 is ‘... not exceeding ten per cent of firm’s annual turnover in the Republic and its exports from the Republic during the firm’s preceding financial year’ – See Section 59 (2) Competition Act 1998, South Africa

in cartel activities by making it costlier to continue with their anti-competitive cartel arrangements. The South African approach to penalties under the Competition Law 1998 is that of deterrence. The Competition Tribunal stated in its decision in the case of *Harmony Gold Mining Limited, Durban Roodepoort Deep Limited vs. Mittal Steel South Africa Limited, Macsteel International Holdings*³²⁶ that the aim of administrative penalty is deterrence. The Competition Tribunal is empowered by virtue of Section 59 (1) to impose penalties on a first offence on cases involving hard core cartel offences under Section 4 (1) (b), the more serious the conduct, the heavier the penalty which may be imposed³²⁷. Additionally, the introduction of criminal sanctions for cartel offences under the 2009 amendments³²⁸ brings a more serious threat to not just the firms but also the individuals involved in cartel arrangements³²⁹, provided the South African competition authorities are able to demonstrate competence in administering criminal procedure alongside civil procedure in cartel enforcement³³⁰. In terms of penalty, the Malaysian

³²⁶ Case No. 13/CR/Feb 2004, at <http://www.comptrib.co.za/assets/Uploads/Case-Documents/13CRFeb04remedies.pdf> accessed on 12/12/2011

³²⁷ See Section 59 (3) Competition Act 1998, South Africa for the list of factors to be considered by the Competition Tribunal in deciding on the appropriate penalty.

³²⁸ Competition Amendment Act 2009, South Africa

³²⁹ Individuals who are directors or managers who cause firms to engage in cartel activities are now liable to a fine not exceeding 500, 000 Rand or imprisonment not exceeding ten years or both (see Sections 12 and 13 Competition Amendment Act 2009, South Africa). A new organ known as the National Prosecution Authority (NPA) has been created by virtue of the amendment and its function is to prosecute persons committing criminal offence under the Competition Amendment Act 2009. However, the authority to certify firms or persons subject to criminal liability under the Competition Amendment Act 2009 who are deserving of leniency is vested with the Competition Commission (see Sections 8 and 12 Competition Amendment Act 2009, South Africa).

³³⁰ At this point in time, it is still too early to provide a reasonable assessment of the enforcement of criminal sanctions on cartel offences in South Africa and there is yet to be much information available on the public domain. However, Lavoie asserted that the implementation of criminal sanctions on cartel offences in South Africa will be a challenging task, particularly in terms of meshing the differences in the administration of civil and criminal jurisdiction in cartel enforcement and managing the interaction between the Competition Commission, NPA and other relevant bodies (see Lavoie, C., 'South Africa's Corporate Leniency Policy: A Five Year Review', *World Competition* Vol. 33(1) (2010) 141-162, pp. 158-

competition legislation provides for substantive fines to be imposed on infringement offences under Part II of the Competition Act 2010 cases which include prohibited cartel agreements. The MyCC may impose a fine not exceeding ten (10) per cent of the worldwide turnover over the period of the infringement³³¹. However, since Malaysia is currently implementing a “soft approach” in enforcement which emphasises on remedial action to allow time for businesses to understand the working of competition law and comply with its legislative requirements³³², the imposition of such substantial fines for competition law infringements in Malaysia is yet to be seen. Nevertheless, in order to attain effective cartel enforcement in Malaysia, the full force of the law, including the imposition of significant penalty in cartel cases within the ambit of the law would have to be enforced.

The above discussion concerns the challenges which are currently being faced by the MyCC with insights from the South African experience. There will also be other

162. Furthermore, even developed countries are facing issues in the implementation of criminal sanctions on cartel offences (see R vs. Burns and Ors [2010]); For the UK Office of Fair Trading Review of the collapse of criminal trial in R vs. Burns and Ors see ‘Project Condor Board Review’ at http://www.offt.gov.uk/shared_offt/board/2010/Project_Condor_Board_Review.pdf accessed on 15/12/2011; For discussion of issues in the administration of leniency policy in criminal cartel cases in the United Kingdom see Stephan, A., ‘How Dishonesty Killed the Cartel Offence’, *Criminal Law Review*, Vol.6 (2011) 446-455; For discussion of issues in the administration of leniency policy in criminal cartel cases in the United Kingdom see Edgehill, K., ‘Is the UK Cartel Offence Dead or Is There a Problem with Immunity? – The Role of Immunity as a Prosecutorial Tool in Criminal Cartel Offences in the UK and Australia (2011) at <http://www.unisa.edu.au/crma/docs/CCW%202011/Paper%20and%20Commentaries/Day2Session4Commentary1.pdf>

³³¹ Section 41 (4) Competition Act 2010, Malaysia

³³² See: The Malaysian Reserve, ‘MyCC Issues 1st ‘Proposed Decision’ Against Price Fixing’ (25 October 2012) at http://themalaysianreserve.com/main/index.php?option=com_content&view=article&id=2396:mycc-issues-1st-proposed-decision-against-price-fixing&catid=36:corporate-malaysia&Itemid=120 accessed on 26/10/ 2012

challenges which will be faced by the MyCC soon particularly because of the Malaysian Government's policy decision to gradually implement its competition law³³³. Before the discussion moves on to the foreseeable future challenges, for purposes of clarity, an explanation of the policy decision on gradual implementation is warranted.

The gradual implementation of the Malaysian competition law means the legislation is being implemented in phases which commenced from January 2011. The initial stage focuses on the setting up of the MyCC and after eighteen (18) months the other provisions shall be implemented³³⁴. The justifications for the decision to gradually implement the Malaysian competition law were explained as: 1) based on the experience of other competition jurisdictions such as Singapore, Indonesia and Japan which focused on advocacy and awareness programmes before enforcing their respective competition legislation; and 2) to allow a transition period for Malaysian businesses to be ready for the implementation of competition law and for the MyCC to be ready to enforce it³³⁵. In tabling the bill to Parliament, the Minister of Domestic Trade, Co-operatives and Consumerism, Malaysia highlighted the case of Japan which only initiated its first case under the Anti-monopoly Act 1947 forty (40) years after the adoption of its competition law³³⁶. The author is of the opinion that this is a superficial

³³³ As outlined by the Minister of Domestic Trade, Co-operatives and Consumerism in his speech to the *Dewan Rakyat* (House of Representatives), Malaysian Parliament on 20 April 2010, Hansard Report (Malay version), pp.151-152

³³⁴ Minister of Domestic Trade, Co-operatives and Consumerism in his speech to the *Dewan Rakyat* (House of Representatives), Malaysian Parliament on 20 April 2010, Hansard Report (Malay version), p.151

³³⁵ *Ibid*

³³⁶ *Ibid*

assessment because there are other factors involved. The global economic and market scenario when Japan adopted its competition law were not as liberalised and open as today and the law was imposed on Japan by the American forces administration after the end of the Second World War³³⁷. At the same time the Minister highlighted that Singapore implemented its law only one year after adoption whilst Indonesia took six years to initiate its first competition law case after the adoption of its law in 1999³³⁸. In this regard, the author is of the opinion that the emphasis should not have been on the duration it took the aforementioned jurisdictions to implement their respective competition laws but it all depends on the readiness level of each country which is dependent on the level of development³³⁹; level of institutional development³⁴⁰; openness of the economy³⁴¹ and prevailing socio-economic ideology³⁴².

Although it has been explained that the other provisions under the Competition Act 2010 shall be implemented after eighteen (18) months from January 2011, there is yet to be a

³³⁷ For a discussion on the history of Japanese competition policy, see Beeman, M.L., *Public Policy and Economic Competition in Japan – Change and Continuity in Antimonopoly Policy, 1973-1995*, Routledge (2002)

³³⁸ Minister of Domestic Trade, Co-operatives and Consumerism in his speech to the *Dewan Rakyat* (House of Representatives), Malaysian Parliament on 20 April 2010, Hansard Report (Malay version), pp.151

³³⁹ For a discussion on the link between effective competition law enforcement and a country's growth based on GDP per capita, see Mateus, A.M., *Competition Law and Development: What Competition Law Regime?*, (October 2010) at <http://dx.doi.org/10.2139/ssrn.1699643>

³⁴⁰ For a discussion on the link between institutional development, see: Mateus, A.M., *Competition Law and Development: What Competition Law Regime?*, (October 2010) at <http://dx.doi.org/10.2139/ssrn.1699643>

³⁴¹ Competition policy and law are tools implemented to regulate market imperfections; thus, the more open the economy, the more receptive and ready a country would be to competition law. The case in point would be that of Singapore which fully enforced its competition law after a year of its adoption.

³⁴² See Gal, M.S., 'The Ecology of Antitrust Pre-conditions for Competition Law Enforcement in Developing Countries', *Competition, Competitiveness And Development: Lessons from Developing Countries*, UNCTAD (2004), pp.23-30 at http://www.unctad.org/en/docs/ditcclp20041ch1_en.pdf

clear indication from the MyCC as to what gradual implementation entails for cartel enforcement in Malaysia – i.e. whether after the said duration all provisions pertaining to horizontal agreements will be fully enforced; or whether certain types of businesses or sectors would be provided with a longer grace period for compliance; and as to the approach which will be implemented in cartel enforcement. Thus far, the MyCC has been focusing on advocacy and awareness programmes³⁴³ and carrying out cartel enforcement on “easy pickings” cases based on a “soft approach”. This may be observed in the first proposed decision by the MyCC against price fixing by the *Cameron Highlands Floriculturist Association*³⁴⁴. The case was based on media reports on the announcement made by the Cameron Highlands Floriculturist Association that its members have agreed to increase flower prices by ten (10) per cent. The MyCC had issued a notice labelled as “proposed decision” to the association for price fixing activities which contravenes the Competition Act 2010. The proposed decision calls for the association to cease their price fixing of flowers and to provide an undertaking that its members shall refrain from any anti-competitive activities. The MyCC also has asked the association to make a public announcement of its remedial actions in mainstream media. This decision has been labelled as a ‘soft approach’ by the MyCC because of the emphasis on remedial measures in order to encourage business compliance instead of imposition of fines. It is well and good that at this early juncture, that competition

³⁴³ See: the Malaysian Competition website for the details on the training sessions and briefings/ dialogue sessions which have been conducted by the MyCC since early 2011 at <http://www.mycc.gov.my>

³⁴⁴ The Malaysian Reserve, ‘MyCC Issues 1st ‘Proposed Decision’ Against Price Fixing’ (25 October 2012) at http://themalaysianreserve.com/main/index.php?option=com_content&view=article&id=2396:mycc-issues-1st-proposed-decision-against-price-fixing&catid=36:corporate-malaysia&Itemid=120 accessed on 26 October 2012

advocacy and awareness are focused on but there has to be a cut-off point in cartel enforcement when the MyCC illustrates that it means business and the full force of the law will be imposed. Otherwise, there is likelihood that Malaysia would be trapped in the “nascent stage” of cartel enforcement even after some years of competition law implementation; hence, the need for a policy which includes a plan clearly mapping out the milestones to be achieved by Malaysia in cartel enforcement.

The recent case concerning the share swap and collaborative agreement between AirAsia and Malaysia Airlines (MAS) displays the lack of clarity in the cartel enforcement strategy of the MyCC (if there is one) and illustrates the need for the MyCC to go beyond advocacy and remedial strategy in cartel enforcement sooner rather than later. Airasia is the Malaysian low cost carrier whilst MAS is the country’s national carrier which is also a Government Linked Company (GLC). The share swap and collaborative agreement between AirAsia and MAS in August 2011 was a commercial agreement which received backing from the government (via the sectoral regulator and Ministry of Transport) due to the national interests involved, particularly in curbing losses suffered by Malaysia Airlines. Despite the argument by both AirAsia and Malaysia Airlines that the agreement was entered into for efficiency reasons, the result is that AirAsia has ceased operations on certain routes and rendered Malaysia Airlines as sole the Malaysian airline firm servicing routes such as Kuala Lumpur – London; Kuala Lumpur – Paris; and Kuala Lumpur – New Delhi. As a result, consumers are left at a disadvantage with less choice for low cost fares for those routes. Although, the agreement was

cancelled in May 2012, the decision for AirAsia to cease operations on those routes stayed. Despite the fact that the agreement was essentially a merger agreement between the undertakings, the MyCC is empowered to investigate the impact of the agreement which on the face of it seemed to involve market division which negatively impacts consumers. The point being emphasised here is that the MyCC was not consulted by the firms in their decision to enter into the agreement. This case was highlighted in the media which also questioned the MyCC's ability to undertake enforcement action on the case³⁴⁵. Despite sufficient publicity on the passing of the Competition Act 2010 and the many advocacy and awareness programmes which have been held by the Ministry of Domestic Trade, Co-operatives and Consumerism since the early 1990's³⁴⁶ and the MyCC since early 2011³⁴⁷, the firms involved simply bypassed the MyCC by failing to consult the authority before entering into the share swap and collaborative agreement despite the probability of anti-competitive impact on the long haul air transport market. In response to the question by the media, MyCC merely responded that it has written to the firms involved to request for a copy of the

³⁴⁵ See: The Star Online Malaysia, *MyCC to Investigate if AirAsia-MAS Share Swap has Made Airfares Go Up*, (4 January 2012) at <http://biz.thestar.com.my/news/story.asp?file=/2012/1/4/business/10199177&sec=business> accessed on 7/8/2012; Channel News Asia, *AirAsia and Rival Malaysia Airlines Cancel Share Swap*, (2 May 2012) at http://www.channelnewsasia.com/stories/afp_asiapacific_business/view/1198610/1.html accessed on 7/8/2012.

³⁴⁶ This is based on the author's knowledge and experience as the desk officer for competition policy in the Ministry of Domestic Trade and Consumer Affairs Malaysia (1997-2003).

³⁴⁷ Until October 2011, 30 briefing/dialogue sessions have been held by the Malaysian Competition Commission. These involved stakeholders such as producers, professional bodies, policy makers, academicians, consumer associations and the Bank of Malaysia. See Malaysian Competition Commission website at http://www.mycc.gov.my/269_213_213/Web/WebPage/2011/2011.html accessed on 28/12/2011.

agreement³⁴⁸ - a response which does not reflect clarity, clout, authority and credibility. A “soft approach” in cartel enforcement is only relevant up to a certain point to allow time for businesses and industries to familiarise themselves with the requirements under the Competition Act 2010. However, the MyCC would have to be clear and convincing in ensuring that the grace period is only temporary.

In view of the above, it is relevant to note that cartel enforcement was also somewhat gradually implemented in South Africa. From 1999 to 2004, the South African Competition Commission’s cartel enforcement strategy was reactive, whereby it only went after “low hanging fruits” such as cases of blatant agreement on price fixing in sectors which have previously been legally sanctioned³⁴⁹; and very much dependent on complaints from third parties which did not always involve competition issues but may be contractual in nature³⁵⁰. The South African Competition Commission also focused on advocacy and awareness works in the early days of its competition law enforcement³⁵¹. However, such a strategy did not make a significant impact on cartel enforcement in

³⁴⁸ See: The Star Online Malaysia, *MyCC to Investigate if AirAsia-MAS Share Swap has Made Airfares Go Up*, (4 January 2012) at <http://biz.thestar.com.my/news/story.asp?file=/2012/1/4/business/10199177&sec=business> accessed on 7/8/2012; Channel News Asia, *AirAsia and Rival Malaysia Airlines Cancel Share Swap*, (2 May 2012) at http://www.channelnewsasia.com/stories/afp_asiapacific_business/view/1198610/1.html accessed on 7/8/2012.

³⁴⁹ See: *Competition Commission vs. Board of Healthcare Funders*, Case no. 07/CR/Feb05; *South African Medical Association*, case no. 23/CR/Apr04 at <http://www.comptrib.co.za/> accessed on 13/11/2011.

³⁵⁰ Most of the complaints received regarding alleged prohibited practices resulted in non-referrals because they were found to be contractual disputes. See Annual Report 2003/2004, Competition Commission, South Africa, p.16 at <http://www.compcom.co.za/assets/Files/annual-report-2003-2004.pdf> accessed on 20/10/2011

³⁵¹ Foreword by The Minister of Trade and Industry, South Africa, Annual Report 2003-2004, p.1, Competition Commission South Africa at <http://www.compcom.co.za/assets/Files/annual-report-2003-2004.pdf>

South Africa. Significant change to cartel enforcement in South Africa only occurred in 2004 whereby the enforcement strategy changed from reactive to pro-active³⁵² which included the adoption of a leniency policy and prioritisation of cartel enforcement.

In regard to the gradual implementation policy of the Competition Act 2010, the challenges which would soon be faced by the MyCC in cartel enforcement include inadequate legislative provisions; clashes between competition and other policies which are crucial to Malaysia's development objectives; and political interference.

It is not uncommon for inadequacies in the law to be discovered particularly in the first few years of enforcement³⁵³. The MyCC may likely face the same challenge particularly as cartel enforcement becomes stricter. Stricter cartel enforcement may likely either push cartels further underground or lead to increase in mergers³⁵⁴. Businesses have to be dynamic in order to survive and this includes adapting to changes in the legal environment. In view of the lack of merger control with a competition dimension in Malaysia, one of the foreseeable challenges that would be faced by the MyCC as cartel enforcement becomes stricter is the merger of cartels which thereafter evolves into

³⁵² See: *Ten Years of Enforcement by the South African Competition Authorities – Unleashing Rivalries 1999-2009*, Competition Commission, Competition Tribunal, South Africa (2009) at <http://www.compcom.co.za/10-year-review> accessed on 20/10/2011.

³⁵³ For examples of inadequate legislation in young competition jurisdictions, see: International Competition Network (ICN), 'Lessons to be Learnt From the Experiences of Young Competition Agencies', Competition Policy Implementation Working Group Report (Subgroup 2), ICN, Cape Town, South Africa (May 2006), pp.9-11 at <http://www.internationalcompetitionnetwork.org/library.aspx?search=&group=13&type=0&workshop=0>

³⁵⁴ Schinkel, M.P., 'Effective Cartel Enforcement in Europe', *World Competition: Law and Economics Review* Vol.30 (2007) 539-572; Mehra, P., 'Choice Between Cartels and Horizontal Merger', (2007), at SSRN: <http://ssrn.com/abstract=1081844> or <http://dx.doi.org/10.2139/ssrn.1081844>

firms engaging in collusion³⁵⁵. Collusions are even harder to detect than cartels because it is difficult to assess with adequate precision whether the anti-competitive impact on the market is due to reasonable commercial responses by the firms or because of collusion between the firms. It is made even more difficult to prove due to the issues that arise out of the differences in the legal and economic concepts of collusion³⁵⁶. Hence, perhaps the absence of merger control with a competition dimension in Malaysia may render enforcement more challenging for the MyCC but until the required economic research is conducted to determine a more up to date and accurate diagnosis of the market characteristics and conditions in Malaysia, this cannot be said with certainty³⁵⁷. In South Africa, structural issues could also be addressed through merger control. In fact, the South African competition regime focused on merger control from the moment the Competition Act 1998 was enforced in South Africa in order to address markets which were highly concentrated which was one of the effects of apartheid and international sanctions on South Africa's economy³⁵⁸.

Another important aspect is the balancing of public interest or non-competition considerations with competition considerations in the implementation of competition law. The South African competition law expressly provides for public interest to be accounted for under the preamble and purpose of the Competition Act 1998.

³⁵⁵ See discussion in Chapter 5 of this thesis.

³⁵⁶ See discussion on tacit collusion in Chapter 5 of this thesis.

³⁵⁷ *Ibid*

³⁵⁸ Foreword by The Minister of Trade and Industry, South Africa, Annual Report 2003-2004, p.1, Competition Commission South Africa at <http://www.compcom.co.za/assets/Files/annual-report-2003-2004.pdf>; Lavoie, C., 'South Africa's Corporate Leniency Policy: A Five Year Review', World Competition Vol. 33(1) (2010) 141-162, pp. 142-143.

Additionally, public interest also has to be considered in merger and exemption applications under Section 12A and Section 10, Competition Act 1998, respectively. The South African competition law describes what may amount to public interest³⁵⁹. South African case laws on public interest have also developed particularly in merger cases under the Competition Act 1998. Such cases include *Minister of Economic Development et al and Wal-Mart Stores Inc. et al (Wal-Mart/ Massmart)*³⁶⁰; *Metropolitan Holdings Ltd/ Momentum Group Limited (Metropolitan/ Momentum)*³⁶¹; and *Kansai Paint Co. Ltd and Freeworld Coatings Ltd (Kansai/ Freeworld)*³⁶². In these cases, employment was considered as public interest.

In *Wal-Mart/ Massmart*, the government argued that the merger would lead to employment losses in South Africa and adverse impact on the development of the domestic industries and small and medium sized businesses because the global procurement networking of Wal-Mart may lead to procurement being diverted to Asia where production costs are cheaper. However, the Competition Appeal Court (CAC) approved the merger because it felt that the competition authorities had not properly considered public interest as required under the law in their assessment. In

³⁵⁹ For mergers under Section 12A (3), they include the impact that the merger will have on : a particular industrial sector or region; employment; the ability of *small businesses*, or *firms* controlled or owned by historically disadvantaged persons, to become competitive; and the ability of national industries to compete in international markets. For exemptions under Section 10 (3) (b) they include anti-competitive agreements that constitute to: the maintenance and promotion of exports; promotion of the ability of small businesses owned or controlled by historically disadvantaged persons to become competitive; change in productive capacity necessary to stop decline in an industry; the economic stability of an industry as designated by the Minister after consulting the Minister responsible for that industry..

³⁶⁰ Case no 110/CAC/Jul11

³⁶¹ Case no 41/LMJul10

³⁶² Case no 53/AM/Jul11

Metropolitan/Momentum, the Competition Tribunal approved the merger subject to certain conditions relating to retrenchments. This case highlights that pro-competitive mergers can be prohibited if the public interest is not adequately addressed by the merging parties. In *Kansai/ Freeworld*, the issue was regarding the hostile takeover of Freeworld by Kansai. Freeworld was the only local manufacturer of automotive coatings supplying to the domestic automotive industry and it was also an exemplar of black economic empowerment. The South African Competition Commission approved the takeover subject to certain conditions which included Kansai having to divest Freeworld's automotive coating business and a requirement to manufacture automotive coating locally. However, these conditions were withdrawn after negotiations between the Competition Commission and the merging entities.

These seminal merger cases on public interest illustrate that under the South African competition jurisprudence, public interest can serve to salvage an anti-competitive merger or it can lead to the prohibition of pro-competitive merger. Second, public interest needs to be considered regardless of the competition analysis. However, it ought to be noted that although the law provides that public interest to be considered has to be substantial, it does not explain the meaning of "substantial" in the South African competition law context³⁶³. Case law also has yet to define it. Nevertheless, the

³⁶³ See Section 12A (1) (b) Competition Act 1998, South Africa

Competition Tribunal held in *Distillers Corporation (SA) Ltd/ Stellenbosch Farmers Winery Group Ltd*³⁶⁴ that the meaning of “substantial” would depend on the context.

In Malaysia, the Competition Act 2010 also provides for non-competition considerations to be balanced with competition considerations in the granting of exemptions under Section 5, Competition Act 2010. Section 5 provides that exemption may be granted under Section 5, Competition Act 2010 if “ ... there are significant identifiable technological, efficiency or social benefits directly arising out of the agreement ...”. However, the law does not interpret the meaning of “significant identifiable technological, efficiency or social benefits directly arising out of the agreement”, nor does it list out the type of considerations which qualify under the said categories as per the South African competition law. Therefore, based on the South African experience, the question of “what to be considered”? is paramount and needs to be resolved by Malaysia considering the lack of interpretation and guidance on non-competition consideration under the Competition Act 2010. In this regard, the types of public interest listed under the South African competition law could be useful guidance for Malaysia because they include trade, industrial and socio-economic concerns – matters which are also relevant to Malaysia. In terms of determining “significant identifiable” non-competition considerations, the method proposed by Townley could be relevant for Malaysia. According to Townley, public interests which are more relevant to the achievement of the meta-objective of the law would be prioritised in terms of the weight

³⁶⁴ Case no. 08/LM/Feb02, para.240

assigned³⁶⁵. Townley stressed on the importance of determining the meta- objective of the jurisdiction's competition law and assigning qualitative weights to non-economic considerations based on the meta-objective³⁶⁶. Although the method specifically focuses on non-economic or equity based considerations, the author is of the opinion that it could be relevant in determining the significance of the non-competition consideration to be considered.

The next issue regarding non-competition considerations is “how to balance non-competition with competition considerations?” This work argues that the balancing needs to be done based on a systematic and transparent mechanism. This is to ensure that decisions made are based on sound justifications; political interference and lobbying are kept at bay by limiting elements of arbitrariness and discretion in the assessment which may lead to abuse or decisions made based on irrelevant considerations - which in turn would jeopardise effective competition law enforcement. For example, the Malaysian *Bumiputera* Commercial and Industrial Community (BCIC) policy did not achieve the thirty (30) per cent *Bumiputera* equity ownership in the economy as outlined under the NEP which ended in 1990³⁶⁷. The BCIC resulted in political patronage which favoured certain *Bumiputera* businesses because of the arbitrary manner of its implementation, whereby the government arbitrarily selects the

³⁶⁵ Townley, C., *Article 81 EC and Public Policy*, Hart Publishing (2009), Chapter 8

³⁶⁶ Townley defines meta-objective as the ultimate aim or over-arching objective. See: Townley, C., *Article 81 EC and Public Policy*, Hart Publishing (2009), p.287

³⁶⁷ At the end of the NEP period, Bumiputera equity ownership was at only 19.3 per cent. See Roslan, A.H., 'Income Inequality, Poverty and Development Policy in Malaysia', paper presented at the International Seminar on "Poverty and Sustainable Development", Université Montesquieu-Bordeaux IV and UNESCO-Paris, France (22-23 November 2001), Table V.10, p.18

businesses, industries and entrepreneurs to be accorded special treatment under the BCIC³⁶⁸. The policy benefited only certain groups of *Bumiputera* entrepreneurs and businesses and widened the intra-ethnic wealth gap³⁶⁹. As a result, the intra-ethnic income disparity has worsened as opposed to inter-ethnic income disparity³⁷⁰. However, the South African competition jurisprudence illustrates that balancing public interest and competition considerations is challenging. Nevertheless, this work does not propose for equity based public interest consideration to be excluded lest consumers are denied the benefits that come with such public interest; competition goals are jeopardised; and competition law is not seen as being complementary to other government policies and vice versa.

First, it should be noted that public interest or non-competition consideration encompasses both efficiency and equity goals³⁷¹ whereby the latter is usually difficult to be translated into a quantifiable form because equity concerns elements of fairness and justice which are subjective in nature³⁷². On the hand, conventional competition

³⁶⁸ See: Gomez, E.T. and Jomo, K.S., *Malaysia's Political Economy: Politics, Patronage and Profit*, Cambridge University Press (1999); Jomo, K.S., 'Industrialisation and Industrial Policy in Malaysia', in Jomo, K.S. (ed.), *Malaysian Industrial Policy*, National University of Singapore (NUS) Press Singapore (2007)

³⁶⁹ See: Roslan, A.H., 'Income Inequality, Poverty and Development Policy in Malaysia', paper presented at the International Seminar on "Poverty and Sustainable Development", Université Montesquieu-Bordeaux IV and UNESCO-Paris, France (22-23 November 2001).

³⁷⁰ *Ibid*, pp.18-20

³⁷¹ Contrast this with Townley's view on "public policy" in the context of Article 101 TFEU. Townley viewed "public policy" as synonym to "non-economic" goals, which are all public policy goals such as public health, plurality of the media except consumer welfare. See: Townley, C., 'Which Goals Count in Article 101 TFEU?: Public Policy and Its Discontents', *European Competition Law Review*, Issue 9 (2011) 441-448, footnote 2

³⁷² Boshoff, W. *et al*, 'The Economics Of Public Interest Provisions In South African Competition Policy', Sixth Annual Competition Law, Economics and Policy Conference, South Africa (2012) at <http://www.compcor.co.za/assets/Uploads/events/Sixth-Annual-Competition-Law-Economics-and-Policy->

standard concerns consumer welfare and efficiency which are economic standards. It is challenging to translate equity based considerations such as “impact of ability of small businesses to become competitive” into quantifiable economic terms³⁷³. Second, calculation under an economic model in competition law is based on partial equilibrium approach because it would facilitate reasonable predictions on the impact on the market in question; whereas public interest considerations concern potential effects which are sometimes beyond the market³⁷⁴. This is because public interest sometimes impact markets or industries beyond the one being considered in competition matters. Third, public interest sometimes involves assessments based on dynamic efficiency which concerns long term productivity that involves future uncertainties³⁷⁵. However, all these should not be hindrances in the quest to develop an economic model for the balancing of non-competition with competition considerations.

In regard to the quantification of non-economic based considerations, Townley has suggested a possible method for quantification of non-economic considerations³⁷⁶ whereby quantitative weights are to be assigned to them by accounting for: the significance of the impact of the non-economic consideration; combining qualitative and

[Conference-in-South-Africa-2012/NewFolder-3/The-economics-of-public-interest-provisions-in-South-African-competition-policy.pdf](http://www.compcom.co.za/assets/Uploads/events/Sixth-Annual-Competition-Law-Economics-and-Policy-Conference-in-South-Africa-2012/NewFolder-3/The-economics-of-public-interest-provisions-in-South-African-competition-policy.pdf)

³⁷³ *Ibid*, p. 26

³⁷⁴ Hodge, J. *et al*, ‘Public Interest Provisions in the South African Competition Act: A Critical Review’, in Moodaliyar, K. And Roberts, S. (Eds), *The Development of Competition Law and Economics in South Africa*, Human Sciences Research Council South Africa (2012), pp.12-13

³⁷⁵ Boshoff, W. *et al*, ‘The Economics Of Public Interest Provisions In South African Competition Policy’, Sixth Annual Competition Law, Economics and Policy Conference, South Africa (2012), p.27 at <http://www.compcom.co.za/assets/Uploads/events/Sixth-Annual-Competition-Law-Economics-and-Policy-Conference-in-South-Africa-2012/NewFolder-3/The-economics-of-public-interest-provisions-in-South-African-competition-policy.pdf>

³⁷⁶ Townley, C., *Article 81 EC and Public Policy*, Hart Publishing (2009), pp.298-300

quantitative weights via a suitable method of calculation; likelihood that the objective will be achieved/harmed; and comparison between present and future cost and benefits via discounting mechanism. However, Boshoff *et al*³⁷⁷ argued that public interest with efficiency goals should be prioritised because efficiency and equity goals are often mutually reinforcing. Thus, for example, in assessing “impact of ability of small businesses to become competitive” or environmental concerns, it could be translated in economic terms by looking at the impact on allocation of resources. Alternatively, to ensure equity based consideration which are too difficult to be translated into economic terms are not excluded, the weight allocation method as suggested by Townley could be utilised to complement the economic approach in quantifying non-economic considerations. ,As for the method of calculation under the economic approach to account for the impact of public interest which are beyond the market in question, Hodge *et al* argued that assessment based on general equilibrium approach is required in dealing with public interest considerations which concern potential effects beyond the market in question³⁷⁸. For instance, in *Wal-Mart/ Massmart*, the impact on employment was modelled using a broader interpretation of employment multipliers in supplier industries and employment conditions from a social accounting matrix rather than just considering pure employment numbers. However, this would entail the gathering of data

³⁷⁷ Boshoff, W. *et al*, ‘The Economics Of Public Interest Provisions In South African Competition Policy’, Sixth Annual Competition Law, Economics and Policy Conference, South Africa (2012) at <http://www.compcom.co.za/assets/Uploads/events/Sixth-Annual-Competition-Law-Economics-and-Policy-Conference-in-South-Africa-2012/NewFolder-3/The-economics-of-public-interest-provisions-in-South-African-competition-policy.pdf>,

³⁷⁸ Hodge, J. *et al*, ‘Public Interest Provisions in the South African Competition Act: A Critical Review’, in Moodaliyar, K. And Roberts, S. (Eds), *The Development of Competition Law and Economics in South Africa*, Human Sciences Research Council South Africa (2012), pp.12-13

and documents which are beyond the standard information required in standard competition analysis. In this regard, the method in determining “the relevant market” is paramount and the approach to be utilised ought to be case specific, depending on the nature of the public interest in question – whether it would potentially impact a broader sector across the economy. The economic calculation of non-competition considerations in developing countries should be based on dynamic efficiency goals to encourage innovation for the sake of development³⁷⁹ regardless of the uncertainties. Of course, calculation based on static efficiency goals would present a more accurate outcome as compared to dynamic efficiency goals which concern future outcomes, but for developing countries, the dynamic efficiency approach is growth and development friendly.

The next issue regarding the balancing of competition with non-competition considerations is on the suitability of competition institutions in determining issues concerning public interest which involves considerations which are beyond competition concerns. It has been argued that public interest issues should only be dealt with by the government and competition officials have not been mandated to decide on public policy issues³⁸⁰. Another argument is that public interest would be more appropriately

³⁷⁹ See discussion in Chapter 4 of this thesis regarding the theory on the relationship between competition and innovation.

³⁸⁰ Boshoff, W. *et al*, ‘The Economics Of Public Interest Provisions In South African Competition Policy’, Sixth Annual Competition Law, Economics and Policy Conference, South Africa (2012), p.27 at <http://www.compcor.co.za/assets/Uploads/events/Sixth-Annual-Competition-Law-Economics-and-Policy-Conference-in-South-Africa-2012/NewFolder-3/The-economics-of-public-interest-provisions-in-South-African-competition-policy.pdf>, p.3

dealt with under other legislation or policies and not competition³⁸¹. However, competition authorities should be made accountable for any trade-offs between competition and public interest that they would have to make in their assessment³⁸². Competition issues such as exemptions granted to cartels and mergers may impact not just the market in question but also other linked markets and industries; the economy across the board; and also significant social issues in the country. This may be seen from *Wal-Mart/ Massmart*, where one of the likely impacts of the merger would be employment losses in South Africa and adverse impact on the development of the domestic industries and small and medium sized businesses because the global procurement networking of Wal-Mart may lead to procurement being diverted to Asia where production costs are cheaper. A competition authority may not be in the best position to decide on matters which are beyond or outside of the remit of their expertise and responsibilities³⁸³. In this regard, reference to other agencies would have to be made and this may risk competition considerations being trumped by other considerations such as trade and industry – hence, undermining the independence of the competition authority. This could be seen from the cases of *Wal-mart/ Massmart* and *Kansai/ Freeworld* where the government tried to manipulate the competition authorities to enforce its industrial policy on foreign direct investment via their

³⁸¹ See: 'Article 101 (3) – A Discussion of Narrow Versus Broad Definition of Benefits', Office of Fair Trading, United Kingdom (2010)

³⁸² See: Townley, C., 'Which Goals Count in Article 101 TFEU?: Public Policy and Its Discontents', *European Competition Law Review*, Issue 9 (2011) 441-448, pp.447-448

³⁸³ Boshoff, W. *et al*, 'The Economics Of Public Interest Provisions In South African Competition Policy', Sixth Annual Competition Law, Economics and Policy Conference, South Africa (2012), p.27 at <http://www.compcor.co.za/assets/Uploads/events/Sixth-Annual-Competition-Law-Economics-and-Policy-Conference-in-South-Africa-2012/NewFolder-3/The-economics-of-public-interest-provisions-in-South-African-competition-policy.pdf>, pp.3-4

interventions in the said merger applications which were considered by the competition authorities³⁸⁴. South African case law on mergers provides a viable view on the way to solve this issue. In *Metropolitan Holdings Ltd/ Momentum Group Ltd*, it was held that the South African competition authorities are only concerned with residual public interest by complementing or supporting the functions of other government authorities³⁸⁵. A Labour Tribunal would not be a suitable entity to determine public interest issues in regard to competition matters and its function also differs from the competition authorities in terms of timing of its decision making because the assessment of the competition authorities are prior to the merger whilst a Labour Tribunal would conduct their assessment post merger³⁸⁶. Competition authorities are merely empowered to consider merger specific impacts on public interests and not public interest issues which are not related to the merger in question³⁸⁷. In the author's opinion, competition authorities who have been mandated by the law to consider public interest or non-competition considerations in the implementation of competition should be accountable for their decision. Of course, reference and advice from other relevant entities should be sought but independence in decision making is paramount. The decision to be made has to be independently done via a systematic and transparent model, based on appropriate justifications. Otherwise, the credibility of the competition authorities may be adversely affected and it would not be good for effective competition law enforcement³⁸⁸.

³⁸⁴ *Ibid*, p.11

³⁸⁵ *Metropolitan Holdings Ltd/ Momentum Group Ltd*, Case no 41/LMJul10

³⁸⁶ *Ibid*

³⁸⁷ *Wal-Mart Stores/ Massmart Holdings Ltd*, Case No. 73/LM/Dec10

³⁸⁸ Lewis, D., 'The Role of Public Interest in Merger Evaluation', ICN, Merger working Group, Naples (28-29 September 2002), p.2

The MyCC may also have to deal with another aspect in terms of the interaction between competition and development – that is, competition policy being made subservient to other policies, particularly industrial and trade policies. A good early example would be the “watering down” of the draft Competition Bill 2010 whereby the merger control provisions were excluded from the Competition Act 2010 due to the feedback from *Bank Negara Malaysia* and the Securities Commission for the sake of capital market development and enhancing the competitiveness of domestic players through mergers and acquisition⁴⁰¹. It may be argued that this is a result of competition being viewed as a subservient to the country’s development agenda. This competition with development agenda would be an impediment to cartel enforcement in Malaysia if appropriate assessment mechanisms are not adopted. A proper mechanism could be one which weighs the pro and anti-competitive benefits of the issue at hand and the assessment ought to be based on dynamic efficiency goals. This is to ensure that any flexibilities accorded are justified and do not involve total elimination of competition.

In implementing cartel enforcement, it is also likely that the MyCC would have to deal with cartel infringements involving government linked companies or firms which enjoy the benefit of political patronage. In such cases, there may be political intervention in the decision and course of action to be undertaken by the MyCC; or the firms may also plead for exemption or even exclusion from the remit of the Competition Act 2010. In

⁴⁰¹ The Minister of Domestic Trade, Co-operatives and Consumerism in his speech to the *Dewan Rakyat* (House of Representatives), Malaysian Parliament on 20 April 2010, Hansard Report (Malay version), p.147

cases of political intervention in order to protect firms which enjoy economic rent due to political patronage, the independence of the MyCC is paramount. In the latter instance, it is pertinent for an appropriate filtering mechanism to be adopted and duly implemented to prevent rent seeking activities which are deceptively pleaded as activities which qualify to be exempted or excluded from the remit of the Competition Act 2010. For example, rent seeking activities of firms enjoying political patronage may be pleaded as involving “ ... enterprises entrusted with the operation of services of general economic interest in so far as the prohibition under Chapter 1 and Chapter 2 of Part II would obstruct the performance, in law or in fact, of the particular tasks assigned to that enterprise.”⁴⁰²

Undue pressure such as political interference in the enforcement works of the MyCC could be alleviated or prevented through independence of the competition authorities. Independence of competition authorities means they are able to make unfettered decisions. When competition authorities are seen to be independent in their decision making where their decisions are not influenced by other parties and they are free to implement the law accordingly without being constrained by being made subject to another body, then public respect and confidence would be gained. Under the South African competition law regime, the Competition Commission administers the law – conducting investigations, prosecuting cases and making recommendations before the

⁴⁰² Second Schedule (c) Competition Act 2010, Malaysia

Competition Tribunal⁴⁰³. This is in contrast to the Malaysian set-up whereby the MyCC is the enforcer and adjudicator of cases under the Competition Act 2010, appeals is heard by the Competition Appeal Tribunal. It may be argued that the South African structure renders lesser responsibilities on the Competition Commission and thus allows them to be more focused on investigation and prosecution works. Moreover, it could be perceived that there is more independence in the adjudication because it is conducted by a different body.

In terms of appointment of competition officials, in South Africa, the appointment of Competition Commissioners is made by the Minister of Trade and Industry, South Africa whilst appointment of the members of the Competition Tribunal is made by the President of South Africa⁴⁰⁴. In Malaysia, Competition Commissioners and members of the Competition Appeal Tribunal are appointed by the Prime Minister of Malaysia based on nomination by the Minister of Domestic Trade, Co-operatives and Consumerism⁴⁰⁵. In this regard, it may also be perceived that the competition law adjudicators in South Africa are more superior than the Competition Commission officials because they are appointed by the President. Therefore, the Competition Tribunal Members could not be influenced by the Competition Commission officials in their decision making.

⁴⁰³ OECD, *Competition Law and Policy in South Africa – An OECD Peer Review*, (May 2003), p.37

⁴⁰⁴ See: Sections 22 and 26 Competition Act 1998, South Africa

⁴⁰⁵ See: Section 44 Competition Act 2010, Malaysia; Economic Transformation Programme (ETP), 'Competition Appeal Tribunal – Announcements 28 May 2012', ETP website at http://etp.pemandu.gov.my/28_May_2012-@-Competition_Appeal_Tribunal.aspx

The MyCC has been established as an agency under the purview of the Ministry of Domestic Trade, Co-operatives and Consumerism and the said Minister is also responsible for the implementation of the Competition Commission Act 2010. In this regard, the responsible Minister also has the discretion to amend the exclusion list under the Competition Act 2010⁴⁰⁶ whereas under the South African competition law, the responsible Minister is only empowered to designate industries to be exempted in view of its economic stability after consultation with the Minister responsible for the industry in question. Clearly, the powers of the responsible Minister under the Malaysian competition law is wider and could be exercised without any significant check and balance mechanism installed. This is because exclusion is wider than exemption as it carves out the excluded activity; industry; or business from the remit of competition law altogether. Moreover, the exemption to be granted for the economic stability of the industry under the South African law as designated by the Minister requires the Minister to consult the Minister responsible to the industry in question in making the designation.

Thus, it could be argued that under the present structure and competition regulatory framework in Malaysia, there may be room for interference in the decision making process of the MyCC. These enable the Minister to influence not only the decisions of the MyCC because of the position of the MyCC and also the wide powers granted to the Minister under the Competition Act 2010 to exclude; but also through selection of individuals to be appointed as Commissioners. Currently, there is no apparent check

⁴⁰⁶ The responsible Minister has the discretion to amend the list of exclusions from the remit of the competition law, by virtue of Section 13 (2) and (3), Competition Act 2010.

and balance mechanism in place to prevent abuse of discretionary powers by the Minister. Appeals to the decisions of the MyCC are heard before the Competition Appeal Tribunal whose members, as mentioned earlier are also appointed by the Prime Minister based on the recommendation of the responsible Minister.

To sum, the general principles which are relevant to Malaysia in formulating an appropriate cartel enforcement policy in the implementation of the Competition Act 2010 are: addressing the lack of competition culture; implementing cartel enforcement within the allowance of limited resources; clarification of the modality for gradual implementation of the Competition Act 2010; addressing legislation inadequacies; addressing disjunctions with other policies which are pertinent to Malaysia's development objectives; and establishing and maintaining independence of the competition authorities. South Africa have also experienced similar challenges and limitations as explained above and despite some differences in the legal framework and provisions, there are valuable lessons to be learned by Malaysia from South Africa. These are discussed in detail in the next section.

3.5. LESSONS TO BE LEARNED FROM SOUTH AFRICA IN FORMULATING AN APPROPRIATE CARTEL ENFORCEMENT POLICY FOR MALAYSIA

Before the discussion proceeds, the differences between Malaysia and South Africa should be noted, particularly concerning the circumstance and market environment of

each country when their respective competition law was adopted. This is important in order to determine what are the adaptations which would have to be made by Malaysia should it decide to emulate the South African cartel enforcement policies, methods and approaches. The first difference is that the South African competition law was adopted as part of the legislative reform post apartheid; whilst Malaysia's was adopted for development facilitation purposes – to achieve developed nation or high income status by 2020. The second difference is that at the time of the adoption of the Competition Act 1998, the South African market was highly concentrated to which some were sanctioned by the state; the market was only just opening to international trade due to the embargo imposed by the international community and import substitution reliant and there was income and quality of life disparity between the minority and majority groups in South Africa⁴⁰⁷. However, its property rights were strong and the market institutions were well developed⁴⁰⁸. Malaysia faced some of these issues such as income disparity, reliance on import substitution and has addressed them throughout the 1970's and 1980's⁴⁰⁹. Additionally, when the Competition Act 2010 was adopted, Malaysia's economy was already open and significantly reliant on international trade. Nevertheless there are competition concerns in the form of market concentration in some industries, coupled with political patronage and cronyism, price fixing and possible market allocation cases which have been uncovered.

⁴⁰⁷ OECD, *Competition Law and Policy in South Africa – An OECD Peer Review*, (May 2003), pp.9-16

⁴⁰⁸ *Ibid*, p.9

⁴⁰⁹ See: See Jomo, K.S., 'Industrialisation and Industrial Policy in Malaysia', in Jomo, K.S. (ed.), *Malaysian Industrial Policy*, National University of Singapore (NUS) Press Singapore (2007)

Nevertheless, the similarities between Malaysia and South Africa as explained earlier are relevant and despite the above mentioned differences, both pieces of legislation have development as one of their main aims. Perhaps Malaysia is not wrong at all in not focusing on the structural aspect in its competition law at the moment and that the need for a structural approach in competition law enforcement would emerge as cartel enforcement progresses to become stricter. With the absence of the competition dimension in the countries current merger control regulation, the limited resources available to the MyCC could be focused on cartel enforcement and other aspects of competition law. The significance of the above mentioned differences is, by logical deduction, it would not be too bold to suggest that Malaysia should be able to implement stricter cartel enforcement within a shorter period than it took South Africa which was five (5) years after adoption of the law. On the other hand, the difference in terms of market openness between Malaysia and South Africa when their respective competition laws were adopted could be used as an excuse veiled as a justification to delay tougher cartel enforcement or full implementation of the Competition Act 2010.

Nevertheless, the point being emphasised here is not that the above said differences between South Africa and Malaysia renders South Africa's competition law enforcement experience irrelevant or unsuitable to be referred to by Malaysia but that cartel enforcement should be focused on by Malaysia from the get go since merger regulation is not in the picture and the South African experience in gradually implementing its cartel enforcement is relevant to Malaysia in view of the government's decision to

gradually implement the Competition Act 2010. This is because if gradual enforcement is incorrectly implemented, Malaysia's cartel enforcement would not advance accordingly. Determining a suitable formula in terms of gradual enforcement is pertinent because gradual enforcement itself may be viewed as a "watering down" of competition law enforcement. Therefore, gradual enforcement requires both a suitable approach to acclimatise society to accept and respect competition law and also accommodate development and socio-economic concerns under the competition regulatory framework.

South Africa's competition law enforcement experience has illustrated that cartel enforcement strategy would have to be dynamic, conforming to the competition agencies' level of competency and capacity and public awareness of competition policy and law. Initially, the cartel enforcement approach ought to be softer and reactive. This is to allow time for the competition agencies to build up their competency and capacity and also to accord businesses a grace period to be familiar with the requirements under the competition law and undertake remedial actions, or in other words, putting their houses in order. So far, Malaysia is on the right track; however, there has to be a definite time limit set for this transactional period and it would have to be acted on without entertaining any request for extensions. In the meantime, the MyCC should start honing their skills in cartel enforcement by going after glaring cartel infringements such as those involving hard core cartel offences which have been provided for under the Competition Act 2010 as having the object of significantly preventing, restricting or

distorting competition⁴¹⁰. Such infringements would be easier to establish. Cartel enforcement should be implemented in Malaysia from the beginning of implementation of competition law and should not be subject to any abeyance or exemptions or limitations in the remit which have been provided for under the law. In order for a shift in the business culture paradigm to occur, the law has to be enforced albeit based on appropriate strategies.

As per South Africa's cartel enforcement experience, Malaysia should adopt cartel enforcement tools which are less costly and able to be implemented but would bear a marked impact on cartel detection. These include a leniency programme and a prioritisation framework, similar to those implemented in South Africa. The advantage for Malaysia is that leniency is mandated under the Competition Act 2010⁴¹¹, whereas in South Africa it is part of its cartel enforcement policy. Based on the South African experience, the leniency policy is effective in detecting cartels when coupled with proactive cartel enforcement which increases the risk of detection. Despite this, it is recommended that Malaysia's leniency programme is drafted even in the initial stages of cartel enforcement, by referring to the South African leniency policy and also the worldwide best practices. Once the MyCC is ready to implement stricter cartel enforcement, the leniency policy can be immediately implemented.

⁴¹⁰ See: Section 4 Competition Act 2010, Malaysia

⁴¹¹ Under the Malaysian competition legislation, different percentage of reduction of penalties are allowed depending on whether the applicant firm is the "first through the door" or the stages at which admission or cooperation was made or any other circumstances based on the discretion of the MyCC. See: Section 41 Competition Act 2010, Malaysia.

Another enforcement tool implemented in South Africa which ought to be immediately adopted by Malaysia is a prioritisation framework in cartel enforcement. Malaysia's prioritisation framework should include areas and industries which are: traditional and stable industries where the industry and its market behaviour are well understood by industry specialists so as to lessen erroneous enforcement actions; prone to cartel infringements; and bear direct impacts to consumers - particularly poorer groups of consumers and the public at large. As such, the MyCC would have to identify markets with features which would facilitate collusion such as concentrated markets, homogenous goods and inelastic demands. Additionally, the MyCC should also look into trade associations' activities including those in unconcentrated markets and industries. The limited resources for cartel enforcement therefore could be concentrated on the priority markets and industries. However, suspicious activities in other markets and industries should not be pushed aside. Although it has been argued that prioritising certain markets would send the message to businesses that it would be less risky to cartelise in "unprioritised" markets⁴¹² but this is an appropriate approach for developing countries with limited resources.

Leniency programme and prioritisation framework should be coupled with basic techniques in cartel screening which does not require complicated efforts in cartel detection via resource intensive investigations and sophisticated economic analysis.

⁴¹² Schinkel, M.P., 'Effective Cartel Enforcement in Europe', World Competition: Law and Economics Review Vol.30 (2007) 539-572, pp.26-27 at SSRN: <http://ssrn.com/abstract=948641> or <http://dx.doi.org/10.2139/ssrn.948641>

The South African experience has shown that basic techniques such as analysis of price and supply trends based on readily available data and gaining information by asking basic questions regarding price determination by firms are effective in detecting cartels. This approach is suitable for Malaysia as a developing country with a young competition jurisdiction. However, as cartel enforcement progresses and the skills and experience of the MyCC in cartel enforcement improves and more resources are available, more developed, technical and sophisticated techniques should be adopted and implemented. In this regard, the need for investment in training human resources and also setting-up a dedicated team focussing on cartel enforcement is clear. Like it or not, cartel enforcement requires technical and adequate knowledge on the psychology and economics of cartels which would go to any lengths necessary to prevent discovery of their illicit arrangements.

South Africa's cartel enforcement experience also shows that in order to take away the incentive for firms to cartelise, there has to be threat of serious penalties. Earlier discussion in this chapter has explained how cartel infringements are imposed heavy fines and also highlighted the fact that South African competition law now also provides for criminal sanctions in cartel cases. In this regard, the Malaysian competition legislation provides for substantive fines to be imposed on infringement offences under Part II of the Competition Act 2010 cases which include prohibited cartel agreements. The MyCC may impose a fine not exceeding ten (10) per cent of the worldwide turnover

over the period of the infringement⁴¹³. Other than the infringements under Part II, any person (natural and/or body corporate) who commits an offence under the Competition Act 2010 of which there are no specific penalty mentioned, may be subject to heavy fines and imprisonment⁴¹⁴. Offences include those committed in relation to the investigation and enforcement of the Competition Act 2010. Clearly, these reflect Malaysia's seriousness in combating not only cartels but prohibited anti-competitive conducts in general. These penalties should be fully implemented after the grace period for remedial actions ends in order to deter firms from entering into anti-competitive horizontal agreements or continuing with their cartel arrangements by rendering cartels more costly for firms to operate and not profitable enough to rationalise or maintain the cartel agreements between its members.

Strategic competition advocacy also features significantly in the South African competition law regime. The South African cartel enforcement experience shows that Malaysia has to adopt strategic competition advocacy in engagements between the MyCC with other regulators and policy making agencies; and also building competition awareness in the country. Based on what has been undertaken by the MyCC so far, awareness and advocacy programmes have been focused on by the MyCC since early

⁴¹³ Section 41 (4) Competition Act 2010, Malaysia

⁴¹⁴ See Sections 61 and 63 Competition Act 2010, Malaysia. The imprisonment penalty in this regard relates to conducts which affect the investigation and enforcement of the Competition Act 2010 are considered as offences which are punishable by imprisonment of individuals even offending for the first time and/or substantive fines. This is different from the introduction of criminal sanctions for cartel offences in South Africa because cartel offences per se are not subject to criminal sanctions but failure to provide access to records to the Competition Commission in the investigation and enforcement of cases under the Act is an offence which may result in imprisonment of the individual involved. (see Section 20 Competition Act 2010, Malaysia).

2011. As at December 2011, the MyCC have held or jointly held a number of public consultations⁴¹⁵, training courses⁴¹⁶ and briefing or dialogue sessions with stakeholders⁴¹⁷. It is also interesting to note that the first training session jointly organised with APEC was on mechanisms against cartel offences. This may be viewed as a reflection of Malaysia's concern on anti-competitive cartel activities. This is all well and good but in order to garner significant impact within the constraints of limited resources, competition advocacy has to be strategically implemented – a lesson to be learned from South Africa. This includes tailoring competition advocacy programmes according to the target group and establishing good networking with the media. Advocacy programmes with other regulators and policy making agencies ought to be implemented via formal mechanisms such as joint committees or memorandums of understanding. This is to ensure that the MyCC's views on issues with competition dimensions are accounted for in the decision making process of other economic and commercial areas and there is coordination between the enforcement efforts of the MyCC with those of other agencies. In relation to businesses, the MyCC should be engaging in consultation and advisory programmes in order to facilitate undertakings to

⁴¹⁵ Such as regarding "Guidelines on: Market Definition, Chapter 1 and Complaints Procedures". See MyCC website at http://www.mycc.gov.my/234_179_179/Web/WebEvent/Events/Upcoming-Events.html accessed on 28/12/2011

⁴¹⁶ Among others: APEC Training Course on Competition Policy - Effective Mechanism Against Cartel Offences, 10-12 October 2011, Penang, Malaysia; The Competition Act 2010 – Impact, Issues and Challenges, 13 October 2011, Science University of Malaysia, Penang; Seminar on Competition Law and Consumer Welfare, 3 November 2011, Kuala Lumpur. See MyCC website at http://www.mycc.gov.my/234_179_179/Web/WebEvent/Events/Upcoming-Events.html accessed on 28/12/2011

⁴¹⁷ Until October 2011, 30 briefing/dialogue sessions have been held by the Malaysian Competition Commission. These involved stakeholders such as producers, professional bodies, policy makers, academicians, consumer associations and the Bank of Malaysia. See Malaysian Competition Commission website at http://www.mycc.gov.my/269_213_213/Web/WebPage/2011/2011.html accessed on 28/12/2011.

“put their houses in order” as per the requirements of the Competition Act 2010. As for consumers and the public at large, awareness programmes explaining the workings and benefits of competition law and the harm of cartels to the economy and consumers should be carried out. Particular emphasis should be accorded to the aspects which illustrates cartel harms in areas which consumers and the public at large can relate to such as the prices of food, agricultural inputs construction materials. Additionally, in Malaysia, it would also be useful for the competition concept to be explained in terms of its parallels with Islamic concepts⁴¹⁸. This is indeed useful because Malaysia is a Muslim majority and Muslim led country, namely by the Malays who largely make up not only the civil service but also the higher echelons of Malaysian politics. Hence, it would also be useful to garner support for cartel enforcement and increase the awareness of the benefits of cartel enforcement not only amongst the consumers and public at large, but also the decision makers in the country.

Strategic partnerships and networking with the media would also be useful initiatives. As the saying goes “people will believe it when they see it”, so the MyCC would have to initiate a few cases of cartel infringements which could be highlighted by the media to demonstrate the harmful effects of cartels and the advantages of cartel enforcement. However, in highlighting cartel investigation and prosecution, the MyCC should heed all legislative related provisions lest such publicity backfires like what happened to the

⁴¹⁸ For an explanation of the Islamic perspective on competition law and policy see Zulkifli, H., ‘Islamic Perspective on The Competition Law and Policy’, Islamic Science University of Malaysia (2008) at <http://zulkiflihasan.files.wordpress.com/2008/07/islam-and-competition-policy.pdf>

South African Competition Commission in 2001 in the investigation of cement cartel⁴¹⁹. This is because such enforcement mistakes would not only be detrimental to the MyCC's efforts in establishing their credibility but they also risk facing legal action by the alleged cartel firms which are mostly firms which would not hesitate to institute legal action against the MyCC.

Malaysia ought to take note of the difficulty in balancing non-competition considerations such as public interest under the Competition Act 1998, South Africa and competition considerations of efficiency and consumer welfare. Assessing competition cases based on considerations which go beyond economic considerations of efficiency and consumer welfare would result in distortions in allocation of resources and distribution of wealth. Although the South African jurisprudence on this aspect has been developed based on merger cases, the lesson to be learned here is also relevant to cartel enforcement particularly in regard to the granting of exemptions or exclusions. For Malaysia, this lesson is relevant in regard to the assessment of pro and anti-competitive benefits of a cartel infringement of cases which involve non-competition issues which are relevant to the socio-economic development and prevailing ideology of the country,

⁴¹⁹ The Competition Commission raided the premises of companies allegedly involved in anti-competitive agreements in the cement industry. In this case the High Court set aside the Competition Commission's summons on procedural ground and also because the rights of the respondents had been infringed by the Competition Commission by informing the media of the search and seizure and facilitating the latter's access to the premise during the raid. In their eagerness to highlight their investigative efforts and increase public awareness of the benefits of cartel enforcement, the Competition Commission was not mindful enough of procedural law. Although the reactive strategy afforded time to the South African Competition Commission to hone their expertise in cartel enforcement and establish their credibility, it did not always give rise to commendable results. See: *Pretoria Portland Cement Company Ltd. and Another vs. Commission and Others*, case no. 64/2001 at <http://www.comptrib.co.za/> accessed on 13/11/2011; Lavoie, C., 'South Africa's Corporate Leniency Policy: A Five Year Review', *World Competition* Vol. 33(1) (2010), 141-162, p.142.

such as *bumiputera* rights or in connection to programmes and policies of poverty eradication and fairer distribution of economic wealth between the races.

In terms of establishing the independence of the MyCC, Malaysia should take note of the importance of establishing check and balance mechanisms to ensure any aspects of cartel enforcement under the competition law which involves discretion is based on systematic and objective assessments. This is to prevent abuse of discretionary powers either by the MyCC, its commissioners or the minister. This could be implemented either be through administrative measures or amendments to the law if necessary. Along this same line of argument, Malaysia ought to note that independence of the competition authorities is important in order to establish their credibility in the eyes of the public, particularly the business community and consumers. There are some aspects in the structure; nature of appointment of Competition Commissioners and Competition Appeal Tribunal members; and discretionary powers of the responsible Minister which may affect the perception of independence of the competition authorities in carrying out their functions. Thus, it is vital that check and balance mechanisms are established.

The tools and policies implemented by South Africa in cartel enforcement are not novel. Cartel enforcement tools such as leniency are also included in the competition enforcement framework of other jurisdictions such as the EU, US, Japan and Australia. However, their experiences have shown that such tools could facilitate cartel enforcement regardless of the development level of the country. Additionally, South

Africa's experience have also emphasised the need for competition authorities in developing countries to be innovative in cartel enforcement, albeit within the limits of available resources.

To recap, effective cartel enforcement in the Malaysian context as proposed by this work refers to the existence of credible competition authorities and competent competition law enforcement. Credible means the existence of a competition enforcement regime which is able to function within its limited resources; independent; and accepted by society. Whilst competent competition law enforcement means the ability of the competition authorities to detect, investigate and prosecute cartels under the law which in turn creates credible risk of discovery and punishment to cartels without compromising development gains to the country. South Africa's competition law regime had established credibility and competency because as illustrated in this chapter, the South African competition authorities have been able to function within the limitations of their resources; the framework of the South African competition law enforcement regime also provides for adequate checks and balances to enable the competition authorities to enforce the law independently; and competition culture has been established in South Africa which is reflected in the public support for criminal sanctions to be imposed on cartel infringements. These establish credibility. Whilst the increase in leniency applications and number of cartel discoveries in South Africa as discussed earlier; the imposition of heavy financial penalties in cartel infringement cases; and the South African competition authorities endeavour in accommodating the

development dimension in their enforcement of competition law, such as public interests considerations – establishes competency. Thus, the South African competition law enforcement experience is indeed relevant reference for Malaysia.

3.6. CONCLUSION

In answering the question of “how to determine an appropriate cartel enforcement policy for Malaysia?” this work explains that Malaysia’s cartel enforcement policy needs to be formulated based on Malaysia’s own terms; accounting for the objectives of its competition law; development objectives; and prevailing socio-economic ideology. In this regard, Malaysia should refer to other competition jurisdictions for insights. The discussion argues that reference to the South African competition law enforcement experience is warranted based on shared similarities with Malaysia in terms of development and socio-economic concerns; their achievements in cartel enforcement despite the limitations faced by the competition authorities; and the argument that South African competition jurisprudence is sympathetic to inclusive development – which is also relevant to Malaysia.

The second research question - “what are the general principles in developing an appropriate cartel enforcement policy for Malaysia?” is answered by first discussing effective cartel enforcement in the Malaysian context. Effective cartel enforcement as proposed in this work refers to the existence of credible competition authorities and

competent competition law enforcement. Credible means the existence of a competition enforcement regime which is able to function within its limited resources; independent; and accepted by society. Whilst competent competition law enforcement means the ability of the competition authorities to detect, investigate and prosecute cartels under the law which in turn creates credible risk of discovery and punishment to cartels without compromising development gains to the country. This is relevant because the aim of Malaysia's cartel enforcement policy should be effective cartel enforcement; thus, the general principles in developing an appropriate cartel enforcement policy for Malaysia have to be guided by effective cartel enforcement in the Malaysian context. As such, the general principles in developing an appropriate cartel enforcement policy for Malaysia identified in this discussion are: addressing the lack of competition culture; implementing cartel enforcement within the allowance of limited resources; clarification of the modality for gradual implementation of the Competition Act 2010; addressing legislation inadequacies; addressing disjunctions with other policies which are pertinent to Malaysia's development objectives; and establishing and maintaining independence of the competition authorities.

In answering the last research question, "what are the lessons to be learned from South Africa in regard to cartel enforcement?", this work has laid out several lessons to be learned from South Africa in regard to cartel enforcement. In summary, cartel enforcement should be dynamic, strategic and innovative. These involve: implementing appropriate approaches as cartel enforcement progresses in Malaysia – becoming

stricter in time as society's awareness of competition and cartel enforcement experience develops; adoption of cartel enforcement tools which are less costly and simple to implement but would bear a marked impact on cartel detection; adopting strategic competition advocacy in engagements between the MyCC and other regulators, policy making agencies and the public in order to build competition awareness in the country; noting that accounting for non-competition consideration in cartel enforcement which require assessments that go beyond the economic considerations of efficiency and consumer welfare risks misallocation of resources and distortions in distribution of economic wealth; and the importance of establishing the independence of the competition authorities. More importantly, this work has illustrated that the South African competition law enforcement experience is indeed relevant to Malaysia because the elements for the two indicators of effective cartel enforcement in the Malaysian context as recommended by this work are present under the South African Competition regime.

Most of the cartel enforcement tools and approaches which have been implemented by the South African competition authorities are not novel to the competition fraternity. However, what their cartel enforcement experience and competition law jurisprudence have pointed out is that limitations faced by developing countries and development concerns could be managed and accommodated without compromising competition goals. This may be inferred through the gradual cartel enforcement approach (reactive to proactive); innovativeness in implementation commensurate with available resources; and the South African competition authorities' attempts to accommodate public interest

in the implementation of the Competition Act 1998. Nevertheless, this work is not advocating for Malaysia to solely refer to South Africa in regard to cartel enforcement but that South Africa's competition law enforcement and jurisprudence should not be failed to be studied by fellow middle income developing countries such as Malaysia. The point being put across is that in regard to gaining insights for the formulation of an appropriate cartel enforcement policy for Malaysia, the South African competition law enforcement experience is relevant.

CHAPTER 4:

TOWARDS AN APPROPRIATE IMPLEMENTATION FRAMEWORK ON HORIZONTAL AGREEMENTS EXEMPTIONS IN MALAYSIA

4.1. INTRODUCTION

Ideally, competition law should apply across the board on all industries, enterprise, private or public entities so long as they are engaging in commercial activities⁴²⁰. However, sometimes exemptions and exclusions are provided for in a country's competition legislation based on economic or non-economic considerations⁴²¹. In June 2010, the Malaysian Competition Act 2010 was passed by Parliament and both exemptions and exclusions have been included in the legislation. Although exemptions and exclusions are sometimes used interchangeably⁴²², this work distinguishes between exclusions and exemptions. Khemani explained exemptions as being “excused or free from some obligation to which others are subject” while exclusions as being “excluded

⁴²⁰ Khemani, R.S., ‘Application of Competition Law: Exemptions and Exceptions’, UNCTAD (2002), UNCTAD/DITC/CLP/Misc.25, p.5 available at http://www.unctad.org/EN/docs/ditccclpmisc25_en.pdf

⁴²¹ The objectives of exemptions vary across jurisdictions worldwide. Namely they include: efficiency (Canada, New Zealand); public interest (United Kingdom); consumer welfare and economic efficiency (US); fairness (Indonesia, Russian Federation) (see Khemani, R.S., ‘Application of Competition Law: Exemptions and Exceptions’, UNCTAD (2002), UNCTAD/DITC/CLP/Misc.25, p.8 available at http://www.unctad.org/EN/docs/ditccclpmisc25_en.pdf)

Based on the objectives of its competition law, Malaysia's objectives for exemptions are: economic development, promotion of competition and consumer protection based on efficiency goals (see preamble to the Competition Act 2010)

⁴²² The flexibilities accorded to various anti-competitive activities in Japan from 1950's to 1973 are usually referred to as exemptions. However, in actual fact some of them are exclusions because such anti-competitive activities were excluded from the application of the Anti-monopoly Act 1947. For example, laws which allowed for the formation of government approved cartels including SME cartels, Import-Export cartels and textile cartels exempted the cartels from the scope of application of the Anti-monopoly Act 1947. These were actually exclusions because such cartels were excluded regardless of the anti-competitive conducts they were engaging in.

from or not conforming to a general class, principle, rule etc"⁴²³ . In other words, the exempted activity *per se* is subject to the purview of competition law but the excluded activity is not. Exclusions are carved out of the remit of the law *ab initio*. For example, in certain jurisdictions, although price fixing cartels are generally prohibited under competition law; in theory, if the applicant firm could prove that it fulfils certain conditions as stipulated under the law, it may be allowed and exempted from being subject to the rules regarding anti-competitive cartels⁴²⁴. On the other hand, exclusions are activities or a class of activities which are not subject to the anti-competitive prohibitions under competition law *ab initio*, such as certain aspects of the agricultural sector under EU competition law⁴²⁵; and collective bargaining activities or revenue producing monopolies in Malaysia which have been excluded by virtue of the Second Schedule and Section 13, Competition Act 2010. Under the Malaysian competition legislation, exemptions and exclusions are distinct⁴²⁶.

The focus of this discussion is exemption of horizontal agreements, particularly cartel exemptions as provided for under the Malaysian Competition Act 2010 which shall be administered by the Malaysian Competition Commission (MyCC). Malaysia has adopted

⁴²³ Khemani, R.S., 'Application of Competition Law: Exemptions and Exceptions', UNCTAD (2002), UNCTAD/DITC/CLP/Misc.25, p.1 available at http://www.unctad.org/EN/docs/ditcclpmisc25_en.pdf

⁴²⁴ See: Article 101 TFEU. There is a two tier assessment system where agreements deemed as restricting competition under Article 101(1) TFEU but it may be allowed after and so long as the requirements under Article 101(3) TFEU are proven to be met.

⁴²⁵ Regulation 1184/2006 EU provides that Articles 101 and 102 TFEU apply to the production and trade of agriculture EXCEPT for: i) agreements, decisions and practices which form an integral part of national market organisations; ii) agreements, decisions and practices which are necessary for the attainment of the objectives of the CAP; and iii) agreements between farmers or association of farmers belonging to a single Member State not involving and obligation to charge identical prices.

⁴²⁶ Exemptions are by virtue of Sections 6 and 8 whilst exclusions are by virtue of Section 13 Competition Act 2010, Malaysia.

EU style exemptions provisions under the Competition Act 2010⁴²⁷. However, only time will tell whether Malaysia, a developing country, would be able to appropriately implement an exemption mechanism which is based on that of one of the leading competition jurisdictions in the world.

Exemptions may be viewed as a mechanism that waters down competition legislation and the goals of competition policy due to the fact that it authorises restrictions in competition⁴²⁸. It also makes advocacy activities and efforts to strengthen competition culture harder due to differential treatment and inconsistencies. However, there are rationales for exemptions in competition, such as for the sake of economic growth and development based on dynamic efficiency goals⁴²⁹ and non-competition factors based on broader public policy considerations⁴³⁰. Nevertheless, exemptions have to be properly implemented to ensure that the relief granted is based on sound justifications according to the law and that exemptions are not abused. Otherwise, exemptions may not facilitate competition enforcement particularly for young competition agencies in developing countries. This chapter focuses on horizontal agreements between competitors because it is relatively easier to justify vertical restraints as compared to

⁴²⁷ The observation that Malaysia's exemptions provisions under the Competition Act 2010 is modelled on those of the EU is based on the fact that the Competition Act 2010 are similarly worded (albeit under different provisions) with Article 101 TFEU; the distinction between individual and block exemptions; and the legislative provisions on the granting of exemptions are also based on broad conditions.

⁴²⁸ Khemani, R.S., 'Application of Competition Law: Exemptions and Exceptions', UNCTAD (2002), UNCTAD/DITC/CLP/Misc.25, pp.5-7 available at http://www.unctad.org/EN/docs/ditcclpmisc25_en.pdf)

⁴²⁹ An example of exemptions granted based on dynamic efficiency goals are horizontal research and development agreements in order to encourage innovation.

⁴³⁰ Examples of exemptions granted based on fairness are those granted to small and medium sized industries or sectors where the producers or owners of the firms are made up of disadvantaged groups in society (see Section 10 (3) (b) Competition Act 1998, South Africa); and exemptions granted to trade unions to address unequal bargaining power between employees and employers.

horizontal agreements between competitors which are *prima facie* more anti-competitive⁴³¹. Nevertheless, there have been instances when even hard core cartel agreements⁴³² are exempted and there are horizontal agreements which warrant exemptions such as technology transfer agreements and cooperation in research and development agreements⁴³³.

Exemptions cannot be appropriately implemented without a workable implementation framework despite the fact that the law is already in place. Without a workable implementation framework competition agencies risk granting exemptions which may be improperly granted either in substance or procedurally. This of course would negatively impact cartel enforcement under the law. Therefore, it is useful to discuss how the EU style legislative provisions on exemptions could be made to be implementable in Malaysia based on the factors which are likely to affect appropriate implementation of exemptions in Malaysia and the EU's experience in the granting of exemptions. Main reference is made to the EU exemption mechanism because the Malaysian competition law provisions on horizontal agreements prohibitions and exemptions are based on those of Article 101 TFEU. As such, the research questions addressed in this chapter are: 1) What are the factors which influence proper implementation of exemptions in developing countries?; 2) could EU style exemptions mechanism be workable in

⁴³¹ Jones, A. and Sufrin, B., *EC Competition Law: Text, Cases, and Materials*, Third Edition (2008), Oxford University Press, p. 225

⁴³² See: for example, *Visa International-Multilateral Interchange Fee*, [2002] OJ L 318/17, [2003] 4 CMLR 283. The case involved price fixing agreement between banks within the Visa system.

⁴³³ For example, the EU regulation on block exemptions for research and development, Commission Regulation (EU) No 1217/2010, OJ L335/36 (18.12.10).

Malaysia?; and if so, 3) what are the necessary elements to be included in the implementation framework for the granting of exemptions in Malaysia?

The novelty of this work lies not merely on the fact that it is about a new piece of legislation which is yet to be fully enforced but also because discussions in present literature do not emphasise on the implementation of cartel exemptions as much as say for example leniency and international cartel enforcement. Most work on cartel exemptions are in connection to other aspects such as export cartels⁴³⁴ or small and medium sized industries⁴³⁵. There have been past work conducted among the policy circles such as UNCTAD⁴³⁶, WTO⁴³⁷ and the OECD⁴³⁸ which focused on exemptions but they are neither recent nor sufficiently extensive. The data gathered are mostly from developed countries such as OECD member countries. To date there is yet to be a study conducted on exemptions specifically in developing countries.

The limitation of this work is that since the Competition Act 2010 is yet to be fully enforced and the relevant guidelines are not in place, the premise of the discussion is

⁴³⁴ See: Levenstein, M. C. and Suslow, V. Y., 'The Changing International Status of Export Cartel Exemptions', American University International Law Review, Vol. 20, No. 3; Ross School of Business Paper No. 897 (2004), available at <http://ssrn.com/abstract=618201> or <http://dx.doi.org/10.2139/ssrn.618201>

⁴³⁵ Organisation for Economic Cooperation and Development (OECD), 'General Cartel Bans: Criteria for Exemption for Small and Medium-Sized Enterprises', OCDE/GD(97)53, OECD (1997) available at <http://www.oecd.org/dataoecd/34/54/1920345.pdf>

⁴³⁶ Khemani, R.S., 'Application of Competition Law: Exemptions and Exceptions', UNCTAD (2002), UNCTAD/DITC/CLP/Misc.25 available at http://www.unctad.org/EN/docs/ditccplmisc25_en.pdf

⁴³⁷ World Trade Organization, "Exceptions, Exemptions, and Exclusions Contained in Members' National Competition Legislation", WTO (2001), WT/WGTCP/W/172 (2001) available at <http://docsonline.wto.org/DDFDocuments/t/WT/WGTCP/W172.doc>

⁴³⁸ Hawk, B.E., 'OECD Trade Committee study of the Sectoral Coverage (and Limitations) of Competition Laws and Policies' OECD (1996)

based on foreseeable outcomes based on the experiences of the EU in particular and also those of Japan and South Africa. These are jurisdictions which have been implementing exemptions under their respective competition law. The EU is chosen because Malaysia has adopted EU style exemptions legislative provisions, Japan is chosen because of its experience in granting cartel exemptions throughout the years since 1950's when it was still a developing country to date. South Africa is chosen because of its similar development status with Malaysia and the fact that its competition law is sympathetic to inclusive development⁴³⁹. However, the main reference is focused on the EU experience in the granting of exemptions due to the similarity of legal provisions.

The discussion in this chapter is organised as follows: in Part 2, exemption is explained in general and the notion that the existence of exemptions weakens competition law is discussed. Part 3 explains the meaning of appropriate implementation of exemptions and discusses the factors which are required to enable appropriate implementation of exemptions under the Competition Act 2010. Part 4 discusses the similarities and differences between the EU legislative provisions on exemptions and its Malaysian counterpart. This is to assess whether the EU style exemption mechanism could be workable for Malaysia. Part 5 discusses the necessary elements to be included in the

⁴³⁹ Fox, E.M., 'In Search of a Competition Law Fit for Developing Countries', New York University Law and Economics Research Paper No.11-04 (2011), p.11 at SSRN: <http://ssrn.com/abstract=1761619> or <http://dx.doi.org/10.2139/ssrn.1761619> . See discussion in Chapter 3 of this thesis.

implementation framework for the granting of exemptions in Malaysia before the discussion concludes.

4.2. EXEMPTIONS: WHAT ARE THEY AND DO THEY WEAKEN COMPETITION LAW?

In competition law, exemption is a tool which could be utilised to facilitate acceptance of competition law by accommodating other objectives and programmes which relate to the prevailing socio-economic ideology and developmental needs of the country. Most of the times, exemptions are granted in pursuit of warranted objectives which include national interest⁴⁴⁰; development⁴⁴¹ and broader policy objectives which complement and facilitate public acceptance of competition⁴⁴² particularly in countries with young competition jurisdictions where competition is a novel concept to businesses and also

⁴⁴⁰ This may include food security; development of national champions; and strategic economic and trade interests.

⁴⁴¹ For instance, various exemptions were granted to cartels in Japan from 1950's to 1973 due to the country's focus on industrial policy to generate growth which resulted in competition policy being made subservient to industrial policy. This in turn resulted in weak competition law enforcement. However this was not a case which illustrated that exemptions weakened competition law. Instead, it was a case of a conscious decision made by a country to focus on industrialisation for the sake of growth and development and exemptions were just a tool appropriated to achieve that goal. It can be argued that the exemptions granted in Japan then were based on justifications which were relevant to the country's development goals at the time. See: Beeman, M.L., *Public Policy and Economic Competition in Japan – Change and Continuity in Antimonopoly Policy, 1973-1995*, Routledge (2002); Singh, A. and Dhumale, R., 'Competition Policy, Development and Developing Countries', South Centre Working Papers 7 (November 1999) available at http://southcentre.org/index.php?option=com_content&view=article&id=315%3Acompetition-policy-development-and-developing-countries-&catid=56%3Aother-issues-related-to-trade-negotiations&Itemid=67&lang=en

⁴⁴² For instance, under Section 10 (3) (b) (ii) Competition Act 1998, South Africa, exemptions may be granted to firms owned or controlled by historically disadvantaged people. This is in line with the country's Black Economic Empowerment (BEE) Policy which has to be accounted for in order to remedy the economic distortions which resulted out of Apartheid, by virtue of the public interest consideration as stipulate under the Preamble, Competition Act 1998.

the public at large. If such exemptions are not granted, or exemptions are granted solely based on efficiency and consumer welfare objectives without accounting for development and broader policy objectives, competition law may not be workable in such jurisdiction due operational issues in the implementation of the law which may include inconsistencies or disjunctions with other national policies such as development and industrial policies. For example, if exemptions are not accorded to certain activities which relate to food security or industries which promote national champions – the competition legislation would be inconsistent with the country's industrial and developmental policies or competition law may even stifle innovation and investment which facilitate development based on dynamic efficiency goals⁴⁴³.

Under most competition law regimes, exemptions are not automatically granted without proper assessment. In jurisdictions where there is no provision for direct application such as under Article 101 TFEU, exemptions usually have to be separately applied for by the firm involved from the competition authority because as explained earlier, exempted firms or activities are not exempted *ab initio* from the remit of the competition law⁴⁴⁴. However, in Malaysia there have been instances where firms which have pre-emptively applied for exemptions under the Malaysian competition law without being uncovered as engaging in anti-competitive infringements under the Competition Act

⁴⁴³ See discussion below on the theory of the relationship between competition and innovation and how innovation leads to growth and development.

⁴⁴⁴ See discussion on the EU and Malaysian competition law exemption mechanism below.

2010 by the MyCC beforehand⁴⁴⁵. The four (4) firms were from the logistics; insurance and food industries. One applied for an individual exemption whilst the other 3 applies for block exemptions. Usually, the burden of proof in exemption applications falls onto the applicant firm.

The inclusion of exemptions in competition law is not necessarily an indication that the legislation is weak because exemptions are provided for even under the competition law of developed countries such as EU, Japan, the US and Australia. These are all examples of advanced competition jurisdictions with strong competition law enforcement. It should be noted that based on the experience of countries such as Japan, as competition jurisdictions advance and the economy becomes more developed, the categories or number of exemptions granted are lessened or gradually phased out⁴⁴⁶. This may be because of stronger competition culture; change in economic priorities; and domestic industries have developed and become competitive enough to face competition in open markets. Nevertheless, improper granting of exemptions may weaken competition law and become obstacles in furthering the competition agenda in the country⁴⁴⁷. Firms which are granted exemption gain an advantage over their competitors by being permitted to engage in the exempted anti-competitive activity. This may not only affect production and distributive efficiency but

⁴⁴⁵ See report in The Star online, Malaysia website at <http://biz.thestar.com.my/news/story.asp?file=/2012/4/26/business/11176730&sec=business> accessed on 4 March 2013.

⁴⁴⁶ Beeman, M.L. *Public Policy and Economic Competition in Japan – Change and Continuity in Antimonopoly Policy, 1973-1995*, Routledge (2002), pp. 40-41

⁴⁴⁷ Khemani, R.S., 'Application of Competition Law: Exemptions and Exceptions', UNCTAD (2002), UNCTAD/DITC/CLP/Misc.25, p.5 available at http://www.unctad.org/EN/docs/ditcclpmisc25_en.pdf

also undermine consumer welfare via supra-competitive prices (profiteering) and lesser product choices and quality. Therefore, exemptions granted without sound economic justifications may not just lead to inefficiency but also unfairness. These include instances when exemptions are used as a protectionist tool either by restricting market entry⁴⁴⁸ or favouring certain firms which enjoy political patronage and close relations with decision makers⁴⁴⁹.

In terms of trade, protection granted to domestic firms may act as non-tariff barriers to entry particularly in cases of block exemptions or industry wide exemptions because these types of exemptions do not call for a case by case assessment of the exemptions. Existing players in the domestic market may prevent or limit market access to foreign firms interested in entering the domestic market by entering into arrangements which may seem to be efficiency based horizontal agreements such as exclusive technology sharing agreement in which in actual fact excludes the new entrant or continued existence of the foreign firm in the market⁴⁵⁰. This type of protection could be used to protect national champions which provide employment in the country; are interconnected with other strategic industries; and are the national pride or flag bearer

⁴⁴⁸ See: the argument by Hawk in Hawk, B.E., *Antitrust and Market Access: The Scope and Coverage of Competition Laws and Implications for Trade*, OECD (1996), Overview.

⁴⁴⁹ For example some of Malaysia's policies in the 1980's such as "Bumiputera Commercial and Industrial Community", "Malaysia Incorporated" and "Malaysia 2020" have created political patronage and closer relations between large corporate groups and political leaders. See Jomo, K.S., 'Industrialisation and Industrial Policy in Malaysia', in Jomo, K.S., *Malaysian Industrial Policy*, NUS Press Singapore (2007), pp. 18-19

⁴⁵⁰ This is based on Hawk's argument on the relaxed application and enforcement of competition law. He argued that it is not easy to discern whether measures such as exemptions granted to certain domestic industries are appropriate or merely protectionist. See Hawk, B.E., *Antitrust and Market Access: The Scope and Coverage of Competition Laws and Implications for Trade*, OECD (1996), Overview.

of the country. National car manufacturers in the automotive industry are good examples for these instances.

Firms granted exemptions due to political patronage and close relations with decision makers increase the potential for corruption. This is because competition law enforcement affects the economic rent enjoyed by such groups⁴⁵¹. Therefore, they would be doing anything necessary to ensure that they continue to enjoy economic rent. This include industrial lobbying of politicians and decision makers and resorting to bribery in order to influence economic policy decision making in their favour, such as by exempting or excluding their cartel activities from the purview of competition law. Although the law expressly stipulates the instances where exemption are warranted; without clear and systematic assessment methods, the granting of exemptions could be more open to abuse particularly when the competition authority's independence in decision making could be unduly influenced by political pressure.

In regard to cartels, the existence of exemption and exclusion provisions under the law renders cartels to be distinguished into "good and bad cartels"⁴⁵² in the sense that the "good cartels" are anti-competitive but deemed as necessary based on the efficiency or non-economic considerations whilst the "bad cartels" are those which not only restrict

⁴⁵¹ Chowdhury, M., 'The Political Economy of Law Reform in Developing Countries', Sixth ASCOLA Conference – New Competition Jurisdictions: Shaping Policies and Building Institutions (July 2011), King's College London, p. 2

⁴⁵² This observation was made by Beeman in reference to the Japanese experience in exempting cartels. See Beeman, M.L., *Public Policy and Economic Competition in Japan – Change and Continuity in Antimonopoly Policy, 1973-1995*, Routledge (2002), pp.18-20

competition but also without sufficient merit (if at all) to be tolerated. Therefore, exemption is a useful feature for developing countries to accommodate the country's development objectives, i.e. by allowing cartels which engage in anti-competitive horizontal agreements which have gains that offset their anti-competitive effect. This is in line with the argument that in order to achieve efficiency goals, sometimes competition should be restricted due to the competitive disequilibrium which is more pronounced in developing countries⁴⁵³ and also the argument on the relationship between competition and innovation. Schumpeter argued that highly concentrated industries have a higher incentive to innovate because of the economic rent which will be enjoyed due to lack of competitors⁴⁵⁴. The inverted 'U' shaped relationship between competition and innovation in oligopolistic markets found by Scherer has more recently been found in more advanced studies of the phenomenon⁴⁵⁵. This suggests two possibilities; first, firms will innovate up to a certain level so long as total industry profits are sufficient to cover the initial development costs to the firms. Beyond this level, as total industry profits fall, there is no incentive for the firms to invest in innovations. Second, that under Schumpeter's monopoly model, firms are slow to invest, preferring to achieve profit maximisation via slower, risk free investments unless there are small

⁴⁵³ Singh, A., 'Multilateral Competition Policy and Economic Development: A Developing Country Perspective on the European Union Proposals', UNCTAD (2004), p. 6 available at http://www.unctad.org/en/docs/ditcclp200310_en.pdf

⁴⁵⁴ See: Scherer, F.M., 'Schumpeter and Plausible Capitalism' *Journal of Economic Literature* 30 (1992), 1416-1433

⁴⁵⁵ See: Aghion *et al*, 'Competition and Innovation: An Inverted U Relationship' (2004), AIM Research Working Paper Series at <http://ssrn.com/abstract=1306944> ; Aghion, P. and Griffith, R., 'Competition and Growth: Reconciling Theory and Evidence', *Zeuthen Lectures*. MIT Press: Cambridge, US (2008)

rivals or entrants investing in new technology which threaten their monopoly profits⁴⁵⁶. However, it ought to be noted that even if the type of oligopolistic industry in question is innovation driven such as pharmaceutical and automotive industries there would be less incentive to innovate if the innovation is just a small improvement and there is still going to be competition with older generations of the same product. Therefore, this theory indicates that sometimes less competition is good for innovation which contributes to economic development based on dynamic efficiency goals. Thus, in such instances exemptions are warranted to be granted to cartels due to the weightier benefits to development which restriction in competition brings.

Based on the preceding arguments, it is submitted that in order to ensure exemptions are not granted for reasons which may weaken competition objectives and may become obstacles in cartel enforcement, the implementation of exemptions should be based on an appropriate implementation framework.

4.3. APPROPRIATE IMPLEMENTATION OF EXEMPTIONS IN DEVELOPING COUNTRIES

Appropriate implementation of exemptions in the context of this discussion refers to the granting of exemptions based on transparent and sound justifications as per the

⁴⁵⁶ Lipczinski, J. and Wilson, J. *Industrial Organisation: An Analysis of Competitive Markets*, Pearson Education Limited (2001), p.251; See also Aghion et al, 'Competition and Innovation: An Inverted U Relationship' (2004), AIM Research Working Paper Series at <http://ssrn.com/abstract=1306944>

objectives of the prevailing competition legislation, which also facilitates cartel enforcement. For developing countries, the relevant elements are: exemptions based on dynamic efficiency goals and fairness, and a workable implementation mechanism. Workable means that it is suitable and able to be implemented within the confines of institutional limitations of the country. Therefore, it is submitted that the factors which ought to be accounted for in the proper implementation of exemptions in developing countries are: development oriented based on dynamic efficiency goals and broader public policy objectives; transparency; and institutional limitations.

The author argues that exemptions should be development oriented in developing countries because any flexibility granted is to ensure that the adoption and implementation of competition law does not become obstacles in achieving economic growth and development and could be accepted by society. A development oriented exemption mechanism is in line with the proscribed objectives of competition law and policy for developing countries, i.e. based on dynamic efficiency goals and fairness⁴⁵⁷. Dynamic efficiency concerns the incentives for long term productivity growth in order to yield lower prices and better goods for consumers⁴⁵⁸. Fairness refers to broader public policy considerations which either may lead to efficiency or the achievement of

⁴⁵⁷ See: Singh, A. and Dhumale, R., 'Competition Policy, Development and Developing Countries', South Centre Working Papers 7 (November 1999) at http://southcentre.org/index.php?option=com_content&view=article&id=315%3Acompetition-policy-development-and-developing-countries-&catid=56%3Aother-issues-related-to-trade-negotiations&Itemid=67&lang=en ; Gal, M.S., 'The Ecology of Antitrust Pre-conditions for Competition Law Enforcement in Developing Countries', in *Competition, Competitiveness and Development: Lessons from Developing Countries*, United Nations Publication (2004), UNCTAD/ DITC/CLP/2004/1, available at http://www.unctad.org/en/docs/ditcclp20041ch1_en.pdf

⁴⁵⁸ Gal, M.S., *Competition Policy for Small Market Economies*, Harvard University Press (2003), p.14

objectives which are relevant to the prevailing socio-economic ideology of the country - considerations which are integral to social acceptance of competition policy and law and may disintegrate the social fabric of the country if they are unaccounted for⁴⁵⁹. For Malaysia, broader policy objectives may include *bumiputera* empowerment in the economy and equal wealth distribution between all ethnicities in Malaysia. However, this work is not suggesting that the moment an anti-competitive agreement is found to have a development dimension; then it warrants to be exempted from the application of competition law. Instead, what is submitted here is that it is not enough for an anti-competitive agreement to merely be allowed based on the existence of development gains because the gains would also have to outweigh the anti-competitive impact of the agreement. Otherwise, the attainment of competition objectives could be jeopardised.

For example, even if the agreement in question is one which involves hard core cartel activities, so long as there are justifiable benefits which may contribute to economic development of the country, it warrants an exemption provided the gains outweighs its anti-competitive benefit. This is because if the pro and anti-competitive benefits of a competition restricting agreement were to be of the same weight, i.e. fifty-fifty (no change), then there is insufficient justification to allow it⁴⁶⁰. Exemptions accord an

⁴⁵⁹ Gal, M.S., 'The Ecology of Antitrust Pre-conditions for Competition Law Enforcement in Developing Countries', in *Competition, Competitiveness and Development: Lessons from Developing Countries*, United Nations Publication (2004), UNCTAD/ DITC/CLP/2004/1, p. 28 available at http://www.unctad.org/en/docs/ditccpl20041ch1_en.pdf . For example, exemptions granted to historically disadvantaged groups in society such as to accommodate the Black Economic Empowerment Policy in South Africa. This is provided for under Section 10 (3) (b) (ii) Competition Act 1998, South Africa.

⁴⁶⁰ However, under the Competition Act 2010, the detriment to competition should be proportionate to the benefits (see Section 5 (c) Competition Act 2010, Malaysia). Until and unless the interpretation of

advantage to the firm over its competitors which are actually an intervention into the workings of the market. Market interventions should not be improperly exercised unless it is with sound economic justifications and have the potential to result in gains which trump the anti-competitive impact on the market. This is also the case when there are overlaps between competition and other policies such as industrial policy. In the context of exemptions, it is not enough that because an anti-competitive agreement has the potential to increase long term productivity growth in strategic industries or may lead to fairness in the market by protecting the domestic industries in order to allow them to grow and become more competitive, then the agreement should be exempted⁴⁶¹. This is to ensure that any exemption granted does not totally eliminate competition but to accommodate growth. Otherwise the purpose of adopting competition policy and law becomes futile. Thus, in cases of overlaps between competition policy and other policies such as industrial policy and developmental policy, the dynamic efficiency benefits and fairness of such anti-competitive agreements have to outweigh the pro-competitive benefit of prohibiting them.

This may be observed from the Japanese implementation of exemptions from 1950's – 1973. Throughout this period, vast exemptions were accorded to cartels in order to spur

“proportionate” is clarified by MyCC or the courts, the meaning of proportionate is unclear. This author is of the opinion that “proportionate” in the context of this provision may be interpreted as commensurate or comparable, which is subjective.

⁴⁶¹ See Singh and Dhumale's argument in proscribing the Japanese competition policy and law experience from 1950's to 1973 for developing countries in Singh, A. and Dhumale, R., 'Competition Policy, Development and Developing Countries', South Centre Working Papers 7 (November 1999) at http://southcentre.org/index.php?option=com_content&view=article&id=315%3Acompetition-policy-development-and-developing-countries-&catid=56%3Aother-issues-related-to-trade-negotiations&Itemid=67&lang=en

economic growth and strengthen the level of competitiveness of Japanese firms and industries⁴⁶². Japan achieved historically unprecedented economic growth during this period. The country's Gross Domestic Product (GDP) grew at ten (10) per cent per annum, manufacturing production rose about thirteen (13) per cent per annum and its share in world exports of manufacture rose by a huge ten (10) percentage points⁴⁶³. Under Japan's coordination and competition approach, when there was an overlap between industrial and competition policy, precedence was accorded to industrial policy in order to achieve the relevant structural changes for the sake of development. Therefore, cooperation amongst firms was encouraged in order to promote investments and technological development by the private sector. However, this does not mean that competition policy was suppressed without justification. This is because under this concept, actions which improve or strengthen the market structure such as exempting cartels from the remit of competition law for the sake of development of strategic domestic industries may be allowed. The Japanese government, through the Ministry of International Trade and Industry (MITI) implemented contest based industrial policies through incentives which were tied to performance in export markets, technological development and technological development. As a result, competition among the firms

⁴⁶² Okimoto, D.I., *'Between the MITI and the Market'*, Stanford University Press (1989), pp.12-13 as cited in Singh, A. and Dhumale, R., "Competition Policy, Development and Developing Countries", Singh, A. and Dhumale, R., 'Competition Policy, Development and Developing Countries', South Centre Working Papers 7 (November 1999), p.10 at

http://southcentre.org/index.php?option=com_content&view=article&id=315%3Acompetition-policy-development-and-developing-countries-&catid=56%3Aother-issues-related-to-trade-negotiations&Itemid=67&lang=en

⁴⁶³ Singh, A. and Dhumale, R., 'Competition Policy, Development and Developing Countries', South Centre Working Papers 7 (November 1999), p.12 at

http://southcentre.org/index.php?option=com_content&view=article&id=315%3Acompetition-policy-development-and-developing-countries-&catid=56%3Aother-issues-related-to-trade-negotiations&Itemid=67&lang=en

in the market was intense⁴⁶⁴. This is an example of simulated competition. Korea also broadly followed the Japanese strategy and it also managed to transform itself into an industrialised and technologically advanced country⁴⁶⁵.

Useful insights for Malaysia could also be gained by referring to how the South African competition regime's attempts to accommodate public interest considerations in merger cases as provided for under the Competition Act 1998, South Africa⁴⁶⁶. Accommodating non-competition considerations based on equity and fairness under competition law is challenging because some non-competition considerations could not be translated into economic quantification⁴⁶⁷ to enable an assessment to weigh those equity based considerations against competition considerations such as efficiency and consumer welfare⁴⁶⁸. Additionally, accommodating such non-competition considerations should be done systematically in order to prevent the weighing of pro and anti-competitive gains of

⁴⁶⁴ Singh, A., 'Competition and Competition Policy in Emerging Markets : International and Developmental Dimensions', G-24 Discussion Paper Series No.18 (2002), UNCTAD, p.17-18

⁴⁶⁵ Singh, A. and Dhumale, R., 'Competition Policy, Development and Developing Countries', South Centre Working Papers 7 (November 1999), pp.12-13 at http://southcentre.org/index.php?option=com_content&view=article&id=315%3Acompetition-policy-development-and-developing-countries-&catid=56%3Aother-issues-related-to-trade-negotiations&Itemid=67&lang=en

⁴⁶⁶ See discussion in Chapter 3 of this thesis.

⁴⁶⁷ Such as exemptions applied based on: significant and identifiable social benefits (Section 5 (a) Competition Act 2010, Malaysia); enabling small and medium sized industries and enterprises to become competitive (See Sections 2 (e) and 10 (3) (ii) Competition Act 1998, South Africa); and enabling firms controlled or owned by historically disadvantaged person to become competitive (See Sections 2 (f) and 10 (3) (ii) Competition Act 1998, South Africa). See also, Boshoff, W. *et al*, 'The Economics Of Public Interest Provisions In South African Competition Policy', Sixth Annual Competition Law, Economics and Policy Conference, South Africa (2012), p.26 at <http://www.compcom.co.za/assets/Uploads/events/Sixth-Annual-Competition-Law-Economics-and-Policy-Conference-in-South-Africa-2012/NewFolder-3/The-economics-of-public-interest-provisions-in-South-African-competition-policy.pdf>

⁴⁶⁸ See: Boshoff, W. *et al*, 'The Economics Of Public Interest Provisions In South African Competition Policy', Sixth Annual Competition Law, Economics and Policy Conference, South Africa (2012) at <http://www.compcom.co.za/assets/Uploads/events/Sixth-Annual-Competition-Law-Economics-and-Policy-Conference-in-South-Africa-2012/NewFolder-3/The-economics-of-public-interest-provisions-in-South-African-competition-policy.pdf>

the infringement which involve non-competition considerations in an arbitrary and discretionary manner⁴⁶⁹. Although the Competition Tribunal, South Africa have attempted to provide interpretations on the application of the relevant legislative provisions under the Competition Act 1998, South Africa pertaining to the public interest dimension in merger cases, a suitable economic model on the weighing of public interest against competition considerations is yet to be identified⁴⁷⁰.

In addition to adopting a systematic mechanism in assessing applications for exemption, an appropriate exemption mechanism also calls for transparency in exercising powers to exempt⁴⁷¹. This is because exemption accords an advantage to the firm or firms in question over their competitors in the market. If decisions are not made transparently then it would not facilitate effective competition enforcement which would in turn undermine the agency's credibility and competition goals. Transparency is especially pertinent in exemptions of hard core anti-competitive horizontal agreements. Although it has been argued that in theory it would be difficult to justify the exemption of hard core cartels such as price fixing cartels between competitors, it is still not

⁴⁶⁹ *Ibid*, pp.8-13

⁴⁷⁰ See: Hodge, J. *et al*, 'Public Interest Provisions in The South African Competition Act- A Critical Review', Competition Policy, Law and Economics Conference (2009), pp.12-13; and Boshoff, W. *et al*, 'The Economics Of Public Interest Provisions In South African Competition Policy', Sixth Annual Competition Law, Economics and Policy Conference, South Africa (2012) at <http://www.compcom.co.za/assets/Uploads/events/Sixth-Annual-Competition-Law-Economics-and-Policy-Conference-in-South-Africa-2012/NewFolder-3/The-economics-of-public-interest-provisions-in-South-African-competition-policy.pdf>

⁴⁷¹ See: International Competition Network (ICN), 'Defining Hard Core Cartel Conduct: Effective Institutions Effective Penalties', Building Blocks for Effective Anti-Cartel Regimes Vol.1, ICN 4th Annual Conference, Bonn, Germany, ICN (2005), pp. 13-14

impossible⁴⁷², particularly under EU competition law (which Malaysia's exemptions provisions are modelled on), because there have been instances where horizontal price fixing agreements have been exempted under EU law⁴⁷³. By publishing and clearly explaining the reasons for the granting or refusal of exemptions any doubts or suspicions may be cleared as to the reasons for the granting of the "special treatment" to the firm or firms in question by the competition agency. This in turn would establish the credibility of the agency, a crucial element in garnering public support for competition law and cartel enforcement particularly in young competition jurisdictions which lack competition culture and views competition law as unsuitable for developing countries.

In addition, transparency also breeds clarity of the rules pertaining to exemptions. Without clarity in the rules, cartels may be de-motivated from applying for exemptions due to uncertainty of the outcome should they apply for exemption for their anti-competitive agreement. This may result in either the cartels merging⁴⁷⁴ or going deeper underground – both undesirable outcomes which would not facilitate effective cartel

⁴⁷² Jones, A. and Sufrin, B., *EC Competition Law: Text, Cases, and Materials*, Third Edition (2008), Oxford University Press, p. 221.

⁴⁷³ *Ibid*, pp. 223-224. Also see for example the following cases: *Visa International-Multilateral Interchange Fee*, [2002] OJ L 318/17, [2003] 4 CMLR 283; *Reims II* [1999] OJ L275/17 (renewal), [2004] OJ L56/76; *CECED* 2000 OJ L187/47, [2000] 5 CMLR 635

⁴⁷⁴ When the United Kingdom introduced the Restrictive Trade Practices Act 1956 which outlawed cartels, it triggered a wave of mergers. Similarly, cartels in the US steel and railroad industries resorted to mergers after the Sherman Act, which banned cartels, was introduced in 1898. See Mehra, P., 'Choice Between Cartel and Horizontal Merger', (2007), p.2 at SSRN: <http://ssrn.com/abstract=1081844> or <http://dx.doi.org/10.2139/ssrn.1081844>; The same pattern may be observed in the international merger movements in the 1990's See Evenett, S.J.. *et al*, 'International Cartel Enforcement: Lessons from the 1990s', World Bank Policy Research Working Paper No. 2680 (2002);

enforcement in young competition jurisdictions especially when there is no merger regulation with competition dimension under the present legislative framework⁴⁷⁵.

Competition agencies must be seen to be independent and fair. Competition agencies should be impartial to industrial lobbying and not be made subject to political intervention or influence in their decision making, i.e, from the influences of groups whose enjoyment of economic rent are affected by cartel enforcement via prohibition of their anti-competitive conducts⁴⁷⁶. In terms of being seen to be fair, relevant groups which may be affected by the granting or refusal of exemptions ought to also be consulted. Independence is also connected with transparency as explained above. Being transparent does not merely mean the publication justifications of decisions. It should also include engaging the public and the business community through awareness and advocacy programmes which explains how competition agencies carry out their responsibilities. In order to ensure independence, relevant safeguards to act as checks and balance should be in existence. This include the appointment of credible key officials of the competition agency who are fair, neutral and knowledgeable; not making the competition agency subject to the jurisdiction or purview of agencies or ministries with limited remit but rather, subject to the purview of an entity with strong

⁴⁷⁵ Malaysia's Code of Take-Overs and Mergers 2010 which is implemented by the Malaysian Securities Commission currently does not have a competition dimension. Merger control has also been excluded from the remit of the Competition Act 2010.

⁴⁷⁶ Chowdhury, M., 'The Political Economy of Law Reform in Developing Countries', Sixth ASCOLA Conference – New Competition Jurisdictions: Shaping Policies and Building Institutions (July 2011), King's College London, p. 2; Gal, M.S., 'The Ecology of Antitrust Pre-conditions for Competition Law Enforcement in Developing Countries', in Competition, Competitiveness and Development: Lessons from Developing Countries, United Nations Publication (2004), UNCTAD/ DITC/CLP/2004/1 p.31 at http://www.unctad.org/en/docs/ditcclp20041ch1_en.pdf

political influence and a wide authority remit⁴⁷⁷; and providing for administrative and judicial review of decisions made by the competition commission.

Appropriate implementation of the exemption mechanism also calls for the institutional limitations to be accounted for because institutional disequilibrium in developing countries may take time to develop and evolve. If the exemption mechanism provided for under the law does not account for the institutional factors, the exemptions implementation framework may not be able to be appropriately implemented. The institutional limitations include legislative provisions which require simple judicial administration, lack of adequately trained competition officials and judiciary, challenges in establishing the independence of competition authorities, and level of competition law enforcement.

Young competition agencies lack experience and knowledge in implementing competition law. Thus, in order to ensure exemptions are able to be appropriately implemented, the relevant legal provisions ought to allow for simple judicial administration. For example, under EU law, the prerequisite for applying for exemptions under Article 101 (3) is that agreements must be deemed to be restrictive of competition under Article 101 (1) TFEU. Determining whether an agreement is anti-competitive or

⁴⁷⁷ This is based on Gal's argument that one of the methods to reduce the influence of pressure groups against competition law is by forming pro-law pressure groups under a strong political anchor such as the Prime Minister's office and also the fact that the impact of competition law cuts across all industries and markets. Gal, M.S., 'The Ecology of Antitrust Pre-conditions for Competition Law Enforcement in Developing Countries', in *Competition, Competitiveness and Development: Lessons from Developing Countries*, United Nations Publication (2004), UNCTAD/ DITC/CLP/2004/1, pp. 31-33 at http://www.unctad.org/en/docs/ditcclp20041ch1_en.pdf

restrictive in effect is not easy⁴⁷⁸ and in determining its object, it is insufficient to merely scrutinise the explicit content of the formal agreement. Such provisions call for the utilisation of legal and economic approach in assessing exemptions under EU law. It requires analysing the presumed, actual and potential anti-competitive effect of the agreement⁴⁷⁹. All these require expertise in legal, economic and other relevant fields such as business and accounting in order to enable the implementation of legal and economic approach. Among the aspects to be included in the assessment are: a determination of relevant market definition; interpretation of the content of the agreements; scrutiny of the involved firms' conduct and behaviour in the market; and assessment of pro and anti-competitive benefits of the agreement which includes considerations based on the economic concept of efficiency⁴⁸⁰. It may be inferred that the assessment for exemptions under the Malaysian competition legislation would call for more or less similar approach. Of course Malaysia could just adopt the arguably easier formalistic approach as implemented by the Commission before the modernisation regulation but it may deprive anti-competitive agreements with significant efficiency gains from being exempted simply because of the narrow interpretation of the legislative provisions⁴⁸¹.

⁴⁷⁸ Jones, A. and Sufrin, B., *EC Competition Law: Text, Cases, and Materials*, Third Edition (2008), Oxford University Press, p. 222.

⁴⁷⁹ *Ibid*, p.207

⁴⁸⁰ See: Guidelines on the Application of Article 101 (3) TFEU (formerly 81 (3) of the Treaty) (204/C 101/08)

⁴⁸¹ See: Jones, A. and Sufrin, B., *EC Competition Law: Text, Cases, and Materials*, Third Edition (2008), Oxford University Press, p. 208-209

Compare that with the simpler and more narrowly stipulated exemption provisions under Competition Act 1998, South Africa. For example, in cases where the exemption applied on the promotion of small businesses or business owned by historically disadvantaged persons⁴⁸², the assessment to be made by the competition agency would not be as complicated as that under the implementation of EU law because what needs to be determined is merely whether the business in question falls under the category of small businesses or that it is owned by persons who are considered as historically disadvantaged under the relevant legislative provisions. Therefore, it is submitted that exemption provisions which do not require more complex legal and economic analysis are arguably easier to be implemented and more suitable with the limitations faced by young competition authorities. Simple judicial administration would also facilitate timeliness in decision making. Firms need fast decisions regarding their exemption application lest their businesses are detrimentally affected. Therefore, any decisions to be made ought to be done in a timely manner without compromising procedural and substantive legislative requirements. As such, it is important that the procedures instituted are not cumbersome and suitable with the level of institutional development of the country.

Despite the advantage of narrowly stipulated conditions for exemptions, it ought to be noted that exemption provisions based on broad provisions such as those of the EU give room to accommodate fast moving business innovations and dynamics and other

⁴⁸² See: Section 10 (3) (b) (ii) Competition Act 1998, South Africa.

non-efficiency gains considerations to be accounted for⁴⁸³. Therefore, if the exemptions are listed and narrowly stipulated such as those of the exemption provisions under the current Anti-Monopoly Act in Japan⁴⁸⁴ and Section 10 Competition Act 1998, South Africa, if there are new types of business innovations which warrant exemptions, then the relevant legislative provisions would have to be amended and amendments of legislation is a cumbersome process unless the law stipulates that the responsible Minister is empowered to amend the list under a regulation. Such a process would be less cumbersome but it is open to abuse due to the discretionary power vested with the authorised Minister. Thus, it is submitted that since Malaysia has adopted broad conditions for meeting the eligibility for exemptions, the relevant complementary legislative instruments and mechanisms ought to be in place to facilitate and guide the competition agencies in carrying out their powers in the granting of exemptions.

The granting of exemptions requires competition officials and judiciary who are adequately trained in the implementation and adjudication of competition law. This is to ensure that exemptions are not inappropriately granted that they authorise insufficiently justified anti-competitive agreements which in turn may be detrimental to achieving competition objectives and effective cartel enforcement. This is because, as has been explained earlier, more often than not the assessment of exemption applications calls

⁴⁸³ Such as employment, see: Case 26/76 *Metro-SB-Grossmarkte GmbH vs. Commission* (No.1) [1977] ECR 1857, [1978] 2 CMLR 1; reduction of pollution that leads to technological improvement, see *Exxon/Shell* [1994] OJ L144/20.

⁴⁸⁴ Acts under intellectual property rights (Section 21, Antimonopoly Act 1947, Japan); acts of co-operatives (Section 22, Antimonopoly Act 1947, Japan); and resale price maintenance contracts (Section 23, Antimonopoly Act 1947, Japan)

for legal and economic analysis. Even when it concerns European style block exemptions which do not require individual application for exemptions, the regulator has to determine among others; the sectors, industries or type of firms to be exempted; and the type of agreements and their contents which are blacklisted or allowed. All these require implementation by people who are adequately trained.

Exemptions are tied to the finding of infringements under the law by the competition agency. Therefore the workability of the exemptions implementation framework is dependent on the level of competition enforcement in place. In countries which had only recently adopted competition law, enforcement may be gradually implemented⁴⁸⁵ and the focus might not yet be on cartel enforcement⁴⁸⁶. Therefore the number of applications for exemptions may likely be lower as compared to more mature competition jurisdictions⁴⁸⁷. Hence, in the early days of competition law implementation when cartel enforcement provisions are yet to be fully enforced, the competition agencies ought to focus on block exemptions or conditions for the eligibility of

⁴⁸⁵ Malaysia's competition law is being gradually implemented from early 2011. This was outlined by the Minister of Domestic Trade, Co-operatives and Consumerism in his speech to the *Dewan Rakyat* (House of Representatives), Malaysian Parliament on 20 April 2010, Hansard Report (Malay version), pp.151-152. The Competition Act 2010 has been gradually implemented from early 2011. At the time of writing, the MyCC has only been engaging in consultation, awareness and advocacy programmes and enforcement of blatant price fixing reactively based on a soft approach. See respectively: MyCC website at http://www.mycc.gov.my/234_179_179/Web/WebEvent/Events/Upcoming-Events.html accessed on 27/3/2012; and The Malaysian Reserve, 'MyCC Issues 1st Proposed Decision' Against Price Fixing' (25 October 2012) at http://themalaysianreserve.com/main/index.php?option=com_content&view=article&id=2396:mycc-issues-1st-proposed-decision-against-price-fixing&catid=36:corporate-malaysia&Itemid=120 accessed on 26/10/2012

⁴⁸⁶ Refer to the South African experience in cartel enforcement in Chapter 3 of this thesis. The South African Competition Commission initially concentrated on mergers in the first five (5) years of competition law implementation and they applied a reactive approach in cartel enforcement during that period.

⁴⁸⁷ Khemani, R.S., 'Application of Competition Law: Exemptions and Exceptions', UNCTAD (2002), UNCTAD/DITC/CLP/Misc.25, p.11 available at http://www.unctad.org/EN/docs/ditccplmisc25_en.pdf

exemptions for sector or industrial wide exemptions. This is because once anti-competitive cartels provisions are fully enforced, then the competition agencies would also have to focus on individual exemptions⁴⁸⁸ which require case by case legal and economic assessments. Once the competition law is fully implemented, the granting of exemptions also require monitoring of the exempted firms or industries to ensure that the conditions attached to the granting of the exemptions are adhered to or fulfilled. Any breaches of the conditions ought to be sanctioned accordingly. Without competition law enforcement, exemptions cannot be appropriately implemented and inappropriate implementation of exemptions would not facilitate effective cartel enforcement.

4.4. ARTICLE 101 TFEU AND THE EXEMPTIONS PROVISIONS UNDER THE COMPETITION ACT 2010: SIMILARITIES AND DIFFERENCES

Before the discussion proceeds to the elements which ought to be included in the Malaysian exemptions implementation framework, the main similarities and differences between the EU law and Malaysian law should be examined and appreciated in order to assess whether the EU style exemption mechanism could accommodate developmental objectives and become workable to be implemented by the MyCC in Malaysia. Additionally, it would also facilitate the identification of necessary elements in the Malaysian exemption implementation framework.

⁴⁸⁸ For jurisdictions with European style exemption provisions such as Malaysia.

The similarities between the Malaysian legislative provisions on exemptions under the Competition Act 2010 and Article 101 TFEU are: 1) Section 4 of the Competition Act 2010⁴⁸⁹ which provide for agreements prohibited under the Competition Act 2010 are similarly worded to that of Article 101 (1) TFEU⁴⁹⁰; 2) Section 5 of the Competition Act 2010⁴⁹¹ which provides for the broad conditions for exemptions under the Competition

⁴⁸⁹ *Section 4, Competition Act 2010 – Prohibited Horizontal and Vertical Agreement*

- (1) *A horizontal or vertical agreement between enterprises is prohibited insofar as the agreement has the object or effect of significantly preventing, restricting or distorting competition in any market for goods or services.*
- (2) *Without prejudice to the generality of subsection (1), a horizontal agreement between enterprises which has the object to—*
- (a) fix, directly or indirectly, a purchase or selling price or any other trading conditions;*
 - (b) share market or sources of supply;*
 - (c) limit or control—*
 - (i) production;*
 - (ii) market outlets or market access;*
 - (iii) technical or technological development; or*
 - (iv) investment; or*
 - (d) perform an act of bid rigging,*

is deemed to have the object of significantly preventing, restricting, or distorting competition in any market for goods or services.

- (3) *Any enterprise which is a party to an agreement which is prohibited under this section shall be liable for infringement of the prohibition.*

⁴⁹⁰ *Art. 101 (1) TFEU*

The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and tacit collusion 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.*

⁴⁹¹ *Section 5, Competition Act 2010 - Relief of liability*

Notwithstanding section 4, an enterprise which is a party to an agreement may relieve its liability for the infringement of the prohibition under section 4 based on the following reasons:

- (a) there are significant identifiable technological, efficiency or social benefits directly arising from the agreement;*
- (b) the benefits could not reasonably have been provided by the parties to the agreement without the agreement having the effect of preventing, restricting or distorting competition;*

Act 2010 is similar to the broad conditions⁴⁹² for exemptions stipulated under Article 101 (3) TFEU⁴⁹³; and 3) both EU competition law under the TFEU and the Competition Act 2010 provide for individual and block exemptions. As such, it is submitted that there is a requirement for a two-tier assessment under the Competition Act 2010, Malaysia. However, there is no direct application of the provisions on exemptions. There is a requirement for a two-tier assessment in the granting of exemptions based on Section 5, Competition Act 2010 because application for exemptions is dependent on the finding of a prohibition under Section 4, Competition Act 2010. Agreements which are not deemed as prohibited under Section 4 of the Competition Act 2010 are not eligible to apply for exemptions under the Competition Act 2010. This is similar to the relationship between Article 101 (1) TFEU and Article 101 (3) TFEU. However, the difference between the Malaysian law and EU law is that the provisions on prohibited agreements and the provisions for exemptions are separated under different sections. Therefore, although a prohibition under Section 4, Competition Act 2010 qualifies it to be

*(c) the detrimental effect of the agreement on competition is proportionate to the benefits provided; and
(d) the agreement does not allow the enterprise concerned to eliminate competition completely in respect of a substantial part of the goods or services.*

⁴⁹² Under Section 5 Competition Act 2010, Malaysia, the broad conditions on exemptions are: 1) technological, efficiency and social benefits, 2) indispensability of the restriction, 3) pro and anti-competitive effects are proportionate, 4) no complete elimination of competition. While under Article 101 (3) TFEU, the broad conditions for exemption are: 1) efficiency gains, 2) fair share for consumers, 3) indispensability of the restriction, and 4) no elimination of competition.

⁴⁹³ *Article 101 (3) TFEU*

The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

- *any agreement or category of agreements between undertakings;*
- *any decision or category of decisions by associations of undertakings;*
- *any concerted practice or category of tacit collusion,*

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.

considered for exemption under Section 5, Competition Act 2010; the firms involved have a choice in whether to proceed with applying for exemptions or to just accept the prohibition without applying for exemption. This illustrates that there is no direct application of exemptions provisions on prohibited agreements. This is akin to the EU exemption mechanism before the implementation of the Modernisation Regulation in 2004.

Nevertheless, a relevant point needs to be highlighted in this regard. It may be argued that in Malaysia, that there is a sort of direct application in instances when firms pre-emptively apply for exemption without having been uncovered as involving in anti-competitive infringements in the first place⁴⁹⁴. In such cases, based on provisions of the Competition Act 2010, the author is of the opinion that the MyCC would initially still need to assess whether the activities in question are anti-competitive infringements by virtue of Section 4, Competition Act 2010. However, the assessment of the exemption application may directly be done immediately after since the application has been submitted.

Under the EU exemption mechanism, Article 101 TFEU⁴⁹⁵ is directly applicable⁴⁹⁶. This is so because after the agreement is ruled as restrictive of competition, the burden of

⁴⁹⁴ Four (4) firms in the Malaysian logistics; insurance; and food industries had pre-emptively applied for exemptions from the MyCC; see The Star online, Malaysia website at <http://biz.thestar.com.my/news/story.asp?file=/2012/4/26/business/11176730&sec=business> accessed 4 March 2013.

⁴⁹⁵ In discussing EU law on exemptions, Article 101 TFEU ought to be examined as a whole because the granting of exemptions under 101 (3) TFEU is connected to Article 101 (1) TFEU. Exemptions under

proof immediately falls on the firm involved to prove that the agreement qualifies for an exemption under 101 (3) TFEU) and there is no need for the firm to apply for an individual exemption separately because the applicability of Article 101 (3) TFEU is automatic⁴⁹⁷. If the competition agency finds that the gains outweigh the anti-competitive effect of the agreement, then the firm benefits from an exception to the competition rules. The granting of exemptions under EU law calls for a two-tier assessment involving both legal and economic approach. The assessment under Article 101 (1) TFEU is concerned with allocative efficiency and accounts for presumed, actual and like anti-competitive effects of the restraint. Whilst the economics based US like rule of reason assessment of the pro and anti-competitive effects of the agreement is carried out under Article 101 (3), which renders the focus of the assessment on productive and dynamic efficiency⁴⁹⁸.

Thus, in the case of Malaysia, the issue which would likely arise is also pertaining to the approach to be adopted in the assessments of agreements under Section 4, Competition Act 2010 and application for exemptions under Section 5, Competition Act 2010, particularly because there is no direct application of the provisions on exemptions. If the weighing of the pro and anti-competitive effect of the agreement is to

Article 101 (3) cannot be utilised unless the agreement is deemed as restrictive under Article 101 (1) TFEU.

⁴⁹⁶ Regulation (EC) No.1/2003 ceases the monopoly of the Commission in granting exemptions under Article 101 (3) TFEU (ex- Article 81(3) EC) and decentralises the power to NCAs with effect from 1 May 2004.

⁴⁹⁷ Before the implementation of Regulation (EC) No.1/2003, the firms involved would have to apply for individual exemption with the Commission.

⁴⁹⁸ For an in depth discussion on the debate on the economic approach to be implemented in the assessment of cases under Article 101 TFEU, see Jones, A. and Sufrin, B., *EC Competition Law: Text, Cases, and Materials*, Third Edition (2008), Oxford University Press, pp. 206-269

be conducted under Section 4, then it would be redundant to repeat it in assessing the exemptions application for the same agreement if it is found to be restrictive of competition. However, if the weighing is only to be conducted in assessing the exemption application, then there is a possibility that a restrictive agreement with efficiency gains may be prohibited because the firm in question have a choice in applying for exemptions or otherwise under the Competition Act 2010 as there is no direct application of Section 5, Competition Act 2010 in cases of Section 4, Competition Act 2010 infringement.

This issue would not arise in considering horizontal agreements which have been stipulated as having the object of restricting competition because in such cases there is no need to assess their effect. However, the issue is more related to agreements where their effect would have to be assessed. This issue would need to be clarified by the MyCC and confirmed by the courts because it involves the interpretation of a legislative provision. If the weighing of the pro and anti-competitive effects is to be conducted under Section 4 of the Competition Act 2010, then it risks the possibility that the assessments to be made for exemptions under Section 5 will be more focused on broader policy considerations. This is not desirable because exemptions is not a privilege to be lightly granted merely based on broader policy considerations but to be coupled with economic considerations based on dynamic efficiency goals unless it is integral to the social acceptance of competition policy and law and may disintegrate the

social fabric of the country if they are unaccounted for⁴⁹⁹. Moreover, any broader policy considerations which are not connected to efficiency gains but pertinent to the acceptance and workability of competition policy and law in Malaysia could be excluded based on the Minister's discretion under Section 13 of the Competition Act 2010. A possible solution to this may require different treatments between agreements which object restricts competition and those which are restrictive as to their effect. The weighing of the pro and anti-competitive benefits of agreements with restrictive object could be conducted under Section 5 of the Competition Act 2010 whilst the pro and anti-competitive effects of agreements being assessed on their effect could be conducted under Section 4 of the Competition Act 2010 itself. Any applications for exemption of agreements with restrictive effect should be confined to broader public policy considerations which have potential gains to efficiency⁵⁰⁰ and development.

The next difference is that under the Section 4 (2) of the Competition Act 2010, certain types of horizontal agreements are expressly recognised as having the object of restricting competition. Mostly they are hard core cartel agreements, i.e. price fixing, market allocation, production limitation and bid rigging. Limitation of investment or technical or technological developments are also included. Such so called *per se* rules are easier to be implemented especially for young competition agencies such as

⁴⁹⁹ Gal, M.S., 'The Ecology of Antitrust Pre-conditions for Competition Law Enforcement in Developing Countries', in *Competition, Competitiveness and Development: Lessons from Developing Countries*, United Nations Publication (2004), UNCTAD/ DITC/CLP/2004/1, p. 28 available at http://www.unctad.org/en/docs/ditcclp20041ch1_en.pdf

⁵⁰⁰ This is one of the possible ways of reconciling Article 101 (1) TFEU and Article 101 (3) TFEU as discussed by Jones and Sufrin. See Jones, A. and Sufrin, B., *EC Competition Law: Text, Cases, and Materials*, Third Edition (2008), Oxford University Press, pp. 206-207

Malaysia because once the object of the agreement is proven to be of the type which are deemed restricting of competition, then there is no need for any assessment on its effect to be made. Then next step in terms of exemptions is for the firm to apply for one and for the MyCC to assess in terms of its pro and anti-competitive benefits. Under EU law, the determination of whether an agreement has as its object, restriction of competition is guided by case laws and parameters which are explained under the relevant guidelines. Malaysia therefore has taken the shorter route by expressly determining them under the law. This approach is arguably better for Malaysia because case laws take time to be settled.

The fact that Section 4 (2), Competition Act 2010 has expressly declared certain types of horizontal agreements as having the object to restrict competition indicates that Malaysia is serious in their efforts to prevent anti-competitive cartel arrangements by rendering hard core cartel infringements such as price fixing; market allocation; and bid rigging as easier to prove infringements in the sense that once such conducts are proven, they could be prohibited without having to consider the anti-competitive effects. However, the existence of Section 5, Competition Act 2010 in theory means that even hard core anti-competitive cartel agreements such as price fixing, market allocation and bid rigging agreements could be exempted, just like under EU law. Therefore, block exemptions on the type of horizontal agreements which are prohibited or allowed has to be in place before cartel enforcement is fully implemented. This is to ensure that only horizontal agreements with gains are exempted.

The other difference is that there is a single market dimension in the EU law - only agreements which appreciably affect trade between member states are subject to Article 101 TFEU. Therefore, the *de minimis* rule applies in this instance. Under the Competition Act 2010, for the moment, it cannot be claimed with certainty that there would no requirement for the *de minimis* rule to be applied in case of exemptions. This is because under Section 4, Competition Act 2010, there is a requirement for the agreement to be significantly, preventing, limiting or distorting competition in the market. The meaning of significantly is yet to be provided for. Although the *de minimis* rule to be applied in Malaysia would not be involving the element of “trade between states” like the EU *de minimis* rule; it is foreseeable that there will be a need for the *de minimis* rule to be applied due to the provisions of Section 4, albeit based on a different benchmark. If agreements do not significantly restrict competition, there is no justification to prohibit them. Only agreements which have been prohibited under Section 4, Competition Act 2010 are eligible to be considered for exemptions. Therefore, there is a need for Malaysia to determine the meaning of “significantly, preventing, limiting or distorting competition in the market”.

After discussing the main similarities and differences between the Malaysian and EU law on exemptions, the question now is, “Could the exemption provisions under the Competition Act 2010 which is based on Article 101 TFEU accommodate development objectives and fairness considerations?” This is a relevant question to be addressed because it involves adoption of legislative provisions of a jurisdiction which is not at

similar levels of development. The answer is yes, it is possible. However, the differences between the provisions in EU and Malaysian law need to be accounted for by Malaysia in the implementation of exemptions under the Competition Act 2010. Malaysia has to note that one of the main features of EU law is the single market dimension; that the pre-modernisation EU exemption mechanism would be more relevant to be referred to by Malaysia in regard to the two tier assessment of exemptions; and that the EU competition authorities are better resourced and more experienced as compared to the MyCC.

Nevertheless, it is possible to implement an EU style exemption in Malaysia because the EU competition jurisprudence and exemption mechanism are not solely based on efficiency and consumer welfare but it is able to accommodate non-efficiency considerations through the balancing of pro and anti-competitive benefits. This is relevant to developing countries such as Malaysia because competition law in developing countries should not be implemented based on purely competition objectives⁵⁰¹ and one of the objectives of the Competition Act 2010 is promotion of economic development⁵⁰². Socio-economic factors have been considered by the Commission and European Courts in making assessments under Article 101 (3) TFEU in the past. These include employment⁵⁰³, job creation and bringing in foreign

⁵⁰¹ Gal, M.S., 'The Ecology of Antitrust: Preconditions for Competition law Enforcement in Developing Countries', *Competition, Competitiveness and Development : Lessons from Developing Countries*, United Nations Publication (2004), p. 27

⁵⁰² See Preamble, Competition Act 2010

⁵⁰³ Case 26/76 *Metro-SB-Grossmarkte GmbH vs. Commission* (No.1) [1977] ECR 1857, [1978] 2 CMLR 1.

investment to a poor region⁵⁰⁴ and reduction of pollution that leads to technological improvement⁵⁰⁵. The caveat is that the other conditions under Article 101 (3) would also have to be met before exemption is granted. In this regard, under the Malaysian competition law provision on exemptions, social benefits have been included as one of the conditions which may qualify for exemptions. This is an example of an adaptation which has been made by Malaysia in regard to its adoption of EU style exemption provisions under the Competition Act 2010.

4.5. A WORKABLE EXEMPTIONS IMPLEMENTATION FRAMEWORK FOR MALAYSIA

The elements which are recommended to be included in the Malaysian implementation framework on exemptions are: regulatory instruments which aid and guide the granting of exemption; safeguards pertaining to the independence of the MyCC; the establishment of a coordination and consultancy committee; and prioritisation policy pertaining to cartel enforcement.

There are various regulations, guidelines and precedents in assisting the Commission and national competition authorities (NCAs)⁵⁰⁶ in assessing applications for exemptions under Article 101 (3) TFEU. Likewise, before the MyCC could exercise its powers to

⁵⁰⁴ *Ford/ Volkswagen* [1993] OJ L20/14, [1993] 5 CMLR 617.

⁵⁰⁵ *Exxon/ Shell* [1994] OJ L144/20

⁵⁰⁶ Regulation (EC) No.1/2003 ceases the monopoly of the Commission in granting exemptions under Article 101 (3) TFEU (ex- Article 81(3) EC) and decentralises the power to NCAs with effect from 1 May 2004.

exempt under the law, similar regulatory instruments would also have to be in place as guidance in granting exemptions. Among the guidelines which ought to be in place are on: the implementation of Section 4 of the Competition Act 2010; the implementation of the granting of individual and block exemptions; and the assessment of exemption applications under Section 5 of the Competition Act 2010. The regulations which ought to be in place include on block exemptions on horizontal agreements and vertical agreements.

In formulating the guidelines and regulations, those of the EU may be referred to. However, adaptations would have to be made in line with Malaysia's level of institutional and economic development. It is submitted that the guidelines and regulations would be useful not only to the MyCC officials in their assessments of exemptions application but also that they would help to provide clarity to the industry and firms pertaining to the do's and don'ts with regard to their horizontal agreements. These guidelines and regulations should include:

- i) the approaches to be implemented in carrying out assessments to determine whether an agreement is restricting of competition and in assessing the pro and anti-competitive effect of the agreement in regard to the granting of exemptions. In this regard, it is recommended that Malaysia opts for an economic approach rather than a formalistic one to ensure that efficiency gains of anti-competitive agreements are accounted for. Additionally, it ought to be determined at which

At the juncture should the weighing of the pro and anti-competitive effects of agreements be conducted – at the point of assessing the restrictive object and effect or at the point of assessing the application for exemption? This is because of the fact that there is no direct application of the exemption provisions under the Competition Act 2010, unlike under Article 101 TFEU. Hence, it is recommended that the weighing of the pro and anti-competitive benefits of agreements with restrictive object to be conducted under Section 5, Competition Act 2010 whilst the weighing of the pro and anti-competitive effects for agreements being assessed for their effect is to be conducted under Section 4, Competition Act 2010 itself. Any applications for exemption of agreements with restrictive effect should be confined to broader public policy considerations which have potential gains to efficiency, consumer welfare and development. Regardless of the assessment approach to be decided upon by the MyCC, in order to facilitate the decision making process, the aspects which ought to be accounted for in making the assessments should be stipulated;

- ii) determining whether there is a need for a *de minimis* rule to be applied in terms of agreements which significantly restrict, limit or prevent competition. If so, then the factors to be accounted for in the *de minimis rule* have to be provided for. This rule would indeed be useful when the Competition Act 2010 is fully enforced and the volume of application for exemptions increases; and

iii) the types of horizontal agreements to be allowed and prohibited particularly those which have been prohibited “*per se*” by virtue of Section 4, Competition Act 2010 but may have gains which could offset the anti-competitive effect. This is because in theory, even hard core anti-competitive cartel agreement such as bid rigging and price fixing which have been prohibited “*per se*” under Section 4, Competition Act 2010, may be granted exemptions. Due to the lack of experience and knowledge of young competition authorities such as MyCC in implementing exemptions particularly in making assessments, it would facilitate the implementation process if the form and content of such agreements which may be exempted are provided for in the form of guidelines or regulations. Additionally, under Section 4, Competition Act 2010, horizontal agreements which limit technology or technological development or investment have been prohibited “*per se*” as being deemed as having an object of significantly restricting competition. However, research and development agreements, technology sharing agreements are the common types of horizontal agreements which are exempted in some jurisdictions⁵⁰⁷ due to their efficiency gains which encourage growth through investments and innovations. Therefore to facilitate the granting of exemptions in regard to such agreements, it would be prudent to spell out the terms and conditions in such agreements which may and may not be exempted in the form of block exemptions.

⁵⁰⁷ For example, the EU regulation on block exemption for research and development, Commission Regulation (EU) No 1217/2010, OJ L335/36 (18.12.10)

The prerequisite for applying for individual exemption under Section 6, Competition Act 2010 is that the agreement in question has been deemed as prohibited under Section 4, Competition Act 2010. Therefore, the granting of exemptions under Section 6 shall be affected by the volume of prohibitions decided by the MyCC under Section 4. In the early days of leading up to the full enforcement of cartel regulation under the Competition Act 2010, the focus should be not only to advocacy and awareness programmes but also to the formulation of the implementation guidelines and regulations including those on block exemptions. By the time of full enforcement of the law, all the said statutory instruments would have to be in place lest business opportunities are lost due to the inefficiency and unpreparedness of the MyCC.

For purposes of independence and establishing the credibility of the MyCC, it is insufficient for decisions made by the MyCC to be published and explained⁵⁰⁸ in order to demonstrate transparency. Independence and credibility also requires disassociation from political figures and industrial lobbyists who seek to influence economic policy decision making in their favour. In this regard, the appointment of key officials in MyCC must be transparently made and there should also be mechanisms and safeguards in ensuring the independence of MyCC. The appointment of the Commissioners is by the Prime Minister based on the recommendation of the Minister⁵⁰⁹. There is a possibility that the individuals appointed are not solely based on merit but also their political

⁵⁰⁸ Publication of decisions in granting individual exemptions and block exemptions are provided for respectively under Section 6 (2) and Section 9 Competition Act 2010, Malaysia.

⁵⁰⁹ Section 5, Competition Commission Act 2010, Malaysia.

affiliations and also close relationship with those in power. Therefore, in order to overcome this perception, the appointment of those with political affiliations or enjoy close relationships with the decision makers ought to be avoided. This includes refraining from appointing serving members of parliament and figures affiliated with firms which enjoy political patronage⁵¹⁰.

The position of the MyCC is also a factor which influences its independence. The MyCC has been created as an agency under the Ministry of Domestic Trade, Consumerism and Cooperatives. It is submitted that subjecting the MyCC to the jurisdiction of a Ministry whose responsibilities are limited to certain areas and not across all economic activity may become a challenge for the MyCC in carrying out its function especially when dealing with Ministries which are considered to be more senior in terms of jurisdiction and ministerial ranking, because competition law and policy apply across all industries. These include Ministries such as the Ministry of International Trade and Industry (MITI), Ministry of Agriculture and Agro-Based Industry, Ministry of Plantation Industries and Commodities and the Economic Planning Unit; among others. All these government agencies are responsible in one way or another in industrial and trade policy making. On top of these Ministries, there are also sectoral agencies and regulators to contend with. Hence, it is submitted that the present organisational structure is open to the risk of competition policy being unnecessarily made subservient

⁵¹⁰ Although Section 8, Competition Commission Act 2010, Malaysia provides that the Chairman and Commissioners shall not hold any other office without prior approval of the Minister, the discretion to act upon this provisions vests in the Minister. Moreover, it is not unheard of in Malaysia for serving Members of Parliament and active members of the ruling party to be appointed as board members of sectoral regulators such as the Commercial Vehicle Licensing Board.

to industrial policy. It would have been more ideal for the MyCC to be created as an agency under the Prime Minister's Department or a central agency because it would overcome issues related to remit and seniority. Another possible but perhaps more ambitious alternative is for the Chairman of the MyCC to be accorded the rank of Minister⁵¹¹, thus conferring the MyCC the same rank as a Ministry.

In cases of overlap of jurisdiction particularly with sectoral regulators, there should be a coordination mechanism in place to address any overlapping issues lest they become obstacles in the implementation of exemptions. In this regard, the South African Competition Commission overcame such obstacles by entering into memorandum of understandings (MoUs) with the relevant sectoral regulators⁵¹². However, Section 3, Competition Act 2010 provides that the Competition Act 2010 does not apply to the communications and multimedia sector and the energy which are governed by their own sectoral legislation which are in turn administered by their respective sectoral regulators. These are listed in the First Schedule of the Competition Act 2010. The Minister has the discretion to amend the First Schedule. These two sectors have been

⁵¹¹ According the Chairman of the Japan Fair Trade Commission with a Cabinet rank facilitates enforcement of competition and policy in Japan in regard to remit and also seniority of agency. Based on the discussion with Japan Fair Trade Commission officials during the author's participation in the JICA Antimonopoly Act and Competition Policy Course (30 August – 28 September 2000), Tokyo, Japan. This suggestion is also in line with Gal's argument that a political anchor or godfather for competition law would be useful to reduce the influence of pressure groups which are anti-competition law in developing countries. See Gal, M.S., 'The Ecology of Antitrust Pre-conditions for Competition Law Enforcement in Developing Countries', in *Competition, Competitiveness and Development: Lessons from Developing Countries*, United Nations Publication (2004), UNCTAD/ DITC/CLP/2004/1, p.33 at http://www.unctad.org/en/docs/ditcclp20041ch1_en.pdf

⁵¹² Currently, there are four such MoUs which has been entered into between the South African Competition Commission and sectoral regulators. See Competition Commission South Africa website at <http://www.compcom.co.za/mou/> accessed on 27/3/2012.

excluded due to the existence of competition dimension in their respective sectoral laws which have existed prior to the enactment of the Competition Act 2010, although to date, active enforcement of the competition dimension by the sectoral regulators remains to be seen. Hopefully other sectors would not be excluded from the purview of the Competition Act 2010 in the future just because of the existence of competition dimension in their respective sectoral regulations. Otherwise, it may create different standards in competition law enforcement in Malaysia and any loopholes may be taken advantage of by cartels. In such cases it would be better to follow the example of South Africa because the MoUs do not exclude the application of competition law altogether but it provides a coordinated way in which to handle issues of concurrent jurisdictions.

It is also important for Malaysia to take note of the fact that there is yet to be any suitable economic model which could be utilised in the weighing of non-competition considerations which are based on equity against competition considerations based on economic considerations such as efficiency and consumer welfare⁵¹³. Without a suitable model, there is a risk that exemptions based on equity such as the empowerment of *Bumiputeras* in the economy or promotion of national champions could be inappropriately granted or even abused. Thus, it would be relevant for the Malaysian

⁵¹³ As identified by research on assessment of the public interest dimension under the South African competition law which include: Hodge, J. *et al*, 'Public Interest Provisions in The South African Competition Act- A Critical Review', Competition Policy, Law and Economics Conference (2009); and Boshoff, W. *et al*, 'The Economics Of Public Interest Provisions In South African Competition Policy', Sixth Annual Competition Law, Economics and Policy Conference, South Africa (2012) at <http://www.compcom.co.za/assets/Uploads/events/Sixth-Annual-Competition-Law-Economics-and-Policy-Conference-in-South-Africa-2012/NewFolder-3/The-economics-of-public-interest-provisions-in-South-African-competition-policy.pdf>

competition authorities to conduct an economic study on formulating such an economic model lest exemptions based on equity considerations such as significant and identifiable social benefit as stipulated under Section 5 (a), Competition Act 2010, Malaysia are not granted based on erroneous principles which in turn could lead to misallocation of resources and inefficiency.

4.6. CONCLUSION

Exemptions are relevant not only to developing countries but also developed countries. The difference is that for developed countries or countries with mature competition regimes, exemptions granted may have been lessened over time due to regulatory reform⁵¹⁴ or they may require more in depth and sophisticated form of assessment in line with their advanced development status, business innovations, maturity of competition agencies and stronger competition culture. The granting of exemptions does not weaken competition law provided they are based on sound economic justifications. Hence, exemptions may strengthen competition law by accommodating not only efficiency goals but also relevant broader public policy objectives which may result in efficiency outcomes or facilitate the acceptance of competition policy and law

⁵¹⁴ Like in the case of Japan - In 1998, the number of exemptions granted in Japan was greatly reduced by ninety (90) per cent from more than 1000 previously exempted from the provisions of the Anti-Monopoly Act 1947 via various laws and administrative guidance cartels as authorised by the Japanese Ministry of International Trade and Industry. See Jacobs, S.H., *Regulatory Reform in Japan*, OECD (1999), p.216. From 2003, only three types of exemptions remain under the Anti-monopoly Act 1947 as a result of the revision of the law exercised in 1999-2000, namely: acts under intellectual property rights, acts of cooperatives and resale price maintenance contracts. See Takahashi, I., 'Anti-Monopoly Act Exemptions in Japan', the Specific Workshop between the Drafting Committee on Competition Law of Vietnam and the Japan Fair Trade Commission, JFTC (2003), p.1-2 and 8-9 at <http://www.jftc.go.jp/eacpf/05/hanoiTaka.pdf>

particularly in developing countries which lack competition culture. As such, exemption is a useful tool for ensuring the achievement of developmental objectives under competition law. The factors which influence proper implementation of exemptions in developing countries are: development oriented goals, transparency and institutional limitations. The point highlighted here is that the number of exemptions granted or the fact that exemptions are provided for under the law should not be the sole focus in assessing whether exemptions have “weakened” the law but the emphasis should be on whether the exemptions were based on sound justifications.

This work also explains how EU style exemption provisions may be made workable in Malaysia. Despite the fact that Malaysia modelled its exemption provisions on that of the EU, this discussion has illustrated that it is possible to make it workable based on the fact that it can accommodate development and fairness considerations. However, in order to make the EU style legislative provisions become implementable, certain adjustments have been made in the exemption provisions under the Competition Act 2010 and these need to be complemented by the relevant regulatory tools as discussed. The EU experience and jurisprudence in the granting of exemptions are useful guidance in determining the areas which ought to be focused on in determining a workable exemptions implementation framework in Malaysia. Additionally, if Malaysia were to adopt an economic approach in the granting of exemptions, in theory, even hard core cartel agreements may qualify for an exemption so long as the gains outweigh the anti-competitive effect. This feature is indeed useful for developing countries such as

Malaysia because sometimes cartel arrangements have the potential to contribute to economic growth particularly in terms of agreements on innovations and investments.

This work submits that the necessary elements which ought to be included in the implementation framework for the granting of exemptions in Malaysia are: regulatory instruments which aid and guide the granting of exemption; safeguards pertaining to the independence of the MyCC; the establishment of a coordination and consultancy committee; prioritisation framework pertaining to exemptions; and an appropriate economic model for the assessment of exemptions. All these pertain to the clarification of the implementation of the granting of exemptions in Malaysia, addressing the loopholes in the legislative provisions through complementary legislative instruments and transparency.

Future work which is very relevant and should be immediately considered is on a suitable economic model for the assessment in the granting of exemptions which could accommodate the weighing of non-competition considerations that are based on equity against competition considerations based on economic considerations such as efficiency and consumer welfare.

CHAPTER 5:

LIMITATIONS OF THE COMPETITION ACT 2010 IN LIGHT OF TOUGHER CARTEL ENFORCEMENT – FOCUS ON TACIT COLLUSION

5.1. INTRODUCTION

For the moment, the Malaysian Competition Commission (MyCC) is implementing a “soft approach” in cartel enforcement whereby the focus is remedial action as opposed to deterrence and also emphasis on competition advocacy and awareness⁵¹⁵. This may be observed from the first proposed decision by the MyCC against price fixing by the *Cameron Highlands Floriculturist Association* where the MyCC’s proposed decision emphasises on remedial measures in order to encourage business compliance instead of imposition of fines. This is not surprising considering Malaysia is still in the nascent stage of competition law enforcement. Furthermore, the rationale for the soft approach is to provide a ‘grace period’ for businesses to put their operations in order in accordance to the provisions of the Competition Act 2010; also to inculcate and promote a competition culture in Malaysia; and provide time for the MyCC to prepare for tougher cartel enforcement. Once businesses are familiar with the requirement of the Competition Act 2010; adequate public awareness of the workings and benefits of competition law has been instilled; and the MyCC is ready to implement cartel

⁵¹⁵ See: The Malaysian Reserve, ‘MyCC Issues 1st ‘Proposed Decision’ Against Price Fixing’ (25 October 2012) at http://themalaysianreserve.com/main/index.php?option=com_content&view=article&id=2396:mycc-issues-1st-proposed-decision-against-price-fixing&catid=36:corporate-malaysia&Itemid=120 accessed on 26/10/ 2012

enforcement on a par with the standards enforced internationally, tougher cartel enforcement would have to be implemented. Otherwise, effective cartel enforcement and promotion of competition in Malaysia could not be facilitated.

Tougher cartel enforcement refers to stricter cartel enforcement. It includes any form of change in cartel enforcement which brings about higher risk of detection of cartels and renders cartel set-up more difficult and costlier to maintain. This may be inferred from the findings by Evenett, Levenstein and Suslow⁵¹⁶ which explained that the wave of mergers and joint ventures between international cartel members in 1990's was due to the introduction and revision of leniency programmes in several jurisdictions, bilateral cooperations between selected jurisdictions in cross-border cartel enforcement and more focus on international cartel enforcement by the global fraternity, namely through the OECD. Therefore, in the context of young competition jurisdictions which are opting for gradual enforcement of competition law (such as Malaysia), tougher cartel enforcement would also include the change in cartel enforcement strategy from a "soft approach" which emphasises on remedial action and competition advocacy and awareness to a pro-active approach which aims for deterrence; once the competition agency acquires sufficient capacity and competency to enable pro-active cartel enforcement.

⁵¹⁶ Evenett, S.J. *et al*, 'International Cartel Enforcement: Lessons from the 1990's', *The World Economy* Vol.24 Issue 9 (2001) 1221-1245

Literature suggests that tougher cartel enforcement may either lead cartels to: merge; go further underground to avoid detection; or dissolve – depending on the costs, risks, efficiency factors and practicality factors⁵¹⁷. This is not surprising because survival of businesses is very much dependent on their ability to evolve and also innovations in business practices. The focus of this chapter is on cartels which opt to merge and thereafter evolve into tacit collusion in a more concentrated market. Tacit collusion occurs when the market outcome resembles that of an explicit collusion or even a formal cartel⁵¹⁸. In this regard, the characteristic of oligopolistic markets facilitate tacit collusion because there is no explicit agreement involved between the firms but through their interdependence, they align their conducts which maximises their profits⁵¹⁹. Therefore, the premise of this work is to determine whether available empirical evidence points to the possibility that there are markets in Malaysia where tacit collusion becomes more feasible due to changes in the market structure through mergers in light of tougher cartel enforcement. If it is so, then, the next question is whether they could be of significant concern to Malaysia? In a nutshell, what is being asked in this chapter is: if hard core cartel behaviour could be effectively remedied through cartel enforcement, will this actually solve the problem or will the firms be able to continue coordinating their behaviour tacitly, possibly after some appropriate market restructuring

⁵¹⁷ For detailed discussion on these factors based on the findings of the relevant literature see Mehra, P., 'Choice Between Cartels and Horizontal Merger', (2007), p.8 at <http://ssrn.com/abstract=1081844> or <http://dx.doi.org/10.2139/ssrn.1081844>

⁵¹⁸ Ivaldi, M. *et al*, *The Economics of Tacit collusion*, Final Report for DG Competition European Commission (March 2003), p.4

⁵¹⁹ Jones, A. and Sufrin, B., *EU Competition Law; Text, Cases and Materials*, Fourth Edition (2011), Oxford University Press, p. 784

using mergers? In other words, the apparent victory over hard-core cartels may be false in that the problem with higher price has not gone away, but the means through which the firms achieve this have changed. These are discussed from the Malaysian perspective where merger control is not under the remit of the Competition Act 2010; and the fact that the Malaysian merger control regulation, namely the Code on Takeovers and Mergers 2010 is without a competition dimension. Thus the research questions being asked in this chapter are: 1) how could tougher cartel enforcement bring about the problem of tacit collusion through mergers of firms?; 2) would the current provisions of the Competition Act 2010 be adequate to address tacit collusion?; and 3) how best to address tacit collusion which becomes more feasible due to mergers in light of tougher cartel enforcement in Malaysia?

The first research question is explained in terms of the findings of relevant literature on: observations of significant merger waves which occurred after tougher cartel enforcement was implemented in jurisdictions around the world. The second research question is answered by discussing the theories and concepts of tacit collusion; the lack of competition dimension in Malaysia's merger control regulation and the law's adequacy in dealing with tacit collusion which arises as a result of mergers in light of tougher cartel enforcement. In this regard, significant reference is made to EU provisions dealing with tacit collusion. This is because Malaysia's competition law is "EU

style” whereby the law prohibits concerted practices⁵²⁰ and collective abuse of dominance⁵²¹. The third research question is answered by discussing the state of market structure in Malaysia against the adequacy of the current provisions under the Competition Act 2010.

The motivation of the research is based on the fact that Malaysia is among the new competition jurisdictions which have opted not to include competition dimension in its merger control regulation. Thus, the author is of the opinion that it is interesting to research into the link between merger control and cartel enforcement in a developing country setting. This particularly based on the argument that markets in developing countries tend to be highly concentrated due to high barriers to entry, less efficient capital market, cronyism and political patronage⁵²². In terms of market environment in developing countries, there is a trend towards an increase in industrial concentration⁵²³. So, it is a valid academic interest to assess whether the lack of competition dimension in Malaysia’s merger control would not facilitate effective cartel enforcement in Malaysia.

⁵²⁰ Section 2 Competition Act 2010, Malaysia stipulates that “agreement” in the context of the Competition Act 2010 includes concerted practice; whilst horizontal agreements with the object or effect to significantly distort competition in the market are prohibited by virtue of Section 4, Competition Act 2010.

⁵²¹ Section 10 Competition Act 2010, Malaysia

⁵²² Fox, E.M., ‘In Search of a Competition Law Fit for Developing Countries’, New York University Law and Economics Research Paper No.11-04 (2011), p.9 at SSRN: <http://ssrn.com/abstract=1761619> or <http://dx.doi.org/10.2139/ssrn.1761619>

⁵²³ Whish, R., *Competition Law*, Lexis Nexis, Fifth Edition (2003), p.506

Although Malaysia is still in the nascent stage of competition law enforcement and tougher cartel enforcement is yet to be implemented, the foreseeable outcomes of tougher cartel enforcement is explained by referring to the findings of relevant research in the literature and empirical evidence available thus far. Hence, this work is essentially a theoretical discussion of the anticipated impact of tougher cartel enforcement and the limitations of the current competition legislative framework in dealing with the anticipated issues. The focus of the discussion is on the enforcement of horizontal agreements; therefore in the context of this work, mergers do not refer to vertical mergers. The novelty of this work lies in the fact that the Competition Act 2010 is a fairly new piece of legislation which has yet to be truly tried and tested. Therefore, its adequacy or limitations are yet to be seen. It should be noted that this work does not discuss whether Malaysia needs to include the competition in the country's merger control regulation but it discusses the adequacy of the Competition Act 2010 in dealing with collusions. The author is of the opinion that the question of whether Malaysia needs to include a competition dimension in its merger control regulation could only be adequately answered through economic research.

The discussion in this chapter is arranged as follows: Part 2 explains how tougher cartel enforcement could drive cartels to merge and maintain their supra-competitive profits by coordinating their practices in a more concentrated market and the Malaysian market structure based on empirical findings of available literature. Part 3 explains the theories and concepts of tacit collusion. The adequacy of Malaysia's Competition Act 2010 in

dealing with tacit collusion is discussed in Part 4. Part 5 discusses how best to address tacit collusion which arise out of change in market structure due to mergers in light of tougher cartel enforcement. Proposals and recommendations are discussed in Part 6 before the discussion concludes.

5.2. TOUGHER CARTEL ENFORCEMENT AND BUSINESS ADAPTATION

Tougher cartel enforcement impacts the incentives of the firms to collude by rendering cartels more difficult, costlier and riskier to maintain⁵²⁴. It is more difficult because of cartel enforcement measures which facilitate cartel detection such as leniency programmes which reward cartel members who are willing to “snitch” on fellow cartelists. Therefore, cartel members would have to be more vigilantly monitored and punishment of cheating cartel firms which have strayed from the agreement through mechanisms such as price wars is more difficult to be executed lest it alerts competition officials of the cartel’s existence in the market. These render cartel agreements costlier to maintain because cartels would be forced to adopt more sophisticated mechanisms to avoid detection⁵²⁵. There is also the risk of heavy penalties which would be imposed which in turn would adversely affect their cartel profits. In short, it becomes riskier and costlier to maintain cartel agreements because of increased possibility of detection and credible threat of punishment which comes with tougher cartel enforcement by

⁵²⁴ See: Levenstein, M.C. and Suslow, V.Y., ‘What Determines Cartel Success?’, *Journal of Economic Literature* Vol.44 (1) (March 2006) 43-95

⁵²⁵ Griffin, J.M., ‘An Inside Look at a Cartel at Work: Common Characteristics of International Cartels’, *Fighting Cartels- Why and How?*, Swedish Competition Authority (2001) 29-55 at <http://www.kkv.se/upload/filer/eng/publications/3rdnordic010412.pdf#page=29>

competition agencies with improved competency and capacity in enforcing competition law in the jurisdiction.

The choice of the ensuing course of action to be undertaken by the colluding firms in light of tougher cartel enforcement would be dependent on what is more cost effective; efficient; and practical for the firms⁵²⁶. The findings in the literature suggest that the factors which affect the choice between cartel and merger are not only development of competition law but also: ownership structure; development of financial and capital markets; concentration; entry; economies of scale; and proportion of firms involved in collusion⁵²⁷. In this regard, there are four possible outcomes for cartels, namely; merging; or entering into joint venture agreements which may be used as guises for collusion⁵²⁸; or maintaining the cartel agreement but going “deeper underground” by adopting and investing in mechanisms to avoid detection and prevent cheating by their own members who want to increase their individual profit⁵²⁹; or dissolving the cartel. As mentioned earlier, the focus of this discussion is on cartels which opt to merge to form a market structure better suited for tacit collusion.

⁵²⁶ For detailed discussion on the findings of the relevant literature see Mehra, P., ‘Choice Between Cartels and Horizontal Merger’, (2007), p.8 at SSRN: <http://ssrn.com/abstract=1081844> or <http://dx.doi.org/10.2139/ssrn.1081844>

⁵²⁷ Mehra, P., ‘Choice Between Cartels and Horizontal Merger’, (2007), p.8 at SSRN: <http://ssrn.com/abstract=1081844> or <http://dx.doi.org/10.2139/ssrn.1081844>

⁵²⁸ Based on empirical evidence, Evenett, Levenstein and Suslow found that tougher cartel enforcement resulted in international cartel merging or entering into joint venture agreements as guises for continuation of their anti-competitive conducts. See Evenett, S.J. *et al*, ‘International Cartel Enforcement: Lessons from the 1990’s’, *The World Economy* Vol.24 Issue 9 (2001) 1221-1245

⁵²⁹ See: Levenstein, M.C. and Suslow, V.Y., ‘What Determines Cartel Success?’, *Journal of Economic Literature* Vol.44 (1) (March 2006) 43-95; Griffin, J.M., ‘An Inside Look at a Cartel at Work: Common Characteristics of International Cartels’, *Fighting Cartels- Why and How?*, Swedish Competition Authority (2001) 29-55 at <http://www.kkv.se/upload/filer/eng/publications/3rdnordic010412.pdf#page=29>

Examples of past mergers triggered by tougher cartel enforcement range from mergers which occurred in the American steel and railroad industries after the Sherman Act was introduced in the US in 1898 and cartels were banned; to when the United Kingdom introduced the Restrictive Trade Practices Act 1956 which outlawed cartels⁵³⁰; and the 1990's wave of joint ventures and mergers in cartel prone industries⁵³¹. There are also more recent cases of former cartel members resorting to mergers such as in the French market of urban transport industry involving the firms, Transdev and Veolia⁵³².

In Malaysia, cartels opting for mergers would be more likely in view of the fact that there is no competition dimension under the country's merger control regulation. In other words, the structural approach is not available under the Malaysian competition law framework because it has been excluded from the remit of the Competition Act 2010 based on Malaysia's development needs, which has been explained as to encourage the development of capital market in Malaysia⁵³³. Although there is a Code on Take-Overs and Mergers 2010 enforced by the Securities Commission Malaysia to regulate mergers between companies listed on the Kuala Lumpur Stock Exchange, there is no competition dimension under the said legislative instrument. Therefore, mergers

⁵³⁰ For a summary of the literature on selection of choice between mergers and cartels which was triggered due to developments in competition law see: Mehra, P., 'Choice Between Cartels and Horizontal Merger', (2007), p.8 at SSRN: <http://ssrn.com/abstract=1081844> or <http://dx.doi.org/10.2139/ssrn.1081844>

⁵³¹ See: Evenett, S.J. *et al*, 'International Cartel Enforcement: Lessons from the 1990's', *The World Economy* Vol.24 Issue 9 (2001) 1221-1245

⁵³² See: Langlais, A.C. and Tropeano, J.P., 'Fight Cartels or Control Mergers? On the Optimal Allocation of Enforcement Efforts Within Competition Policy', Working paper 2011-18, Université Paris Ouest Nanterre La Defense, *Economix*, p.2 at http://economix.fr/pdf/dt/2011/WP_EcoX_2011-18.pdf

⁵³³ As mentioned by the Minister of Domestic Trade, Co-operatives and Consumerism in his speech to the *Dewan Rakyat* (House of Representatives), Malaysian Parliament on 20 April 2010, Hansard Report (Malay version), p.147

between cartel members driven by tougher cartel enforcement are a likely option for Malaysian cartelists. Based on the current provisions of the Competition Act 2010, only behavioural remedies are provided for under the law to address tacit collusion. They are prohibition of anti-competitive horizontal agreements under Section 4, Competition Act 2010; and prohibition of abuse of collective dominance under Section 10, Competition Act 2010. However, the adequacy of these provisions is moot and this is discussed later in this chapter.

Therefore, when tougher cartel enforcement is implemented in Malaysia; the impact on competition law enforcement is that cartels may evolve into tacit collusion, thus enhancing the opportunity for a more “difficult to detect” form of anti-competitive horizontal agreement to thrive in more concentrated markets which are better suited for tacit collusion. It needs to be emphasised that the argument here is not that tacit collusion will only arise upon the implementation of tougher cartel enforcement, but the point being put across is that without competition dimension in merger control to complement cartel enforcement in regulating horizontal agreements, infringing businesses could utilise any gaps in the law for purposes of profit maximisation to their benefit and to the detriment of consumers through a more feasible approach. However, this possibility is dependent on the market conditions in Malaysia. This is because not all mergers between firms in concentrated markets would result in tacit collusion.

The works by Kuhn on factors that facilitate joint collusion in the context of merger control⁵³⁴ and Ivaldi *et al* in their report for DG Competition have been insightful in identifying the factors which enable firms to tacitly collude and the impact on merger control⁵³⁵. It was found that tacit collusion does not only depend on structural variables but also characteristics of the demand side and characteristics of the supply side⁵³⁶. The factors which influence firms to tacitly collude include: number of competitors; significance of market share; barriers to entry; frequency of interaction; market transparency; demand growth; business cycles and demand fluctuations; the role of innovation; symmetries; product differentiation; and multi-market contact⁵³⁷. However, the change in these factors as a result of mergers differ in terms of their impact on the deviation and punishment incentives to collude and the factors which fall under each category differs for each market⁵³⁸. Hence, Ivaldi *et al* argued that the factors may be divided into several categories based on their relevance to the sustainability of firms to collude; namely: “ ... factors which may or may not be affected by the merger have a decisive impact on the firms’ ability to sustain collusion; factors that are both relevant and likely to be affected by mergers; and factors that can have an influence on the sustainability of collusion, possibly to a lesser extent and that may or may not be directly

⁵³⁴ See: Kuhn, K. U., ‘An Economists’ Guide Through the Joint Dominance Jungle’, Michigan Law and Economics Research Paper No. 02-014 (2001) at SSRN: <http://ssrn.com/abstract=349523> or <http://dx.doi.org/10.2139/ssrn.349523> ;

⁵³⁵ Ivaldi, M. *et al*, *The Economics of Tacit Collusion*, Final Report for DG Competition European Commission (March 2003)

⁵³⁶ *Ibid*, pp.58-63

⁵³⁷ *Ibid*, pp.12-57

⁵³⁸ *Ibid*, pp.67-70

affected by mergers ...”⁵³⁹. Therefore, based on the above said findings, it may be inferred that not all mergers would lead firms to tacitly collude such as engaging in tacit collusion. There are instances when the current structure in some markets does not allow for collusion; however, a series of mergers can restructure the industry so that tacit collusion becomes feasible, for example by making each firm more similar in size etc. However, in some markets, even mergers cannot restructure them such that successful collusion is feasible. Therefore, the question now is whether the first set of cases is significant in Malaysia and could merger control alleviate the problem? This requires assessment of the findings of studies on market structure in Malaysia. Nevertheless, the disclaimer which ought to be emphasised is that the first arm of the question could only be adequately answered through economic research whilst the second arm is discussed later in this chapter. However, some insights may be gained from findings of available empirical research on market structure in Malaysia.

Malaysia is an open state led economy where the government role in economic decision making continues to be lessened⁵⁴⁰. However, several studies on the manufacturing industry and banking industry had found evidence of market concentration. An empirical

⁵³⁹ *Ibid*

⁵⁴⁰ See Beeson, M., ‘Mahathir and the Markets: Globalisation and the Pursuit of Economic Autonomy in Malaysia’, *Pacific Affairs* Vol. 73 No. 3 335-351 (Fall 2000), p.340; and The World Bank, *Malaysia Overview*, at <http://www.worldbank.org/en/country/malaysia/overview> Examples of liberalisation include: the banking sector continues to be liberalised since 2009; seventeen (17) services subsectors were liberalised from January 2012. Malaysia has also embarked on privatisation of nationalised firms and sectors since the early 1980’s.

study on the manufacturing industry in 2006⁵⁴¹ discovered that: due to Malaysia's relatively small economy, economies of scale is the cause for market concentration in Malaysia; foreign firms owned or controlled a significant share of the local industry and they have an upper hand in the market as compared to local firms because of their technology, marketing skills and R & D development which may deter entry of local firms into the market or lead to their winding up or bankruptcy that in turn would increase market concentration; market concentration of the Malaysian manufacturing industry is rather high as compared with most other countries; however, competition in certain sectors of the industry had increased over time. The findings of this study have been consistent with other earlier seminal empirical studies on the Malaysian manufacturing industry⁵⁴². It should be noted that this study by Mohammad Ridhuan and Suhaila are based on data from 1986 to 1990. However, in view of the fact that liberalisation in Malaysia earnestly commenced from 1995 when Malaysia joined the WTO, market concentration in Malaysia's manufacturing industries could have increased with the more liberalised entry of foreign firms, particularly considering the fact that industrial consolidation is encouraged by the government. Indeed, this impact may be observed in Malaysia's banking industry.

⁵⁴¹ Muhammad Ridhuan, B. and Suhaila, A.J., 'Industrial Structure and Concentration in the Malaysian Manufacturing Industry', *International Journal of Management and Strategy* 13 (Special Issue) (2006) 83-101

⁵⁴² See: Rugayah M., 'The Measurement of Market Concentration and Profitability in Malaysian Manufacturing', *The Malaysian Economic Review* (1992) 23(1): 1-11 Yusuf, Z. A. and Phang H. E., 'Industrial Market Structure in Malaysia 1979-1990: A Profile', *Bank Negara Malaysia*, Discussion Paper No. 21 (1993); Nor Ghani M. N., Z. Osman, A. Z. Abdullah, and Jun C. Y., 'Trends in the Malaysian Industrial Market Structures', *Jurnal Ekonomi Malaysia* (2000) 34: 3-20 ; Nor Ghani M. N., A. Z. Abdullah and S. D. Applanaidu, 'Advertising Intensity, Concentration and Profitability in Malaysian Manufacturing Revisited: A Simultaneous Equation Approach', *International Journal of Management Studies* (2004) 11(2): 45-53

The findings of a 2004 empirical study by Nasser Katib on the market structure and performance in the Malaysian banking industry suggests that market concentration determines profitability in the Malaysian banking industry⁵⁴³. However, the empirical findings found that market structure was not consistently correlated with profitability of price due to the constant industrial monitoring conducted by *Bank Negara Malaysia* (the Central Bank of Malaysia), which ensured competition in the market⁵⁴⁴. The study also found that the market share of the three (3) largest banks is forty five (45) per cent. This is based on the share of total bank deposits in the market in 1995. Although this study was based on dated data, it should be noted that the industrial consolidation exercise in the Malaysian banking sector which has been ongoing since the onset of the new millennium in order to create six (6) domestic financial groups in the industry have led to even higher market concentration level⁵⁴⁵. Anecdotal evidence based on media reports also indicates that there may be market concentration in the cement industry⁵⁴⁶.

Based on these findings it may be inferred that market concentration in the studied industries are high because of the small size of Malaysia's domestic market and that economies of scale is the cause of market concentration. Although the high market

⁵⁴³ Nasser Katib, M., 'Market Structure and Performance in the Malaysian Banking Industry: A Robust Estimation', 8th Capital Markets Conference, Indian Institute of Capital Markets Paper (2004) at SSRN: <http://ssrn.com/abstract=872266> or <http://dx.doi.org/10.2139/ssrn.872266>

⁵⁴⁴ *Ibid*, p.13

⁵⁴⁵ The mergers of Malaysian banks have been on the advice on the Central Bank of Malaysia (*Bank Negara Malaysia*) as a response to market liberalisation. See The Star Malaysia, *Bank Negara Explains Rationale for Bank Mergers*, (11 August 1999) at http://mir.com.my/lb/econ_plan/contents/press_release/110899merge.htm accessed on 5/1/2013

⁵⁴⁶ See: The Star newspaper report, *Probe Warranted if Cement Makers have Pact to Raise Prices*, (3/8/2012) at <http://biz.thestar.com.my/news/story.asp?file=/2012/8/3/business/11786336&sec=business> accessed 13/1/2013

concentration in the manufacturing and banking industries in Malaysia indicates that there are not many competitors in the market which could facilitate coordination between the firms, the studies did not go into the details of the other factors which enable tacit collusion such as: symmetry between firms; the demand growth; level of dependency on innovation; level and type of interaction between the firms; level of market transparency; etc. However, regulation has managed to keep competition in check in the banking industry. The findings are insufficient to provide a strong argument for the inclusion of a competition dimension in Malaysia's merger control laws for the moment. Nevertheless, the findings of the study on the banking industry suggest that effective monitoring by the regulator is necessary to ensure that the ongoing bank merger exercise do not result in anti-competitive outcomes to the detriment of consumers.

Nevertheless, it ought to be noted that the studies were conducted before the introduction of competition law in Malaysia; significant empirical studies have been limited to the manufacturing and banking industries; and the studies were based on dated data which predates Malaysia's WTO membership. Furthermore, the studies did not specifically focus on the impact of mergers on factors which enable tacit collusion as identified by Ivaldi *et al* and Kuhn. It has to also be acknowledged that obtaining data for such studies is not easy due to confidentiality laws; business secrecy; and also lack of

collection of the relevant data particularly in developing countries⁵⁴⁷. This signals a need for a more comprehensive study on market concentration in Malaysia which incorporates markets with oligopolistic tendencies in order to provide a more accurate diagnosis of Malaysia's competition concerns. Furthermore, it should also be noted that the said empirical studies and anecdotal indications give rise to the possibility that there may be market concentration in other Malaysian industries. After all, markets in developing countries tend to be highly concentrated due to high barriers to entry, less efficient capital market, cronyism and political patronage⁵⁴⁸ and in terms of the global trend in market environment, there is a trend towards increase in industrial concentration⁵⁴⁹.

Although available empirical research findings on the Malaysian manufacturing and banking industries at this point in time could not strongly support the argument for the inclusion of a competition dimension in Malaysia's merger control laws, the point being made in this discussion is not that Malaysia must include a competition dimension in its merger control regulation but that the Competition Act 2010 may be inadequate to address tacit collusion in light of tougher cartel enforcement. Not including a competition dimension in the country's merger control regulation may be appropriate for Malaysia for the moment; however, as competition law enforcement advances through the years and

⁵⁴⁷ Muhammad Ridhuan, B. and Suhaila, A.J., 'Industrial Structure and Concentration in the Malaysian Manufacturing Industry', *International Journal of Management and Strategy* 13 (Special Issue) (2006) 83-101, p.100

⁵⁴⁸ Fox, E.M., 'In Search of a Competition Law Fit for Developing Countries', *New York University Law and Economics Research Paper No.11-04* (2011), p.9 at SSRN: <http://ssrn.com/abstract=1761619> or <http://dx.doi.org/10.2139/ssrn.1761619>

⁵⁴⁹ Whish, R., *Competition Law*, Lexis Nexis, Fifth Edition (2003), p.506

Malaysia edges nearer to achieving a developed nation status and business practices evolve, the need for a competition dimension in Malaysia's merger control regulation may arise.

5.3. THE THEORIES OF TACIT COLLUSION

Before the limitations of the Competition Act 2010 in dealing with tacit collusion could be assessed, an explanation of the theories and concepts of tacit collusion is necessary. In this regard, this section discusses how oligopolistic markets facilitate tacit collusion; the types of collusion; the mechanics of tacit collusion; the difference between the legal and economic concept of collusion; the difficulty in uncovering tacit collusion; and how best to address tacit collusion.

Oligopoly lies somewhere between monopoly and perfect competition. Its market characteristics include: few large firms; inelastic demand; homogenous products; high barriers to entry; advertising and promotions driven; and interdependence between the firms in decision making. The characteristics of oligopolistic markets renders that a firm must consider the market behaviour of their competitors in order to determine its own best policy⁵⁵⁰. Therefore, prices in oligopolistic markets tend to be rigid because any price change by one firm will be followed by the others⁵⁵¹. Hence, the characteristics of

⁵⁵⁰ Carlton, D.W. and Perloff, J.M., *Modern Industrial Organization*, Prentice Hall, 4th Edition (2005), p.157

⁵⁵¹ See: M. Motta, *Competition Policy Theory and Practice*, Cambridge University Press (2004), pp.142-149; Whish, R., *Competition Law*, Lexis Nexis, Fifth Edition (2003), pp.505-509

oligopolistic markets facilitate collusion through the interdependence of firms in their market behaviour⁵⁵². Despite the fact that oligopolistic markets can facilitate collusion, it should not be automatically presumed that oligopolies result in inefficiencies⁵⁵³. It used to be the prevalent belief that “oligopoly is a single problem that competition law needed to address”⁵⁵⁴. This view was changed as a result of later empirical studies, which found that higher profits could be better explained as a result of greater efficiencies accompanied by firm size and higher concentration⁵⁵⁵. Repeated game theory models also showed that coordination in oligopolistic markets is more difficult to achieve than it was originally thought⁵⁵⁶. Hence, there is no conclusive agreement amongst economists that oligopolies would result in good or bad outcomes for consumers because it would depend on various market specific factors such as market conditions and nature of rivalry between the firms⁵⁵⁷. But then again, non-collusive oligopoly outcomes are indeed desirable as opposed to collusive outcomes as far as consumers are concerned.

⁵⁵² Firms may still compete very aggressively even if there are only two firms in the market. For example, two bidders who really want a contract to deliver a service may bid very aggressively against each other initially. However, they may come to realise that this aggression only lead to short term gains and it would be better for them to collude due to higher long term gains for both.

⁵⁵³ See Hawk, B.E. and Motta, G.A., ‘Oligopolies and Collective Dominance: A Solution in Search of a Problem’, (Eighth Edition of the Treviso Conference on ‘Antitrust Between EC Law and National Law’) (2008), Fordham University School of Law (November 2008), pp.60-62 at SSRN : <http://ssrn.com/abstract=1301693>

⁵⁵⁴ *Ibid*, p.61

⁵⁵⁵ *Ibid*, pp.60-62

⁵⁵⁶ *Ibid*, p.61

⁵⁵⁷ Statement by Peter Freeman, Chairman of the UK Office of Fair Trading (2007) as cited in Hawk, B.E. and Motta, G.A., ‘Oligopolies and Collective Dominance: A Solution in Search of a Problem’, (Eighth Edition of the Treviso Conference on ‘Antitrust Between EC Law and National Law’) (2008), Fordham University School of Law (November 2008), p.62 at SSRN: <http://ssrn.com/abstract=1301693>

Tacit collusion is not an easy concept to grasp not only because of the difference between the categorisation of collusion in US and EU competition law but also due to the difference between the legal and economic concept of collusion. US law categorises collusion into explicit collusion; conscious parallelism; and concerted action⁵⁵⁸. Under US competition law, explicit collusion such as cartel agreement is prohibited by competition law; however, conscious parallelism is legal; whilst concerted action is a gray area under US competition law⁵⁵⁹. Concerted action under US law is coordination between firms which are conducted through some form of communication which are beyond conscious parallelism but do not expressly propose or reach an agreement⁵⁶⁰. Concerted action and conscious parallelism are both viewed as tacit collusion under US competition law⁵⁶¹. Under EU competition law, explicit collusions are also prohibited and purely parallel behaviour which occurs as a reasonable commercial response to the behaviour of competitors in the market is not prohibited; however, concerted practices are not considered as tacit collusion. Concerted practice under EU competition law has been interpreted as “... coordination between undertakings which, without having reached the stage where an agreement, properly so called, has been concluded, knowingly substitutes practical cooperation between them for the risks of competition”⁵⁶². Tacit collusion on the other hand, does not involve any explicit agreement but occurs because of the interdependence of oligopolists in aligning their

⁵⁵⁸ Harrington Jr., J.E., ‘A Theory of Tacit Collusion’, John Hopkins University (January 2012), pp.2- 3 at http://econ.jhu.edu/wp-content/uploads/pdf/papers/wp588_harrington.pdf

⁵⁵⁹ *Ibid*

⁵⁶⁰ *Ibid*

⁵⁶¹ *Ibid*

⁵⁶² *ICI vs. Commission*, [1972] ECR 619, paras. 64 and 65.

actions to maximise their profits⁵⁶³. However, tacit collusion may be deemed to be an indication of concerted practice if there is no other explicable justification for tacit collusion based on market conditions⁵⁶⁴.

Collusion is also viewed differently in law and economics. In law, although a formal agreement is not necessary, collusion requires some form of collective agreement or concerted practice⁵⁶⁵. Whilst in economics, collusion refers directly to the market outcomes and the existence of an agreement is immaterial⁵⁶⁶. Therefore, under the economic concept, it is immaterial how the firms managed to arrive at supra-competition price. Due to the difference between the legal concept which is translated into the law and the economic concept; explicit collusion is illegal under the law but tacit collusion could escape prohibition under EU competition law unless there is proof of concerted practice under Article 101 TFEU or abuse of collective dominance under Article 102 TFEU. So, in markets where mergers occur due to tougher cartel enforcement, would not a more concentrated market structure facilitate concerted practice and abuse of collective dominance among oligopolists?; or result in undetected cartels becoming

⁵⁶³ Jones, A. and Sufrin, B., *EU Competition Law; Text, Cases and Materials*, Fourth Edition (2011), Oxford University Press, p. 784

⁵⁶⁴ See the ECJ's judgment in *Wood Pulp*, Cases C-89, 104, 114, 116-17, and 125-9/85, [1993] ECR I-1307

⁵⁶⁵ Buccirosi, P., 'Facilitating Practices', Buccirosi, P. (ed.), *Handbook of Antitrust Economics*, The MIT Press (2008), p.305

⁵⁶⁶ Kuhn, K. U., 'An Economists' Guide Through the Joint Dominance Jungle', Michigan Law and Economics Research Paper No. 02-014 (2001), pp.7-8 at SSRN: <http://ssrn.com/abstract=349523> or <http://dx.doi.org/10.2139/ssrn.349523>

even harder to detect? Hawk and Motta⁵⁶⁷ referred to these situations as “oligopoly gap” and “cartel gap”. The “oligopoly gap” concerns the question of “how to ensure firms compete and not cooperate when they are aware that they are highly interdependent?”; whilst the “cartel gap” is undiscoverable cartels which could thrive and operate undetected in the market due to the environment in oligopolistic markets⁵⁶⁸. Nevertheless, it ought to be noted that tacit collusion is not feasible in all oligopolistic markets⁵⁶⁹ and is dependent on factors which enable collusion⁵⁷⁰ as mentioned in the previous section of this chapter.

Tacit collusion arises from dynamic and repeated interaction between the firms in the market⁵⁷¹. It is more or less driven by similar elements as cartels⁵⁷² in terms of: incentives to profiteer above the competitive level; the need to monitor and punish deviation due to the possibility of increasing individual profit level; the need to coordinate in order to reach an agreement; the need to create barriers to entry against

⁵⁶⁷ Hawk, B.E. and Motta, G.A., ‘Oligopolies and Collective Dominance: A Solution in Search of a Problem’, (Eighth Edition of the Treviso Conference on ‘Antitrust Between EC Law and National Law’) (2008), Fordham University School of Law (November 2008), at SSRN: <http://ssrn.com/abstract=1301693>

⁵⁶⁸ However, Hawk and Motta argued that the “carte” gap” is not significant because cartels require effective organisation and repeated communication which are bound to leave an evidence trail. Furthermore, cartel enforcement tools such as leniency programmes facilitate the uncovering of cartels.

See: Hawk, B.E. and Motta, G.A., ‘Oligopolies and Collective Dominance: A Solution in Search of a Problem’, (Eighth Edition of the Treviso Conference on ‘Antitrust Between EC Law and National Law’) (2008), Fordham University School of Law (November 2008), SSRN: at <http://ssrn.com/abstract=1301693>

⁵⁶⁹ Stigler, G., ‘A Theory of Oligopoly’, *Journal of Political Economy* 72 (1964), p.44

⁵⁷⁰ See; Ivaldi, M. *et al*, *The Economics of Tacit Collusion*, Final Report for DG Competition European Commission (March 2003)

⁵⁷¹ *Ibid*, p.7

⁵⁷² For a discussion on how cartels work, see: Levenstein, M.C. and Suslow, V., ‘What Determines Cartel Success?’, *Journal of Economic Literature* Vol.44 (1) (March 2006) 43-95

firms which could undermine their anti-competitive set-up⁵⁷³. However, there are also other factors which determine the sustainability of tacit collusion, which include: symmetry of firms; number of competitors; frequency of interaction; market transparency; innovativeness in the market; demand growth; and business cycle and demand fluctuation⁵⁷⁴. In general the mechanics of collusion are: the sustainability of tacit collusion is dependent on: the ability to coordinate; the dynamics between collusive and deviation profits; and the ability to monitor and punish deviation⁵⁷⁵.

It is not easy for oligopolists to coordinate and arrive at a collusive price which would make all the firms better off by gaining supra-normal profits. However, based on the Games Theory, repeated interactions between the firms which in turn render the action of rivals more transparent facilitate tacit collusion⁵⁷⁶. Nevertheless it should be noted that economic theory cannot predict with precision which of the collusive equilibria price would be arrived at by the firms⁵⁷⁷. The firms would also have to be able to monitor, detect and punish deviation by rivals. Basically, there is trust among the firms to collude, but should one of them deviate from the collusion to increase individual profit, then the trust is lost and the firms would engage in price wars to punish the deviating rivals by

⁵⁷³ See: Ivaldi, M. *et al*, *The Economics of Tacit Collusion*, Final Report for DG Competition European Commission (March 2003); Buccirosi, P., 'Facilitating Practices', Buccirosi, P. (ed.), *Handbook of Antitrust Economics*, The MIT Press (2008)

⁵⁷⁴ *Ibid*

⁵⁷⁵ Buccirosi, P., 'Facilitating Practices', Buccirosi, P. (ed.), *Handbook of Antitrust Economics*, The MIT Press (2008), pp.307-311

⁵⁷⁶ Buccirosi, P., 'Facilitating Practices', Buccirosi, P. (ed.), *Handbook of Antitrust Economics*, The MIT Press (2008), p.307; Harrington Jr., J.E., 'A Theory of Tacit Collusion', John Hopkins University (January 2012), p.4 at http://econ.jhu.edu/wp-content/uploads/pdf/papers/wp588_harrington.pdf

⁵⁷⁷ Ivaldi, M. *et al*, *The Economics of Tacit Collusion*, Final Report for DG Competition European Commission (March 2003), p.6

either bringing down the price to normal level or specifically targeting the profit of the deviating firm⁵⁷⁸. The ability to monitor and punish deviating firms is only possible through repeated interaction between the firms and also the dynamic between collusive and deviation profits⁵⁷⁹. Collusion is easier to maintain when collusive profits are higher and/or deviation profits are lower⁵⁸⁰. The swifter a deviation is detected and punished, the lesser the incentive to deviate because of the lower short run gain from deviation and the higher loss inflicted by the punishment⁵⁸¹. Therefore, the punishment must be "... credible and sufficiently severe to offset the gains from deviation"⁵⁸². Tacit collusion is easier to sustain in a growing market where the future gains are more than the short term ones; hence the lack of incentive for firms to deviate⁵⁸³. Barriers to entry also affect the sustainability of tacit collusion. If there are low or no barriers of entry into the market, then tacit collusion could not be sustained because the new entrant would be imposing below the collusive price level and this in would affect the collusive gains⁵⁸⁴. Entrants into the market would also not enable punishment to be inflicted on rivals who decide to break away from the collusion⁵⁸⁵. Additionally, it ought to be noted that asymmetries between firms; innovative markets; business cycles and demand fluctuations hinder tacit collusion because these factors do not render the mechanics of tacit collusion

⁵⁷⁸ *Ibid*, pp.5-6

⁵⁷⁹ *Ibid*, pp.6-10

⁵⁸⁰ Buccirosi, P., 'Facilitating Practices', Buccirosi, P. (ed.), *Handbook of Antitrust Economics*, The MIT Press (2008), p.309

⁵⁸¹ Ivaldi, M. *et al*, *The Economics of Tacit Collusion*, Final Report for DG Competition European Commission (March 2003), pp.6-10

⁵⁸² Buccirosi, P., 'Facilitating Practices', Buccirosi, P. (ed.), *Handbook of Antitrust Economics*, The MIT Press (2008), p.310

⁵⁸³ *Ibid*, pp.26-28

⁵⁸⁴ *Ibid*, p.16

⁵⁸⁵ *Ibid*

sustainable⁵⁸⁶. Symmetry of firms is not dependent on market share alone but also production capacity and cost⁵⁸⁷. The lesser the number of competitors in the market, the easier it is to tacitly collude because it renders coordination easier and the profit share of each firm would be higher⁵⁸⁸. The point which has to be emphasised is that the reaction of each market to the above said collusion enabling factors is dependent on the market structure and characteristics⁵⁸⁹.

The fact that cartels and tacit collusion are driven by the same elements is not surprising because cartel agreements and tacit collusion are both collusive agreements. The difference with cartels is that in the context of cartels, there is explicit agreement between the cartel members to engage in anti-competitive activities which popularly include price fixing. Some cartels are even administered under formal set-ups with regular albeit clandestine meetings held. Thus, cartels are arguably easier to enforce the law against because cartels require “ ... effective organisation with respect to coordination and cheating.”⁵⁹⁰ This increases the possibility of creation of evidence because cartels require communication between the cartelists which includes frequent

⁵⁸⁶ *Ibid*, pp.29-50

⁵⁸⁷ Kuhn, K. U., ‘An Economists’ Guide Through the Joint Dominance Jungle’, Michigan Law and Economics Research Paper No. 02-014 (2001), pp.10-13 at SSRN: <http://ssrn.com/abstract=349523> or <http://dx.doi.org/10.2139/ssrn.349523> ; Ivaldi, M. *et al*, *The Economics of Tacit Collusion*, Final Report for DG Competition European Commission (March 2003)

⁵⁸⁸ *Ibid*, pp.12-14

⁵⁸⁹ See: Ivaldi, M. *et al*, *The Economics of Tacit Collusion*, Final Report for DG Competition European Commission (March 2003); Buccirossi, P., ‘Facilitating Practices’, Buccirossi, P. (ed.), *Handbook of Antitrust Economics*, The MIT Press (2008)

⁵⁹⁰ Hawk, B.E. and Motta, G.A., ‘Oligopolies and Collective Dominance: A Solution in Search of a Problem’, (Eighth Edition of the Treviso Conference on ‘Antitrust Between EC Law and National Law’) (2008), Fordham University School of Law (November 2008), p.71 at SSRN: <http://ssrn.com/abstract=1301693>

meetings⁵⁹¹. In this regard, tacit collusion of the types which are prohibited under the law is arguably more difficult to prove because of the difficulty in gathering hard evidence to distinguish whether the anti-competitive outcomes are due to parallel conduct or concerted practice or abuse of collective dominance. This is illustrated in the discussion below.

The behavioural approaches (concerted practices and abuse of collective dominance) in addressing tacit collusion are not infallible. Their limitations could be explained through the mechanics of tacit collusion and the relevant case laws. The problem of coordination in tacit collusion arises because of the difficulty in determining a jointly optimal price or quantity for all the firms involved⁵⁹². If the price set is too low, the profit could not be maximised. If the price is too high due to a change in demand and one of the firms starts to lower its price, without communicating, this may be viewed as a deviation from the collusive price by its competitors and the competitors might initiate a price war by increasing production to punish the seemingly deviating firm. In cartel agreements, the firms overcome the problem of coordination through an explicit agreement. However, in tacit collusion, the firms need to coordinate their behaviour to select the price or quantity which is jointly optimal for all the firms without involving any explicit agreement. If the firms arrive at a jointly optimal price by engaging in practices which facilitate coordination in order to enable them to anticipate the actions of their rivals, then they

⁵⁹¹ *Ibid*, p.72

⁵⁹² For detailed explanation, see: Motta, M., *Competition Policy Theory and Practice*, Cambridge University Press (2004), pp.140-142

may be liable for concerted practice under Article 101 TFEU. This may include publication of their intentions through repeated dealings between the firms in the market⁵⁹³. By coordinating their actions, firms for example, are able to restrict output in order to maximise their profits through the imposition of supra-competitive prices to the detriment of consumers⁵⁹⁴. It should be noted collusion does not only involve the price dimension, firms could also collude in terms of levels of production; capacity choices; and bidding markets⁵⁹⁵.

There are various factors to be considered In order to determine whether the communication and information exchange in question facilitate collusion. For instance, if the communication leads to the facilitation of collusion such as through the creation of market transparency due to the: market conditions; market structure; the nature of information exchanged; and the level of data disaggregation involved in the case, it may be deemed that the communication could facilitate coordination between the competing firms⁵⁹⁶. Another way to detect tacit collusion is through the existence of repeated interactions between the firms. This is how the firms tacitly “communicate” with each other in order to not only facilitate coordination but also a means for conflict

⁵⁹³ Buccirosi, P., ‘Facilitating Practices’, Buccirosi, P. (ed.), *Handbook of Antitrust Economics*, The MIT Press (2008), p.312

⁵⁹⁴ Whish, R., *Competition Law*, Lexis Nexis, Fifth Edition (2003), p.506

⁵⁹⁵ Ivaldi, M. *et al*, *The Economics of Tacit Collusion*, Final report for DG Competition European Commission (March 2003)

⁵⁹⁶ See the decision of the EU Competition Commission which was also upheld by the CF and ECJ in *UK Agricultural Tractor Registration Exchange*, Commission Decision, cases IV/31.370 and 31.446; O.J. (1992), L68/19

resolution⁵⁹⁷. Repeated communication by exchanging simultaneous messages reduces the probability of coordination failure⁵⁹⁸. Such indirect communication could be in the form of information exchanges; or announcements; or communication between competing firms in auctions⁵⁹⁹. Buccirossi⁶⁰⁰ argued that very simple forms of communication would suffice when firms are symmetric and have perfectly aligned interests. However, in a more complex market set-up; riskier coordination environment and where coordination involves firms with asymmetric interests, sequential or repeated communication would have to be resorted to in order to find acceptable solutions to issues on coordination and bargaining. In *United States vs. Airline Tariff Publishing Co.*⁶⁰¹, the US Department of Justice (DOJ) alleged that the repeated feeding of information on airline ticket prices for first and last ticket tickets dates and first and last travel dates by airlines on a database accessible to all airlines and travel agents, amounted to practices which facilitated collusion. The case was resolved through settlement.

However, it should also be noted that courts have mainly relied on hard evidence of tacit collusion rather than market data because the latter is not adequate proof for tacit collusion and also it is difficult to determine with adequate precision the competitive

⁵⁹⁷ Buccirossi, P., 'Facilitating Practices', Buccirossi, P. (ed.), *Handbook of Antitrust Economics*, The MIT Press (2008), p.315

⁵⁹⁸ Farrell, J., 'Cheap Talk, Coordination and Entry', *RAND Journal of Economics* 18(1) (1987) 34-39

⁵⁹⁹ See: Motta, M., *Competition Policy Theory and Practice*, Cambridge University Press (2004), pp.150-156

⁶⁰⁰ Buccirossi, P., 'Facilitating Practices', Buccirossi, P. (ed.), *Handbook of Antitrust Economics*, The MIT Press (2008), p.315

⁶⁰¹ 836 F. Supp. 9 (DDC 1993)

price in each market⁶⁰². Price wars are not proof of tacit collusion unless it occurs repeatedly to the point of raising suspicion of collusion. This is because price wars could be just episodes where firms adjust to factors such as entry of new firms into the market or fall in demand⁶⁰³. Hard evidence includes historical evidence of explicit market sharing agreements as in the *Soda-Ash*⁶⁰⁴ case. Thus, it can be said that in tacit collusion cases, the uncovering of communication is more difficult as compared to the discovery of direct evidence in cartel cases, particularly because hard evidence of communication is required and market data has been insufficient as proof of tacit collusion.

Apart from being caught under Article 101 TFEU when concerted practices are involved; under EU competition law, tacit collusion may also be prohibited under Article 102 TFEU if there is proven to be abuse of collective dominance. It used to be interpreted that the term “one or more undertakings” under Article 102 TFEU referred only to entities within the same corporate group or formed part of the same economic entity⁶⁰⁵. This position was changed in the *Flat Glass*⁶⁰⁶ case whereby the court held that Article 102 TFEU could apply to economically independent undertakings which collectively holds a dominant position. The EU courts in several cases applied the concept of

⁶⁰² Motta, M., *Competition Policy Theory and Practice*, Cambridge University Press (2004), pp.185-190

⁶⁰³ *Ibid*, p.188

⁶⁰⁴ *Soda –ash, ICI*, OJ 1991 L152/1

⁶⁰⁵ Case 85/76, *Hoffmann-La Roche vs. Commission* [1979] ECR 461, para.39

⁶⁰⁶ Cases T-68, 77, and 78/89, *Società Italiana Vetro SpA vs. Commission* (*'Flat Glass'*) [1992] ECR II-1403, paras. 357-358

collective dominance to firms which were bound together by contractual links⁶⁰⁷. Whilst in *Irish Sugar plc vs. Commission*⁶⁰⁸, firms linked by vertical agreements and significant equity holding were held to amount to collective dominance under Article 102 TFEU. In *Almelo*, the ECJ attempted to clarify the meaning of “link” between the firms to establish collective dominance under Article 102 TFEU by stating that “ ... the firms must be linked in such a way that they adopt the same conduct on the market”⁶⁰⁹. However, the court failed to clarify what links were required to amount to collective dominance under Article 102 TFEU⁶¹⁰. To date most of the collective dominance cases under Article 102 TFEU are those linked by some consensual arrangement⁶¹¹. This suggests that EU courts have been reluctant to find abuse of collective dominance solely based on evidence of interdependence.

So, the question now is whether a behavioural remedy alone is adequate to address tacit collusion in a more concentrated market better suited for collusion? It is difficult to say for certain as to what is the best way to address tacit collusion which arises due to market structure issues. Moreover, the debate on how best to address tacit collusion is

⁶⁰⁷ For example, *French-West African Shipowners' Committees* [1992] OJ L134/1; *CEWAL* [1993] OJ L34/20; and *Trans-Atlantic Conference Agreement (TACA)* [1999] OJ/L95/1

⁶⁰⁸ [1997] OJ L25/1, *Irish Sugar plc vs. Commission*; Case T-228/97 *Irish Sugar plc vs. Commission* [1999] ECR II-2969

⁶⁰⁹ Case C-393/92, *Almelo vs. NV Energiebedrijf Ijsselmij* [1994] ECR I-1477

⁶¹⁰ Jones, A. and Sufrin, B., *EU Competition Law; Text, Cases and Materials*, Fourth Edition (2011), Oxford University Press, p. 840

⁶¹¹ Hawk, B.E. and Motta, G.A., ‘Oligopolies and Collective Dominance: A Solution in Search of a Problem’, (Eighth Edition of the Treviso Conference on ‘Antitrust Between EC Law and National Law’) (2008), Fordham University School of Law (November 2008), p.103 at SSRN:

<http://ssrn.com/abstract=1301693>

also still ongoing⁶¹². It needs to be noted that tacit collusion is not *per se* prohibited under both EU and US competition law. It is only when tacit collusion involves concerted practices or abuse of joint dominance that it may be caught under the provisions of Article 101 TFEU or Article 102 TFEU respectively; and as explained earlier, mergers would exacerbate the oligopoly gap and cartel gap which exist because of the limitation of the aforesaid behavioural approaches. In regard to the oligopoly gap, it ought to be noted that not all mergers would lead to tacit collusion⁶¹³. Therefore, in order to address tacit collusion, the factors which enable tacit collusion would have to be assessed to determine which markets are prone to tacit collusion so that appropriate measures could be adopted under merger regulation. As for the cartel gap, cartel enforcement tools such as leniency programmes have also facilitated the discovery of cartels⁶¹⁴ and therefore could be utilised to lessen the cartel gap.

Nevertheless if these gaps significantly exist and the factors which enable tacit collusion are present in the market; what ought to be the appropriate approach to be adopted in

⁶¹² For detailed discussions see: Kuhn, K. U., 'An Economists' Guide Through the Joint Dominance Jungle', Michigan Law and Economics Research Paper No. 02-014 (2001), at SSRN: <http://ssrn.com/abstract=349523> or <http://dx.doi.org/10.2139/ssrn.349523>; Whish, R., *Competition Law*, Lexis Nexis, Fifth Edition (2003), pp.510-512; Hawk, B.E. and Motta, G.A., 'Oligopolies and Collective Dominance: A Solution in Search of a Problem', (Eighth Edition of the Treviso Conference on 'Antitrust Between EC Law and National Law') (2008), Fordham University School of Law (November 2008) at SSRN: <http://ssrn.com/abstract=1301693>; Gudofsky, J. *et al*, 'Abuse of Joint Dominance – Is the Cure Worse than the Disease?', Canadian Bar Association 2010 Annual Competition Law Conference (30 September – 1 October 2010), Gatineau, Quebec at http://www.cba.org/cba/cle/PDF/COMP10_Gudofsky_paper.pdf

⁶¹³ See: Ivaldi, M. *et al*, *The Economics of Tacit collusion*, Final Report for DG Competition European Commission (March 2003)

⁶¹⁴ Hawk, B.E. and Motta, G.A., 'Oligopolies and Collective Dominance: A Solution in Search of a Problem', (Eighth Edition of the Treviso Conference on 'Antitrust Between EC Law and National Law') (2008), Fordham University School of Law (November 2008), p.72 at SSRN: <http://ssrn.com/abstract=1301693>

addressing tacit collusion? Currently, there are several tools available to competition law enforcers to remedy tacit collusion (depending on the legislative provisions). As mentioned earlier, under EU law, tacit collusion could be caught by the provisions on concerted practice under Article 101 TFEU or abuse of collective dominance under Article 102 TFEU. Additionally, the European Commission has also utilised merger control to “ ... prevent mergers between firms which are likely to create a market situation in which tacit collusion is likely or more likely.”⁶¹⁵ The regulatory approach has also been utilised in the United Kingdom to address tacit collusion issues through market enquiries⁶¹⁶. However, not all of these tools are available to some competition jurisdictions. For example, in Malaysia, merger control is not available to address tacit collusion because the Malaysian merger control regulation does not include a competition dimension. In the US, addressing tacit collusion under abuse of dominance provision under Section 2, Sherman Act has been rejected by the US Courts⁶¹⁷.

It has been argued that it is sensible or more appropriate to address collusion via a structural approach since tacit collusion are infringements which arise out of market structure conditions⁶¹⁸. Moreover prevention is better than cure particularly where ex-

⁶¹⁵ Jones, A. and Sufrin, B., *EU Competition Law; Text, Cases and Materials*, Fourth Edition (2011), Oxford University Press, p. 796

⁶¹⁶ Hawk, B.E. and Motta, G.A., ‘Oligopolies and Collective Dominance: A Solution in Search of a Problem’, (Eighth Edition of the Treviso Conference on ‘Antitrust Between EC Law and National Law’) (2008), Fordham University School of Law (November 2008), pp.65-66 at SSRN: <http://ssrn.com/abstract=1301693>

⁶¹⁷ Gudofsky, J. *et al*, ‘Abuse of Joint Dominance – Is the Cure Worse than the Disease?’, Canadian Bar Association 2010 Annual Competition Law Conference (30 September – 1 October 2010), Gatineau, Quebec, p.3 at http://www.cba.org/cba/cle/PDF/COMP10_Gudofsky_paper.pdf

⁶¹⁸ Kuhn, K. U., ‘An Economists’ Guide Through the Joint Dominance Jungle’, Michigan Law and Economics Research Paper No. 02-014 (2001), p.9 at SSRN: <http://ssrn.com/abstract=349523> or

ante mergers are concerned⁶¹⁹. In the US, merger control is the only tool utilised to address the gaps in behavioural remedies for tacit collusion⁶²⁰. The utilisation of merger control to address tacit collusion could be justified by the fact that there is yet to be a market test which could detect collusive prices adequately⁶²¹. Thus, asset transactions between firms which could significantly facilitate tacitly collusive behaviour in the market should be regulated⁶²². Nevertheless, Whish cautioned that utilising the structural approach to address problems of oligopolistic markets would require exceptional circumstances to justify dismantling of oligopolistic market structures especially considering the fact that the theory of oligopolistic interdependence is not without criticisms⁶²³. Whish's argument would be more relevant to cases of pre-existing dominance but much less so to new merger applications particularly in light of tougher cartel enforcement, whereby mergers in oligopolistic markets, especially those which are prone to cartels ought to be suspiciously viewed. Still, as mentioned earlier, simply because firms exist in an oligopolistic market does not necessarily mean that the presumption of tacit collusion should be automatic and that mergers between firms in

<http://dx.doi.org/10.2139/ssrn.349523> ; Hawk, B.E. and Motta, G.A., 'Oligopolies and Collective Dominance: A Solution in Search of a Problem', (Eighth Edition of the Treviso Conference on 'Antitrust Between EC Law and National Law') (2008), Fordham University School of Law (November 2008), p.103 at SSRN: <http://ssrn.com/abstract=1301693> ; Jones, A. and Sufrin, B., *EU Competition Law; Text, Cases and Materials*, Fourth Edition (2011), Oxford University Press, p. 849

⁶¹⁹ Jones, A. and Sufrin, B., *EU Competition Law; Text, Cases and Materials*, Fourth Edition (2011), Oxford University Press, p. 849

⁶²⁰ Hawk and Motta labelled this as the oligopoly gap. See Hawk, B.E. and Motta, G.A., 'Oligopolies and Collective Dominance: A Solution in Search of a Problem', (Eighth Edition of the Treviso Conference on 'Antitrust Between EC Law and National Law') (2008), Fordham University School of Law (November 2008), p.65 at SSRN: <http://ssrn.com/abstract=1301693>

⁶²¹ Kuhn, K. U., 'An Economists' Guide Through the Joint Dominance Jungle', Michigan Law and Economics Research Paper No. 02-014 (2001), p.9 at SSRN: <http://ssrn.com/abstract=349523> or <http://dx.doi.org/10.2139/ssrn.349523>

⁶²² *Ibid*

⁶²³ Whish, R., *Competition Law*, Lexis Nexis, Fifth Edition (2003), pp.510-512

such markets should be prohibited because the characteristics of oligopolistic markets merely facilitate tacit collusion. Hence, the focus should be on the impact of the merger on factors which would render tacit collusion significantly easier to sustain⁶²⁴.

The other method which could be utilised to complement the behavioural approach in addressing collusion is the regulatory approach. Whish suggested that a regulatory approach to address collusion would involve fixing prices in oligopolistic markets at a “competitive” or “reasonable” level⁶²⁵. However, because of the difficulty to determine what is “competitive” or “reasonable”, it is better for it to be left to market forces rather than a regulator⁶²⁶. Alternatively, regulation could require periodical price notifications to the regulator and fixing the price of the notifying firm at the notified price, this would limit the ability of firms to adjust their prices based on their rival’s conduct⁶²⁷. However, this would be cumbersome and require significant amount of government resources to implement⁶²⁸. Nevertheless, regulatory approaches such as the UK Market Investigation procedure which enable the competition authority to conduct market enquiries and have vested broad powers in the competition authority to remedy adverse effects on competition in the market have been able to identify adverse outcomes for consumers but have failed to identify evidence of tacit collusion⁶²⁹. The procedure is less

⁶²⁴ Ivaldi, M. *et al*, *The Economics of Tacit Collusion*, Final Report for DG Competition European Commission (March 2003), p.64

⁶²⁵ Whish, R., *Competition Law*, Lexis Nexis, Fifth Edition (2003), p.513

⁶²⁶ *Ibid*

⁶²⁷ *Ibid*

⁶²⁸ *Ibid*

⁶²⁹ Hawk, B.E. and Motta, G.A., ‘Oligopolies and Collective Dominance: A Solution in Search of a Problem’, (Eighth Edition of the Treviso Conference on ‘Antitrust Between EC Law and National Law’)

prosecutorial and does not involve any admission of liability or wrong doing⁶³⁰. Section 11, Competition Act 2010 empowers the MyCC to conduct market reviews – this could be utilised to implement an approach similar to the UK Market Investigation procedure. Another form of regulatory approach which had been proposed is for the competition authorities or industrial regulator to black list facilitating practices in the form of guidelines⁶³¹. However, this may lead to erroneous prohibitions because tacit collusion cannot be adequately assessed based on the checklist method⁶³².

Based on the preceding arguments and findings in the literature, it may be concluded that the behavioural approach is not without limitations and could result in tacit collusion which lead to inefficiencies falling through oligopolistic and cartel gaps. However, whether other approaches such as structural or regulatory approach ought to be utilised to address tacit collusion, it is dependent on two (2) main elements: first, whether the gaps are significant; and second, on market conditions – the existence of factors which enable tacit collusion. If both elements exist, then the structural approach and regulatory approach are warranted. *Ex-ante* merger control is useful to filter mergers which would increase the likelihood of collusion in the market ex-post; hence, lowering incidences of collusion with inefficient outcomes in the market. This in turn would lessen the need for behavioural corrective measures. However, in so far as the regulatory approach is

(2008), Fordham University School of Law (November 2008), pp.65-66 at SSRN:

<http://ssrn.com/abstract=1301693>

⁶³⁰ *Ibid*, p.66

⁶³¹ Motta, M., *Competition Policy Theory and Practice*, Cambridge University Press (2004), p.191

⁶³² Ivaldi, M. *et al*, *The Economics of Tacit Collusion*, Final Report for DG Competition European Commission (March 2003), p.70

concerned, the author is of the opinion that even if one or both aforesaid factors are not in the picture, it could be utilised so long as it neither involves cumbersome procedures nor is costly to implement.

5.4. LIMITATIONS OF THE COMPETITION ACT 2010

The glaring fact which ought to be noted is that merger control in Malaysia is without a competition dimension. The Malaysian Code on Takeovers and Mergers 2010 does not provide that the competition dimension is to be considered in the assessment of merger applications. There are also no provisions on merger control under the Competition Act 2010. Therefore, structural remedy in dealing with the likely changes in the market which could be brought about by tougher cartel enforcement is not available under the current Malaysian competition law framework. Behavioural remedies for tacit collusion are provided for under the Competition Act 2010. Section 10 (1), Competition Act 2010 prohibits both unilateral and collective abuse of dominance; whilst the provision on anti-competitive horizontal agreements under Section 4, Competition Act 2010 prohibits concerted practices. However, whether the said provisions would be adequate to address tacit collusion in light of tougher cartel enforcement in Malaysia could only be ascertained once the law has been fully enforced and case laws are developed. Nevertheless, based mainly on the EU experience, implementation issues could be anticipated. This is because the EU jurisprudence on tacit collusion is relevant to Malaysia due to the fact that the aforementioned provisions under Malaysia's

competition law is similar to the corresponding provisions on concerted practices and abuse of collective dominance under the EU competition law and also because EU law recognises collective dominance as a competition law infringement⁶³³. The assessment is made in terms of the adequacy of the legislative provisions in addressing the “oligopoly gap” and the “cartel gap”.

It ought to be noted that although Section 4, Competition Act 2010 does not expressly list concerted practice as a prohibition like its EU equivalent, Article 101 TFEU; the interpretation provision, Section 2, Competition Act 2010 provides that “agreement” under the Competition Act 2010 also includes concerted practice. Section 2, Competition Act 2010 interprets concerted practice as “... any form of coordination between enterprises which knowingly substitutes practical cooperation between them for the risks of competition and includes any practice which involves direct or indirect contact or communication between enterprises, the object or effect of which is either— (a) to influence the conduct of one or more enterprises in a market; or (b) to disclose the course of conduct which an enterprise has decided to adopt or is contemplating to adopt in a market, in circumstances where such disclosure would not have been made under normal conditions of competition ...”. This interpretation is similar to EU competition jurisprudence as explained in the decision of *ICI vs. Commission*, which is, “...

⁶³³ As mentioned earlier in this chapter, it is not that US competition law does not recognise collective dominance, but addressing collective dominance under Section 2, Sherman Act has been rejected by US courts and shared monopolies could only be subject to Section 1, Sherman Act if there is an element of agreement involved. See: Gudofsky, J. *et al*, ‘Abuse of Joint Dominance – Is the Cure Worse than the Disease?’, Canadian Bar Association 2010 Annual Competition Law Conference (30 September – 1 October 2010), Gatineau, Quebec, p.3 at http://www.cba.org/cba/cle/PDF/COMP10_Gudofsky_paper.pdf

coordination between undertakings which, without having reached the stage where an agreement, properly so called, has been concluded, knowingly substitutes practical cooperation between them for the risks of competition”⁶³⁴. The difference is that the interpretation provided under Section 2, Competition Act 2010 is more extensive which would facilitate enforcement by the MyCC.

Both the Malaysian and EU interpretation of concerted practice is concerned with “coordination” as opposed to the anti-competitive outcomes in the market. This may lead to coordination which results in efficiency being caught under the provision for concerted practices; particularly considering the fact that studies on the Malaysian manufacturing and banking sector found that market concentration in Malaysia is driven by economies of scale and not because of profiteering⁶³⁵. So, should coordination in such markets be prohibited despite the fact that it leads to efficiencies in the market? Rightly, it should not but because of the difference between legal and economic concepts of collusion, then this contributes to the “oligopoly gap”. But then again, such concerted practice could qualify for exemption under Section 5, Competition Act 2010 provided the efficiency can be proven as one of those which could be exempted.

Concerted practice under the Competition Act 2010 includes both direct and indirect communication. This is also well and good but discovering any form of communication is not easy in tacit collusion cases. In the EU, the courts look at hard evidence of

⁶³⁴ *ICI vs. Commission*, [1972] ECR 619, paras. 64 and 65.

⁶³⁵ Refer to earlier discussion in Part 5.2. of this chapter.

communication in regard to proof for concerted practice⁶³⁶. Moreover, the existence of concerted practice would only be accepted if there is no other explicable reason for it to exist in the market after accounting for the market structure⁶³⁷. Discovery would be even more difficult when the market becomes more concentrated through mergers. Therefore, the establishment of competent, credible and adequately endowed competition law enforcement machineries is paramount to ensure strong and effective enforcement to cater for the extensive and in depth investigative works required in regard to discovery of coordination in tacit collusion.

Section 10, Competition Act 2010 prohibits both independent and collective abuse of dominance. Section 2, Competition Act 2010 interprets dominant position as "... a situation in which one or more enterprises possess such significant power in a market to adjust prices or outputs or trading terms, without effective constraint from competitors or potential competitors ...". However, interpretation of collective dominance has not been provided for under the Competition Act 2010. Therefore, the MyCC should clarify what amounts to collective dominance under the Competition Act 2010 - namely, type of link between the firms involved and whether an oligopolistic link is required. This needs to be confirmed by the courts. If collective dominance under Section 10, Competition Act 2010 includes interdependent firms in oligopolistic markets; then the question is, would the Malaysian competition authorities and the courts be willing to include firms which

⁶³⁶ For a detailed discussion on the standard of proof for collusion and the relevant cases, see Motta, M., *Competition Policy Theory and Practice*, Cambridge University Press (2004), pp.185-190

⁶³⁷ See: ECJ's decision in *Wood Pulp*, Cases C-89, 104, 114, 116-17, and 125-9/85, [1993] ECR I-1307

are not linked by some form of consensual arrangement as being collectively dominant; which is unlike in the EU where the courts have been reluctant to find abuse of collective dominance solely based on evidence of interdependence? This is a valid question in view of the fact that tacit agreement is difficult to prove and there is yet to be a market test available to ascertain with adequate precision the competitive price in the market⁶³⁸.

Based on the above, it can be argued that it would not be easy for cartel enforcement to merely rely on behavioural approaches in dealing with the “oligopoly gap” because of the market structure which enables interdependence and may also likely involve cooperation between the firms either in the form of concerted practice or joint collusion. The market structure renders it difficult to discover cooperation between oligopolists. As for the “cartel gap”, Hawk and Motta argued that it is not significant because cartels require effective organisation and repeated communication which are bound to leave an evidence trail. Furthermore, cartel enforcement tools such as leniency programmes facilitate the uncovering of cartels. This argument is well and good; but what about undiscovered cartels which are operating well and where the incentive to deviate is lesser than the cartel gains? Indeed it is arguably easier to detect evidence on cartel agreements as compared to tacit collusions; however, cartel detection is not easy because of its illicit nature and the lengths cartelists go to in order to avoid detection⁶³⁹.

⁶³⁸ See: discussion on the standard of proof for collusion in Motta, M., *Competition Policy Theory and Practice*, Cambridge University Press (2004), pp.185-190

⁶³⁹ For an example of the lengths cartels are willing to go to in order to avoid detection, see: Griffin, J.M., ‘An Inside Look at a Cartel at Work: Common Characteristics of International Cartels’, *Fighting Cartels-*

Yes, leniency is a valuable and useful tool in cartel detection and it is expressly provide for under Section 41 Competition Act 2010; but in order for it to be effective, it needs to be coupled with credible risk of detection; the threat of tough penalties; and clear and reliable promise of amnesty⁶⁴⁰.

Section 11 Competition Act 2010 provides for market reviews to be conducted by the MyCC on its own initiative or upon request by the Minister. However, the market review provided for under the law is only in regard to studies on anti-competitive features in the market⁶⁴¹. The findings of studies conducted under the said market reviews are only to be published and made available to the public⁶⁴². These provisions are clearly not the same as the market investigations procedure which is carried out by the competition authority in the United Kingdom because the Malaysian law does not empower the MyCC with the power to remedy any findings of anti-competitive behaviour in its market review. Nevertheless, in conducting market reviews, the MyCC could administratively as the competition regulator in Malaysia implement remedial measures through negotiations and consultations with the infringing firms. The main thing to note is that the administrative procedures adopted should not be cumbersome or costly. Moreover, there is also nothing to prevent the MyCC from taking enforcement action in accordance to the Competition Act 2010 should there be a need for tougher measures to be

Why and How?, Swedish Competition Authority (2001) at <http://www.kkv.se/upload/filer/eng/publications/3rdnordic010412.pdf#page=29>

⁶⁴⁰ OECD Policy Brief, *Using Leniency to Fight Hard Core Cartels*, September 2001, p.4 at OECD website: www.oecd.org/daf/ca/1890449.pdf

⁶⁴¹ Section 11 Competition Act 2010, Malaysia.

⁶⁴² See: Section 12 Competition Act 2010, Malaysia.

implemented. Thus, this regulatory approach could be utilised to complement the behavioural approach in dealing with tacit collusions under the Competition Act 2010.

Additionally, before competition dimension is included or even if it is not included after all under Malaysian merger control law, the MyCC could resort to utilising advocacy to pro-actively persuade the relevant agencies and regulators to consider the highlighted competition concerns in their decision making. For example, when a proposed merger could potentially give rise to collusion with anti-competitive outcomes, the MyCC could highlight their competition concerns to the Securities Commission Malaysia. However, it has to be noted that this would just merely be persuasive and it would also depend on the level of clout possessed by the MyCC⁶⁴³. This is because the Code of Take-overs and Mergers 2010 does not provide for any competition dimension to be considered. Moreover, if the merger of cartels would facilitate the development of capital market in Malaysia, then any competition concerns highlighted by the MyCC may just be set-aside and superseded by the said development agenda, even if there is potential for collusion between the firms in a more concentrated oligopolistic market. Apart from the Securities Commission, the MyCC could also engage with sectoral regulators in collusion prone industries via consultations to ensure competition considerations are accounted for in sectoral regulation. After all sectoral regulation is a complementary measure to

⁶⁴³ Unless the competition agency is provided with a mandate to advocate their views to other relevant regulatory and public agencies such as in Canada, Italy, the Republic of Korea, Russia and South Africa. See Dabbah, M., *International and Comparative Competition Law*, Cambridge University Press (2010), p. 67

competition policy in industrial supervision⁶⁴⁴ and the industrial monitoring conducted by *Bank Negara Malaysia* has been successful in ensuring anti-competitive outcomes do not arise as a result of the ongoing merger exercise⁶⁴⁵. However, it ought to be noted that the energy sector and the communications and multimedia sector are excluded from the remit of the Competition Act 2010⁶⁴⁶ because their sectoral regulations have already included competition dimensions⁶⁴⁷.

Due to the limitations of the behavioural remedies available under the Competition Act 2010, anti-competitive infringements which arise due to the market structure have to also be addressed through the structural approach and/or the regulatory approach and supported by competition advocacy initiatives. As it is now, there are limitations in the Competition Act 2010 in regard to addressing tacit collusions. However, as to whether such limitations would impact effective competition enforcement in Malaysia in light of tougher cartel enforcement, it would need to be assessed against the significance of the “oligopoly gap” and “cartel gap” in the market and also the Malaysian market structure. The latter is to assess the presence of elements which would enable tacit collusion based on their changes in response to mergers.

⁶⁴⁴ See: Aubert, C. and Pouyet, J., ‘Competition Policy, Regulation and the Institutional Design of Industry Supervision’, *Louvain Economic Review* Vol. 70 (2) (2004) 153-168

⁶⁴⁵ See: Nasser Katib, M., ‘Market Structure and Performance in the Malaysian Banking Industry: A Robust Estimation’, 8th Capital Markets Conference, Indian Institute of Capital Markets Paper (2004), p.13 at SSRN: <http://ssrn.com/abstract=872266> or <http://dx.doi.org/10.2139/ssrn.872266>

⁶⁴⁶ See: Section 3 (3) and First Schedule Competition Act 2010, Malaysia

⁶⁴⁷ Respectively, the Communications and Multimedia Act 1998 and the Energy Commission Act 2001.

It should also be noted that a challenge which may likely arise is that the evolution of cartels into tacit collusion due to mergers in light of tougher cartel enforcement would also adversely impact cartel enforcement. This is because since merger control is not available to filter mergers between firms with the likelihood to tacitly collude, then the burden to address tacit collusion would also still have to be borne partly through cartel enforcement because of the prohibition of concerted practice under Section 4, Competition Act Malaysia. Thus, in a way, it would be *status quo* for cartel enforcement albeit with the extra and arguably more complex dimension of tacit collusion.

5.5. PROPOSALS AND RECOMMENDATIONS

First and foremost, a comprehensive empirical study needs to be carried out on the level of market concentration in Malaysia. The study should include major industries with oligopolistic tendencies. The scope of the study should include the level of market concentration but also the enabling factors for market concentration in the market; the existence and magnitude of facilitating factors for tacit collusion in the market and their response to change in the market structure via mergers. The study should aim to: capture an adequately accurate diagnosis of Malaysia's level of market concentration across the board; determine whether market concentration is driven by economies of scale or supra-competition profit; and to identify markets or industries with likelihood for merger in light of tougher cartel enforcement. These studies could also be carried out severally based on industry. Such empirical studies are needed in order to determine

whether there is a need to include a competition dimension in Malaysia's merger control regime. If there is adequate justification to do so, then the case for it should be supported by strong empirical evidence not only to ensure that Malaysia implements appropriate competition policy and enforcement strategies but also because it is anticipated that it will not be easy for the MyCC to convince the government and other relevant sectoral regulators particularly *Bank Negara Malaysia*, the Securities Commission and the Ministry of Finance to agree to the inclusion of a competition dimension under the country's merger control regime. This is not only because the country's development agenda trumps competition interests but because of reasons of agency seniority and "turf" protection. Therefore, a convincing and hard case to refute would have to be supported by strong empirical evidence.

Thereafter, the appropriate action to be undertaken would depend on the findings of the proposed empirical study/studies. If the findings support the inclusion of a competition dimension in Malaysia's merger control regime; then, it is proposed as follows:

i) legal framework –

The first alternative is to include a competition dimension in the Code of Take-overs and Mergers 2010 to enable competition considerations to be accounted for in merger applications. Therefore, the Securities Commission would not have to hand over their "turf" to the MyCC and merger control with competition dimension could be implemented in

Malaysia. The second alternative is for the competition dimension of merger control to be included under the remit of the Competition Act 2010 but mergers involving selective strategic industries; types of commercial activities; or undertakings are excluded or carved out from the remit of the Competition Act 2010. The industries, types of commercial activities and undertaking selected ought to be based on sound economic development justifications; and

- ii) merger control to also assess the potential for abuse of collective dominance –

Under both the abovementioned alternatives, mergers should not only account for potential for unilateral abuse of dominance but also the potential for abuse of collective dominance. This is because the assessment of the two types of abuse of dominance involves different variables, likewise their remedies⁶⁴⁸. In this regard, the works by Kuhn⁶⁴⁹ and Ivaldi *et al*⁶⁵⁰ are useful to be referred to. Therefore, it would be useful for the Securities Commission Malaysia and the MyCC to jointly issue

⁶⁴⁸ Kuhn, K. U., 'An Economists' Guide Through the Joint Dominance Jungle', Michigan Law and Economics Research Paper No. 02-014 (2001), pp.10-13 at SSRN: <http://ssrn.com/abstract=349523> or <http://dx.doi.org/10.2139/ssrn.349523>

⁶⁴⁹ Kuhn, K. U., 'An Economists' Guide Through the Joint Dominance Jungle', Michigan Law and Economics Research Paper No. 02-014 (2001), at SSRN: <http://ssrn.com/abstract=349523> or <http://dx.doi.org/10.2139/ssrn.349523>

⁶⁵⁰ Ivaldi, M. *et al*, *The Economics of Tacit Collusion*, Final Report for DG Competition European Commission (March 2003)

Guidelines pertaining to the driving factors for collusion and their impact on merger regulation in Malaysia. This is to facilitate merger officials in their assessment and also to provide clarity to businesses. However, it needs to be emphasised that merger applications for firms in oligopolistic markets are more appropriate to be assessed based on structural analysis and not solely via the checklist method. This is to ensure that mergers in oligopolistic markets are not being overzealously blocked by merger officials.

If the findings of the empirical studies cannot support the inclusion of a competition dimension into Malaysia's merger control regime; then the regulatory approach and advocacy should be adopted to complement the behavioural remedies under the Competition Act 2010. In this regard:

- i) the MyCC should set up coordination and consultation mechanisms between itself and the Securities Commission; other relevant policy making agencies; and industrial or sectoral regulators in order to pro-actively persuade, if not ensure that competition concerns are considered by the said agencies in their decision making and also to iron out any inconsistencies between competition enforcement and industrial regulation. For instance, in carrying out their duties, there is a possibility that the MyCC and other agencies and regulators would come across

information which would be useful to one another⁶⁵¹. As such, consultation is crucial in order to enable: views to be exchanged and information which are not confidential to be shared; and

- ii) the MyCC should adopt regulatory approaches which are practical; less cumbersome; cost effective and less formal in addressing anti-competitive issues in oligopolistic markets. This should include the following: (a) remedial actions through market reviews and issuing the relevant guidelines. The guidelines should include clarification on: the types of communication which may amount to direct or indirect communication in terms of concerted practice as prohibited under Section 4, Competition Act 2010, something akin to the *Antitrust Guidelines for Collaborations Among Competitors (AGCAC)* issued by the US Federal Trade Commission and US Department of Justice. This is to facilitate businesses in the dos and don'ts of tacit collusion which in turn would provide certainty in terms of competition law enforcement; (b) the meaning of collective dominance under Section 10, Competition Act 2010. This is to clarify not only the

⁶⁵¹ For example, information uncovered during the evaluation of mergers and acquisitions information pertaining to collusion may be uncovered. However, legal barriers to information sharing ought to be noted. Even in jurisdictions which do not exclude mergers from the remit of their competition laws impose limitations in use of such information. Therefore, this option is unlikely to be viable for the MyCC under the current legal framework. Still, it is an option which could be pursued by Malaysia in future. See Ghosal, V., 'The law and Economics of Enhancing Cartel Enforcement: Using Information from Non-Cartel Investigations to Prosecute Cartels', *Review of Law and Economics* Vol. 7 (2) (2011) 501-538. Another example is when the MyCC uncovers information of price fixing by merged entity made up of former cartel members in the communications and multimedia sector or the energy sector, it would be useful if the MyCC could provide the information to the respective sectoral regulators for further consideration.

meaning of collective dominance under the Competition Act 2010 but also as to whether collective dominance under the Malaysian competition law would require the firms representing themselves as one entity and also the type of link required between the firms which amounts to collective dominance.

It should be noted that the regulatory approach and advocacy are recommended to be implemented regardless of the findings of the suggested empirical study/studies. Infact, guidelines and advocacy works pertaining to collusion ought to be initiated even before tougher cartel enforcement is implemented in Malaysia. This is because collusion should be dealt with in a comprehensive manner because it is a more complex infringement as compared to cartels and the possible shortcomings in behavioural remedies available under the Competition Act 2010, as explained earlier.

It should also be noted that just because cartels have merged and evolved into coordination does not mean that the burden of cartel enforcement would be lessened. On the contrary, the MyCC should be more vigilant of tacit collusion in carrying out cartel enforcement. In this regard, appropriate strategies ought to be adopted and these include: stepping up monitoring of announcements through trade associations; identifying industries and markets which are prone to collusion and include them in the prioritisation framework on cartel enforcement; utilising cartel detection tools such as leniency programme which could also be useful in detecting tacit collusion by creating

incentives for oligopolists to snitch on their fellow colluders⁶⁵². Hence, it is pivotal for cartel enforcement tools and instruments which would facilitate detection and create credible threat for punishment to be already up and running by the time tougher cartel enforcement is implemented in Malaysia.

5.6. CONCLUSION

As discussed above, tacit collusion is a more complex form of competition law infringement as compared to cartels. This is because it is difficult to pinpoint adequately whether the anti-competitive outcomes in the market are due to coordination or joint collusion between oligopolists or are merely as a result of parallel conducts due to the market structure. In the first place, there is yet to be an adequately precise economic test available to determine the competitive price in the market. It is also difficult to say for certain as to what is the best way to address collusion. However, in determining suitable approaches in addressing tacit collusion, two main aspects should be considered; they are: the significance of “oligopoly gap” and “cartel gap”; and the existence of factors which would enable tacit collusion based on their response to change in market structure via mergers.

The implementation of tougher cartel enforcement may likely lead to cartels merging and evolving into tacitly colluding oligopolists in a more concentrated market which is

⁶⁵² Motta, M., *Competition Policy Theory and Practice*, Cambridge University Press (2004), pp.193-202

better suited for collusion; particularly when merger control law does not have a competition dimension. Available literature discussion points to this likelihood. However, in the Malaysian context, the need for the competition dimension to be included in its Code on Takeovers and Mergers 2010 needs to be supported by empirical evidence which to date is insufficient. Available empirical evidence so far (which is yet to be adequately sufficient because it is only based on empirical studies of the manufacturing and banking industries and also conducted before the adoption of competition law in Malaysia) points that despite the fact there is market concentration in the manufacturing and banking industries, the driving factor was economies of scale instead of supra-competition profits.

Adequacy of the current provisions under the Competition Act 2010 in dealing with tacit collusion cannot be answered with certainty at this point in time because it could only be answered in time as competition law enforcement progresses in Malaysia and also based on supporting evidence from economic research. However, based on the current provisions on concerted practice, joint collusion and market reviews and with insights from EU jurisprudence on tacit collusion; there are limitations to the remedies available under the Competition Act 2010.

As for the appropriate approach for Malaysia to adopt in dealing with tacit collusion in light of tougher cartel enforcement, it would indeed depend on the significance of the “oligopoly gap” and “cartel gap”; and the existence of factors which would enable tacit

collusion based on their response to change in market structure via mergers. Even if there is no supporting empirical evidence for the inclusion of a competition dimension in Malaysia's merger control regime, it is appropriate for behavioural remedies to be complemented by the regulatory approach and advocacy. In the event that there is empirical findings in future and much warranted research on the state of market concentration in Malaysia, this work has put forth some possible alternatives in terms of the legal framework for merger control; namely: including a competition dimension in the Code of Take-overs and Mergers 2010 or including merger control under the Competition Act 2010 but excluding selective strategic industries, types of commercial activities or undertakings from the remit of the law.

Despite all the arguments which have been put forth in this chapter, it needs to be cautioned that the discussion in this chapter is theoretical in nature based on the findings of available studies in the literature and also EU jurisprudence on tacit collusion; in view of the similarities between the Malaysian legal provisions on prohibition of anti-competitive horizontal agreements and abuse of dominance and those of the EU. Nevertheless, the discussion in this work has highlighted the need for: first, a comprehensive study to be carried out on the state of market concentration in Malaysia and the anticipated evolution in business practices as competition law enforcement progresses; second, for an assessment to be carried out on the significance of the "oligopoly gap" and "cartel gap" in Malaysia; and third, after a few years of competition law enforcement, an assessment ought to be carried out to

determine the adequacy of available remedies under the Competition Act 2010 in addressing tacit collusion without being complemented by the structural approach via merger control with competition dimension.

CHAPTER 6:

THE WAY FORWARD FOR MALAYSIA

6.1. SUMMARY OF FINDINGS

Before the way forward for Malaysia in terms of policy recommendations on cartel enforcement is discussed, it is prudent to recap the main findings of all the substantive discussions in the chapters of this thesis.

The difference in levels of development should not be a hindrance in cross border enforcement cooperation of competition cases under regional TAs, However, there are prerequisites which have to exist before competition related provisions in regional TAs could be considered as a suitable alternative for international cartel enforcement by any country. First, there ought to be incentives for the regional TA signatory countries to cooperate in international cartel enforcement by invoking the competition related provisions thereunder. Second, the limitations of each country should be recognised. Third, there has to be government commitment in eradicating the adverse impact of anti-competitive international cartel activities on trade liberalisation and competition;

The two factors which create incentives for the inclusion and utilisation of competition related provisions in regional TAs are the existence of credible competition enforcement regimes and the strength of trade relationship between the regional TA partners.

Without domestic competition law in place, there is no legal basis for cooperation. Even if there is a competition law in place, the absence of a credible competition enforcement regime would not incentivise a developed country with an advanced competition jurisdiction to invoke the competition related provisions in the regional TA to address cross border competition infringements such as international cartels. As for the strength of trade relationship between the regional TA partners, the incentives are created based on the defensive and offensive trade interests of each country and the interplay between trade and competition considerations in the negotiations between the regional TA partner countries.

The structure recommended for regional TAs between developed and developing countries is for the broad provisions on competition to be included in the regional TA and for the details of the cooperation to be provided under an implementing agreement between the competition authorities involved. This is similar to the implementing agreements for each relevant chapter under regional TAs which are being practised by Japan. Such a structure allows for the details regarding the implementation of the competition related provisions to be thrashed out between the experts, namely the respective competition authorities without affecting the execution of the overall regional TA itself and bundling competition commitments with trade commitments that may be deemed as too restricting by the signatories⁶⁵³;

⁶⁵³ See: Sokol, D.D., 'Order Without (Enforceable) Law: Why Countries Enter Into Non-Enforceable Competition Policy Chapters in Free Trade Agreements', *Chicago-Kent Law Review*, Vol. 83 (2008) 101-163, p.136

The recommended minimum required elements which are necessary to facilitate the utilisation of competition related provisions under regional TAs may be divided into four categories; namely, advancement of the competition agenda, bridging the difference in legal standards, addressing the interaction between trade and competition, certainty and flexibilities. Under advancement of competition, the elements are: the requirement to adopt and maintain competition law measures; cooperation in competition law enforcement. Bridging the difference in legal standards requires the following elements: description of anti-competitive practices; information sharing; and comity. The elements necessary to address the interaction between trade and competition are: whether trade measures are allowed to be invoked for breach of any of the competition related provisions; and inclusion of anti-competitive mergers under the ambit of the regional TAs. Certainty requires the dispute settlement element to be included and exemptions; and special and differential treatment are those elements which provide for flexibilities to account for the limitations of developing countries;

Links with existing networks in international competition such as OECD, ICN, UNCTAD, World Bank and the WTO are also necessary and useful. The guidelines, recommendations and works which have been conducted under the said organisations are good reference points in international cartels enforcement⁶⁵⁴. Thus, in the implementation of competition related provisions in regional TAs, these organisations

⁶⁵⁴ These include : OECD's *Best Practices for the Formal Exchange of Information Between Competition Authorities in Hard Core Cartels Investigations* (2005); ICN's *Report on Cooperation Between Competition Agencies in Cartel Investigations* (2007)

may be consulted by the signatories particularly in matters of best practices, clarification and disputes settlement;

Future studies on jurisdictional issues in implementation of regional TAs are warranted; for example, in cases where more than one regional TA apply in a particular international cartel case. A possible answer may be dependent on having to do some sort of analysis on which regional TA would involve cheaper costs, less cumbersome procedures and higher probability of successfully uncovering and prosecuting the cartel. Such a question is indeed pertinent and warrants research in the future.

Malaysia's cartel enforcement policy needs to be formulated based on Malaysia's own terms; accounting for the objectives of its competition law; development objectives; and prevailing socio-economic ideology. In this regard, it is useful for Malaysia to refer to other suitable competition jurisdictions for insights. Reference to the South African competition law enforcement experience is warranted based on shared similarities with Malaysia in terms of development and socio-economic concerns; their achievements in cartel enforcement despite the limitations faced by the competition authorities; and the argument that South African competition jurisprudence is sympathetic to inclusive development – which is also relevant to Malaysia.

Effective cartel enforcement as proposed in this work refers to the existence of credible competition authorities and competent competition law enforcement. Credible means

the existence of a competition enforcement regime which is able to function within its limited resources; independent; and accepted by society. Whilst competent competition law enforcement means the ability of the competition authorities to detect, investigate and prosecute cartels under the law which in turn creates credible risk of discovery and punishment to cartels without compromising development gains to the country. This is relevant because the aim of Malaysia's cartel enforcement policy should be effective cartel enforcement; thus, the general principles in developing an appropriate cartel enforcement policy for Malaysia have to be guided by effective cartel enforcement in the Malaysian context.

The general principles in developing an appropriate cartel enforcement policy for Malaysia identified in this discussion are: addressing the lack of competition culture; implementing cartel enforcement within the allowance of limited resources; clarification of the modality for gradual implementation of the Competition Act 2010; addressing legislation inadequacies; addressing disjunctions with other policies which are pertinent to Malaysia's development objectives; and establishing and maintaining independence of the competition authorities.

In general, the lessons to be learned from South Africa in regard to cartel enforcement are: cartel enforcement should be dynamic, strategic and innovative. These involve: implementing appropriate approaches as cartel enforcement progresses in Malaysia – becoming stricter in time as society's awareness of competition and cartel enforcement

experience develops; adoption of cartel enforcement tools which are less costly and simple to implement but would bear a marked impact on cartel detection; adopting strategic competition advocacy in engagements between the MyCC and other regulators, policy making agencies and the public in order to build competition awareness in the country; noting that accounting for non-competition consideration in cartel enforcement which require assessments that go beyond the economic considerations of efficiency and consumer welfare risks misallocation of resources and distortions in distribution of economic wealth; and the importance of establishing the independence of the competition authorities.

In referring to the South African cartel experience, it ought to be noted that the Competition Act 1998, South Africa and the Competition Act 2010, Malaysia have development as one of their main aims. The South African competition law enforcement experience is indeed relevant to Malaysia because the elements for the two indicators of effective cartel enforcement in the Malaysian context as recommended by this work are present under the South African Competition regime.

Most of the cartel enforcement tools and approaches which have been implemented by the South African competition authorities are not novel to the competition fraternity. However, what their cartel enforcement experience and competition law jurisprudence have pointed out is that limitations faced by developing countries and development concerns could be managed and accommodated without compromising competition

goals. This may be inferred not only through their gradual cartel enforcement approach (reactive to proactive); innovativeness in implementation commensurate with available resources; and the South African competition authorities' attempts to accommodate public interest in the implementation of the Competition Act 1998.

Malaysia should not solely refer to South Africa in regard to cartel enforcement but Malaysia and fellow middle income developing countries should not fail to refer to South Africa's competition law enforcement and jurisprudence for insights.

Exemptions are relevant not only to developing countries but also developed countries. The difference is that for developed countries or countries with mature competition regimes, exemptions granted may have been lessened over time due to regulatory reform⁶⁵⁵ or they may require more in depth and sophisticated form of assessment in line with their advanced development status, business innovations, maturity of competition agencies and stronger competition culture;

⁶⁵⁵ Like in the case of Japan - In 1998, the number of exemptions granted in Japan was greatly reduced by 90 per cent from more than 1000 previously exempted from the provisions of the Anti-Monopoly Act 1947 via various laws and administrative guidance cartels as authorised by the Japanese Ministry of International Trade and Industry. See Jacobs, S.H., *Regulatory Reform in Japan*, OECD (1999), p.216. From 2003, only three types of exemptions remain under the Anti-monopoly Act 1947 as a result of the revision of the law exercised in 1999-2000, namely: acts under intellectual property rights, acts of cooperatives and resale price maintenance contracts. See Takahashi, I., 'Anti-Monopoly Act Exemptions in Japan', the Specific Workshop between the Drafting Committee on Competition Law of Vietnam and the Japan Fair Trade Commission, JFTC (2003), p.1-2 and 8-9 available at <http://www.jftc.go.jp/eacpf/05/hanoiTaka.pdf>

The granting of exemptions does not weaken competition law provided they are based on sound economic justifications. Infact, exemptions may strengthen competition law by accommodating not only efficiency goals but also relevant broader public policy objectives which may result in efficiency outcomes or facilitate the acceptance of competition policy and law particularly in developing countries which lack competition culture. As such, exemption is a useful tool for ensuring the achievement of developmental objectives under competition law.

The factors which influence proper implementation of exemptions in developing countries are: development oriented goals, transparency and institutional limitations.

EU style exemption provisions may be made workable in Malaysia despite the difference in level of development and competition advancement between Malaysia and EU. However, in order to make the EU style legislative provisions become implementable in Malaysia, certain adjustments have been made in the exemption provisions under the Competition Act 2010 and these need to be complemented by the relevant regulatory tools;

Malaysia ought to note of the fact that there is yet to be any suitable economic model which could be utilised in the weighing of non-competition considerations which are based on equity against competition considerations based on economic considerations

such as efficiency and consumer welfare⁶⁵⁶. Thus, it would be relevant for the Malaysian competition authorities to conduct an economic study on formulating such an economic model lest exemptions based on equity considerations such as significant and identifiable social benefit as stipulated under Section 5 (a), Competition Act 2010, Malaysia are not granted based on erroneous principles which in turn could lead to misallocation of resources and inefficiency;

Tougher cartel enforcement in Malaysia could lead to cartels merging and tacitly colluding in markets which are better suited for coordination and abuse of collective dominance. However, this probable outcome is dependent on the factors which would enable tacit collusion based on their response to change in market structure via mergers. Whilst the need to include competition dimension in Malaysia's merger control regime is not only dependent on the existence of the said factors but also the limitations of the current provisions of the Competition Act 2010 in dealing with the "oligopoly gap" and the "cartel gap".

Adequacy of the current provisions under the Competition Act 2010 in dealing with tacit collusion cannot be answered with certainty at this point in time because it could only be

⁶⁵⁶ As identified by research on assessment of the public interest dimension under the South African competition law which include: Hodge, J. *et al*, 'Public Interest Provisions in The South African Competition Act- A Critical Review', Competition Policy, Law and Economics Conference (2009); and Boshoff, W. *et al*, 'The Economics Of Public Interest Provisions In South African Competition Policy', Sixth Annual Competition Law, Economics and Policy Conference, South Africa (2012) at <http://www.compcom.co.za/assets/Uploads/events/Sixth-Annual-Competition-Law-Economics-and-Policy-Conference-in-South-Africa-2012/NewFolder-3/The-economics-of-public-interest-provisions-in-South-African-competition-policy.pdf>

answered in time as competition law enforcement progresses in Malaysia and also based on supporting evidence from economic research. However, based on the current provisions in the Competition Act 2010 on concerted practice, joint collusion and market reviews; and with insights from EU jurisprudence on tacit collusion; there are limitations to the remedies available under the Competition Act 2010.

Presently, there is insufficient empirical evidence to support inclusion of a competition dimension in Malaysia's merger control regime. However, even if there is no supporting empirical evidence for the inclusion of a competition dimension in Malaysia's merger control regime, it is appropriate for behavioural remedies to be complemented by the regulatory approach and advocacy. In the event that there is empirical findings in future and much warranted research on the state of market concentration in Malaysia, the possible alternatives in terms of the legal framework for merger control are: including a competition dimension in the Code of Take-overs and Mergers 2010 or including merger control under the Competition Act 2010 but excluding selective strategic industries, types of commercial activities or undertakings from the remit of the law.

Comprehensive empirical studies need to be carried out on market concentration in Malaysia and also the significance of "oligopoly gap" and "cartel gap" in Malaysia. The study should include major industries with oligopolistic tendencies. The scope of the study should be not only the level of market concentration but also the driving factors for market concentration in the market and also the existence and magnitude of facilitating

factors for collusion in the market. The study should aim to capture an adequately accurate diagnosis of Malaysia's level of market concentration; to find out whether market concentration is driven by economies of scale of supra-competition profit; and to identify markets or industries with likelihood for merger in light of tougher cartel enforcement.

6.2. POLICY RECOMMENDATIONS

In the effort to lessen the inconsistencies in international cartel enforcement via increased participation of developing and developed countries in international accords which facilitate cross border cartel enforcement such as regional TAs; competition jurisdictions in developing countries need to be able to implement competition law through effective cartel enforcement. This is because even if there is a competition law in place, the absence of a credible competition enforcement regime would not incentivise a developed country with an advanced competition jurisdiction to invoke the competition related provisions in the regional TA to address cross border competition infringements. Malaysia is a developing country with a young competition jurisdiction which is yet to formulate a formal cartel enforcement policy. Though the law is already in place, it has to be complemented by an implementation policy which is practical and workable in order to ensure effective cartel enforcement. Therefore, based on the findings of this thesis, it is recommended that Malaysia undertake the following actions:

- i. formulate a cartel enforcement policy document. It is recommended that the policy is titled as “Roadmap for Effective Cartel Enforcement in Malaysia (the Roadmap). The purpose of the Roadmap is to provide clear guidance for the benefit of not only competition policy officials but also the industry and the public on how Malaysia’s cartel enforcement will be implemented, the goals it aims for and the elements which have been identified as pivotal for effective cartel enforcement in Malaysia. It would facilitate the MyCC in terms of being transparent and clear in carrying out its role and function; hence providing certainty and clarity to businesses and consumers alike – which in turn would encourage investment in the country’s economy;

- ii. draft the relevant tools and instruments to facilitate effective cartel enforcement in Malaysia, namely: the leniency programme; prioritisation framework for cartel enforcement; competition advocacy policy; guidelines which include: guidelines on international cooperation in cartel enforcement; exemptions guidelines; guidelines for collaborations among oligopolists; and guidelines on the implementation of tacit collusion and collective dominance under the Competition Act 2010. This is to facilitate businesses in the dos and don’ts of collusion which in turn would provide certainty in terms of competition law enforcement; and guidelines for international cooperation in competition enforcement. The drafting of these tools and instruments would have to be initiated from now;

- iii. establish inter-agency consultation mechanism on the implementation of competition law;
- iv. conduct relevant studies on issues related to cartel enforcement and market concentration in Malaysia. These include studies: to determine an appropriate economic model to be applied in weighing out non-competition considerations against competition considerations, particularly in the assessment of exemptions; and on market concentration in Malaysia;
- v. adopt a regulatory approach to complement the Competition Act 2010 in addressing issues of market inefficiencies which adversely affect consumers;
- vi. establish capacity building and technical cooperation programmes with other supra-national competition organisations which advocates competition and also other competition jurisdictions such as the South African competition authorities, particularly the Competition Commission and Competition Tribunal; and
- vii. engaging in strategic competition advocacy and awareness programmes.

6.3. ROADMAP FOR EFFECTIVE CARTEL ENFORCEMENT IN MALAYSIA

The Roadmap is essentially a policy document which clarifies effective cartel enforcement in Malaysia, maps out the aims, strategies and milestones which ought to be undertaken in Malaysia's quest to implement effective cartel enforcement in Malaysia. This work suggests that Malaysia's cartel enforcement policy should be based on Malaysia's competition objectives as provided for under the Competition Act 2010; account for the limitations of the competition authorities; and the country's developmental concerns without compromising competition. As such, the general principles which are relevant to Malaysia in formulating an appropriate cartel enforcement policy in the implementation of the Competition Act 2010 are: addressing the lack of competition culture; implementing cartel enforcement within the allowance of limited resources; clarification of the modality for gradual implementation of the Competition Act 2010; addressing legislation inadequacies; addressing disjunctions with other policies which are pertinent to Malaysia's development objectives; and establishing and maintaining independence of the competition authorities.

Malaysia's cartel enforcement policy should aim for effective cartel enforcement. Effective cartel enforcement is the existence of credible competition authorities and competent competition law enforcement. Credible means the existence of a competition enforcement regime which is functioning, independent and adequately resourced.

Whilst competent competition law enforcement means the ability of the competition authorities to detect, investigate and prosecute cartels under the law.

Thus, it is recommended that effective cartel enforcement be defined in a broad manner based on the aims of competition policy and law but accounting for the limitations as a developing country with a young competition jurisdiction and also its development concerns. Therefore, it is proposed that effective cartel enforcement in Malaysia be defined as : “The deterrence of anti-competitive collusion which leads to increased level of competitiveness in the market and improvements in consumer access to a wider choice of quality products at competitive prices through proper management of available resources by functioning, independent and adequately sourced competition authorities, guided by Malaysia’s development objectives”. The objective of cartel enforcement should be to contribute towards the achievement of the objectives of competition policy in Malaysia. The objectives of competition policy in Malaysia as translated via the Competition Act 2010 are promotion of economic development, promotion of competition and consumer welfare⁶⁵⁷.

The Roadmap should outline Malaysia’s implementation approaches and strategies in terms of milestones and targets to be achieved, bearing in mind that Malaysia has decided to gradually implement its competition law. These elements provides coherence and clarity and are should be included to ensure cartel enforcement progresses

⁶⁵⁷ See: Preamble, Competition Act 2010, Malaysia

accordingly lest Malaysia ends up being stuck in the doldrums of nascent stage of competition law enforcement. As such, cartel enforcement in Malaysia should be gradually implemented based on three (3) stages of advancement – becoming stricter in time as society’s awareness of competition, cartel enforcement experience develops, and more resources are available for cartel enforcement.

The stages are to be divided into, the nascent stage; the intermediate stage; and the advanced stage. There are also targets to be met in each stage. The strategy to be adopted throughout the stages is to commence with a soft approach with emphasis on remedial action, advocacy and awareness which shall become more proactive and deterrence based as the stages advance. This is to allow time for the competition agencies in Malaysia, i.e. the MyCC, the Competition Tribunal and the courts to develop their capacity and competency; also to provide businesses time to put their “houses in order” based on the requirements of the Competition Act 2010; and educate the public on the importance and benefits of competition and cartel enforcement.

The targets for the nascent stage ought to be building the capacity and competency in addition to creating public awareness of competition law and the benefits of cartel enforcement. For the intermediate stage, the targets should be proactive enforcement and generating demand for cartel enforcement. The targets for the advanced stage are recommended to be adoption of more complex cartel enforcement tools and mechanism

such as criminalisation of cartel offences and greater involvement in the global competition agenda.

In the nascent stage, the focus should be on building the capacity and competency of the competition authorities and making the public aware and understand the workings of competition policy in general and cartel enforcement and its benefits specifically. During the nascent stage, there would likely be low demand (if at all) for cartel enforcement due to the lack of awareness of cartel enforcement⁶⁵⁸. Hence, throughout this stage, the form of cartel enforcement carried out should be reactive and remedial approach in enforcement. The focus should be on building the competency and capacity of the competition authorities and establishing the competition authorities' independence in carrying out their functions. Once the competition authorities possess the capacity and competency to enable tougher cartel enforcement, during the intermediate stage, then awareness programmes ought to be focussing on creating demand from the public for cartel enforcement. Upon reaching the advanced stage, something akin to the level where South Africa is now, then cartel enforcement ought to start focussing on more complex cartel enforcement mechanisms and tools whilst also increasing their involvement in advancing the global competition agenda.

⁶⁵⁸ See: Chowdhury, M., 'The Political Economy of Law Reform in Developing Countries', Sixth ASCOLA Conference – New Competition Jurisdictions: Shaping Policies and Building Institutions (July 2011), King's College London

Throughout the stages, the elements of awareness and advocacy; credibility of competition authorities; and proper utilisation of resources would have to be continuously present. All these elements are relevant and related to effective cartel enforcement. However, in each of the stages, the focus and form of each element is different. The explanation which follows shall be discussed based on the aforementioned stages.

In the nascent stage, the priorities ought to be on setting up the MyCC for operation by getting the required funding, employing people with the right skills and expertise, training not only the MyCC officials but also members of the Competition Tribunal and the judiciary. In addition, the MyCC have to focus on awareness and advocacy programmes. This is important in order to educate the public and stakeholders on competition policy and law, the importance of cartel enforcement and the benefits not only to the consumers but also the country's economy which come with effective cartel enforcement. Based on what has been undertaken so far, progress on awareness and advocacy programmes carried out by the MyCC is commendable. As at December 2011, the MyCC have held or jointly held a number of public consultations⁶⁵⁹, training course⁶⁶⁰ and briefing or dialogue sessions with stakeholders⁶⁶¹. It is also interesting to

⁶⁵⁹ Consultations have been conducted on the drafting of Guidelines on: Market Definition, Chapter 1 and Complaints Procedures. See MyCC website at http://www.mycc.gov.my/234_179_179/Web/WebEvent/Events/Upcoming-Events.html accessed on 28/12/2011

⁶⁶⁰ APEC Training Course on Competition Policy - Effective Mechanism Against Cartel Offences, 10-12 October 2011, Penang, Malaysia; The Competition Act 2010 – Impact, Issues and Challenges, 13 October 2011, Science University of Malaysia, Penang; Seminar on Competition Law and Consumer Welfare, 3 November 2011, Kuala Lumpur. See MyCC website at

note that the first training session jointly organised with APEC was on mechanisms against cartel offences. This may be viewed as a reflection of Malaysia's concern on anti-competitive cartel activities.

Credibility of the competition authorities is paramount because it is related to the perceived independence of the competition authorities in decision making and also their competency. The MyCC and the Competition Tribunal have been established as agencies under the Ministry of Domestic Trade, Co-operatives and Consumerism; and the responsible Minister has also been granted discretionary powers in regard to nomination of Competition Commissioners and also the power to amend the Schedule under the Competition Act 2010 pertaining to exclusions. Such discretionary powers could be abused or exercised based on inappropriate considerations. Therefore, there has to be check and balance mechanisms in place. This is particularly important for Malaysia due to the fact that there has been evidence of cronyism and political patronage in Malaysia and businesses enjoying close links with decision makers and those in the higher echelons of power would lobby against cartel enforcement in order to protect their interest of continued enjoyment of economic rent. Therefore, it needs to be ensured that the individuals appointed in key positions are not politicians or politically connected; the Malaysian competition authorities are able to function without any

http://www.mycc.gov.my/234_179_179/Web/WebEvent/Events/Upcoming-Events.html accessed on 28/12/2011

⁶⁶¹ Until October 2011, 30 briefing/dialogue sessions have been held by the Malaysian Competition Commission. These involved stakeholders such as producers, professional bodies, policy makers, academicians, consumer associations and the Bank of Malaysia. See Malaysian Competition Commission website at http://www.mycc.gov.my/269_213_213/Web/WebPage/2011/2011.html accessed on 28/12/2011.

interference from the Minister and senior members of the ministry; and the exercise of discretionary powers by the responsible Minister pertaining to exclusions under the Competition Act 2010 are based on certain guiding principles. The guiding principles need to be incorporated into the Competition Act 2010 to ensure adherence by the responsible Minister. As such, it is recommended that the relevant amendments are made to the law. It also has to be ensured that there are sufficient powers granted to the competition authorities to enable cartel enforcement⁶⁶². Granted that the Competition Act 2010 has been enacted and enforced but checking and improving the legislation is an ongoing task based on the enforcement requirements which sometimes unfortunately may only be determined once cartel enforcement is undertaken.

In terms of the types of cartel infringements to be pursued in the nascent stage, , the MyCC should start with glaring anti-competitive cartel offences such as hard core cartel offences which have been ongoing and widely known in sectors which directly impact consumers; and cases which are straight forward and not controversial – in view of the

⁶⁶² Based on the present provisions in the Competition Act 2010, Malaysia, the MyCC is vested with strong powers of investigation and enforcement. Infact, in some aspects, the powers are wider and stronger than that of the South African Competition Commission as provided for by the Competition Act 1998. Among others: i) in South Africa, searches without warrant may not be conducted on a private dwelling (see Section 47 (1) Competition Act 1998, South Africa) and searches with or without warrant may only be conducted during the day unless a night time search is necessary and justifiable (see Sections 46 (4) and 47 (3) Competition Act 1998, South Africa). However, under the Malaysian Competition Act 2010, searches with or without warrant may be carried out at any reasonable time day or night and does not exclude private dwellings (see Sections 25 and 26 Competition Act 2010, Malaysia); ii) under Section 49 (9) Competition Act 1998, South Africa, the Competition Commission may also compensate those who suffered damage due to forced entry onto the premise when no one responsible for the premises was present. In contrast, under Section 28 Competition Act 2010, Malaysia, even if the search warrant is defective, it shall still be admissible and no cost or damages shall be recoverable in relation to the seizure of document or data unless it was executed without reasonable excuse (see Section 31 Competition Act 2010, Malaysia).

limited experience and available resources. Choosing to go after the right cases is important in order to demonstrate to the public and the market that the competition authorities are independent and competent enough to implement cartel enforcement as per the requirements of the Competition Act 2010. In this regard, cooperation with the media is useful and relevant and should be initiated in order to establish good networking with the media. As the saying goes “people will believe it when they see it”, so the MyCC would have to initiate a few cases of cartel infringements which could be highlighted by the media to demonstrate the harmful effects of cartels and the advantages of cartel enforcement. However, in highlighting cartel investigation and prosecution, the MyCC should heed all legislative related provisions lest such publicity backfires. Such enforcement mistakes would not only be detrimental to the MyCC’s efforts in establishing their credibility but they also risk facing legal action by the alleged cartel firms which are mostly well endowed firms which would not hesitate to institute legal action against the MyCC.

Apart from this, during this stage, the MyCC should also be engaging in consultation and advisory programmes not only to facilitate undertakings to “put their house in order” as per the requirements of the Competition Act 2010 but also to engage with sectoral regulators and policy making agencies in coordination mechanisms.

Another task which has to be prioritised during the nascent stage is the drafting or setting-up of tools, instruments and mechanisms which facilitate cartel enforcement.

This is not only for purposes of establishing credible risk of cartel detection but also to ensure appropriate utilisation of resources and provide coherence and clarity in cartel enforcement. In this regard, it is recommended that Malaysia emulates South Africa and many other countries in adopting a leniency programme and also a prioritisation framework and also the relevant guidelines which are explained in detail later in this chapter.

Establishment of credible risk of detection has to be coupled with serious penalties. In terms of penalty, the Malaysian competition legislation provides for substantive fines to be imposed on infringement offences under Part II of the Competition Act 2010 cases which include prohibited cartel agreements. The MyCC may impose a fine not exceeding ten per cent of the worldwide turnover over the period of the infringement⁶⁶³. Other than the infringements under Part II, any person (natural and/or body corporate) who commits an offence under the Competition Act 2010 of which there are no specific penalty mentioned, may be subject to heavy fine and imprisonment⁶⁶⁴. Offences include those committed in relation to the investigation and enforcement of the Competition Act 2010. Clearly, these reflect Malaysia's seriousness in combating not only cartels but prohibited anti-competitive conducts in general. However, in the nascent stage, the soft

⁶⁶³ Section 41 (4) Competition Act 2010, Malaysia

⁶⁶⁴ See: Sections 61 and 63 Competition Act 2010, Malaysia. The imprisonment penalty in this regard relates to conducts which affect the investigation and enforcement of the Competition Act 2010 are considered as offences which are punishable by imprisonment of individuals even offending for the first time and/or substantive fines. This is different from the introduction of criminal sanctions for cartel offences in South Africa because cartel offences per se are not subject to criminal sanctions but failure to provide access to records to the Competition Commission in the investigation and enforcement of cases under the Act is an offence which may result in imprisonment of the individual involved. (see: Section 20 Competition Act 2010, Malaysia).

approach requires focus on remedial measures and also enhancing of awareness. Therefore, any penalty should be imposed only after the infringing firms have been accorded with an opportunity to rectify the infringement; failing which, the penalty as provided for under the law shall be invoked. In this regard, the MyCC should also implement a compliance programme to encourage firms to comply with the requirements of the Competition Act 2010.

Next, is the intermediate stage. In this stage, the capacity and competency of the competition agencies have reached the level which enables pro-active deterrence based cartel enforcement. This is when cartel enforcement becomes more focussed, for instance having a number of people in the MyCC whose job is to specifically deal with cartel enforcement; enforcement tools and mechanisms such as leniency programme and prioritisation framework are up and running; and increased budget being allocated specifically for cartel enforcement. As such, the enforcement strategy to be adopted ought to be pro-active. This is the supply side of cartel enforcement⁶⁶⁵. In so far as the demand side is concerned, awareness programmes ought to be continued to be prioritised, the difference with the nascent stage is that during the intermediate stage, the focus of the awareness programmes is more on enhancing public support for cartel enforcement and less on elementary education on the workings and benefits of competition law and cartel enforcement but more on the competency of the MyCC. This

⁶⁶⁵ For a discussion of the evolution of cartel enforcement in developing countries explained in terms of the concept of supply and demand, see Chowdhury, M., 'The Political Economy of Law Reform in Developing Countries', Sixth ASCOLA Conference – New Competition Jurisdictions: Shaping Policies and Building Institutions (July 2011), King's College London

may include highlighting the complexity of cartel cases being investigated and prosecuted by the MyCC.

It should be noted that the intermediate stage means tougher cartel enforcement via pro-active deterrence approach. Hence, it is also at the start of this stage that it is recommended Malaysia's stance on excluding the competition dimension from the country's merger control regime is reviewed. This is to facilitate effective cartel enforcement and promotion of competition because as discussed in Chapter 5, the lack of merger control without a competition dimension may seem as a logical; less cumbersome and less costly alternative for cartelists in oligopolistic markets in light of tougher cartel enforcement. This in turn, could lead to cartels merging and engaging in tacit collusion in a more concentrated market which is better suited for concerted practice and joint collusion –more complex forms of competition infringement. Tougher cartel enforcement calls for the full implementation of all the tools to facilitate effective cartel enforcement such as leniency programme, compliance programme, prioritisation framework. This should be coupled by the threat of serious penalties as provided under the law where the aim of cartel enforcement is for deterrence and the soft approach emphasising remedial action ceases.

Legislative provisions have to be reviewed in order to overcome any limitations in the law which have been identified during the nascent stage. Improvements to tools for enforcement such as compliance programme, leniency programme, prioritisation

framework and guidelines related to the implementation of cartel enforcement under the Competition Act 2010 would also have to be made in order to keep them updated and also to remedy any loopholes and weaknesses in the said tools and instruments. Relevant studies would also need to be carried out and their findings would provide the evidence necessary to support any change to be made to the law and also enforcement approach of the MyCC. Additionally, in order to gauge the effectiveness of the competition agencies, Malaysia should also subject the MyCC to peer reviews by relevant bodies such as the ICN, UNCTAD and OECD. Such exercises may help provide independent analysis and highlight the shortcomings and strengths of the Malaysian cartel enforcement regime. Apart from such reviews, the MyCC should also start to actively engage in publishing its decisions and opinions in order to demonstrate transparency in their decision making which would contribute positively to the credibility of the MyCC.

Lastly, comes the advanced stage in cartel enforcement which is similar to the level where the South African cartel enforcement competition authorities are at now. At this stage, the credibility of the competition authorities is established and there is sufficient level of awareness among the public and businesses to have an acceptable level of competition culture in place. In this stage, the competition authorities could now concentrate on more complex cartel enforcement issues. This may include the possibility of introducing criminal sanctions for cartel offences such as in South Africa, increased involvement in the furtherance of the competition agenda at the regional and

global level, lobbying for the inclusion of merger regulation under the competition law or inclusion of the competition dimension in the existing merger regulation framework. These are all aspects which should be looked into at this stage when the MyCC has gained enough clout and expertise to tackle complex and potentially controversial issues which however are relevant to effective cartel enforcement in Malaysia⁶⁶⁶. In this regard, the awareness programmes ought to now focus on garnering public support for such issues which are put forth by the competition agencies for the sake of furtherance of the competition agenda. The MyCC should also be involved in advocacy and capacity building programmes in the role of mentors for other young competition jurisdictions in developing countries.

6.4. TOOLS AND INSTRUMENTS FOR EFFECTIVE CARTEL ENFORCEMENT

The Roadmap should be complemented by tools and instruments which would facilitate effective cartel enforcement. These include: the leniency programme; prioritisation framework for cartel enforcement; competition advocacy policy; guidelines which include: guidelines on international cooperation in cartel enforcement; exemptions guidelines; guidelines for collaborations among oligopolists; and guidelines on the

⁶⁶⁶ For instance, criminalisation of cartel offences may not be easy to enforce based on the experience of developed countries such as the United Kingdom and even the EU. Furthermore, it has been argued that criminalisation of cartels may jeopardise the effectiveness of leniency programmes and drive cartelists to be more secretive and illicit with their activities. Criminalisation is a strong deterrent but it is like a two pronged knife. At this early juncture for Malaysia, attempting to enforce criminal sanctions on cartels without much experience may prove to be disastrous and detrimental to their efforts to establish their credibility. South Africa only criminalised cartels after nearly ten years of experience with cartel enforcement. See Stephan, A., 'How Dishonesty Killed the Cartel Offence', *Criminal Law Review*, Vol.6 (2011) 446-455; Lavoie, C., 'South Africa's Corporate Leniency Policy: A Five Year Review', *World Competition* Vol. 33(1) (2010) 141-162, p.161.

implementation of tacit collusion. The implementation of the said tools and instruments in cartel enforcement ought to be documented and published for the sake of transparency and clarity in cartel enforcement.

The Competition Act 2010, Malaysia specifically provides for a leniency regime⁶⁶⁷. The advantage of leniency being specifically provided for under the law is that there is legal certainty in the provision of immunity to co-operating cartel members. Nevertheless the legislative provision is generally worded and its implementation would have to be supported by policy instruments for the details. In this regard, Malaysia should look at South Africa's CLP incorporating the latest amendments which are based on international best practices standards as those advocated by organisations such as the OECD and ICN. Therefore, the relevant guidelines or policy document ought to be formulated as soon as possible by Malaysia. The elements which should be present in the leniency instrument are not only those which would be incentives for cartelists to seek immunity from prosecution but also those which are necessary to ensure that immunity is not abused for example by ringleaders who purposely set up the cartel and rats out on their fellow cartelists simply to drive competitors out of the market.

⁶⁶⁷ Under the Malaysian competition legislation, different percentage of reduction of penalties are allowed depending on whether the applicant firm is the "first through the door" or the stages at which admission or cooperation was made or any other circumstances based on the discretion of the MyCC (see Section 41 Competition Act 2010, Malaysia). In contrast, although leniency is one of the main features of cartel enforcement in South Africa, it is not specifically provided for under the Competition Act 1998, instead, it is in the form of a policy.

In so far as prioritisation framework is concerned, Malaysia would have to determine the criteria for identifying sectors and cases which are to be prioritised in cartel enforcement, particularly markets with oligopolistic tendencies and industries prone to cartelisation. In this regard, the criteria for prioritisation should be determined. As guidance, South Africa's criteria for its prioritisation framework are: impact on poor consumers; contribution to accelerated and shared growth in terms of national economic policy; and likelihood of substantial competition concerns⁶⁶⁸. These in turn helped to identify four (4) priority sectors: namely; food and agro-processing, infrastructure and construction, intermediate industrial products and financial services⁶⁶⁹. It is recommended that Malaysia accounts for both structural and behavioural issues which may give rise to anti-competitive cartel agreements⁶⁷⁰. Granted that merger regulation is unavailable under the Malaysian Competition Act 2010 to deal with structural issues but determining areas which ought to be focussed on under the prioritisation framework for cartel enforcement in Malaysia by identifying sectors and industries with high market concentration is within the ambit of the competition legislation. In identifying sectors and markets with known or suspected high

⁶⁶⁸ 'Ten Years of Enforcement by the South African Competition Authorities – Unleashing Rivalries 1999-2009', Competition Commission, Competition Tribunal, South Africa (2009), Box 7, p.39 at <http://www.compcom.co.za/10-year-review> accessed on 20/10/2011.

⁶⁶⁹ 'Ten Years of Enforcement by the South African Competition Authorities – Unleashing Rivalries 1999-2009', Competition Commission, Competition Tribunal, South Africa (2009), Box 7, p.39 at <http://www.compcom.co.za/10-year-review> accessed on 20/10/2011

⁶⁷⁰ For a detailed discussion on cartel detection see Harrington Jr., J.E., 'Detecting Cartels', John Hopkins University (2004-2005) at <http://econ.jhu.edu/wp-content/uploads/pdf/papers/wp526harrington.pdf> accessed on 9/8/2012

incidents of anti-competitive cartel activities, the MyCC should refer to among others, consumer complaints and industry announcements⁶⁷¹.

As mentioned earlier, competition advocacy and awareness have to be implemented throughout the different stages of cartel enforcement development in Malaysia. However, advocacy and awareness programmes have to be strategically implemented in light of limitation of resources. The focus and form of competition advocacy in each stage of cartel enforcement development would have to be different and this has been explained in the previous section. The aim of Competition Advocacy Policy should be promotion of the competition agenda; instilling and enhancing awareness of the workings and merits of competition policy and law; and generating support and demand for enforcement. In this regard, the MyCC should not only act as an advocate for the furtherance of the competition agenda in Malaysia but also as an adviser. Therefore, the MyCC should pro-actively engage the media and the international competition fraternity in competition advocacy and awareness programmes; organise road shows; establish a one stop competition policy and law centre for training and consultation purposes; and implement a compliance programme to aid and facilitate businesses in complying with the requirements of competition law.

The guidelines for international cooperation in competition enforcement are also necessary for effective cartel enforcement because Malaysia economy is significantly

⁶⁷¹ Harrington Jr., J.E., 'Detecting Cartels', John Hopkins University (2004-2005), p.2 at <http://econ.jhu.edu/wp-content/uploads/pdf/papers/wp526harrington.pdf> accessed on 9/8/2012

dependent on trade, therefore, as discussed in Chapter 2 of this thesis, the more liberalised the trade and the more significance trade is to a country's economy, the more vulnerable it is to anti-competition international cartel activities. The guidelines are formulated to not only facilitate international cooperation in cross border cartel enforcement issues but also as guidance for competition officials in negotiations especially in regard to regional TAs. As such, the guidelines should encompass preliminary considerations, namely, the prerequisites for cooperation in international cartel enforcement via regional TAs; and the elements to be included as recommended in the discussion in Chapter 2 of this thesis. The preliminary considerations should assess the following before a decision is made whether it is viable to pursue a competition chapter under the regional TA: the existence of credible competition enforcement regime; strength of trade relations or trade interests between the signatories; the level of commitment by the governments in curbing anti-competitive international cartel activities between the jurisdictions of the signatories; and whether the signatories are willing to account for the limitations of all the signatories involved. If any one of the prerequisites is missing or not strong enough to support the viability for Malaysia to include a competition chapter under the regional TA, then it should not be followed through.

Under regional TAs where utilising the competition chapter for international cartel enforcement is viable, then the respective competition agencies should commence negotiation on the broad provisions to be included in the competition chapter and also

the detailed provisions under the implementation agreement. The implementing agreement should include the recommended elements (where possible) to enable cooperation in international cartel enforcement between the signatories via their respective competition agencies. The said elements are: the requirement to adopt and maintain competition law measures; cooperation in competition law enforcement; description of anti-competitive practices; information sharing; and comity; whether trade measures are allowed to be invoked for breach of any of the competition related provisions; anti-competitive mergers; dispute settlement mechanism; exemptions; and special and differential treatment.

However, for the time being, since Malaysia has only recently implemented its competition law, it is suffice for Malaysia to only focus on cooperation in training and capacity building in regard to competition chapter under regional TA or bilateral cooperation agreement. Once Malaysia is ready to implement tougher cartel enforcement, the competition chapter in regional TAs could start including cooperation in international cartel enforcement.

Formulating appropriate guidelines on exemption of anti-competitive horizontal agreement is also essential for effective cartel enforcement. This is because the mechanism adopted would have to be able to filter anti-competitive horizontal agreements which should be allowed despite their anti-competitive nature due to the pro-competitive benefits which outweighs its anti-competitive nature which theoretically

could include even hard core cartels. Furthermore guidelines which are transparent and clear would lessen uncertainty for businesses. Therefore, it should include; the appropriate test to be implemented in carrying out assessments to determine whether an agreement is restricting of competition and in assessing the pro and anti-competitive effect of the agreement in regard to the granting of exemptions; the *de minimis* rule to be applied in terms of agreements which significantly restrict, limit or prevent competition (if required); and the types of horizontal agreements to be allowed and prohibited particularly those which have been prohibited *per se* by virtue of Section 4 of the Competition Act 2010 based on their anti-competitive object but may have gains which could offset the anti-competitive effect.

As discussed in Chapter 5 of this thesis, tacit collusion is a more complex form of anti-competitive infringement than cartels and it could be a possible outcome of tougher cartel enforcement in light of the lack of a competition dimension in Malaysia's merger control regime. Tacit collusion is harder to detect and it cannot be said with adequate precision whether an anti-competitive outcome is due to coordination or joint collusion or because of purely parallel conduct. Hence, Malaysia should also issue guidelines for collaborations among oligopolists along the lines of the *Antitrust Guidelines for Collaborations Among Competitors (AGCAC)* issued by the US Federal Trade Commission and US Department of Justice. This is to facilitate businesses in the dos and don'ts of tacit collusion which in turn would provide certainty in terms of competition law enforcement. In addition, guidelines on the definition and enforcement of collective

dominance under Section 10, Competition Act Malaysia, should also be issued. In formulating the guidelines on collusion, Malaysia should refer to EU competition jurisprudence and enforcement experience on tacit collusion for insights because of the similarities in the respective legislative provisions.

6.5. INTER-AGENCY CONSULTATION MECHANISM ON THE IMPLEMENTATION OF COMPETITION LAW

Competition policy and law impact all industries. Thus, their implementation cannot be made in isolation without the involvement of other relevant agencies, regulators and also representatives from the business, consumer and academic sides. It is strongly recommended for a high level committee on the implementation of competition in Malaysia to be established in order to ensure commitment from all the agencies and parties involved and all relevant aspects and views are considered in the implementation of competition law. Perhaps what could be established is something akin to the Cabinet Committee on Supply and Price which is chaired by the Deputy Prime Minister. The high level committee could be supported by an inter-agency working level committee. Under such a formal consultation structure, the promotion of the competition agenda could be facilitated and impediments connected to issues of agency seniority and “turf” could be overcome. Additionally, the MyCC could also enter into formal Memorandums of Understanding with sectoral regulators to facilitate

consultations and cooperation between them, like what the South African Competition Commission has done.

6.6. STUDIES AND RESEARCH

As a competition agency, the MyCC should be dynamic in carrying out its role and functions. Therefore, for the sake of competition law development and ensuring that Malaysia's competition law is implemented based on appropriate strategies, researches and studies on relevant enforcement issues need to be carried out from time to time. Based on the discussions in this thesis and the findings, the studies to be conducted include:

- i) a suitable economic model for the assessment in the granting of exemptions which could accommodate the weighing of non-competition considerations that are based on equity against competition considerations based on economic considerations such as efficiency and consumer welfare;
- ii) a comprehensive empirical study on market concentration in Malaysia. The study should include major industries with oligopolistic tendencies. The scope of the study should be not only the level of market concentration but also the driving factor/s for market concentration in the market and also the existence and magnitude of enabling factors for tacit collusion in the market and their response to changes in market structure. The study should aim to capture an

- adequately accurate diagnosis of Malaysia's level of market concentration; to find out whether market concentration is driven by economies of scale of supra-competition profit; and to identify markets or industries with likelihood for merger in light of tougher cartel enforcement. These studies may also be carried out severally based on industry. Such empirical studies are needed in order to determine whether there is a need to include a competition dimension in Malaysia's merger control regime. If so, then the case for it should be supported by strong empirical evidence;
- iii) study on the viability for the Malaysian competition jurisdiction to continue to be enforced without merger control with a competition dimension. This would also include assessment of the "oligopoly gap" and "cartel gap" in Malaysia; and
 - iv) research on jurisdictional issues in regard to implementation of regional TAs. For example in cases where more than one regional TA apply in a particular international cartel case. A possible answer may be dependent on having to do some sort of analysis on which regional TA would involve cheaper costs, less cumbersome procedures and higher probability of successfully uncovering and prosecuting the cartel. Such a question is indeed pertinent and warrants research in the future. This study would also be useful in

determining the markets and sectors which should be included in Malaysia's prioritisation framework for cartel enforcement.

The first two (2) studies is recommended to be carried out as soon as possible whilst the third and fourth suggested studies could be carried out on the cusp or in the early days of tougher competition law enforcement in Malaysia.

6.7. REGULATORY APPROACH

It is recommended that the MyCC also adopt a regulatory approach to complement the behavioural remedies for tacit collusion as provided for under the Competition Act 2010. The MyCC is empowered to conduct market review by virtue of Section 11, Competition Act 2010. However, the law only provides for the findings and recommendations of market reviews to be to be published and be made available to the public⁶⁷². This work is suggesting that it should go beyond merely that by administratively resorting to remedial measures to address competition issues arising out of market inefficiencies which adversely affect consumers. This regulatory approach should be less formal, less cumbersome and emphasises on consultations, negotiations between the regulator and the industry and it should emphasise on remedial actions. A good benchmark for the MyCC to aspire to could be *Bank Negara Malaysia* (the Central Bank of Malaysia) which has been effective in regulating the Malaysian banking industry to ensure that

⁶⁷² See: Section 12, Competition Act 2010

consumers are not adversely affected by the ongoing industrial consolidation exercise, as discussed in this thesis.

6.8. CAPACITY BUILDING AND TECHNICAL COOPERATION PROGRAMMES

Capacity building and technical cooperation programmes should be focused on by Malaysia particularly throughout the nascent stage of competition law implementation. As such, Malaysia should endeavour to establish links with not only supra-national organisations which advocate competition such as the ICN, UNCTAD and OECD but also with countries which can act as a mentor for Malaysia in cartel enforcement and also competition law implementation in general. Such programmes could be pursued under the auspices of the competition chapter in regional TAs and Malaysia should not fail to include South Africa and also the EU in this regard because the competition jurisprudence and competition law enforcement experience of the two jurisdictions are relevant to Malaysia, as discussed throughout this thesis.

6.9. CONCLUSION

This research has illustrated that it is pertinent for competition jurisdictions in developing countries whose economy is significantly dependent on international trade to implement effective cartel enforcement in order to overcome the adverse effects of international cartels on their domestic market and also their offensive trade interests. This answers

the first overarching research question which is “why should international trade reliant countries be concerned about international cartel enforcement?”. The second overarching research question of this thesis is “what is an appropriate cartel enforcement policy for Malaysia?” In this regard, this work suggests the form and content of an appropriate cartel enforcement policy for Malaysia and its complementary tools and instruments and also the necessary studies which ought to be carried out to ensure that cartel enforcement in Malaysia is not based on erroneous implementation strategies. This work approached the second research question by discussing: appropriate cartel enforcement policy for Malaysia; exemptions of horizontal agreements; limitations of the Competition Act 2010 in light of tougher cartel enforcement.

The findings indicate that Malaysia’s main competition concerns pertaining to cartels are mainly over market concentration, rent seeking activities which are facilitated by cronyism and political patronage, lack of competition culture, accommodating developmental interests in the implementation of competition law and limited resources. In formulating an appropriate cartel enforcement policy for Malaysia, reference to the South African cartel enforcement experience and competition jurisprudence should not be failed to be made not only because of their achievements in cartel enforcement but also the fact that its competition jurisprudence is sympathetic to inclusive development – a similar concern with Malaysia. However, references to other competition jurisdictions in warranted aspects should also be made. The discussion on the granting of

exemptions to anti-competitive horizontal agreements such as cartels found that exemptions implemented based on appropriate mechanisms not only could accommodate developmental concerns but also facilitate the acceptance of competition law in developing countries which lack competition culture. However, to date a suitable economic model to “marry” non-competition interests which are development oriented with competition considerations such as efficiency and consumer welfare is yet to be identified. The discussion on tacit collusion as one of the possible outcomes of tougher cartel enforcement in Malaysia found that there is insufficient empirical evidence to support the inclusion of competition dimension in Malaysia’s merger control regime at the moment. However, based on available literature, insights from EU competition jurisprudence and enforcement experience, it is likely that the legal provisions on prohibition of anti-competitive agreements and abuse of dominance under Sections 4 and 10, Competition Act 2010 may be inadequate to address tacit collusion in light of tougher cartel enforcement in Malaysia.

The fact that Malaysia’s market is liberalised and is an open economy at the time its competition law was adopted could be a double edged sword argument for tougher cartel enforcement and full implementation of competition law in Malaysia. By logical deduction, Malaysia should be able to implement stricter cartel enforcement within a shorter period than it took South Africa which was five (5) years after adoption of the law. On the other hand, the difference in terms of market openness between Malaysia and South Africa when their respective competition laws were adopted could be used as

an excuse veiled as a justification to delay tougher cartel enforcement or full implementation of the Competition Act 2010. Hence, the necessity for Malaysia to formulate an appropriate cartel enforcement policy.

Malaysia is not the first developing country to implement competition law with anticipated impediments. The experiences of other competition jurisdictions, be they developed or developing countries are available as useful references and benchmarks for Malaysia. Additionally, the global competition fraternity including supra national agencies such as UNCTAD, ICN and the OECD are always willing to provide assistance to any competition jurisdiction which requires it. The policy recommendations put forth hopefully would be considered by the policy makers in Malaysia, including the MyCC in furthering the competition agenda in Malaysia. The only question now is the level of commitment from the government in enforcing competition law. If the commitment of the government is there, then, half the battle has been won.

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ANNEXES

**MATRIX OF COMPETITION RELATED PROVISIONS IN
REGIONAL TRADE AGREEMENTS BETWEEN
DEVELOPED AND DEVELOPING COUNTRIES BASED
ON WTO'S REGIONAL TRADE AGREEMENT DATABASE
(AS OF MAY 2012)**

MATRIX OF COMPETITION RELATED PROVISIONS IN REGIONAL TRADE AGREEMENTS BETWEEN DEVELOPED AND DEVELOPING COUNTRIES BASED ON WTO'S REGIONAL TRADE AGREEMENT DATABASE (AS OF MAY 2012)

(i) No.	(ii) PTA (Date in Force)	(iii) Adoption or Maintenance of measures	(iv) Anti-competitive Practices	(v) Enforcement / Implementati on Measures	(vi) May Invoke Trade Related Measures	(vii) Information Sharing	(viii) Dispute Settlement	(ix) Exemptio ns	(x) Anti-competiti ve mergers	(xi) Comity	(xii) Special & Differentia l Treatment
1	ASEAN – AUSTRALIA – NEW ZEALAND (1 Jan 2010)	X	X	X Only cooperation in training and technical cooperation subject to available resources	X	X	X	X	X	X	X
2	AUSTRALIA – CHILE (6 Mar 2009)	√ Maintain and adopt measures consistent with domestic laws to proscribe anticompetitiv e activities and take appropriate action with respect thereto	√ Public & private business conduct which adversely affect competition: Anti-competitive horizontal arrangements Anti-competitive unilateral conducts Anti-competitive vertical arrangements Anti-competitive M&As	√ Notification Consultation Exchange of non- confidential information Technical assistance	X BUT may be subject to provision on general implementati on	√ Public information Confidential information to be kept confidential EXCEPT to comply with domestic legal requirement BUT disclosure to another party must be with written consent of party which provided the information.	X	√ May exempt based on public policy and public interest BUT a party may seek consultati on if it considers an exemption affects its interest Some CRPs on enterprise with	√	√	X

MATRIX OF COMPETITION RELATED PROVISIONS IN REGIONAL TRADE AGREEMENTS BETWEEN DEVELOPED AND DEVELOPING COUNTRIES BASED ON WTO'S REGIONAL TRADE AGREEMENT DATABASE (AS OF MAY 2012)

								special or exclusive rights including designated monopolies are not applicable to government procurement			
3	CANADA – CHILE (5 July 1997)	<p align="center">√</p> <p>Adopt and maintain measures to proscribe anti competitive business conduct and take appropriate action with respect to such conduct</p> <p>Parties shall consult from time to time on effectiveness of measures adopted</p>	<p align="center">X</p> <p>Not explicitly stated in RTA but subject to domestic laws</p>	<p align="center">√</p> <p>Mutual legal assistance</p> <p>Notification</p> <p>Consultation</p> <p>Exchange of information</p>	<p align="center">X</p> <p>BUT may be subject to provision on general implementation</p>	<p align="center">√</p> <p>Relating to the enforcement of competition laws and policies in the free trade area</p>	<p align="center">X</p>	<p align="center">√</p> <p>Some CRPs on monopolies and state enterprise are not applicable to non commercial government procurement</p>	<p align="center">X</p> <p>Not explicitly stated in RTA but subject to domestic laws</p>	<p align="center">X</p>	<p align="center">X</p>
4	CANADA – COLOMBIA (15 Aug 2011)	<p align="center">√</p> <p>Adopt and maintain measures to proscribe anti competitive business conduct.</p>	<p align="center">X</p> <p>Not explicitly stated in RTA but subject to domestic laws</p>	<p align="center">√</p> <p>Colombia may implement its obligations via the Andean Community</p>	<p align="center">X</p> <p>BUT may be subject to provision on general implementation</p>	<p align="center">√</p> <p>To be addressed under cooperation instrument</p>	<p align="center">X</p> <p>Except for matters related to designated monopolies and state enterprises</p>	<p align="center">√</p> <p>Exclusions should be transparent and periodically</p>	<p align="center">X</p> <p>Not explicitly stated in RTA but subject to domestic laws</p>	<p align="center">√</p> <p>To be addressed under cooperation instrument</p>	<p align="center">X</p>

MATRIX OF COMPETITION RELATED PROVISIONS IN REGIONAL TRADE AGREEMENTS BETWEEN DEVELOPED AND DEVELOPING COUNTRIES BASED ON WTO'S REGIONAL TRADE AGREEMENT DATABASE (AS OF MAY 2012)

		Enforcement action in pursuant thereto shall be consistent with the principles of transparency, non-discrimination and procedural fairness		<p>Competition Laws and the Andean Community Enforcement Authority</p> <p>Parties shall adopt through its respective Competition Authorities a cooperation instrument to address:</p> <p>Notification</p> <p>Consultation</p> <p>Positive and negative comity</p> <p>Technical assistance</p> <p>Exchange of information</p>				<p>assessed</p> <p>Some CRPs on designated monopolies are not applicable to some non-commercial govt procurement</p>			
5	CANADA – COSTA RICA (1 Nov 2002)	√ Adopt and maintain measures to proscribe anti competitive business conduct and take appropriate enforcement action with respect to such measures	√ Include : Hard core anticompetitive agreements Abuse of dominance M&A with substantial anti-competitive effect UNLESS	√ Notification Consultation Exchange of information Technical assistance	X BUT may be subject to provision on general implementation	√ Information shared are: Subject to respective laws confidential and only to be used for purposes of enforcement as per notification	X BUT may be subject to provision on general implementation	√ Exclusions and authorisations shall be transparent and periodically assessed.	√	√	X

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		Implementation on a non discriminatory basis.	exempted by respective laws. BUT exemptions shall be transparent and periodically assessed.								
6	CANADA – PERU (1 Aug 2009)	<p>√</p> <p>Adopt and maintain measures to proscribe anti competitive business conduct and take appropriate action with respect to such conduct</p> <p>Measures shall be based on principles of transparency, non discrimination and procedural fairness</p>	<p>X</p> <p>Not explicitly stated in RTA but subject to domestic laws</p>	<p>√</p> <p>Peru may implement its obligations via the Andean Community Competition Laws and the Andean Community Enforcement Authority</p> <p>Parties shall adopt through its respective Competition Authorities a cooperation instrument to address:</p> <p>Notification</p> <p>Consultation</p> <p>Positive and negative comity</p> <p>Technical assistance</p> <p>Exchange of information</p>	<p>X</p> <p>BUT may be subject to provision on general implementation</p>	<p>√</p> <p>To be addressed under the cooperation instrument</p>	<p>X</p> <p>Except for matters related to designated monopolies and state enterprises</p>	<p>√</p> <p>Shall be transparent and periodically assessed</p> <p>Some CRPs on designated monopolies are not applicable to some non commercial govt procurement</p>	<p>X</p> <p>Not explicitly stated in RTA but subject to domestic laws</p>	<p>√</p> <p>To be addressed under the cooperation instrument</p>	<p>X</p>

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7	CHILE – JAPAN (3 Sept 2007)	√ Parties shall adopt measures in accordance to laws and regulations and in manners consistent with RTA Chapter which are considered appropriate against anticompetitive activities	X Not explicitly stated in RTA but subject to domestic laws	√ Cooperation in accordance to respective laws and subject to respective available resources	X BUT may be subject to provision on general implementation	X BUT may be subject to provision on general implementation	X	X Not explicitly stated in RTA but subject to domestic laws	X Not explicitly stated in RTA but subject to domestic laws	X	X
8	EFTA – ALBANIA (1 Nov 2010)	X	√ Agreements or concerted practices between undertakings and collective decisions by association of undertakings with object or effect prevents/restricts/distorts competition Abuse of dominance INCOMPATIBLE WITH PROPER FUNCTIONING OF AGREEMENT	√ Via Joint Committee	√ Subject to consultation in Joint Committee	X BUT may be subject to provision on general implementation	X	X	X	X	X
9	EFTA – CHILE	√	√	√	X	√	X	X	√	√	X

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	(1 Dec 2004)	Parties undertake to apply their competition laws in a manner consistent with RTA Chapter	Includes private and public enterprises': Anticompetitive agreements Concerted practices Abuse of dominance Anticompetitive mergers	Notification Consultation Exchange of information Coordination of enforcement activities	But parties recognise that causes which lead to dumping may be addressed by effective implementation of competition rules	Subject to respective laws regarding disclosure of information. If the laws provide, confidential information may be provided to the courts.					
10	EFTA – COLOMBIA (1 July 2011)	X	√ Horizontal/vertical agreements Concerted practices or arrangements between enterprises Abuse of dominance	√ Includes: Notification Consultation Exchange of information Technical assistance Colombia may implement its obligations via the Andean Community Competition Laws and the Andean Community Enforcement Authority To strengthen cooperation,	X BUT may be subject to provision on general implementation	√ Shall be subject to rules and standards of confidentiality applicable. Information provided shall remain confidential.	X	X	X	√	X

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				parties may sign cooperation agreement								
11	EFTA – EGYPT (1 Aug 2007)	√ Joint committee shall adopt the necessary rules for implementation within 5 yrs of PTA's entry into force	√ Public and private undertakings: Agreements or concerted practices between undertakings and collective decisions by association of undertakings with object or effect prevents/restricts/distorts competition Abuse of dominance INCOMPATIBLE WITH PROPER FUNCTIONING OF AGREEMENT	√ Via a Joint Committee	√ Subject to consultation in Joint Committee	√ Subject to limitations imposed by the requirements of national secrecy laws such as rules of professional and business secrecy	X BUT may be subject to provision on general implementation	X	X	X	X	X
12	EFTA – FYR MACEDONIA (1 Jan 2001)	X BUT may be subject to provision on general implementation via a Joint Committee	√ Public and private undertakings: Agreements or concerted practices between undertakings and collective decisions by association of undertakings with object or effect	X BUT may be subject to provision on general implementation : Cooperation Consultation Information	√ May invoke safeguard measures	X BUT may be subject to provision on general implementation	X BUT may be subject to provision on general implementation	X	X	X	X	X

MATRIX OF COMPETITION RELATED PROVISIONS IN REGIONAL TRADE AGREEMENTS BETWEEN DEVELOPED AND DEVELOPING COUNTRIES BASED ON WTO'S REGIONAL TRADE AGREEMENT DATABASE (AS OF MAY 2012)

			prevents/restricts/ distorts competition Abuse of dominance INCOMPATIBLE WITH PROPER FUNCTIONING OF AGREEMENT	sharing							
13	EFTA – JORDAN (1 Jan 2002)	X BUT may be subject to provision on general implementatio n via a Joint Committee	√ Public and private undertakings: Agreements or concerted practices between undertakings and collective decisions by association of undertakings with object or effect prevents/restricts/ distorts competition Abuse of dominance INCOMPATIBLE WITH PROPER FUNCTIONING OF AGREEMENT	X BUT may be subject to provision on general implementatio n : Cooperation Consultation Information sharing	√ May invoke safeguard measures	X BUT may be subject to provision on general implementati on	X BUT may be subject to provision on general implementati on	X	X	X	√ Regarding the extension of time for allowance of safeguard measures, Taking into considerati on Jordan's economic situation by the Joint Committee
14	EFTA – LEBANON (1 Jan 2007)	X	√ Agreements or concerted practices between undertakings and	√ Via Joint Committee Consultation	√ Subject to consultation in Joint Committee	√ Subject to limitations on confidentialit	X BUT may be subject to provision on general	X	X	X	X

MATRIX OF COMPETITION RELATED PROVISIONS IN REGIONAL TRADE AGREEMENTS BETWEEN DEVELOPED AND DEVELOPING COUNTRIES BASED ON WTO'S REGIONAL TRADE AGREEMENT DATABASE (AS OF MAY 2012)

			<p>collective decisions by association of undertakings with object or effect prevents/restricts/distorts competition</p> <p>Abuse of dominance</p> <p>INCOMPATIBLE WITH PROPER FUNCTIONING OF AGREEMENT</p>			y	implementati on				
15	EFTA – MEXICO (1 July 2001)	√	<p>√</p> <p>Give particular attention to:</p> <p>Anticompetitive agreements</p> <p>Abuse of market power</p> <p>Anticompetitive M&As</p> <p>IN ACCORDANCE TO RESPECTIVE LAWS</p>	<p>√</p> <p>Notification</p> <p>Consultation</p> <p>Exchange of information</p>	X	√	<p>X</p> <p>BUT may be subject to provision on general implementati on</p>	X	√	√	X
16	EFTA – MOROCCO (1 Dec 1999)	X	<p>√</p> <p>Public and private undertakings:</p> <p>Agreements or concerted practices between undertakings and</p>	<p>X</p> <p>BUT may be subject to provision on general implementation :</p>	√	X	<p>X</p> <p>BUT may be subject to provision on general implementati on</p>	X	X	X	X

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			collective decisions by association of undertakings with object or effect prevents/restricts/distorts competition Abuse of dominance INCOMPATIBLE WITH PROPER FUNCTIONING OF AGREEMENT	Consultation Information sharing							
17	EFTA – PERU (1 July 2011)	√ To apply competition law and to cooperate in matters under the Chapter	√ Horizontal/vertical agreements, Concerted practices/ decisions by associations of enterprises which have as their object or effect the prevention, restriction or distortion of competition Abuse of dominance	√ Notification Consultation Technical assistance Exchange of information Peru may implement its obligations via the Andean Community Competition Laws and the Andean Community Enforcement Authority To strengthen cooperation, parties may sign	X BUT may be subject to provision on general implementation	√ Shall be subject to rules and standards of confidentiality applicable. Information provided shall remain confidential.	X	X No specific provision on exemption in the Chapter BUT some CRPs on state enterprise and designated monopolies are not applicable to government	X	√	X

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				cooperation agreement							
18	EFTA – SACU (1 May 2008)	X BUT may be subject to provision on general implementation via a Joint Committee	Recognises certain : Anticompetitive agreements Concerted practices Abuse of dominant position MAY AFFECT TRADE AND HINDER THE OBJECTIVES OF RTA	X Cooperation which include exchange of information	X	√ exchange of information to the extent allowed by domestic law	√ Via consultation in the Joint Committee	X	X	X	X
19	EFTA – TUNISIA (1 Jun 2005)	X BUT may be subject to provision on general implementation via a Joint Committee	√ Public and private undertakings: Agreements or concerted practices between undertakings and collective decisions by association of undertakings with object or effect prevents/restricts/distorts competition Abuse of dominance INCOMPATIBLE WITH PROPER FUNCTIONING	√ Via consultations in Joint Committee	X	X Does not explicitly mention trade related measures but could be invoked if it is deemed as a provisional measure which may be invoked to deal with breach of competition related provisions.	√ Via consultations in Joint Committee	X	X	X	X

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			OF AGREEMENT								
20	EFTA – TURKEY (1 April 1992)	X	√ Public and private undertakings: Agreements or concerted practices between undertakings and collective decisions by association of undertakings with object or effect prevents/restricts/distorts competition Abuse of dominant position INCOMPATIBLE WITH PROPER FUNCTIONING OF AGREEMENT T	X	√ May invoke safeguard measures	X BUT may be subject to provision on general implementation	X BUT may be subject to provision on general implementation	X	X	X	X
21	EU - ALBANIA (1 Dec 2006 –Goods) (1 Apr 2009 – Services)	√ Approximation of laws	√ Agreements or concerted practices between undertakings and collective decisions by association of undertakings with object or effect prevents/restricts/distorts competition Abuse of	√ Via consultation in Stabilisation and Association Council	√	X	X	√ State aid in Agriculture and fisheries	X	X	√ In relation to state aid but not in perpetuity

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			dominant position State aid which distorts/threatens to distort competition INCOMPATIBLE WITH PROPER FUNCTIONING OF AGREEMENT								
22	EU – ALGERIA (1 Sept 2005)	X BUT may be subject to provision on general implementation	√ Agreements or concerted practices between undertakings and collective decisions by association of undertakings with object or effect prevents/restricts/distorts competition Abuse of dominant position INCOMPATIBLE WITH PROPER FUNCTIONING OF AGREEMENT	√ Administrative cooperation	√ Subject to consultation in Association Committee	√ Subject to limitations imposed on professional and business confidentiality	X BUT may be subject to provision on general implementation	X	X	X	X
23	EU – BOSNIA HERZEGOVINA (1 July 2008)	√ Parties shall ensure that an operationally independent public authority is entrusted with powers to	√ Agreements or concerted practices between undertakings and collective decisions by association of undertakings with	X BUT anticompetitive practices shall be assessed on criteria arising out of EU law and	√ Subject to consultation in Interim Committee Nothing shall prejudice the	X BUT may be subject to provision on general implementation	X BUT may be subject to provision on general implementation	X	X	X	√ In relation to state aid but not in perpetuity

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		implement provisions anticompetitive practices	object or effect prevents/restricts/distorts competition Abuse of dominant position State aid which distorts/threatens to distort competition INCOMPATIBLE WITH PROPER FUNCTIONING OF AGREEMENT	regulations on competition	right to antidumping and countervailing measures under WTO/GATT rules.						
24	EU – CARIFORUM STATES EPA (1 Nov 2008)	√ Within 5 years of entry into force of the agreement the Parties shall have laws and enforcement authorities to address anticompetitive practices in their jurisdiction,	√ Agreements or concerted practices between undertakings and collective decisions by association of undertakings with object or effect prevents/restricts/distorts competition Abuse of dominant position INCOMPATIBLE WITH PROPER FUNCTIONING OF AGREEMENT	√ Notification Exchange of information Technical assistance Capacity building	X BUT may be subject to provision on general implementation	√ Non confidential information Subject to standards of confidentiality in each jurisdiction	X BUT may be subject to provision on general implementation	X	X	X	X
25	EU – CHILE (1 Feb 2003 – G)	√	√ Give particular attention to :	√ Notification	X	√ Non confidential	X	X	X	√	X

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	(1 Mar 2005 – S)		Anticompetitive agreements Concerted practices Abuse of dominance	Consultation Exchange of information Technical assistance		information Where the law provides, may provide confidential information to courts but confidentiality shall be maintained by the courts					
26	EU – EGYPT (1 Jun 2004)	√ The Association Council shall adopt rules for implementation within 5 years of entry into force of RTA	√ Agreements or concerted practices between undertakings and collective decisions by association of undertakings with object or effect prevents/restricts/distorts competition Abuse of dominant position Public aid which distorts/threatens to distort competition INCOMPATIBLE WITH PROPER FUNCTIONING OF AGREEMENT	√ Exchange of information Implementation rules to be adopted by Association Council until then WTO rules on subsidies applies on state aid	√ Subject to consultation in Association Council but Nothing prejudices right to take countervailing measures under GATT and WTO	√ Subject to limitations imposed on professional and business confidentiality	X BUT may be subject to provision on general implementation	√ public aid in agriculture products	X	X Subject to implementation rules to be adopted by Association Council	X
27	EU – FYR MACEDONIA	√ Approximation	√ Public and private	√ To be	√ Subject to	√ Subject to	X	√ public aid	X	X	√ In relation

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	(1 June 2001 – G) (1 April 2004 – S)	of laws	undertakings: Agreements or concerted practices between undertakings and collective decisions by association of undertakings with object or effect prevents/restricts/ distorts competition Abuse of dominant position Public aid which distorts competition INCOMPATIBLE WITH PROPER FUNCTIONING OF AGREEMENT	gradually implemented as per agreed transition period. Modalities of enforcement to be decided as such.	consultation in Stabilisation and Association Council	limitations imposed on professional and business confidentiality		in agriculture and fisheries			to public aid but not in perpetuity
28	EU - JORDAN (1 May 2002)	√ Approximation of laws	√ Public and private undertakings: Agreements or concerted practices between undertakings and collective decisions by association of undertakings with object or effect prevents/restricts/ distorts competition	√ Rules for implementation shall be adopted within 5 years of the date of entry into force of agreement. Until then, rules of implementation is as per the relevant EU laws shall	√ Subject to consultation in Association Committee	√ Subject to limitations imposed by the requirements of professional and business secrecy	X	√ State aid in Agricultural products	X	X	√ In relation to state aid but not in perpetuity

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			Abuse of dominant position Public aid which distorts competition INCOMPATIBLE WITH PROPER FUNCTIONING OF AGREEMENT	apply								
29	EU – LEBANON (1 March 2003)	√ The Cooperation Council shall adopt rules for implementation within 5 years of entry into force of RTA	√ Agreements or concerted practices between undertakings and collective decisions by association of undertakings with object or effect prevents/restricts/distorts competition Abuse of dominant position INCOMPATIBLE WITH PROPER FUNCTIONING OF AGREEMENT	√ Exchange of information Implementation rules to be adopted by Cooperation Council	√ Subject to consultation in Cooperation Council	√ Subject to limitations on confidentiality	X BUT may be subject to provision on general implementation	X	X	X	X BUT subject to implementation rules to be adopted by Cooperation Council	X
30	EU – MEXICO (1 July 2000 – G) (1 Oct 2000 – S)	√ To be determined by Joint Council	√ Joint Council shall decide in particular on the following matters: Agreements or concerted	√ To be determined by Joint Council and include: Mutual legal	X	X	X BUT may be subject to provision on general implementation	X	√	X	X	

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			practices between undertakings and collective decisions by association of undertakings with object or effect prevents/restricts/distorts competition Abuse of dominant position Mergers State monopolies of commercial character Public and private undertakings which have been granted exclusive rights	assistance Notification Consultation exchange of information							
31	EU – MONTENEGRO (1 Jan 2008 – G) (1 May 2010 – S)	√ Approximation of laws Montenegro shall establish an authority to implement CRPs within 1 year from the date of entry into force of the agreement	√ Public and private undertakings: Agreements or concerted practices between undertakings and collective decisions by association of undertakings with object or effect prevents/restricts/distorts competition Abuse of	√ Based on criteria applied in EU rules on competition	√ Subject to consultation in Stabilisation and Association Council but Nothing prejudices right to take countervailing measures under GATT and WTO	X	X BUT may be subject to provision on general implementation	√ public aid in agriculture and fisheries	X	X	√ In relation to state aids but not in perpetuity

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			dominant position State aid which distorts competition INCOMPATIBLE WITH PROPER FUNCTIONING OF AGREEMENT								
32	EU – MOROCCO (1 Mar 2000)	√ Approximation of laws Rules for implementation shall be adopted within 5 years of the date of entry into force of agreement	√ Agreements or concerted practices between undertakings and collective decisions by association of undertakings with object or effect prevents/restricts/distorts competition Abuse of dominant position Official aid which distorts/threatens to distort competition INCOMPATIBLE WITH PROPER FUNCTIONING OF AGREEMENT	√ Until rules for implementation of anticompetitive practices are adopted, rules of implementation are as per the relevant EU laws.	√ Subject to consultation in Stabilisation and Association Committee	√ Subject to limitations imposed by the requirements of professional and business secrecy	X BUT may be subject to provision on general implementation	√ state aid in agriculture and fisheries	X	X	√ In relation to official aids but not in perpetuity
33	EU – SERBIA (1 Feb 2010)	√ Serbia shall establish an authority to enforce the related CRPs	√ Agreements or concerted practices between undertakings and collective	√ Based on criteria applied in EU rules on competition	√ Subject to consultation in Interim Committee but	X BUT may be subject to provision on general implementation	X BUT may be subject to provision on general implementation	√ State aid in Agriculture and fisheries	X	X	√ In relation to state aid but not in perpetuity

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			<p>decisions by association of undertakings with object or effect prevents/restricts/distorts competition</p> <p>Abuse of dominant position</p> <p>State aid which distorts competition</p> <p>INCOMPATIBLE WITH PROPER FUNCTIONING OF AGREEMENT</p>		Nothing prejudices right to take countervailing measures under GATT and WTO		on				
34	EU – SOUTH AFRICA (1 Jan 2000)	√ Shall adopt laws within a period of 3 years after entry into force of RTA	√ Horizontal agreements/ collective decisions by association of firms/ vertical agreements which have the effect of substantially preventing or lessening competition UNLESS anticompetitive effects are outweighed by pro-competitive ones Abuse of market power	√ Consultation Technical assistance	√ May take measures consistent with domestic laws and subject to consultation in Cooperation Council with respect to powers of the competition authority concerned	√ Subject to limitations imposed by the requirements of professional and business secrecy	X BUT may be subject to provision on general implementation	X	X	√	X

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			INCOMPATIBLE WITH PROPER FUNCTIONING OF AGREEMENT								
35	EU – TUNISIA (1 Mar 1998)	√ Association Council shall within 5 years of the date of entry into force of agreement adopt rules for implementation for anticompetitive practices	√ Agreements or concerted practices between undertakings and collective decisions by association of undertakings with object or effect prevents/restricts/distorts competition Abuse of dominant position Official aid which distorts competition INCOMPATIBLE WITH PROPER FUNCTIONING OF AGREEMENT	√ Based on criteria applied in EU rules on competition and until Association Committee adopt rules on implementation for the agreement GATT rules on subsidies applies to state aid	√ Subject to consultation in Association Committee and GATT rules on subsidies	√ Subject to limitations imposed by the requirements of professional and business secrecy	X BUT may be subject to provision on general implementation	√ State aid in Agriculture and fisheries	X	X	√ In relation to state aid but not in perpetuity
36	EU – TURKEY (1 Jan 1996)	√ Approximation of laws Before entry into force of agreement Turkey shall: Adopt competition law based on	√ Agreements or concerted practices between undertakings and collective decisions by association of undertakings with object or effect prevents/restricts/distorts	√ Notification Exchange of information Rules of implementation to be adopted by association Council within	√ Subject to consultation in Association Committee and GATT rules on subsidies	√ Subject to limitations imposed by the requirements of professional and business secrecy	X BUT may be subject to provision on general implementation	√ Economic development Project of common European interest Remedy serious	X	√	X

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		<p>EU competition law</p> <p>Establish competition authority</p>	<p>competition</p> <p>Abuse of dominant position</p> <p>Official aid which distorts competition</p> <p>INCOMPATIBLE WITH PROPER FUNCTIONING OF AGREEMENT</p>	<p>2 years of entry into force of the agreement. The rules are to be based on existing EU rules.</p> <p>Until such rules are adopted, each competition authority shall implement the CRP</p>				<p>disturbance in the economy of any of the signatories</p> <p>Aid for structural adjustments necessitated by the establishment of the customs union but subject to review</p> <p>Aid to facilitate development of certain economic activities or certain economic areas so long as does not adversely affect trade between EU and Turkey</p> <p>Aid to promote cultural and heritage conservati</p>			
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MATRIX OF COMPETITION RELATED PROVISIONS IN REGIONAL TRADE AGREEMENTS BETWEEN DEVELOPED AND DEVELOPING COUNTRIES BASED ON WTO'S REGIONAL TRADE AGREEMENT DATABASE (AS OF MAY 2012)

								on so long as does not adversely affect trade between EU and Turkey				
								Other aid which may be specified by Association Council				
37	ISRAEL – MEXICO (1 July 2000)	√ Signatories undertake to enforce respective laws which may adversely affect bilateral trade	√ As stated under each party's respective competition law	√ Consultation Notification Exchange of information ON MATTERS THAT AFFECT BILATERAL TRADE	X	√	X where judicial challenge procedures are provided by the other party under its law	X	X Not explicitly provided in RTA	X	X	X
38	JAPAN – INDONESIA (1 July 2008)	√ In accordance with each country's laws Subject to respective available resources.	X Not explicitly described under RTA but subject to the domestic laws	√ The details and procedure to be provided in the Implementing Agreement	X	√	X BUT may be subject to provision on general implementation	X Not explicitly provided under RTA but subject to the domestic laws	X Not provided in RTA but subject to the domestic laws	X Not provided in RTA but may be included in implementing agreement	X	X

MATRIX OF COMPETITION RELATED PROVISIONS IN REGIONAL TRADE AGREEMENTS BETWEEN DEVELOPED AND DEVELOPING COUNTRIES BASED ON WTO'S REGIONAL TRADE AGREEMENT DATABASE (AS OF MAY 2012)

39	JAPAN – MALAYSIA (13 July 2006)	√ In accordance with each country's laws Parties endeavour to review, improve and adopt law and regulations when necessary	X Not explicitly described under RTA but subject to the domestic laws	√ In accordance with each country's laws Subject to respective available resources. The details shall be provided under the implementing agreement	X BUT may be subject to provision on general implementation	X Not provided in RTA but may be included in implementing agreement and provision on general implementation	X	X Not explicitly provided under RTA but subject to the domestic laws	X Not explicitly provided under RTA but subject to the domestic laws	X Not provided in RTA but may be included in implementing agreement	X
40	JAPAN – MEXICO (1 Apr 2005)	√ In accordance with each country's laws	X Not explicitly described under RTA but subject to the domestic laws	√ In accordance with each country's laws The details shall be provided under the implementing agreement	X BUT may be subject to provision on general implementation	X Not provided in RTA but may be included in implementing agreement and provision on general implementation	X	X Not explicitly provided under RTA but subject to the domestic laws	X Not explicitly provided under RTA but subject to the domestic laws	X Not provided in RTA but may be included in implementing agreement	X
41	JAPAN – PERU (1 March 2012) *	X	X Not explicitly stated in RTA or Implementing Agreement but implicitly as per the relevant laws of the parties	√ Include; Notification Exchange of information	X BUT may be subject to provision on general implementation	√ Information other than publicly available information shall remain confidential	X BUT may be subject to provision on general implementation	X Not explicitly stated in RTA or Implementing Agreement	√	√	X

MATRIX OF COMPETITION RELATED PROVISIONS IN REGIONAL TRADE AGREEMENTS BETWEEN DEVELOPED AND DEVELOPING COUNTRIES BASED ON WTO'S REGIONAL TRADE AGREEMENT DATABASE (AS OF MAY 2012)

				<p>Coordination of enforcement</p> <p>Technical cooperation</p> <p>Consultations</p> <p>BUT does not include:</p> <p>The review of business conducts and routine filings</p> <p>Research, studies or surveys with the objective of examining the general economic situation or general conditions in specific sectors.</p>		<p>and can only be disclosed to a 3rd party with the consent of the party which provided the information.</p> <p>Confidentiality of information is to be maintained subject to the laws of each party.</p> <p>Information provided shall not be used for criminal proceedings.</p>		<p>t but implicitly as per the relevant laws of the parties</p>								
42	JAPAN – PHILIPPINES (11 Dec 2008)	<p>√</p> <p>In accordance with each country's laws based on principles of transparency, procedural fairness and non-discrimination.</p> <p>Parties endeavour to review,</p>	X	<p>Not explicitly described under RTA but subject to the domestic laws</p>	<p>√</p> <p>In accordance with each country's laws</p> <p>Subject to respective available resources.</p> <p>The details shall be provided</p>	X	<p>BUT may be subject to provision on general implementation</p>	X	<p>Not provided in RTA but may be included in implementing agreement and provision on general implementation</p>	X	<p>X</p> <p>Not explicitly provided under RTA but subject to the domestic laws</p>	X	<p>X</p> <p>Not explicitly provided under RTA but subject to the domestic laws</p>	X	<p>X</p> <p>Not provided in RTA but may be included in implementing agreement</p>	X

MATRIX OF COMPETITION RELATED PROVISIONS IN REGIONAL TRADE AGREEMENTS BETWEEN DEVELOPED AND DEVELOPING COUNTRIES BASED ON WTO'S REGIONAL TRADE AGREEMENT DATABASE (AS OF MAY 2012)

		improve and adopt law and regulations when necessary		under the implementing agreement							
43	JAPAN – THAILAND (1 Nov 2007)	√ In accordance with each country's laws	X Not explicitly described under RTA but subject to the domestic laws	√ In accordance with each country's laws Subject to respective available resources. The details shall be provided under the implementing agreement	X BUT may be subject to provision on general implementation	X Not provided in RTA but may be included in implementing agreement	X	X	X	X	X
44	JAPAN – VIETNAM (1 Oct 2009)	√ In accordance with each country's laws based on principles of transparency, procedural fairness and non-discrimination	√ As per the described domestic laws on competition	√ In accordance with each country's laws May take the form of; Exchange of information Notification Coordination of enforcement	X BUT may be subject to provision on general implementation	√ Each party shall maintain the confidentiality of information provided by the other party in accordance to its laws and regulations Information may be transmitted	X	X	X	X	X

MATRIX OF COMPETITION RELATED PROVISIONS IN REGIONAL TRADE AGREEMENTS BETWEEN DEVELOPED AND DEVELOPING COUNTRIES BASED ON WTO'S REGIONAL TRADE AGREEMENT DATABASE (AS OF MAY 2012)

				activities Consultation Technical assistance		to a 3 rd party with the consent of the party which provided the information					
45	REP. KOREA – CHILE (1 April 2004)	X	√ Shall give particular attention to: Anticompetitive agreements Concerted practices Abusive behaviour	√ Includes: Notification Consultation Exchange of non confidential information Technical assistance	X BUT may be subject to provision on general implementation	√ May exchange non confidential information Confidential information shall not be disclosed to unauthorised entity Confidential information may be provided to the courts if it is provided by the law so long as its confidentiality is maintained by the courts	X	X	X	√	X
46	REP. KOREA – INDIA (1 Jan 2010)	X	X Not explicitly described in RTA but implicitly as per the described domestic laws on competition	√ Consultations on enforcement cooperation to commence after full	X BUT may be subject to provision on general implementation	√	X	X	X	√	X

MATRIX OF COMPETITION RELATED PROVISIONS IN REGIONAL TRADE AGREEMENTS BETWEEN DEVELOPED AND DEVELOPING COUNTRIES BASED ON WTO'S REGIONAL TRADE AGREEMENT DATABASE (AS OF MAY 2012)

				<p>enforcement of India's Competition Act.</p> <p>Shall include:</p> <p>Capacity building</p> <p>Exchange of information</p> <p>Notification</p> <p>Comity</p>					the described domestic laws on competition		
47	NEW ZEALAND – MALAYSIA (1 Aug 2010)	<p>X</p> <p>Parties are not obliged to adopt or withdraw specific measures to address anticompetitive practices.</p>	X	<p>√</p> <p>Exchange of information</p> <p>Technical cooperation</p> <p>Discussions</p>	<p>X</p> <p>BUT may be subject to provision on general implementation</p>	<p>X</p> <p>BUT may be subject to provision on general implementation</p>	X	<p>√</p> <p>Shall be transparent and undertaken on the grounds of public policy or public interest.</p>	X	X	X
48	NAFTA (1 Jan 1994)	<p>√</p> <p>Parties shall consult from time to time on the effectiveness of the measures adopted</p>	X	<p>√</p> <p>Including:</p> <p>Mutual legal assistance</p> <p>Notification</p> <p>Consultation</p> <p>Exchange of information</p>	<p>X</p> <p>BUT may be subject to provision on general implementation</p>	<p>√</p>	X	X	X	X	X

MATRIX OF COMPETITION RELATED PROVISIONS IN REGIONAL TRADE AGREEMENTS BETWEEN DEVELOPED AND DEVELOPING COUNTRIES BASED ON WTO'S REGIONAL TRADE AGREEMENT DATABASE (AS OF MAY 2012)

49	PANAMA – SINGAPORE (24 Jul 2006)	√ Adopt and maintain competition laws Based on principles of non discrimination, transparency and due process	√ Includes : anticompetitive horizontal arrangements abuse of market power anticompetitive vertical arrangements anticompetitive M&As	√ Establishing consultation mechanisms Exchange of information	X BUT may be subject to provision on general implementation	√ Except information deemed as confidential	X	X	√	X	X
50	PERU – REP. KOREA (1 Aug 2011)	√ Parties shall maintain and enforce competition laws and maintain enforcement authorities. Enforcement shall be consistent with principles of transparency, non discrimination, timeliness and procedural fairness.	√ Agreements between enterprises and decisions by associations of enterprises which have the purpose of impeding, restricting or distorting competition as specified in the parties' competition laws Abuse of dominant position as specified in the parties' competition laws Market concentrations which significantly impede	√ Including: Notification Consultation Technical assistance Exchange of non confidential information	X BUT may be subject to provision on general implementation	√ Confidentiality standards to be maintained. No disclosure without approval from the party which provided the information. Parties shall endeavour to provide information requested as long as it does not affect ongoing investigations and compatible	X	X	X	X	X

MATRIX OF COMPETITION RELATED PROVISIONS IN REGIONAL TRADE AGREEMENTS BETWEEN DEVELOPED AND DEVELOPING COUNTRIES BASED ON WTO'S REGIONAL TRADE AGREEMENT DATABASE (AS OF MAY 2012)

			competition as specified in the parties' competition laws			with standards of confidentiality which apply.							
51	PERU – SINGAPORE (1 Aug 2009)	<p align="center">√</p> <p>Adopt and maintain competition laws and national authorities for enforcement.</p> <p>Based on principles of timeliness, non discrimination, transparency and due process</p>	X	<p>Including:</p> <p>Notification</p> <p>Consultation</p> <p>Exchange of information</p>	X	<p>BUT may be subject to provision on general implementation</p>	<p>Subject to laws on confidentiality and competition laws</p>	X	X	X	√	X	
52	THAILAND – AUSTRALIA (1 Jan 2005)	<p align="center">√</p> <p>Address anticompetitive practices</p> <p>Adopt and enforce appropriate measures to counter such practices</p>	√	<p>Anti-competitive horizontal arrangements</p> <p>misuse of market power</p> <p>anti-competitive vertical arrangements</p> <p>anti-competitive M&As</p>	<p align="center">√</p> <p>Notification</p> <p>Consultation</p> <p>Exchange of information</p> <p>Coordination of cross border enforcement matters</p>	X	<p>BUT may be subject to provision on general implementation</p>	<p>Information shall be kept confidential except when disclosure is required under domestic laws.</p> <p>BUT before disclosure, the party who provided the information must be</p>	X	√	√	X	X

MATRIX OF COMPETITION RELATED PROVISIONS IN REGIONAL TRADE AGREEMENTS BETWEEN DEVELOPED AND DEVELOPING COUNTRIES BASED ON WTO'S REGIONAL TRADE AGREEMENT DATABASE (AS OF MAY 2012)

						informed					
53	THAILAND – NEW ZEALAND (1 July 2005)	√ Ensure all commercial activities are subject to competition law Shall be consistent with principles of timeliness, non discrimination, transparency, comprehensiveness and procedural fairness	√ Anti-competitive horizontal arrangements misuse of market power anti-competitive vertical arrangements anti-competitive M&As	√ Notification Consultation Exchange of information Coordination of cross border enforcement matters Technical cooperation subject to available resources	X BUT may be subject to provision on general implementation	√ Information shall be kept confidential except when disclosure is required under domestic laws. BUT before disclosure, the party who provided the information must be informed	X	√ May exempt but must be transparent and based on public policy and public interests	√	X	X
54	TRANSPACIFIC STRATEGIC ECONOMIC PARTNERSHIP (28 May 2006)	√ Shall adopt or maintain competition laws that proscribe anticompetitive business conducts Shall maintain enforcement authority for competition law With the objective of promoting economic efficiency and	√ Will give particular attention to: Anticompetitive agreements Concerted practices/ arrangement by competitors Abuse of dominance	√ Notification Consultation Exchange of information Implemented via Cooperation Agreement between competition authorities after entry into force of RTA	X BUT may be subject to provision on general implementation	√ Information shall be kept confidential except when disclosure is required under domestic laws. BUT before disclosure, the party who provided the information must be informed	X	√ May exempt but must be transparent and based on public policy and public interests Shall not have the objective of negatively affecting trade between	X	X	X

MATRIX OF COMPETITION RELATED PROVISIONS IN REGIONAL TRADE AGREEMENTS BETWEEN DEVELOPED AND DEVELOPING COUNTRIES BASED ON WTO'S REGIONAL TRADE AGREEMENT DATABASE (AS OF MAY 2012)

		consumer welfare						<p>the parties</p> <p>Any additions to exemption list which shall affect trade with other parties shall be informed and the affected party may request consultation</p> <p>Additions and removals from exemption list shall be via Implementing Arrangement</p> <p>EXEMPTIONS AS AT ENTRY INTO FORCE OF THE AGREEMENT ARE:</p> <p><u>NZ</u></p> <p>Pharmaceutical</p>			
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MATRIX OF COMPETITION RELATED PROVISIONS IN REGIONAL TRADE AGREEMENTS BETWEEN DEVELOPED AND DEVELOPING COUNTRIES BASED ON WTO'S REGIONAL TRADE AGREEMENT DATABASE (AS OF MAY 2012)

								subsidies			
								Export arrangements			
								Agricultural producer boards			
								<u>S'PORE</u>			
								Provision of ordinary letters and postcard services by licensed and regulated entities			
								Supply of piped potable water			
								Supply of wastewater management services, including collection, treatment and disposal of wastewater			
								Public transport			

MATRIX OF COMPETITION RELATED PROVISIONS IN REGIONAL TRADE AGREEMENTS BETWEEN DEVELOPED AND DEVELOPING COUNTRIES BASED ON WTO'S REGIONAL TRADE AGREEMENT DATABASE (AS OF MAY 2012)

55	TURKEY – CROATIA (1 July 2003)	√ Adopt measures in conformity with procedures and under the conditions laid down in their respective agreements with the EU	√ Agreements or concerted practices between undertakings and collective decisions by association of undertakings with object or effect prevents/restricts/distorts competition Abuse of dominant position State aid which distorts competition INCOMPATIBLE WITH PROPER FUNCTIONING OF AGREEMENT	√ subject to the respective agreements with the EU	√ Subject to consultation in Joint Committee and GATT/WTO rules on subsidies	√ Subject to limitations imposed by the requirements of professional and business secrecy	X BUT may be subject to provision on general implementation	X But may be subject to the respective agreements with the EU	X	X But may be subject to the respective agreements with the EU	X But may be subject to the respective agreements with the EU
56	TURKEY – ISRAEL (1 May 1997)	√ The Joint Committee shall within 3 years of entry into force of agreement decide on the rules of implementation of CRPs in RTA	√ Agreements or concerted practices between undertakings and collective decisions by association of undertakings with object or effect prevents/restricts/distorts competition Abuse of dominant position	√ To be decided by Joint Committee until then, GATT subsidies rules applies on state aid which distorts competition.	√ Subject to consultation in Joint Committee and GATT rules on subsidies	√ Subject to limitations imposed by the requirements of professional and business secrecy	X BUT may be subject to provision on general implementation	X	X	X BUT subject to rules of implementation to be decided by Joint Committee	X

MATRIX OF COMPETITION RELATED PROVISIONS IN REGIONAL TRADE AGREEMENTS BETWEEN DEVELOPED AND DEVELOPING COUNTRIES BASED ON WTO'S REGIONAL TRADE AGREEMENT DATABASE (AS OF MAY 2012)

			State aid which distorts competition INCOMPATIBLE WITH PROPER FUNCTIONING OF AGREEMENT								
57	US – CHILE (1 Jan 2004)	√ Shall adopt or maintain competition laws that proscribe anticompetitive business conducts Shall maintain enforcement authority for competition law	X	√ Including: Notification Consultation Exchange of information	X BUT may be subject to provision on general implementation	√ Public information	X ONLY FOR monopolies, state enterprises, pricing differences and information requests	√ Designated monopolies in procurement	X Not explicitly provided under RTA but subject to the domestic laws	X	X
58	US – PERU (1 Feb 2009)	√ Shall adopt or maintain competition laws that proscribe anticompetitive business conducts Shall maintain enforcement authority for competition law	X	√ Including: Notification Consultation Exchange of information Establish a Working Group for implementation of Chapter on Competition	X BUT may be subject to provision on general implementation	√ Public information	X ONLY FOR monopolies, state enterprises and information requests	√ Designated monopolies in procurement	X Not explicitly provided under RTA but subject to the domestic laws	X	X

MATRIX OF COMPETITION RELATED PROVISIONS IN REGIONAL TRADE AGREEMENTS BETWEEN DEVELOPED AND DEVELOPING COUNTRIES BASED ON WTO'S REGIONAL TRADE AGREEMENT DATABASE (AS OF MAY 2012)

59	NAFTA (1 Jan 1994)	√	X	√ Including: Mutual legal assistance Notification Consultation Exchange of information	X	√	X	X	X	X	X
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* Competition Related Provisions are provided in Implementing Agreement

**REGIONAL TRADE AGREEMENTS BETWEEN
DEVELOPED AND DEVELOPING COUNTRIES AS
LISTED ON WTO WEBSITE (AS OF MAY 2012)**

REGIONAL TRADE AGREEMENTS BETWEEN DEVELOPED AND DEVELOPING COUNTRIES AS LISTED ON WTO WEBSITE (AS OF MAY 2012)

1. ASEAN – AUSTRALIA – NEW ZEALAND FREE TRADE AGREEMENT
2. ASEAN – CHINA
3. ASEAN – INDIA
4. ASEAN – JAPAN
5. ASEAN – REPUBLIC OF KOREA
6. ASEAN FREE TRADE AREA (AFTA)
7. ASIA PACIFIC TRADE AGREEMENT (APTA)
8. ASIA PACIFIC TRADE AGREEMENT (APTA) – ACCESSION OF CHINA
9. AUSTRALIA – CHILE
10. AUSTRALIA – PAPUA NEW GUINEA (PATCRA)
11. CANADA – CHILE
12. CANADA – COLOMBIA
13. CANADA – COSTA RICA
14. CANADA – PERU
15. CARRIBEAN COMMUNITY AND COMMON MARKET (CARICOM)
16. CENTRAL EUROPEAN FREE TRADE AGREEMENT (CEFTA) 2006
17. CHILE – JAPAN
18. CHINA – HONG KONG, CHINA
19. CHINA – MACAO, CHINA
20. CHINA – NEW ZEALAND
21. CHINA – SINGAPORE
22. DOMINICAN REPUBLIC – CENTRAL AMERICA – UNITED STATES FREE TRADE AGREEMENT (CAFTA – DR)
23. EC (25) ENLARGEMENT

24. EC (27) ENLARGEMENT
25. EFTA – ALBANIA
26. EFTA – CHILE
27. EFTA – COLOMBIA
28. EFTA – EGYPT
29. EFTA – FORMER YUGOSLAV REPUBLIC OF MACEDONIA
30. EFTA – JORDAN
31. EFTA – LEBANON
32. EFTA – MEXICO
33. EFTA – MOROCCO
34. EFTA – PERU
35. EFTA – SACU
36. EFTA – TUNISIA
37. EFTA – TURKEY
38. EU – ALBANIA
39. EU – ALGERIA
40. EU – BOSNIA AND HERZEGOVINA
41. EU – CAMEROON
42. EU – CARIFORUM STATES EPA
43. EU – CHILE
44. EU – IVORY COAST
45. EU – EGYPT
46. EU – FORMER YUGOSLAV REPUBLIC OF MACEDONIA
47. EU – JORDAN
48. EU – LEBANON
49. EU – MEXICO
50. EU – MONTENEGRO
51. EU – MOROCCO
52. EU – OVERSEAS COUNTRIES AND TERRITORIES (OCT)

53. EU – PAPUA NEW GUINEA/FIJI
54. EU – SERBIA
55. EU – SOUTH AFRICA
56. EU – SYRIA
57. EU – TUNISIA
58. EU – TURKEY
59. GLOBAL SYSTEM OF TRADE PREFERENCES AMONG DEVELOPING COUNTRIES (GSTP)
60. INDIA – JAPAN
61. INDIA – SINGAPORE
62. ISRAEL – MEXICO
63. JAPAN – INDONESIA
64. JAPAN – MALAYSIA
65. JAPAN – MEXICO
66. JAPAN – PERU
67. JAPAN – PHILIPPINES
68. JAPAN – THAILAND
69. JAPAN – VIETNAM
70. JORDAN – SINGAPORE
71. REPUBLIC OF KOREA – CHILE
72. REPUBLIC OF KOREA – INDIA
73. NEW ZEALAND – MALAYSIA
74. NORTH AMERICAN FREE TRADE AGREEMENT (NAFTA)
75. PANAMA – SINGAPORE
76. PAN - ARAB FREE TRADE AREA (PAFTA)
77. PERU – REPUBLIC OF KOREA
78. PERU – SINGAPORE
79. PROTOCOL ON TRADE NEGOTIATIONS (PTN)
80. SOUTH PACIFIC REGIONAL TRADE AND ECONOMIC COOPERATION AGREEMENT (SPARTECA)
81. THAILAND – AUSTRALIA

82. THAILAND – NEW ZEALAND
83. TRANS-PACIFIC STRATEGIC ECONOMIC PARTNERSHIP
84. TURKEY – CROATIA
85. TURKEY – ISRAEL
86. US – CHILE
87. US – JORDAN
88. US – MOROCCO
89. US – PERU

NOTE: Regional Trade Agreements involving Palestinian Authority and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu have been excluded because their level of development based on income as per the World Bank's classification cannot be ascertained.

COMPETITION ACT 2010, MALAYSIA