



Malaysia ❖

– Shankaran Nambiar †

Malaysia is located in Southeast Asia. It is composed of two distinct parts, a peninsula bordering Thailand and the northern one-third of the island of Borneo. The peninsula is called West Malaysia and that part of Borneo which belongs to Malaysia is referred to as East Malaysia, both of which are separated by the South China Sea.

During the late 18th and 19th centuries, Great Britain established colonies and protectorates in the area of current Malaysia. These were occupied by Japan from 1942 to 1945. In 1948, the British-ruled territories on the Malay Peninsula formed the Federation of Malaya, which became independent in 1957.

Malaysia was formed in 1963 when the former British colonies of Singapore and the East Malaysian states of Sabah and Sarawak on the Northern coast of Borneo joined the Federation. The first several years of the country's history witnessed political instability, occasioned by Indonesia's efforts to control Malaysia; Philippine's claims to Sabah; and Singapore's secession from the Federation in 1965.

Economy

Malaysia is a small, open economy that is heavily dependent on FDI. Its growth, to a large extent, relies on exports from the manufacturing sector. Output from the electronics and electrical sub-sectors are important sources of export.

Malaysia has espoused a policy of economic openness and a willingness to adopt economic liberalisation. Capital controls and a fixed exchange rate were adopted following the economic and financial crisis in 1998. The capital controls were relaxed as the economy recovered. Although the ringgit is still pegged to the US dollar, the Government is committed to liberalising its financial and capital markets.

PROFILE	
Population:	29.24 million***
GDP (Current US\$):	303.5 billion***
Per Capita GDP: (Current Price, US\$)	9,800 (Atlas method)*** 13,676 (at PPP)***
Surface Area:	329.8 thousand sq. km
Life Expectancy:	74 years**
Literacy (%):	93 (of ages 15 and above)**
HDI Rank:	64***
<i>Sources:</i> - World Development Indicators Database, World Bank, 2012 - Human Development Report Statistics, UNDP, 2012 (**) For the year 2011 (***) For the year 2012	

Competition Evolution and Environment

In May 1969, there were racial riots in Malaysia. This is attributable to the economic exclusion and resulting resentment experienced by the ethnic Malays (*Bumiputra*). Following this incident, the Government initiated the New Economic Policy (NEP). The NEP was meant to eradicate poverty and to redress economic inequalities. Both policies were intended to improve the well-being of the *Bumiputra*, or sons of the soil, to ensure that they enjoyed greater participation in the economy, owned more equity and were better represented in the professions.

The NEP, in terms of implementation, implied that:

- trustee companies representing the interests of *Bumiputra* were entitled to purchase equity in selected commercial and industrial companies;
- compliance was expected in the employment of *Bumiputra* within the public sector, and to a lesser extent in the private sector;

❖ Original paper written (2006-07) and updated in June 2013.

- the 1975 Industrial Coordination Act was an instrument to control the entry of firms into industry, thus emphasising satisfactory *Bumiputra* ownership and employment;
- *Bumiputra* companies had an advantage in certain categories of government procurement; and
- *Bumiputra* were entitled to preferential treatment in government-owned institutions of higher education.

The NEP was directed at achieving re-distribution, so as to correct ethnic imbalances. The stretch of the NEP was wide. Furthermore, the NEP necessitated an interventionist state. Immediately after gaining independence (1957), Malaysia embarked on a system that incorporated indicative planning. This was a plan process where the Government set broad policy directions and allowed an active role for the private sector. Considerations of social development (amidst ethnic inequalities) and social justice were added justifications for state interventionism.

Although the Government introduced its privatisation policy in the 1980s, this did little to reduce their interference. The *Privatisation Guidelines* required that at least 30 percent of equity in privatised projects should be allocated to *Bumiputra* companies. Even those companies that were privatised had government presence in their governance structure. This was effected through the presence of the Ministry of Finance or Economic and Planning Unit on the Board of Directors.

Generally, privatisation policies are intended to reduce the heavy hand of the Government. The rationale of privatising companies is meant to allow for the free play of market forces. This has not always been the case in Malaysia. It would be expected that the purpose of heralding privatisation was to introduce greater efficiency and accountability within the system. Following the financial crisis of 1998, some of the projects that had been privatised, but which later proved to be unprofitable, were re-nationalised. Some of these companies include Malaysian Airlines System (MAS), the national airlines, and Indah Water Konsortium (IWK), the national sewage system.

Several observations can be made regarding the role of the state in Malaysia.

- First, although the Government attempted to implement privatisation, this was not done completely in that the Government was often not prepared to release its grip over the conduct of many companies.
- Second, economic interventionism was largely used to support the re-distributive policies espoused by the NEP.
- Third, the Government has evinced reluctance in designing and implementing a regulatory framework that would permit the free play of the private sector. Regulation, with regard to competition is a case in point, an issue that we now turn to.

Competition Law and Policy

The Competition Act 2010 [Act 712], which came into force on January 01, 2012, aims to provide a comprehensive legal framework to curb and restrict anti-competitive practices and to promote a competitive market environment in Malaysia. Prior to the implementation of the Act, there have been attempts to regulate anti-competitive behaviour, but these were confined to specific industries, namely communications and multimedia (via the Communications and Multimedia Act 1998 [Act 588]) and energy (via the Energy Commission Act 2001 [Act 610]). These laws contain specific provisions regulating competition, though it should be noted that the provisions on competition therein are less extensive than those in the Act.

Together with the enactment of the Act, the Malaysia Competition Commission (MyCC) was formed to regulate competition matters in the country and is actively involved in the process of implementing a competition regime. To date, MyCC has issued three guidelines (on anti-competitive agreements, market definition and complaints procedure). MyCC has also recently released draft guidelines on abuse of dominance, which are currently open to public comments.

Key Provisions of the Act

The Act regulates anti-competitive agreements and abuse of dominance. Unlike many other jurisdictions, it does not currently have merger and acquisition control provisions, though this may change in the future. The Act applies to any commercial activity, both within and outside Malaysia, that has an effect on competition in any market in the country. As the communications and multimedia and energy sectors already have their own competition regime, the Act will not apply to any commercial activity regulated under acts 588 and 610.

The following matters are excluded from the application of the Act:

- an agreement or conduct engaged in, in order to comply with a legislative requirement;
- collective conduct relating to negotiating and concluding employment terms and conditions; and
- conduct of enterprises entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly.

Anticompetitive Agreements

Agreements prohibited by the Act are horizontal and vertical agreements between enterprises that have the object or effect of significantly preventing, restricting or distorting competition in any market for goods or services. Note that the Act does not only apply to formal agreements or written contracts. Any form of contract, arrangement or understanding, whether or not legally enforceable, between enterprises (including a decision by an association or

concerted practices) will fall under the scope of the Act. Therefore, two competitors who get together to discuss pricing strategies over a game of golf can be charged under the Act in the same way as a formal agreement would. However, verbal agreements are harder to uncover.

Horizontal agreements are agreements between enterprises each of which operate at the same level in the production or distribution chain (for example, agreement between manufacturer and manufacturer). These agreements are typically entered into between competitors.

Vertical agreements, on the other hand, are agreements between enterprises, each of which operate at a different level in the production or distribution chain (for example, agreement between manufacturer and distributor or supplier and retailer).

For horizontal agreements that have the following objects:

- to fix, directly or indirectly, a purchase or selling price or any other trading conditions;
- to share market or sources of supply;
- to limit or control production, market outlets, market access, technical or technological development or investment; or
- to perform an act of bid rigging, such agreements are deemed to have the object of significantly preventing, restricting or distorting competition, and would infringe the Act.

In respect of horizontal agreements that do not contain the above *per se* prohibitions, or vertical agreements in general, MyCC will attempt to determine if such agreements significantly prevent, restrict or distort competition, before a finding of infringement is made.

MyCC's guidelines on anticompetitive agreements provide the following 'safe harbour' approach: "... anti-competitive agreements will not be considered 'significant' if:

- the parties to the agreement are competitors who are in the same market and their combined market share of the relevant market does not exceed 20 percent
- the parties to the agreement are not competitors and all the parties individually have less than 25 percent in any relevant market ..."

Enterprises that find themselves involved in agreements that are prohibited under the Act may apply for either an individual exemption for a particular agreement, or a block exemption for a particular category of agreements, provided that they are able to establish and satisfy all of the following:

- there are significant and identifiable technological, efficiency and social benefits arising from the agreement;
- the benefits could not reasonably be achieved without the agreement having the effect of preventing, restricting or distorting competition;

- the detrimental effect of the agreement on competition is proportionate to the benefits; and
- the agreement does not completely eliminate competition in respect of a substantial part of goods or services.

Exemptions may be granted subject to conditions or obligations and on payment of prescribed fees, as MyCC considers appropriate.

Abuse of Dominant Position

MyCC has indicated that it will take a two-stage approach in examining whether or not there is abuse:

- it will ask whether the enterprise is dominant in a relevant market in Malaysia; and
- if so, it will assess whether the enterprise is abusing that dominant position.

The guidelines provide that a market share above 60 percent would be indicative that an enterprise is dominant. Nevertheless, although market share is relevant, it is not in itself a conclusive factor in determining dominance. In order to assess whether an enterprise is dominant, it would be necessary to consider the market conditions within which the business competes including determining its existing competitors, its market share and barriers to entry into the market.

Dominance in itself would not be an infringement of the Act. It is the abuse of an enterprise's dominant position that is prohibited, and conduct amounting to abuse would include:

- imposing an unfair purchase or selling price or other unfair trading conditions on a supplier or customer;
- limiting or controlling production, market outlets/ access, technical or technological development or investment to the prejudice of consumers;
- refusing to supply; or
- engaging in predatory behaviour towards competitors.

Other abusive behaviour may include applying discriminatory conditions, forcing conditions or buying up scarce supply. However, a conduct would not be prohibited if the dominant enterprise has a reasonable commercial justification for the conduct, or the conduct is a reasonable commercial response to market entry or competitive conduct.

Powers of MyCC

Under the Act, MyCC has wide powers, including the power to conduct investigations. The Act grants MyCC and its officers the same investigatory powers as those of a police officer in relation to corresponding police investigations, including the power to require the provision of information from any person, or to retain documents and have access to records, books and accounts. Anyone who fails to cooperate in an investigation (for example, not responding to a notice or refusing to provide requested

information or documents), obstructs MyCC officials or hides, destroys or falsifies relevant documents may be guilty of a criminal offence punishable by a fine and/or imprisonment.

In keeping with a proven method in other jurisdictions, a leniency regime is established under the Act. A maximum reduction of 100 percent of the penalty may be granted if an enterprise has admitted its involvement in any of the *per se* prohibitions under the Act, and provides significant information or other form of cooperation to MyCC. The requirement to be the first creates a powerful incentive among parties to a cartel to inform the regulator about its existence.

Infringement

As the consequences of an infringement of the Act are severe, precautions must be taken. Companies should implement an effective compliance programme so as to ensure that all their business practices, whether within or beyond Malaysia, are in line with the Act. An effective compliance programme would include a review of a company's dealings, business strategies and arrangements, to ensure that such activities comply with the Act. In addition, training and awareness programmes should also be conducted so that employees, in particular those who meet competitors, understand the dos and don'ts involved in dealing and communicating with competitors. Finally, employees at all levels of a business, from the top down, need to demonstrate a commitment to complying with the law.

In the course of an investigation, MyCC may also impose "interim measures" if it reasonably believes that there is an infringement and the measures are necessary as a matter of urgency to prevent serious and irreparable damage or to protect public interest. Such interim measures may involve requiring or causing any person to:

- suspend the effect of and desist from acting in accordance with an agreement which may be an infringement of the Act;
- desist from any conduct which may be an infringement of the Act; or
- do or refrain from doing any act (but excluding the payment of money).

In addition, MyCC may require that the infringement cease immediately and may specify steps to be taken by the infringing enterprise to bring the infringement to an end.

Market review

MyCC can also conduct market reviews to determine whether any feature or combination of features of a market prevents, restricts or distorts competition in a market. On completion of a market review, MyCC must publish a report of its findings and recommendations, which must be made available to the public.

Consequences of infringement

An infringement of the Act would attract financial penalty of up to 10 percent of the worldwide turnover of the enterprise over the period during which the infringement occurred.

Anticompetitive Business Practices

The problem of gathering evidence of anticompetitive conduct is somewhat akin to the "chicken and egg problem". Without a competition law, it may be difficult to gather information on possible anticompetitive conducts, but without such evidence, it is difficult to justify the Law in the first place.

In the past, the Ministry has relied on evidence collected abroad to support its case for a national competition policy. This clearly has to change. For a policy of such potentially significant impact on the domestic economy, some strong evidence on anticompetitive conduct and their costs are required. Taking this into account, the Ministry has commissioned some preliminary studies assessing the extent of anticompetitive conduct in the country.

The preliminary empirical evidence gathered by the Ministry of Domestic Trade and Consumer Affairs does indicate that a significant number of industries in manufacturing sector are highly concentrated. They include several sub-sectors in the food, wood, chemical, rubber, plastic, and transport industries. Whilst these are not of direct anticompetitive conduct, they provide some suggestion that anticompetitive conduct certainly does exist.

More direct evidence further indicates that the more prevalent types of restrictive business practices (RBPs) that can be found in the manufacturing sector include exclusive dealing and resale price maintenance. In addition, there is also some evidence of collusion to set floor prices in the sector.

Even with such evidence at hand, it is difficult to conclusively argue that such RBPs are detrimental to consumers or the affected firms. Given that domestic empirical evidence is not always going to be sufficient, competition advocacy may be important for the effective implementation of the national competition policy.

Some anticompetitive practices, such as resale price maintenance, price collusion, tied selling and cartel agreements have been detected. There is also evidence that the market structure in certain sectors of the economy in Malaysia is increasingly oligopolistic in nature.

Although there is no published survey on the presence and extent of RBPs in Malaysia, observations tend to support the presumption that there are adequate grounds for investigation and, perhaps, action.

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

- oil and gas;
- car assembly;
- tyres and tube manufacturing;
- food and food-related products;
- plastic products; and
- hydraulic cement.

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

Sectoral Regulation

Since Independence, the economic sectors in Malaysia have been regulated primarily at the sectoral level. Regulation of competition in these sectors mainly took the form of government control over entry conditions (*via* licences and permits) and in some sectors, prices. This sectoral approach to competition regulation has continued even after the implementation of a major privatisation program since the mid-1980s.

However, in the regulatory reforms that took place following privatisation, new regulatory agencies were established in a few sectors, such as ports, airports, energy, communications and multimedia. Whilst economic regulation (e.g. entry, prices) continued to be the main focus of regulation in these sectors, the regulatory reforms in a few sectors have expanded the scope of regulation to include competition policy. These sectors include the communications and multimedia sector, and the energy sector.

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

- Communications and Multimedia Act 1998 (CMA); and
- Communications and Multimedia Commission Act 1998 (CMCA).

The CMA expressly prohibits rate fixing, market sharing, boycotting of competitors, and tying. This Act has been established, under its ambit, the Communications and Multimedia Commission (CMC). Two shortcomings are worthy of note. First, the CMA points out that anticompetitive conduct by firms can be tolerated if 'national interest' demands it. Second, the CMC cannot make a judgement as to whether or not a firm's conduct

amounts to anticompetitive behaviour. This decision is solely within the mandate of the Minister concerned.

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

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

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

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

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

If the intention to have a competition policy and law is slow to see realisation, it is because the Government has several concerns. One of the considerations is to ensure that the distributive considerations voiced in the NEP are achieved. The Government also wishes to pursue measures that will promote the growth of domestic firms.

Finally, the Government wants to protect domestic firms from the competitive pressures that will emanate from MNCs. In sum, the Government hopes to achieve a development path that is in line with national aspirations, rather than one that is based on the dictates of efficiency and fair trade.

Consumer Protection

One could argue that competition policy, broadly speaking, has two objectives: 1) regulating the conduct of firms, and ensuring that they do not engage in anticompetitive acts; and 2) ensuring that consumers are able to enjoy the highest level of surplus possible. The Malaysian Government has not disregarded consumer welfare. The protection of consumer interests has been embedded in the following statutes:

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

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

Concluding Observations and Future Scenario

There is a need for Malaysia to seriously examine the need to introduce a competition policy regime and the appropriate legal framework. While it is indeed true that

the Government has, for some time now, been entertaining the idea of introducing competition policy and law, not much has been accomplished in concrete terms.

There seems little doubt that the anticompetitive behaviour of firms need to be arrested. However, attendant issues need to be resolved. These include the following:

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

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

[†] **Dr. Shankaran Nambiar** is Assistant Director and Senior Research Fellow at the Malaysian Institute of Economic Research (MIER). Earlier he held teaching positions in institutions of higher learning. He has also been an academic administrator. His areas of research are mainly in trade policy, development and institutional economics.

*Dr. Nambiar has been a consultant to the Ministries of International Trade and Industry, Finance, and, Domestic Trade and Consumer Affairs in Malaysia. He has also consulted for UNESCAP, UNECLAC, UNDP, ILO, ADBI and the ASEAN Secretariat. He has been a resource person for various capacity-building programmes in Central and Southeast Asia. He is author of the book, *Sen's Capability Approach and Institutions*.*