ECONOMIC CONCENTRATION IN MALAYSIA

- LEGAL (AND ECONOMIC) ISSUES

by

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PERAKUAN KEIZINAN

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Fakulti Undang-Undang
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(MUHAMMAD SHAFEE BIN MD. ABDULLAH)

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PREFACE

The main aim of this study is to focus the relevant Authority's attention (and also that of the public) to the problem of economic concentration in Malaysia. The problem posed here is a grave one but ironically little or no study at all has been conducted directly on it. Economists have almost totally neglected this area. In fact at least one eminent economist in this country has even made a blatant statement that the problem of economic concentration is not a feature of this country.[1] The statement made was obiter and presumably it was not accompanied by any empirical study.

It is sincerely hoped that the present study would pave the way for further deeper research into the subject.

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[1] See, V. Kanapathy, 'The Law, Commercial Banking, and Malaysia's New Economic Policy,' a revised version of the paper presented at the <u>Second Malaysian Law Conference, 1973</u>, p. 24, where the author said:

"Malaysia does not have a Monopolies Act as found in some other countries, nor has she instituted a Monopolies Commission. The existing situation probably does not demand such measures...."

ACKNOWLEDGEMENT

The writer is deeply appreciative of the significant contributions made to this project paper by many persons. The writer wishes that he could list down the names of the contributors, but for reasons of confidentiality, he is forced to refrain from doing so. But the writer wishes to thank those individuals from certain government departments and employees of certain firms who have gone out of their way to provide confidential information which were highly needed for the exercise.

A special note of thanks should go to a certain foreign journalist who made available some vital information on some Malaysian company matters without which this work would not be as complete.

Sincere thanks and a note of appreciation must go to both supervisors at the Law Faculty, namely Puan Rafeah Salim and Professor M.P. Jain, for their invaluable and dedicated guidance given in the writing of the exercise. The writer would like to extend his apology if he had been a difficult supervisee to manage.

The writer appreciates the partial financial help given by the Consumers' Association of Penang which tremendously aided the writer in his field works.

The writer wishes to thank Mrs. Shaikha Zakaria (the Law Librarian, University of Malaya) and Mr. Chan (the Library Clerk, University of Malaya) for their endless assistance and for providing

the right research materials needed for this exercise.

Lastly, the writer expresses his appreciation for the clerical assistance given by his close friend, Cik Saleha Ramly.

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HYPOTHESIS, RESEARCH METHODOLOGY AND LIMITATIONS

General Hypothesis

That the prevailing economic situation in Malaysia is indicative of the existence of high economic concentration that justifies the introduction of legal and extra legal means of regulating or controlling it. And that the economic concentration referred to here exists on both levels - i.e. market concentration and overall concentration.

Specific Hypothesis

The above general hypothesis specifically means the following:

(1)(a) Market dominance (commodity or service wise) by firms in their respective industries is widespread and that it has reached a level where artificial market conditions could be dictated by these firms.

(b) Relationships between corporations such as that found in parent/subsidiary and interlocking directorship relationships are extensively used to further effect the monopolisation activities that bring about greater economic concentration. Take-overs, mergers and other reconstructions of companies are means whereby such relationships are sought to be achieved.

(2) Concentration of wealth among the top corporations and individuals is the major aspect of economic concentration in Malaysia. This concentration

of wealth is brought about by four major reasons:

(a) interlocking directorates;

(b) parent/subsidiary relations;

(c) mergers and take-overs, etc.;

(d) loan and investment capacities of big corporations as compared to the limited capacities of smaller corporations.

(3) Due to the above concentrated structures of our economy, some economic powers in Malaysia have taken the appearance of political powers (similar with the developments found in various other countries). Due to this frequent synonymity of economic powers and political powers, a vicious circle has developed that further threatens the issue of economic concentration in Malaysia.

(4) The present legal instruments available in Malaysia do not attempt in the least to solve the problems of economic concentration. The economic laws available are indicative of the ignorance or indifference of the legislators and the government of the serious problems of economic concentration that is currently being faced.

Immediate steps should therefore be taken to draw up legislations to curb this development of economic concentration, beginning with the establishment of an Inquiry Commission to probe into the matter.

Research Methodology

The actual research done on this paper took a total of six months of which three months were spent on field works alone.

The bulk of the field works were conducted in the form of interviews. A list of questionnaires[1] were prepared to facilitate the interviews with the respective firms. In carrying out the interviews, the writer found that it was more useful to conduct them with the employees of the firms rather than with the directors themselves. But where the employees were not able to furnish the information, the writer resorted to getting it from the top people in the corporations. It was also found that the employees were more frank than their employers.

The writer also sought to interview the officials of the government departments, namely those in the Bank Negara, Federal Industrial Development Authority, Economic Planning Unit of the Prime Minister's Department, Ministry of Trade and Industry, Attorney-General's Chamber and the Statistics Department. The writer did a great deal of research and interviews with the Stock Exchange of Kuala Lumpur.

It was necessary, in the writer's opinion to obtain the same information from various sources to ascertain the truth of the information. This was necessary because some firms would not give correct information and they usually underestimated the figures required.

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[1] See Appendix 'A'.

This was especially true in relation to production figures of the firms which the firms considered to be trade secrets.

A great bulk of the confidential information produced in this exercise came from informal sources which the writer is obliged not to reveal. A great deal of company matters need to be probed in detail using these sources which generally are made up of employees, ex-employees, journalists, competing firms and government officials acting in their informal capacity.

The writer was fortunate to have met a certain foreign journalist who had some vital information on Malaysian companies which is useful for purposes of the present exercise.

Substantial help was also obtained from the Statistics Department which made available certain unpublished datas on companies. This was found to be a good source of counterchecking the truth of information.

The rest of the research was done in the various libraries namely, the University of Malaya Library, the High Court Library (both in Kuala Lumpur and Penang), the Bank Negara Library, F.I.D.A. library, the Stock Exchange library, the Statistics Department library and others.

Limitations

There are briefly five main limitations which the writer faced while conducting the present exercise:

(i) <u>Difficulty in getting the relevant information:</u>

Due to the confidentiality of most of the information needed, great hardship was encountered in overcoming them.

(ii) <u>Public ignorance on the subject:</u>

The subject of economic concentration (especially the laws regarding it) is totally alien to most Malaysians, including academicians. As such the writer was faced with great difficulty in trying to explain to certain people the nature of the subject before interviews could be conducted with them.

(iii) <u>Lack of local materials:</u>

No local materials were available directly on the subject. As such the writer had to shoulder the burden of doing the research at grass root level with the aid of overseas materials.

(iv) <u>Finance:</u>

This formed a major stumbling block because the study involved a great deal of money.[2] The writer was fortunate to get a partial financial aid from a Local Consumers' Association.

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[2] Up to date, the writer has spent nothing less than $[illegible]00/-.

(v) Transport:

The firms surveyed by the writer were dispersed all over the country. This necessitated travels and the writer was handicapped in terms of transport.

The rest of the problems faced by the writer were minor.

CONTENTS

The theory of Economics does not furnish a body of settled conclusions immediately applicable to policy. It is a method rather than a doctrine, an apparatus of the mind, which helps its possessor to draw correct conclusions.

- John Maynard Keynes.

CHAPTER ONE

ECONOMIC CONCENTRATION - INTRODUCTION

The legislation of economic laws involves the transformation of economic principles into legal norms. This includes the laws regulating monopolies and restrictive practices.

The economic principles are given the necessary legalities and lubricated for purposes of their smooth and just implementations by the usual legal procedures.

Logically therefore, the basic principles of economics have to be borne in mind before one can make an intelligible study of the legal aspects of monopolies (or more generally referred to as the problems of economic concentration).

Economic theories sometimes seem to be in conflict partially or even totally with economic or business practices. This can be explained if one pays due regard to the nature of the subject itself. Economic observations for purposes of deriving theories are different from pure scientific observations. Economics (as is the case for 'law') is a living subject - it involves complex interactions of human activities, mainly business activities. There cannot be a controlled laboratory experiment on a specific interaction at the exclusion of other interactions. The conflict between theories and practice arises because economic theories are built up on some assumptions. Unless the situations in practice resemble or closely resemble that in the theoretical assumptions, the result predicted by the theory may not be as expected. But this does not make the theories bad. The theories, even if they are an over-simplification of the actual market conditions, are useful because of the light they throw on the subject.

Economics of Competition and Monopoly and the Problem of Concentration

The New Economic Policy in Malaysia places greater significance in the development of industries in Malaysia for the economic good of the country. Traditionally, Malaysia relied almost completely on the production of raw materials for its economic survival. This traditional approach has proven to be detrimental to the economy of the nation because of the almost continuous instability of prices of these commodities. These detrimental effects were more obvious during the various economic depressions faced by the world. Statistics have clearly shown that the most badly affected countries during these depressions were the developing and underdeveloped countries who were mainly dealing with primary commodities.

It is mainly due to the above reason that the government has taken positive steps in bringing about the change in the economic 'reliance' in this country. Various steps have been taken to promote the growth of industries in Malaysia, especially manufacturing industries. Apart from the various socio-economic measures taken, the government has also introduced various legislations with similar objectives. Among some of these legislations are: The Free Trade

Zone Act, 1971; The Investment Incentives Act, 1968; The Industrial Coordination Act, 1975; and many others.

The government has also set up the Federal Industrial Development Authority under the Federal Industrial Development Authority Act, 1965, with the aims of encouraging the growth of the industrial sector. The Authority is also formed for the purpose of regulating the growth of the industries with the necessary cooperation from the Ministry of Trade and Industry.

A developing country like ours which is comparatively new in the industrial field provides large potentials of further growth in industrialisation. The cheap labour available in this country coupled with other benefits provided by the government has encouraged foreign investors in opening up many industries in this country. Malaysia adopts the 'open-door' policy to foreign investments and as such we now experience the growth of multinational corporations within our industry. The growth of these multinational corporations such as Dunlop, Alcan, Maleyan Breweries, Sime Darby, Guthrie, Harrison and Crossfield, Carlesberg, Lever Bros. and others have created a substantial impact on the Malaysian economy. The annual incomes of some of these giant firms are comparable to many of the statutory bodies' incomes and in fact in some cases are comparable to the incomes of some of the States in the Federation. Companies like Guthrie, Sime Darby and Harrison and Crossfield and others own properties in land worth millions of dollars. These lands form a substantial portion of the total lands in the country. According to studies done immediately after the May 13 incident, about 70% of the country's earned wealth had been deposited to foreigners through these giant firms. And out of the other 30% that were Malaysian owned, the majority were in the possession of the Chinese. But this ownership by the Chinese is misleading because according to the same studies only about five or six Chinese families who actually owned the majority of the wealth. The same is true of ownership of wealth within the other races - namely the Malays and the Indians. It is only the minority of each of these races that control the wealth of the nation. Therefore it can be seen that in Malaysia, just like in any other developing country, there is substantial amount of economic concentration which logically also leads to political power concentrated in few hands.

It is doubtless to say that these wealth that were acquired by both the foreigners and the few Malaysians are mainly derived through business and industrial activities.

Logically therefore, if there is to be any attempt by the Third Malaysia Plan to redistribute the wealth of the country to the majority of the people, then there is no better way to achieve this than through the proper regulation of the business activities in the country. The main areas that need to be focussed would be in the areas where there are a great deal of economic concentration by firms who are monopolies or having monopolistic trends.

It is the intention of this paper to examine the nature of the economic concentration formed by some of the monopolistic firms;

to study their structures and behaviour with due consideration to the national objectives and public policy. A greater and more important part of this paper is devoted to the legal examinations of these monopolistic practices; to survey the existing laws on trade regulation with special emphasis on their drawbacks and in the final analysis to draw up some proposals on the legal measures to be adopted in dealing with the problems of economic concentration in Malaysia.

As said earlier, some knowledge of Economics is essential for one to make an intelligible probe into the legal issues of monopolies and other economic concentrations.

Firstly, it is pertinent for us to discover the kind of economic system we are living in. Our economy generally works on the 'Laissez Faire' mechanism. This system allows a great deal of liberty to the private corporations. But while this is true, the government has also taken various measures, both legal and economic, to control and regulate this system. We have therefore a system which is a blend between free competition and State controlled economy. It is important to point out that is is 'Laissez Faire' that forms the basis of our economic system. State controls are only superimposed on this basic premise.

Firms in a 'Laissez Faire' economy compete with similar product producing firms in order to gain market dominance. If there are many sellers selling a homogenous product, then competition is said to be perfect provided that none of the sellers has the power to dictate the price of the product. In other words, none of the sellers must have market power. But in practice we seldom come across two products from two different firms which are exactly similar. There would be some amount of variation either in colour, shade, taste or others, and due to 'consumers preferences', a firm may be able to rely on a solid core of customers of his product. Some of these firms can obtain such customers through their goodwill. Patents and trade marks also play great parts in establishing 'consumers preferences'. The point is then it is true to a certain extent that every firm is some kind of a monopolist. But on the other hand, every firm faces competitions from other firms because competition does not necessarily mean that a firm dealing in spectacles has to compete only with a firm dealing in spectacles. The spectacle firm may have to compete with the contact lenses producers because consumers may get more fashion conscious. Similarly, the railway service may have to compete with the airline service though each of them forms a monopoly by themselves in Malaysia.

At this point it needs to be explained that the economists' definition of monopoly is different from its legal definition as found in the monopoly legislations in U.K., U.S.A., Australia, India and others. The legal definition is too technical to be introduced here yet, but for the moment it is sufficient to know that the legal definition of a monopoly does not mean that the seller must have 100% dominance of the market. He needs only to have a substantial portion of dominance only. The degree of dominance that constitute a monopoly is to be determined by the specific legislation in that specific country. For example, in U.K. by the Fair Trading Act of 1973, a monopoly situation shall be taken to exist in relation to the supply of goods of any description if at least one-quarter of all the goods of that description which one supplied in the U.K. are supplied by one and the same person, or are supplied to one and the same person.[1] Formerly this ratio was one third. The ratio can be varied in accordance with the sophistication and concentration of the country's economy. Therefore in the legal context, a monopoly includes a duopoly, an oligopoly or a few dominating sellers in a market of many sellers. It is also to be observed clearly that by the Fair Trading Act, 1973 of U.K., as mentioned above, a monopoly includes a monopsony - i.e. a dominant buyer. This is also true of other legislations in other countries.

A firm can pursue to get market dominance and ultimately becoming a monopolist through two major ways:

(a) The Traditional Approach (or sometimes called the Commodity approach) -

This approach involves the obtaining of market control of the sales of a certain commodity. In other words, the firm that gets the larger share of sales in the market as compared to the industry's total sales gets the dominant position. This is an internal process that relates a lot to the efficiency of the firm. This is the type

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[1] Fair Trading Act (U.K.), 1973, s. 6(1)(a).

of market dominance we have so far talked about.

In this approach, the firm can obtain dominance by acquiring more formidable weapons to introduce competition in areas where others have enjoyed a monopoly position and at the same time it can seek to strengthen its own monopoly position in areas where it is secured of market power.

Next, the firm seeks to introduce some barriers to competition so as to prevent other firms from coming to take some share of the market.

Finally, if the firm realises that aggressive competition to kill rivals would not work, the firm may be put in a position when it seeks to have agreements with its rivals on areas that each of them is to dominate and perhaps to fix prices in areas of dispute. This is a collusion. These collusive firms may then put up barriers to halt the entry of other firms into the industry.

(b) The New Approach

This approach is becoming more significant nowadays. This is especially true in the case of Malaysia where there are little controls or regulations pertaining to it. The approach involves external factors, i.e. the firm that seeks to dominate the market would acquire as many firms in the industry as is possible (especially its own rival companies) and therefore forming a giant corporation. This giant firm would then gain a certain degree of economies of scale which by itself would form an effective barrier to stop other firms from coming in and therefore creating a position of unrivalled parallel. Acquisitions can take the forms of take-overs and mergers. Mergers and take-overs can take the structures of one of the ways, namely:

i. Horizontal;

ii. Vertical; or

iii. Conglomerate.

The horizontal variety has a close connection with the 'concentrated structures' shown in Figure 1, namely, monopoly, market dominance, duopoly and oligopoly. It involves the acquisition by the dominant or potentially dominant firm of other firms producing the same commodities. The object being in this case to make the firm bigger and therefore extending its market control.

Vertical merger or take-over can take place at an earlier or subsequent stage of production. If it is the former, the acquiring firm may be able to stop the supplies or discriminate on price against those rival firms who are not integrated backwards.

The conglomerate merger or take-over is a case where firms producing entirely different products may decide to come together nevertheless. The classic case of this would be the ITT or as in the case of Malaysia, the Sime Darby Group.

In terms of share ownership, we are faced with the problem of determing the controllers of the firm - i.e. the parent-subsidiary problem. The real issue here is determining what are the firms that

THE CONCENTRATION PROBLEM

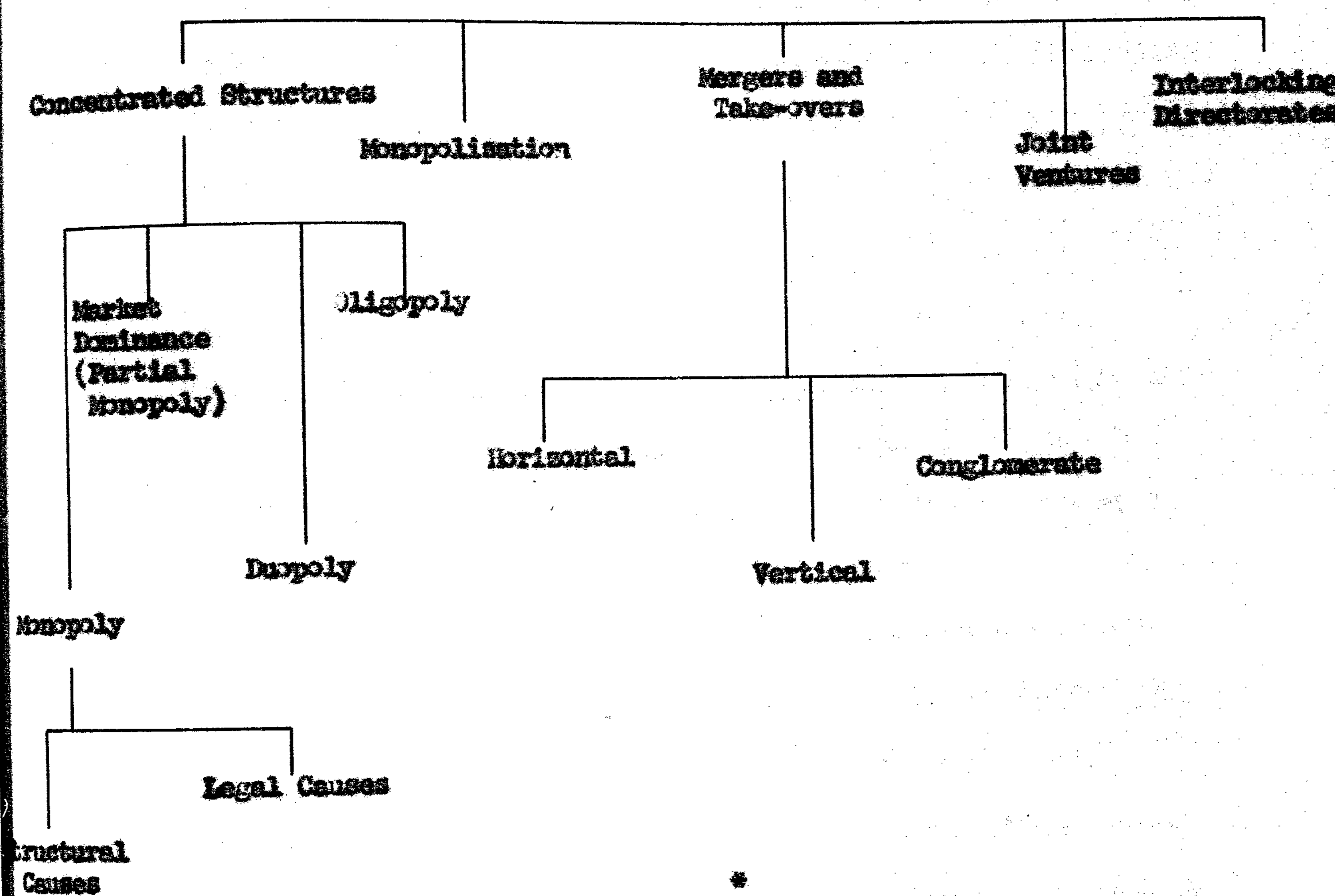

Figure I *

* Extracted from the book written by Professors Dennis Swann and Dennis Lees, Antitrust policy in Europe (An Economists Advisory Group EAG business research study - World Trade Centre), p. 16. [With slight modification by the present writer to suit his own classifications]

form the subsidiaries of the holding company. This is important because even if there are many firms in a certain industry, due to the control exerted by the parent company over many of these firms (who are actually subsidiaries), the industry would in fact still face the problems of concentration. S. 5 of the Malaysian Companies Act, 1965 (Revised 1973), deems a company to be a subsidiary of the other if:

(a) that other corporation

(i) controls the composition of the board of directors of the first mentioned corporation;

(ii) controls more than half of the voting power of the first mentioned corporation; or

(iii) holds more than half of the issued share capital of the first mentioned corporation (excluding any part thereof which consists of preference shares); or

(b) the first mentioned corporation is a subsidiary of any corporation which is that other corporations subsidiary.

The above parent-subsidiary problem is similarly faced in the case of interlocking directorates. This problem is of special importance in the Malaysian company matters. This is because the Malaysian company law does not prohibit or limit a person from holding any number of directorships in companies even if the companies are rivals to each other; as long as the director discloses this information to all the companies concerned as required by S. 131 of the Malaysian

Companies Act, 1965, he is in breach of no law. As a result of this, we find that in Malaysia, it is not uncommon to find prominent members of the public holding as many as 30 directorships from 30 different companies even though the possibility of conflict of interests is glaring.[2]

The antitrust objection to such interlocking directorates is that an influential director from a leading firm who is also a member in many other similar product producing firms, either vertically or horizontally, may be able to exert enough control on the various firms so as to form a certain market structure that tends towards market concentration.

Joint ventures between two firms to set up a third one may reduce competition between them because of the link in property in the third firm.

It is pertinent to point out the difference between 'monopoly' and 'monopolisation'.

A 'monopoly' describes the structure of the firm in relation to the industry. But 'monopolisation' refers to the activity of a firm who tries to exclude competitors from coming in to take some share of

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[2]As revealed by the interview conducted with the officials of the Registry of Companies, Malaysia. (The Slater-Walker technique of acquiring companies is an excellent illustration to show the building up of a conglomerate and interlocking directorates.)

the market. This has nothing to do with the competitive capacity of the firm. It relates to more of the conduct of the firm. Usually, the methods employed by the firm are illegal or unethical. For example, the firm may on hearing the news of an emerging rival, cuts down its prices so low that the potential rival may find itself in the most disadvantageous position to compete. The monopolising firm can afford to reduce its price because it enjoys a substantial standard of economies of scale. But as soon as the monopolsing firm realises that it has managed to get rid of the potential rival, it will raise the price again to reap as much profit as possible from the consumers.

Another method where a firm practices monopolisation is when the sales of its products are done by its agents. The firm would often require that the agents would only deal with its own product only. A breach of this condition will result in the agent losing its agency. Because of the dominating position of the firm, the agents are left with no choice. Therefore this firm that has the head start in acquiring the distribution channels through its various agencies and dealers would leave little or no channels at all for competing firms to distribute their products. This monopolication of distributive channels certainly form an effective barrier to competition. Typical examples of this practice in Malaysia would be the case of the brewery and the petroleum industries.

Due to the special importance of the issue on mergers and take-overs in the context of economic concentration specifically and the business activities generally, it will do much justice to this paper if more is said about the subject.

The popularity of mergers and take-overs overseas can be illustrated clearly when one takes a look at the figures of investment in Britain during the early 70s. An estimate showed that merger activity accounted for two-thirds of that capital investment in Britain - a sum equal to almost double the investment made by the manufacturing industry alone.[3]

In Malaysia, the use of mergers and take-overs has begun to take significant importance. The main reasons for mergers and take-overs in Malaysia are similar to the oversea situations. The reasons can be broadly listed under two headings:

(a) asset advantage;

(b) trade advantage.

The 'asset advantage' is the raison d'etre of the Slater Walker technique - namely, acquiring control of a company at a much lower price than the price sold to another buyer. For example, in 1964, Slater bought a company called H Lotery. He invested £700,000 in it and later his shares were valued at £1.4 million. Later, he changed the company's name to the present "Slater Walker Securities" and by some internal process of expansion and acquisitions, a £70 million

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[3]Anthony Vice, The Strategy of Take-overs (a case book of international practice) Mc Graw Hill, 1971, cover note.

price was put on the company in late 1970.[4]

In this particular case, though the intention of the person who arranges for such mergers or other reconstructions is not to monopolise an industry, his professional action of acquiring wealth through these processes would certainly deteriorate the already problematic area of economic concentration and therefore necessitates governmental supervision and control in line with national and public interests.

The 'trade advantage' reason is more directly related to the economic concentration problem. This is easy to understand if examination is made to the advantages received here. Briefly, some of the advantages are[5]:

- Economies of Scale - especially in horizontal mergers. Economies of scale can form an effective barrier to competition and this is particularly true in the context of a developing country like Malaysia.
- Ensuring raw materials and supplies - as earlier mentioned of the case of backward vertical integration, a merging firm may choke the supplies of raw materials from reaching its competitors by bringing about a merger or take-over of the supplying firm.
- Financial advantages - this advantage is received because of the centrifugal force created by large firms in their borrowing capacity - both in terms of loans and raising the amount of shares in the market. The demand on the capital market, by the numerous numbers of industries in Malaysia who need large sums of fund, is expected to be higher. Though the demands for the capital-loan come

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[4]ref.: Anthony Vice, op. cit., p. 1.

[5]ref.: Weinberg, Take-overs and Mergers, 3rd Edition, Sweet and Maxwell (London), pp. 22-34.

from various sizes of industries, the chances of bigger and established firms getting the limited loan are certainly greater. This is due to the qualifications required by most financial institutions, namely, to provide sizeable securities to the respective loans. Even the Malayan Industrial Development Finance Bhd. (MIDF), a company sponsored by the Malaysian government and the World Bank, has stringent rules and policies that favour the big-time borrowers. MIDF's explanatory pamphlet reads:

"......... sponsors of projects are expected to provide adequate proportion of the capital required. In addition, suitably qualified managerial and technical personnel must also be available to ensure the success of the operation." [6]

This biasness against small industries in matters relating to loans and the policies thereof, can be said to be also responsible for the further growth of economic concentration. In this context, it needs to be pointed out that the Malaysian Capital Issues Committee (CIC) is yet to expand its duties to control the raising of fund along the line of its U.K. counterpart. The Committee only regulates the issue of shares and/or the listing of such shares on the Stock Exchange.[7] Perhaps the Capital Issues Committee could expand its present objective of merely protecting the investing public by looking further at the share issuing and loan-making activities of persons and corporations that are responsible for the further concentration of wealth in the country.

- Marketing advantages - this is again an advantage that is totally being abused to some extent by big firms in Malaysia. It involves the elimination of marketing outlets of the firm's rivals. This can be done either through legal or illegal means.

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[6] M.I.D.F., Capital for Industry, an explanatory pamphlet, p. 2.

[7] ref.: Abdul Aziz Hj. Taha, Secretary of CIC, "The Capital Issues Committee", The Malaysian Association of Investors in Securities, p. 82. (Interview conducted with him on 5-6-76 at Bank Negara).

- Acquisition of a competitor - this is of course the ambition of most businessmen because it is a direct and effective way of establishing a monopoly in the industry.

  Other trade advantages include the diversification and reduction of earnings volatility and purchasing management.

The Multinational Corporations as a Source of Economic Concentration in Malaysia

A great deal of the problems of economic concentration in Malaysia is created by the Multinational Corporations (MNEs). Dr. V. Kanapathy, an Economic Adviser at the United Malayan Banking Corporation (UMBC), feels that the pattern of ownership in foreign hands is still the case for Malaysia. He estimated that about 60% of our rubber, tin, banking, insurance and wholesale trade and about 90% of our Shipping still lie in foreign hands,[8] and out of all these foreign ownership a great bulk of them comes under the control of MNEs.

MNEs take on similar patterns in every corner of the globe. The most conspicuous characteristics of the MNEs is their ability to grow into unchallengeable size in terms of investment, plant size and profitability and most of all their endless grip of the market. It has been said that some of the MNEs' annual incomes are bigger or

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[8] V. Kanapathy, "Multinational Corporations and their implications for S.E. Asia: Foreign Investment in Malaysia," Institute of S.E. Asian Studies Current Issues Seminar, Series No. 1, Feb. 73, p. 3.

comparable to many of the nations' annual incomes. The huge profit seeking ability of the MNEs is due to several factors among which technological skill and capital intensive schemes provided are but a few. Due to the ubiquitous nature of the MNEs, world wide resources are made available instead of merely resorting to a single nation's resources. This factor enables the MNEs to reap global economies of scale. The usual problem of interlocking directorates becomes more complex in the case of MNEs because of the various jurisdictions they are in. The dispersed group-companies may seem to be independent of each other but because of the interlocking directorates, they are in fact controlled by parent companies.

Due to the unlimited areas in which MNEs can travel and set up business, their economic and political powers are far reaching instead of being merely being confined to a nation. This privilege puts the MNEs even better of than some of the nations including those nations who are hosts to the MNEs themselves.

Therefore it has now become apparent that some control should be imposed on the MNEs so that they would not be able to use their economic power to influence either economic or political decisions of the host country. Anthony Sampson has clearly illustrated in his book the nature of political activities that MNEs like ITT can get involved with.[9]

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[9] Ref.: Anthony Sampson, <u>The Sovereign State</u>, 1974 Edition, Coronet Books - Hodder Fawcett Ltd., London.

According to Anthony Sampson, ITT passionately devoted itself to blocking down a Marxist government in Chile. Though this story was strongly denied by the ITT officials at the time of the publication of Sampson's book, it has been confirmed very recently by an admission from ITT itself that the Company may have given $350,000 to Chile in 1970 to fight Communism.[10]

It is to be pointed out that it is not for any ideological reasons that ITT get involved in politics. This is not the motive of the company. The real motive of the involvement is merely to obtain 'lobby power' so as to maintain economic interest. This is clearly seen by ITT's contradiction in action - i.e. while the company helps to fight Communism in Chile, it was at the same time eagerly negotiating with the Communists in Moscow to open up the huge potential new market.[11]

The case of the ITT demonstrated that an MNE can even politically sabotage the nation in which it is conducting its business. This is not to mention the economic harms done in which the MNEs have always been accused of by host countries. Some of these harms include:

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[10] New Straits Times, 14th May, 1976, p. 5.

[11] Anthony Sampson, op. cit, p. 266.

(a) causing adverse balance of payments;

(b) violating the exchange control regulations;

(c) misallocation of the country's resources especially in the case of developing countries like Malaysia where millions of dollars are spent in producing luxurious commodities when in the scale of priorities they are not that needed as yet. Misallocation here includes misallocation of labour, income, expenditure etc., as well;

(d) brain drain of nation's expertise into the company instead of directly being retained by the nation itself. This problem has become serious in Malaysia that the Government recently had to warn the concerned companies not to dabble in buying of public servants, otherwise the companies involved would be black-listed;

(e) monopolisation;

(f) unethical business conducts such as restrictive trading, price discrimination, etc.

When dealing with the multinational firms, it is pertinent to realise the fact that the MNEs' main objective is never coincident with the nation's main objective. This is because MNEs set 3 levels of priorities in their scale of priorities; namely:

(i) the company's self-interest which is profit motivated;

(ii) parent company's interest;

(iii) host economy's interest.

Our own national interest is therefore last in the scale of priorities of MNEs.

MNEs like Shell, Esso, Sime-Darby, Exxon, Jardine and Matheson, Guthrie, Harrison and Crossfield and many others hold substantial portions of the nation's wealth and this wealth is highly concentrated in a few hands thereby creating an unhealthy climate taking the form of foreign exploitation of the local market.

The economic concentration taking itself in many forms coupled with the mechanism of interlocking directorates force the Malaysian branch MNEs to act in a certain regulated way. This regulation has its source in the parent company which is located in a different country. The directors of this parent company who usually form the majority of the interlocking directors of the group are most often citizens or at least residents of the parent country and as a result of this the particular nation which is controlling this parent company may be able to enforce the political ideologies through the instruments found in these MNEs. In fact it is undeniable that countries like U.K., U.S.A., France, Japan, Russia and others make use of MNEs to effect their expansionist policies. History read together with the prevailing conditions bear testimony that the expansionist policies of these countries have in fact taken place in the form of economic conquest of our nation. But this is only the beginning.

CHAPTER TWO

SURVEY OF LAWS PREVENTING OR ENCOURAGING ECONOMIC CONCENTRATIONS

There is no specific legislation in Malaysia dealing with the problem of economic concentration. In U.K., the laws dealing with the problem are: the Monopolies and Restrictive Practices (Inquiry and Control) Act, 1948; the Monopolies and Mergers Act, 1965; and the Fair Trading Act, 1973. In U.S.A. it takes the forms expressed in many acts, such as the Sherman Act, 1890, the Federal Trade Commission Act, 1914, the Clayton Act, 1914, etc. Similar laws as in U.K. or a blend of the U.K. and U.S.A. systems are also enforced in India, Australia and many other countries.

Since Malaysia does not possess any of the above laws, it is necessary to survey the existing laws that either, directly or indirectly, affect the problem of economic concentration. The survey of the present laws and a survey of the economic and business realities are the two most important areas to be studied before an intelligible conclusion can be made as to whether we need to go beyond what the present business - regulating laws are offering in Malaysia. This chapter examines some of the statutory laws in Malaysia under the various headings, namely:

(A) Fiscal and other Industrial Control laws.

(B) Laws dealing with Industrial Incentives.

(C) Laws dealing with Tariff Protection and other related matters.

(D) Industrial Licensing policy laws.

(E) The Companies Act, 1965.

The law relating to consumer protection is also mentioned in passing at the end of the chapter.

(A) Fiscal and other Industrial Controls Laws

The controls involved here are:

(i) Internal monetary control.

(ii) Exchange Control.

Monetary controls is given a broad meaning so as to include not just mere money controls but also controls of issue of shares, debentures, loans, etc.

The exchange control is necessitated by foreign investments and other international trade practices and their subsequent repercussions.

The main government institution that exercises fiscal controls is the Bank Negara of Malaysia established under the Central Bank of Malaysia Ordinance, 1958. The principal objects of the Bank, inter alia, are:[1]

(i) to promote monetary stability and a sound financial structure; and

(ii) to influence the credit situation to the advantage of the Federation.

These two objectives can, if chosen, be construed very widely. It is important for the Bank to have such wide objectives because of the

[1] Section 4, Central Bank of Malaysia Ordinance, 1958.

unpredictability of the economic trends, both at national and international levels. The Bank has, therefore, powers to monitor the credit situation of the country so as not to let undue concentration of money power be vested in a few hands. This can be done through various ways. Firstly, by virtue of the Banking Act, 1973, read together with the Central Bank of Malaysia Ordinance, 1958, which gives the Central Bank the duty to advise the government on financial matters, the Central Bank can influence the Finance Minister on issuing or revocation of licences to banks.[2] And Section 6 of the Banking Act, 1973, gives the Minister the right not to grant license or shall hold the licence, if it has been given already to a bank, which is or has become owned or controlled by a foreign government. This power of the Minister can be invoked to ensure that foreigners do not have uncontrolled quantity of monetary instruments in their hands which can be abused to dominate the capital market of Malaysia. Details are provided in the Banking Act, 1973, for the enforcement of the ownership control. Any kind of reconstructions within the banks have to be duly approved by the Minister first.

One of the most effective measures taken to control the domination of the capital market by individuals or corporations is through the control of loans by banks and other credit institutions. With regard to loans to foreigners, the Exchange Control Act, 1953, requires that banks and other persons resident in Malaysia seek the permission

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[2] Section 4, Banking Act, 1973.

of the Controller of Exchange before they lend money, treasury bills, or securities to any body, that is, including any corporation, a company or branch etc., (other than a bank) which is resident in Malaysia and which is controlled, directly or indirectly, by residents of countries outside Malaysia. This permission is needed when the credit facilities exceed half a million dollars inclusive of interest payable. Control is needed here because our capital market is limited in its local resources and therefore priority should be given to locally controlled industries. But there is no control of money received from outside Malaysia into Malaysia to form investments, but they are regulated by the Foreign Investment Committee (FIC)[3]. Normally, applications by foreign-controlled firms for local credit facilities exceeding $\frac{1}{2}$ million are approved, but the maximum allowed is equal to the firm's paid up capital plus its undistributed profit. Therefore, here the policy adopted is the "1:1 policy".

Section 26 of the Banking Act, 1973, is interesting in its possible rationale, that is, the disintegration of concentration of credit facilities through interlocking directorates. Stringent rules are constructed to regulate and control loans to the bank's own directors, or to a firm in which the bank or any of its directors is interested as partner, manager or agent, or to any individual or firm of whom or of which any of its directors is a guarantor or to any corporation which is deemed to be related to the bank by virtue of

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[3]See Chapter 3.

the Companies Act, 1965 (Section 6).

Part V of the Banking Act, 1973, have among other things as their objects the provision that ensures that related persons or bodies to the bank concerned do not obtain undue advantage over other unrelated persons or bodies in obtaining the credit facilities of the bank. These provisions are important because they ensure that growth of investment and capital does not only concentrate on the few individuals or bodies who because of their relationships or advantageous position could stand a better chance of financing their projects at the expense of others. Banks are not allowed to engage in trade except in the course of satisfaction of debts due to it for the purposes of carrying on its banking business. This is naturally so because otherwise the banks can make use of their own credit facilities which are contributed by the public to finance their own trading activities and thus forming a concentration of capital and trading power in a continuous chain-like position gaining the centrifugal force leading to economic concentration. To implement the above objectives, Part VI of the Act lays down the Central Bank's powers of supervision and control over all banks.

The Borrowing Companies Act, 1969, regulates and controls the activities of borrowing companies along the same line as the regulations and controls imposed on the general banks. The provisions that are relevant here are those that deal with the restrictions of loans[4] which also includes loans to directors.[5] Section 21(2) even deems

[4]Section 20.

[5]Section 21.

a 'director' to include the wife, husband, father, mother, son or daughter of a director. This is an obvious attempt, <u>inter alia</u>, to prevent concentration of money within certain families or groups. Borrowing companies are also prohibited from acquiring shares of any corporation, immoveable property or any beneficial interest in any firm unless with the consent in writing of the Central Bank.[6]

The legislations governing the banks, borrowing companies and other credit institutions have attempted to give some powers to either the Central Bank or the Finance Minister to deal with the problem of possible misallocation of the credit facilities by these credit institutions. It is a common conception among economists that credit facilities are easier to obtain by large corporations or persons who have the correct interlocking interests in the capital market. Since capital is in fact the major essence of industrial development, the control of capital distribution is therefore the effective method of ensuring disintegration of economic power. But it needs to be pointed out that while the legislations are present to deal with the problem of economic concentration through the proper control of credit facilities, enforcement of the legislations have been very poor. In fact in Malaysia, the maxim that the bigger the corporation the bigger the share of credit facilities obtainable is still the rule today. This is especially true in the case of enforcement of the rules of the merchant banks who have to play, among several others, the special role in developing the agricultural

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[6] Section 22.

and industrial sectors; strengthening weak business enterprises by providing a sophisticated system of corporate financing, including to those corporations who apply to merge or involve in take-overs. The operational guide-lines, apart from lacking the legal sanction, does not seek to achieve the objectives of developing the less developed enterprise.

(B) Incentives

The New Economic Policy of the country incorporates many measures aimed at encouraging the growth of industries. One of the measures enforced under this new policy is the giving of incentives to new firms who are still in their infant stage of growth. Incentives in this context has been given a broad meaning, that is, it includes direct incentives as conferred by the Free Trade Zone Act, 1971, and the Investment Incentives Act, 1968, and also 'protective' incentives which is conferred by the Customs (Malaysia Common Tariffs) Act, 1966.

The objective of the Investment Incentives Act, 1968, is to encourage "by way of relief from income tax and payroll tax the establishment and development in Malaysia of industrial and other commercial enterprises, for the promotion of exports and for incidental and related purposes.[7]

By Section 3 of the Act, the Minister of Trade and Industry may declare an industry and the products of such an industry, to be a

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[7]Preamble to the Investment Incentives Act, 1968.

'pioneer' industry and 'pioneer products' respectively, and therefore receive the advantages conferred by the Act. There are four requirements to be met before the pioneer status can be given:[8]

(a) that the industry is not being carried on in Malaysia on a commercial scale suitable to the economic requirements or development of Malaysia or at all;

(b) that there are favourable prospects of further development of the industry including development for export;

(c) that there are insufficient facilities in Malaysia to enable the industry to be carried on on a commercial scale suitable to the economic requirements or development of Malaysia including development for export;

(d) it is expedient in the public interest to encourage the development (including development for export) or establishment of the industry in Malaysia.

The privileges conferred by the Act can take many forms, some of which are tax relief, investment tax credit, export incentives, export allowance, and payroll tax relief. Note that some of these privileges are also given to non-pioneer companies. The <u>Investment Incentives (Amendment) Act, 1971</u>, provide for special investment incentives to electronics, hotel and high labour utilising industries. It also provides increased capital allowances for approved projects.

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[8] Section 3.

Many writers have expressed their opinion that the investment incentives have in effect conferred the industries with some amount of monopoly privileges, because most of these firms are of one of the only kind in Malaysia. But it is submitted that the Act does not seek to establish monopolies. The intention of the Act is only to protect by encouraging the budding industries of our time. Once the 'infant' stage is over, the privileges would be lifted, and the industry has to grow on its own in competition with others.

But in Malaysia, as is admitted by some of the officers in F.I.D.A., some of the industries receive almost perpetual pioneer status even though the industries are ripe enough to stand on their own. This, it is submitted, is against public interest, because the firms involved tend to make excessive profits, which is a characteristic of monopolistic practices and is certainly a disqualification when construed in the light of Section 3 of the Investment Incentives Act, 1968.

Economic concentration is objectionable especially if the abuses are practised within the nation itself. On the international level, some nations would encourage the growth of monopolies so that the firms can compete better internationally if they are large enough so as to reap global economies of scale. Therefore monopoly industries dealing exclusively in export trade would receive little objection from the nation's consumers, because their (the industries') activities do not affect them. The Free Trade Zone Act, 1971, among some other things, seek to encourage the development of export trade in Malaysia.

The Act empowers the government to declare any area to be a free trade zone and defines the operations permitted within that trade zone. Those goods allowed by law may be brought into a free trade zone without payment of any customs duty, excise duty or sales tax. Retailing is prohibited within the area and the goods are to be manufactured by approval of the Minister concerned. Clearly, therefore, this law only seeks to give some market advantages to the export industries above so that the national balance of payments is in equilibrium. It does not intend to give any advantages at all to firms doing their business locally.

(C) Tariff Protection and Other Related Matters

The policies regarding tariff protection and other related matters need to be scrutinised closely because tariff protection is one of the two ways of restricting business competition in the international and national levels. The protective measures granted by the government under this policy include[9]:

- tariff protection;
- import quota restriction;
- exemption from import duty and surtax on raw materials or component parts and machines;
- drawback of import duties and surtax paid; and
- refund of import duties and surtax.

These measures are in some ways responsible directly for the emergence of some monopolistic practices in the Malaysian local market. This is

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[9] Guidelines for getting Tariff Assistance - produced by the Federal Industrial Development Authority (F.I.D.A.), Malaysia.

as a result of the local manufacturers receiving an advantage over foreign producers by the government measures of discrimination against those foreign goods.

But looking at it in the international field, these measures by the government is justifiable on the ground that competition provided by the giant international conglomerates are too big for our local manufacturers to swallow. In other words, by protecting those tender local firms against those super international monopoly firms, the protective measures are in fact encouraging the growth of a potential competitor in the international arena.

These measures are mainly enforced with the authority given by various Acts such as: Customs (Malaysian Common Tariffs) Act, 1966, Sales Tax Act, 1972, etc.

(D) Industrial Licensing Policy

Prior to the passing of the Industrial Coordination Act, 1975, there was no systematic licensing policy of trade and industries. The Business Registration Ordinance, 1956 merely facilitate the keeping of records of registration of the businesses in West Malaysia. But this Ordinance does not go beyond the duty of registration and as such it could be said that Malaysia did not have any licensing policy of legal standing prior to the passing of the Industrial Coordination Act, 1975. The industrial policy that was then practised was implemented through moral-suasion. The Investment Incentives Act, 1968 was the only legislation that was enforced by the Ministry of Trade and Industry prior to the passing of the Industrial

Coordination Act, 1975. Though the Investment Incentives Act, 1968, the Ministry was able to regulate and supervise the development of industries which have been granted incentives by the imposition of various conditions. But approved companies consist of only 10% of the entire industries. This means that only 10% of the Malaysian industries were controlled, 90% were not controlled. These 90% which are almost totally unregulated are responsible to a large extent to the failure of the government's effort at bringing about a rapid, constructive and orderly development of the industrial sector. There are attempts by other statutory bodies to control some industries, but these were limited in scope because they concerned only a few industries. Examples of these are: the Petroleum Development Act, 1974 enforced by Petronas and the Pineapple Industry Act, 1967, enforced by the Malayan Pineapple Industry Board. The Industrial Coordination Act, 1975 was therefore passed with the objective of coordinating the entire industries in Malaysia.

Industrial Coordination Act, 1975

In summary, the following are the reasons given by the Ministry of Trade and Industry for the passing of the Industrial Coordination Act, 1975.[10]

(1) Previous development policies had been haphazard. It was revealed that previously there were many cases where wasteful competition were caused by the entry of too many companies in a particular industry resulting

[10] As revealed in the interview with Incik Anwar Aji - Penolong Pengarah, Kementerian Perdagangan dan Perusahaan, on 19-6-76 at the Ministry of Trade and Industry, Kuala Lumpur.

in excess production capacity and misallocation of resources. Examples of some of these industries were: plastic products industry, frozen sea food industry, motor car batteries industry, printing ink industry, paper carton boxes industry.

(2) Enforcement of industrial policy through moral suasion failed. The Ministry could not stop firms from doing business without Ministry's approval because there was no legal backing except in those firms requiring incentives. A glaring example of non-compliance to the Ministry's policy is the plastic products industry in which out of 266 establishments now existing, only 62 are approved ones. Due to this reason, only 10% of industries were within the Ministry's supervision and control.

(3) Another important reason for the passing of the Act is to facilitate the collection of comprehensive information and datas which would be useful for the planning of industrial development. The Ministry was not in the picture of the stark reality of the mess our industries were and are still in. On one extreme an industry can be over-populated, in another, pure monopolies exist and dictate the market at their fancy to the very detriment of the consumers and the nation as a whole.

The Ministry intends to extend its licensing conditions to the non-approved firms by the new Act. The following matters, among others and their corresponding conditions which carry the New Economic Policy would be given special emphasis:

(a) Location - this is in connection with the policy of preventing over-concentration of industries in certain areas.

(b) Equity structure - firms will be instructed to submit their long term plans to comply with the government's perspective plan for ownership of 70% by Malaysian including at least 30% by Bumiputras by 1990.

(c) Board of directors - changes in the Board's composition will be based on the company's equity structure.

(d) Export - this would depend on the special circumstances within the context of each particular case. The basic idea is to encourage the more established firms particularly those with superior marketing know-how and international connections to start exporting so as to enlarge the industry's existing market. Firms that intend to come in into the already congested industries would be given the strict condition on approval that their products would be strictly for export only.

S. 3 of the Industrial Coordination Act, 1975 prohibits person or persons from engaging in any manufacturing activity unless he is issued a licence in respect of such manufacturing activity. And

S. 4(3) and S. 4(4) give the Minister a wide discretion when considering an application. The Minister needs to consider whether the issue of a licence is expedient in the national interest and whether it would promote the orderly development of manufacturing activities in Malaysia. The Minister is also given the wide power of imposing conditions on the licensee and he can also vary the conditions later.

Under the Industrial Coordination (Exemption) Order, 1976, the Minister exempts all the provisions of the Industrial Coordination Act, 1975 to manufacturing activities:

(a) with shareholders' funds of less than two hundred and fifty thousand ringgit; or

(b) with less than twenty five full time paid employees.[11]

The licensing of patents and trade marks is carried out under their various ordinances following closely along the line of U.K. laws. In fact patent registration is carried out by means of validating U.K. patents under the Registration of United Kingdom Patents Ordinance, 1951.

The important thing to bear in mind about patents and trade marks is that by virtue of the exclusive use of trade marks and patents conferred by the ordinances, monopolies are likely to be created. Trade marks like Kodak, Coca-Cola, and others create their

[11] Order 2, Industrial Coordination (Exemption) Order, 1976.

monopolistic effect due to brand preferences of the consumers. This is one of those monopolies sometimes referred to as monopolies created by legal means.[12]

(E) The Companies Act, 1965 - Revised 1973

As in the other enactments looked at previously, the Companies Act, 1965 would also be studied in the light of the concentration problems. There are generally four main areas to be looked into in this respect, namely:

(i) Qualifications and restrictions on directors and managing directors;

(ii) Restrictions on loans and investments;

(iii) Regulations pertaining to voting rights;

(iv) Arrangements and reconstructions (namely mergers and take-overs).

(i) Qualifications and restrictions on directors and managing directors

Unlike its U.K. counterpart, the Malaysian Companies Act, 1965 does not allow anyone else other than a natural person to be a director of a company.[13] This means a corporation cannot be a director of a company. This seems to be an attempt at decentralising control of subsidiaries by the parent company.[14] However, due to the

[12] See Fig. 1, Chapter 1.

[13] S. 122(2).

[14] It is to be pointed out however that the main aim of S. 122(2) is not decentralisation but for the purpose of being able to put a blame on a person or persons responsible should an offence be committed by the company.

fact that the Act does not lay a limit of the number of directorships a person can hold, the above attempt is becoming hopeless.[15]

Companies nowadays circumvent the rule by forming the system of interlocking directorate and thus still able to maintain complete control of the subsidiaries. Therefore under the present system it is still very possible for companies that belong to a group to maintain their own separate legal entities while in actual fact all decision makings come from the parent company.

Another way of circumventing S. 122(2) is for the parent company to appoint 'dummy directors' for its subsidiaries. This is analogous to what is known in politics as 'power behind the throne'.

The Act does not provide any share qualification for a person to be a director but usually the article of the company provides so and this the director has to comply within the specific period defined. In the former case, it is even more obvious that there is a divorce of ownership and control of the companies. S. 128 of the Act provides that a director of a public company may be removed by an ordinary resolution notwithstanding anything in the company's memorandum or articles or in any agreement between the director concerned and the company. This reflects a counter check of 'control' by 'ownership'. Moreover to prevent power squabbles among the directors themselves, S. 128(8) provides that a director of a public company cannot be

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[15]In India, the company law limits the number of directorships a person can hold to a maximum of 20 only.

removed from office by resolution, request or notice of the rest of the directors. This is irrespective of anything in the articles or any agreement.

Some companies do provide in their articles retirement of their directors by rotation, but some are appointed for life. In all these cases, removal of directors is still possible by ordinary resolution.[16] But of course this is strictly theory; whether it works in reality is entirely a different issue altogether.

(a) Division of powers between directors and general meetings

The division of powers between the directors and the general meetings is very much decided by the Act or the articles of the companies concerned. But it is important to note that the general meeting cannot direct on management of company affairs and conduct of the company's business unless specifically stated by the Act or articles to be so. In any case residual powers are always assumed by the board of directors.[17] Though it is true that the general meeting can remove directors of whom it finds disfavour, the board of directors can bring the general meeting under its grip through the voting mechanism to lobby decisions for its own advantage. In reality, the division of powers between the directors and the general meeting goes in a circle and the body who has the headstart in the

[16] See article 67 of Table A, Companies Act, 1965.

[17] See article 73 of Table A, Companies Act, 1965.

circle maintains powers throughout. And it is undeniable that it is usually the directors who win the race and in some extreme cases (though not uncommon) it makes no difference whether the board of directors takes the decision or the general meeting because in either case actual decision comes from the directors and the general meeting is only used as the board's mouthpiece. This concentration of power in the Board of Directors is prima facie dangerous because it can lead to a lot of other concentrations which goes beyond the four walls of the company concerned.

Within the board of directors itself, another concentration of power develops i.e. between the managing director and the rest of the directors. Due to technicalities in management which directors, other than the managing director, are ignorant of, a great deal of power is vested in the managing director. Not only is the managing director vested with power but he is usually not affected by the 'retirement by rotation' requirement. This enables him to grow stronger with time and has comparative advantage as against the new directors who would replace the retiring ones. The almost permanent situation created for the managing director enables him to reach out for economic and business contacts which are usually directed at accumulation and consolidation of more business power through one of the processes such as mergers, take-overs, direct monopolisation, etc.

A major defect of the <u>Companies Act, 1965</u> is its lack of provision controlling the number of managing directorships a person can hold. In India, a person cannot be a managing director of more than two companies; the same rule applies to the ordinary managers. This defect is an encouragement of the development of interlocking control of companies by a single or few persons.

(b) Disclosure

Another measure taken by the Companies Act, 1965 to regulate secret interlocking interests of a director or directors which are unknown to other directors or members of the company is the requirement of disclosure of interests of all directors.

S. 131 of the Act requires that a director of a company who is in any way, whether directly or indirectly, interested in a contract or proposed contract with the company shall declare the nature of his interest at a meeting of the directors of the company.

S. 134(1) requires more elaborate information of interests of directors in the company or in another corporation which is deemed related to the company by virtue of S. 6. The provision requires that a register be kept showing the number and description of shares or amount of debentures held by the director. The same information is also required if those interests are held in trust for the director or if he has any right to become the holder or if he has, directly or indirectly, any beneficial interest in them. To effectuate the workings of the above section, S. 134(11) deems a director of a company to be having those interests mentioned in S. 134(1) if those interests are held by a corporation being not his own company and -

(a) that corporation or its directors are accustomed to act in accordance with his directions or instructions; or

(b) he is entitled to exercise or control the exercise of one-third or more of the voting power at any general meeting of that corporation.

The above provisions aim at establishing a record of interlocking directorates for inspection by the members of the company, the Registrar of Companies and the Minister concerned and other government bodies having intention of assessing and regulating business enterprises.

S. 135 lays down the general duty to make disclosure. The significant point about this section is that it deems that any person who is for the time being beneficially entitled to 5% or more of the issued equity shares of a company to be a director[18] and thus subjected to the rules of disclosure as elaborated in S. 134 and S. 135. This provision therefore attempts at not merely bringing to record dominant directors but also other shareholders that may share this dominance with some degree. The seriousness of the above 'disclosure' provisions is reflected in the high penalties that would be imposed on persons offending the provisions.

(ii) Restrictions on Loans and Investments

Apart from controlling the remuneration of directors, the Companies Act, 1965 attempts at curbing unfair internal circulation

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[18] See S. 135(3).

of loans or credits to the directors - almost similar to the attitude adopted in the Banking Act, 1973.

The rationale too is the same in both cases, i.e. the prevention of over accumulation of credit power in the hands of the dominant few. Moreover, without this rule, the abuse can be very extensive considering the almost omnicompetent position of directors of the companies. S. 133 of the Act goes even further in attempting to achieve the above objective by prohibiting a company from giving loans to directors of another company which by virtue of S. 6 is deemed related to the first company.

A director of a company can seek unfair means of accumulating wealth within his family circles or other groupings by deceiving the company, the shareholders and the public by dealing through 'insider trading'. S. 132 of the Act thoroughly prohibits such an activity by imposing criminal liability on the offenders.

Other methods of credit control takes the form of restrictions in intercorporate loans and obligations are laid down for both borrowing and guarantor corporations to furnish information of loans etc. More stringent rules on borrowing are placed on investment companies.[19]

Intercorporate investments too are regulated by the Act. Firstly, by S. 69A disclosure of beneficial interest in any share in a private company is required to be made. The interest can be held either by the corporation itself or by a person acting on behalf of the corporation - both are caught by the rule.

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[19] See S. 320.

In the case of investment companies, restrictions in investment is executed by prohibiting the investment company from investing in a corporation if the total investment exceeds ten per centum of the net tangible assets or if in shares not exceeding five per centum of the subscribed ordinary share capital of the corporation.[20]

(iii) Voting rights

Control of companies by means of voting rights is perhaps the most effective method of gaining dominance. Voting rights, among other rights, are conferred by the number and type of shares the shareholder holds - usually termed as 'class-rights'. Voting rights being such an important tool to gain control of a company is usually made use of by people who are interested to gain this control. Usually it is the company controllers themselves who make use of this device to obtain greater or increased control of the company. Increased voting rights can be got by the controllers by means of variation of class rights. The Companies Act, 1965 attempts at limiting this strategy of such controllers by having provisions that partially guarantee the rights of holders of shares. The provisions are spelt out clearly in SS. 65 and 66 of the Act.

S. 65(1) of the Act rules that if in the case of a company, the share capital of which is divided into different classes of shares and in which a specified proportion of the holders of a class of shares are agreed on variation of their rights, the holders of not less (in the aggregate) than ten per centum of the issued shares of that

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[20]See S. 321.

class, may apply to the court to have the variation or abrogation cancelled. And S. 65(2) deems the above application not invalid by reason of consent given by the applicant for the variation or abrogation if the court is satisfied that any material fact was not disclosed by the company to those applicants before they so consented or voted. It is to be noted that the above variation and abrogation can also be challenged under S. 181 as a case of oppression of a class of shareholders or minority.

S. 66 of the Act prohibits the company from alloting any preference shares or convert any issued shares into preference shares unless there is set out in its memorandum or articles the rights of the holders of those shares with respect to, inter alia, voting, in relation to other shares or other classes of preference shares.

Both the sections above have among some of their objects, the important object of protecting the voting rights of shareholders so that controllers or other persons in the company cannot unduly monitor the set up of the company to achieve dominance of power over the company.

The above limitations are imposed to stop the company controllers from having the special resolution to vary the shareholders' rights. However, the company can still circumvent these limitations by going to court and ask for its sanction or to carry out a complete reorganisation.[21]

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[21] See Gower, Modern Company Law, 3rd Edition, p. 514.

(iv) Arrangements and Reconstructions

Arrangements and reconstructions taking the forms, such as reduction of capital, variations of rights, take-overs and mergers etc., play significant roles in the development of economic concentration. But the Companies Act, 1965 does not provide any provision at all that seeks to control this economic concentration problem that is achieved through the above methods with the slight exceptions in the cases of the first two methods - i.e. reduction of capital and variation of rights. Even here, as pointed out the control is limited to the extent that the rule can be circumvented. Under Part VII of the Act (Ss. 176-181), only provisions relating to the procedure of reconstructions and protection of shareholders and creditors are laid out. Neither national nor public interests is considered at all in the objectives of sections dealing with this part.

Conclusion

Unlike the systems present in U.K., India, Australia, U.S.A. etc., the Malaysian system does not possess a specific legislation that deals with the problems of economic concentration.[22] Not only

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[22] E.gs. - Sherman Act, 1890 of U.S.,
Clayton Act, 1914 of U.S.,
F.T.C. Act, 1914 of U.S.,
Monopolies and Mergers Act, 1965 of U.K.,
Fair Trading Act, 1973 of U.K.,
Monopolies and Restrictive Trade Practices Act, 1969 of India, etc.

is this so, but a quick look at the above survey on the laws governing private enterprise will lead one to the inevitable conclusion that in aggregate effect, the above laws do not make a coherent attempt at tackling the ever-increasing problems of economic concentration. This is especially so in the aspect of prevention of concentration. In fact, in most cases, the law seems to be condoning economic concentration by being completely lethargic. Some of the laws even have the positive effects of increasing economic concentration.

The present system of legal control of private enterprise is grossly inadequate in the context of the New Economic Policy. Many of the legislations, especially the Companies Act, 1965, does not give much consideration to the interests of the nation and the consumers. The Act merely governs or regulates private enterprise and acts as a protector of these private enterprises at the exclusion of other considerations. There are some minor attempts by the Legislature to protect consumers, through various laws such as the Trade Descriptions Act, 1972;[23] Control of Supplies Act, 1961; Control of Supplies, Petroleum and Electricity Act, 1974; Price Control Act 1946; and lastly the Sale of Goods Ordinance 1950, and the Contracts Act, 1950. But it is submitted that the protections are only directed at a very narrow aspect of the problem. Moreover, even within the limited area there are further limitations. For

[23] Refer to the writer's article 'Consumer protection as against misleading advertising (with special reference to the Trade Descriptions Act, 1972)', submitted for publication in the Journal of Malaysian Comparative Law.

example, in the case of the Price Control Act, 1946, only certain controlled goods (usually necessities) are under the jurisdiction.

But the argument is that, without a main legislation dealing with the Economic Concentration problem, the various abuses that the private enterprise can get involved in, apart from those with regard to price and quality, cannot be successfully covered by such remedial consumer protection laws because these laws provide only a small fraction of the 'cure'. What we need is a preventive measure with an enlarged 'cure' where prevention fails.

CHAPTER THREE

FOREIGN INVESTMENT COMMITTEE AND THE CAPITAL ISSUES COMMITTEE

As noted in the preceding chapter, existing legal means of control of economic concentration is hardly a control at all. Moreover, in some cases, the law seems to be condoning the formation of economic concentration. However, recent developments in Malaysia saw the emergence of two committees whose aim, among other things, is the control of concentration of wealth in the hands of a minority. These two committees are:

(i) The Foreign Investment Committee (FIC);

(ii) The Capital Issues Committee (CIC).

It is to be pointed out that these two Committees are formed under no legislations at all.[1] Though the committees have to resort to moral suasion techniques, they have been successful in their aims to some extent. This is maybe due to the fact that the committees are attached to prominent branches of the Government, namely, the Bank Negara and the Prime Minister's Department (Economic Planning Unit). Perhaps the more important reason for the compliance of the private enterprise to the requirements of the committees is because

[1] However, the Securities Industry Act, 1973 does provide that the Registrar of Companies may consult the CIC on any matter relating to securities industry, but this is not the same as giving the Committee the legal sanction to enforce. The legal sanction is given only for its existence as an advisory body.

of the fear of private sectors that their licensing privileges and other privileges may be curtailed should no cooperation be given to the two committees. This is because the committees are of advisory nature occupying a position of high influence in the decision of the government. But there have been cases of violation of the advice of these committees. This will be dealt with in Chapter 4. The present chapter intends to introduce the two committees and to highlight the objectives of the committees.[2]

Foreign Investment Committee (FIC)

The conditions that prompted the formation of FIC is best summed up in the introduction of the guidelines issued by the Committee:[3]

> "The government has given careful considerations to the question of the acquisition of assets or any interests, mergers and take-overs of companies and businesses incorporated or registered in Malaysia which result in greater concentration of wealth in the hands of a minority and in increasing imbalance in ownership and control. The government has therefore decided, in the national interest, to lay down these guidelines to regulate the acquisition of certain assets or interests and mergers and take-overs of companies and businesses in Malaysia."

The terms of reference to the FIC, in aggregate, relate to all those business activities concerning foreign ownership vis-a-vis the New Economic Policy. The New Economic Policy seeks to remedy the

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[2]The detailed workings and objectives of the two committees are not available to the public. As such the writer has to rely on the very restricted information that is obtained by interviews and through some reading material dealing with the general character of the committees.

[3]Dated 20th February, 1974. (See Appendix 'B' for the composition of the committee.)

present situation where foreign ownership and control of the country's major economic activities are too substantial and there is a marked imbalance in ownership between Malaysians and foreigners. Foreign investment is encouraged only if the foreigners are willing to give visible benefits to the national economy.

The FIC has set out the general guidelines for the regulation of acquisitions, mergers and take-overs.

Among some of the more important guidelines set by the committee includes the policy against the acquisition of interests which increases foreign ownership and control to the detriment of the already unbalanced pattern of ownership in favour of foreigners. Therefore, the committee has formulated a guide where in any proposed acquisition of assets or any interests, merger or take-over, due consideration must be given to the national economic objectives of increasing Malaysian participation, particularly Bumiputra participation, ownership and management and other such considerations.

The committee has listed down <u>six</u> situations where the policy guidelines would apply:[4]

(i) in the case of proposed foreign acquisition of interests of any substantial fixed assets in Malaysia;

(ii) in the case of proposed acquisition, mergers or take-overs of companies and businesses in Malaysia which shift ownership or control into foreign hands;

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[4] Ref: Guidelines for the regulation of acquisition of assets, mergers and takeovers - issued by FIC on 20.2.74. (See Appendix 'C').

(iii) in the case of a proposed acquisition of 15% or more of the voting power by any one foreign interests or associated group, or by foreign interests in the aggregate of 30% or more of the voting power of a Malaysian company and business;[5]

(iv) in the case where Malaysian companies are being controlled in a joint venture agreement or management agreement and technical assistance or other agreements;

(v) in the case of mergers and take-overs of any company or business in this country by Malaysian or foreign interests;

(vi) in the case of any other proposed acquisition of assets or interests exceeding in value of $1 million whether by Malaysian or foreign interests.

(v) and (vi) above seem to give the FIC the duty of regulating even those businesses that are completely Malaysian owned or those that involve Malaysian acquisitions of other local companies and interests. This would seem to be an attempt by the FIC that while foreign economic concentration should be discouraged, situations giving rise to local economic concentration in Malaysia should also be equally discouraged so as to be consistent with the objectives of

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[5] It is believed that in practice, a 15% or more right of voting is substantial enough to gain some amount of control of a company. But the effective percentage for control is about 30%.

the New Economic Policy, the essence of which is to distribute wealth more equally.

It should be noted with interest that the FIC procedure of considering an application has been formulated with a certain degree of legality, that is, the FIC has placed the onus of proving that the proposed acquisition of assets or any interests, merger or take-over of companies and businesses are not against the objectives of the New Economic Policy on the acquiring parties concerned.

Though the detailed procedures and criteria used by the FIC in determining an application are not available because of the secrecy in which the committee works, it is suspected that a great deal of reliance is placed on the methods adopted by the United Kingdom Monopolies Commission, but perhaps the procedures are not that formal as in United Kingdom.

At this stage, it is relevant to ask whether the FIC is in fact a mini Monopolies Commission with perhaps the possibility of its playing a more active and enlarged role in the near future?

<u>Capital Issues Committee (CIC)</u>:[6]

Though the Capital Issues Committee is mentioned in the <u>Securities Industry Act, 1973</u> and the <u>Industrial Coordination Act, 1975</u>, this only goes as much as only to give validity to the existence of the Committee and nothing more. In both the Acts, the Committee is

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[6] See Appendix 'B' for composition of the Committee.

referred to as an advisory body only carrying with it mere persuasive power. The committee has no legal power at all in enforcing its objectives. This is because the formation of the committee has no legal sanction behind it. At the present moment, the committee's directions to firms or companies can still be ignored and there is no legislation to compel these companies to obey the directives of the committee. But in practice, most companies do obey the committee's directions because of fear of repercussions coming from the government if the directions are not complied with.

The Capital Issues Committee was set up by the Minister of Finance in June, 1968, the purpose being the proper regulation of the issue of shares by public companies in Malaysia. The function of the committee, to put it simply, is to regulate the issue of shares and/or the listing of such shares on the Stock Exchange. The idea behind this is mainly to provide adequate protection for the investing public within the framework of the law and government policy.

The formation of the CIC was prompted by the fact that the Malaysian public had suddenly become more involved in the business of the capital market. This created a deep concern in the government and the formation of the CIC is directed to protection of the public.

The committee seeks to protect the public through many ways:

(a) by making the companies concerned in the issue of shares disclose information of material importance, particularly in the prospectus. In addition to the requirements of the Companies Act 1965, the committee also seeks to obtain detailed information on financial statements, forecasts, legal and contractual relationships, conflicting interest matters and property valuation as a routine check list for vetting purposes.[7] The committee also investigates into the Directors' shareholdings and holdings through nominees. The latter is most important to bring to light because the mechanism of shareholdings through nominees can be used by a person to in fact control many companies without the knowledge of the public and thus forming a giant monopoly constituted by these companies acting in concert. These detail information is also officially or unofficially submitted to the FIC for the determination of the economic concentration problems.

(b) As earlier pointed out, unjust enrichment can be caused by persons who abuse their positions in the companies at the expense of shareholders - this is in relation to the question of conflict of interest. The CIC ensures that there is no conflict of interest on the part of company promoters or directors. In cases where certain investments conflict with principles involved in acquiring funds from the public, CIC ensures that

[7] Ref: New Straits Times, The Business Times, May 15, 1971.

such investments are divested.[8]

(c) By ensuring a proper method of valuation of major assets of the companies concerned. With regard to this the committee has recently stated in its letter to the Stock Exchange and other legal and financial bodies that it is concerned over the indiscriminate evaluation of assets by some public companies.[9] In these companies the assets were being revalued for the express purpose of creating surpluses which were subsequently used for the issue of bonus shares. This illegal means of creating bonus shares can be used by the controllers of a company to gain control of the company itself.

(d) Again as a matter of controlling promoters and directors from gaining unfair advantage which may lead to undue enrichment, the committee prohibits options to subscribe for shares, where such option is given to the company promoter or director, and where such option is deemed to put such promoter or director at an unfair advantage over other shareholders.

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[8] Ref: Ibid. See also Abdul Aziz Haji Taha, The Malaysian Association of Investors in Securities, "Capital Issues Committee", p. 63.

[9] New Straits Times, Business Times, July 1, 1976.

(c) The committee sees that government policy is complied with by companies especially with regard to increasing the interests of Malaysian investors particularly to the Bumiputras.

Recently, the CIC has widened its control especially in the context of bonus issue of shares.[10] Now, companies, whether locally or foreign incorporated, will have to obtain the approval of CIC before they can make a bonus issue of shares. The only exception in the case of locally incorporated companies is, when bonus shares are to be issued out of unappropriated profits.

It is obvious that the functions of both the FIC and the CIC are complementary to each other and in fact, in many areas, the functions overlap. But generally, the CIC is more involved with the micro aspect of the internal affairs of companies, especially in the area of securities. Although it is claimed by CIC that this function is merely to protect the shareholders, this is open to suspicion especially so if one is to study its close activities with FIC. The FIC, presumably, apart from getting its own information, relies quite a lot on the information processed by the CIC, when the former engages in the activity of company-probing.

Both the committees seem to have adopted the modern approach of controlling the question of economic concentration - that is, via the control of shares, interlocking directorates, mergers and take-

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[10] Ibid.

overs, nominee shareholdings, joint ventures and others. The traditional approach of control by commodity - that is, market control of sale of commodities, which is still a useful method employed by most monopolies commissions overseas, seem to be not in the purview of both the committees, nor any other bodies.

People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices.

\- Adam Smith.

Monopolies are 'ever without the law .... never without friends.'

\- Sir Edward Coke.

CHAPTER FOUR

ECONOMIC CONCENTRATION: THE MALAYSIAN EXPERIENCE

INTRODUCTION

This chapter attempts to establish the validity of the hypothesis of the paper, namely: that the economic situations in Malaysia have reached a high degree of economic concentration that justifies the introduction of legal and extra-legal means of controlling it.

During the course of the survey of the laws,[1] it was sufficiently established that the Malaysian legal system in existence today does not provide for any effective means of regulating or controlling economic concentrations. In fact, the system does not even take cognizance of the existence of the problem. Substantial economic power held by few individuals are totally unchecked. The Malaysian Constitution is totally silent on this point. In the U.S., on the other hand, there is a constitutional doctrine that equates money ~~power or~~ economic power with political power. This doctrine argues that if political power is subjected to constitutional checks, why may economic power not be subjected to the same.[2] The Indian Constitution too

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[1] Chapter 2.

[2] See, Valentine Korah, Monopolies and Restrictive Practices, Penguin Books, 1968, pp. 26 - 27.

provides some measures to be taken to prevent or unscramble economic concentrations.

For the purpose of establishing the stated hypothesis, this chapter is divided into the following parts:

A <u>Conceptual aspects of concentration</u>:

This section discusses matters relating to the area of study of the paper, the approaches adopted, and concentration concepts and measures.

B <u>Market concentration</u>:

This section discusses the market concentration of certain selected industries as listed down in the area of study.

C <u>Overall concentration of wealth and power in the top corporations in Malaysia</u>:

This section makes reference to a certain study which was recently completed. This forms no part of the field work with which the bulk of the chapter is concerned. This part discusses the overall concentration of wealth and power in the top corporations with special emphasis on the distribution of company stocks, the economic power of selected top corporations and the system of interlocking directorates.

D **Case samples of Concentration Problem:**

This part makes a case study of selected companies to illustrate the various activities and mechanisms practised by these companies which have resulted in the further concentration of wealth and power.

A. Conceptual Aspects of Concentration

a. Area of Study

This is important as a point of information on the limitation and the qualification of the survey conducted.

The following industries were studied in the course of the survey:

i) Cement industry;

ii) Tin Smelting industry;

iii) Steel industry;

iv) Chemical Fertilizer industry;

v) Aluminium industry,

vi) Tractors industry;

vii) Petroleum industry;

viii) Brewery industry;

ix) Cigarettes industry;

x) Tyres and Tubes industry;

xi) Metal Boxes industry;

xii) Paints industry.

A few leading firms in the various industries were picked where the interviews were conducted. But due to the secretive attitude adopted (which is quite understandable) by most of these firms, quite a heavy reliance was placed on information available at the Ministry of Trade and Industry, the Statistics Department, F.I.D.A., Bank Negara and other governmental and private agencies.[3]

It needs to be pointed out that the above industries were studied only in relation to the traditional approach adopted by firms in gaining market power.[4] This is to say that the industries were studied in relation to the degree of market control, that is, in terms of percentage of sale (production), of the respective firms as a part of the total sale or total production of the respective industries. The other items looked at under this approach are: the investment of the respective firms, their assets, employment, etc. The modern approach is applied when an examination is made on some leading firms of their activities, such as acquisitions, mergers and take-overs in their attempts to establish themselves in some dominant positions in the market.

The two approaches are not capable of complete separation. In many areas, the two approaches are complementary to each other. For example, in the case of a take-over or merger where the intention of the acquiring firm is to eliminate its competitor, the effect

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[3]The precise source of information cannot be revealed due to obvious reasons.

[4]See Chapter 1, p. 7.

would actually be an enlargement of market control by this new enlarged firm, in the traditional sense. Slightly different from this is the case of a backward or forward take-over or merger which actually makes it possible for the acquiring firm to control the market in terms of supplies of new materials or in terms of channels of distribution or market outlets.

But there can be situations where the traditional approach act in separate aspects of economic concentration altogether. One such example can be found in the conglomerate structure, where firms diversify the nature of the business they deal in. A typical example of this is the Sime Darby Group in Malaysia where there is not just a mere monopoly of certain commodities, but also the concentration of diversified businesses under one group. A glaring global example is the I.T.T.[5]

The present-study is handicapped in many ways, especially when talking of the area of survey conducted in this chapter. This is because economic concentration in Malaysia is quite widespread but to study the entire situation in detail and accurately would require a tremendous amount of work, manpower and money. Due to this, the present survey was conducted by the sampling method, that is, by selecting a few industries and the various companies under them which in the writer's opinion contributes to the problem of economic concentration. This is, therefore, far from

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[5] See Anthony Sampson, The Sovereign State, 1974 Edition.

exhaustive. In fact, there is a likelihood that a highly concentrated area which is not apparent escapes the present survey. This possibility exists because of the poor record of information regarding industries and businesses kept by the various government agencies. Moreover, where information was available, secrecy was the other barrier.

b. Concentration Concepts and Measures

This is the area of methodology of the survey analysis. Before that, some concepts need to be clarified.

According to M.A. Utton,[6] there are two types of economic concentration, namely:

i) Overall concentration - this refers to the proportion of output or sales in the whole industrial sector, or an important part of it which is accounted for by few firms, that is, concentration within a substantial or the whole portion of the economy. This type of measure of concentration makes use of the largest 100 or so firms in the economy as a whole or in a substantial part of it. This is a much broader concept of concentration and is important because it brings with it some political and social consequences.

[6]Utton, Industrial Concentration, Penguin Modern Classics, p. 34.

ii) Market concentration - this is the more familiar concentration structure. It refers to concentration within an industry. It is usually measured by considering the proportion of output or sales or assets of the three or four largest firms in the industry, to the total output or sales or assets of the industry.

It is important to note that the above two situations can exist independently of each other. It does not follow that if there is overall concentration there is market concentration, or vice versa.

Strictly speaking, the laws regarding anti-trust or monopoly and restrictive practices, usually refer to the problems of the latter concentration, that is market concentration. But overall concentration is still important to consider because of its overall political and social consequences.

There are two main systems of measures of economic concentration which are proposed to be adopted here:

1) Absolute Concentration Measures

The measure that is adopted here is the concentration ratio. This is widely used in U.K. and U.S.A. This measure is defined as the ratio of the proportion of total industry output accounted for by the largest three or four firms.[7]

2) Inequality Measures and Concentration

This is a difficult method to explain in words. Basically it makes use of the Lorenz Curve, which contrasts equal distribution (as in a perfect situation) from unequal distribution which takes the form of economic concentration. This method will become clearer when analysis of the survey is made.

For the purposes of the present survey, both systems of measure would be used interchangeably, because of the different emphasis which each method specialises in.

B. Market Concentration

The Tin Smelting Industry

The tin smelting industry has thrived for decades in the Malaysian economy and it has enhanced the export value of the domestic product.

It needs to be pointed out that Malaysia has been and perhaps still is the leading producer of tin ore in the world and not surprisingly, therefore, its tin smelting industry is sophisticated and huge in size by world standards. But the industry has been dominated by only two firms that have been in existence

[7] The present survey would not use the largest three or four system. Instead the writer proposes to calculate concentration ratio by the largest two firms in the industry.

almost as long as the tin mining industry. The two firms are: Straits Trading and Eastern Smelting (now known as Dato Kramat Smelting).

Market Control

According to the survey conducted, the total industry's throughput is around 100,000 tons of tin ore a year, which is an equivalent of about 75,000 tons of tin content output per year. The market share of each of the two firms in this industry is around 50%, plus or minus on both sides. But the share of either of the firms never goes below 45% of the entire market production.[8]

The tin smelting industry is therefore clearly a duopoly market with concentration ratio of 100% (measured by the production figures of the two firms).

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[8]See Figure 2.

Total No. of Estab. - 2

Total Industry's Production - 74,000 tons per year

Firm	Actual production	% of firm's production to total industry's production
Dato Kramat Smelting	37,000 tons of tin content per year	50%
Straits Trading	37,000 tons of tin content per year	50%

Figure 2

Market and Trade Practices

The reasons for the dominant position of these two firms that constitute the duopoly are as follows:

i) Capital intensive nature of the industry - this alone is a barrier for a new firm to come in.

ii) The technical expertise involved in the trade. Due to the overall shortage of technical experts in the country, especially the special expertise needed in this industry, even enterprises with capital are not willing to venture into the trade.

iii) The two firms have reached a high degree of economies of scale gained through a few decades of growth. The two firms are reputed to be some of the world's efficient producers of tin. Because of this economies of scale, the firms are able to reduce their costs of smelting that no new firms can ever reach, not until after a considerable time of growth.

iv) The two companies have established their own chains of customers, namely the tin-miners. The choice of smelters between the miners are almost fixed, with a small percentage of miners who are still floating with no fixed smelter. Competition between the smelters seem to be in getting the custom of these small floating group of miners.

This is one of the reasons why a Japanese venture called Oriental Tin Smelter had to close down. This company had only the support of small Chinese miners. As a result, the company had no adequate ore to melt so as to maintain a break-even level. Oriental Tin Smelter was in fact excluded from the formal Straits Tin market which was, and still is, comprised of Straits Trading and Dato Kramat Smelting as its only members.

v) The two companies have interests that resemble backward vertical merger because of their substantial investment in the local tin mining industry. The interests in the local tin mining industry ensures ore supplies to the companies.

vi) Perhaps the most important factor that is responsible for the dominant position of the two tin smelting companies is the uniqueness of their market structure and conditions.

A description of the tin market would perhaps make things clearer.[9]

The smelters receive ore daily from the mines. The mines make known their intention to sell and the quantity of ore they wish to sell each morning before 10 o'clock. The aggregate of these declarations constitutes the daily turnover of the market. The mines are given advances by the smelters on receipt of the ore. But the price of the ore is fixed by the demand of the market and also by the purity percentage of the ore. After this is done, the price is paid less the advances.

It is to be noted that the determination of the purity of the content is done by the smelters' laboratories themselves. Though the miners can check the accuracy with independent chemists, this is seldom done because it would incur extra expenses. Therefore most of the time the miner takes for granted the determination of the smelters. After all, the smelters are the only sale outlets. Also, it is to be noted that the smelters do not take any overnight risk when the ore is sent to the smelters' premises. These factors point to the bargaining power the smelters have as against the miners.

On the other front, that is, the smelter and buyer market, the same dominancy is exhibited by the smelter.[10]

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[9] As revealed by an interview with Khor Eng Kooi and Cheah Eng Kim, Marketing Operations Manager and Assistant Purchasing Operations Manager respectively, of Datuk Kramat Smelting.

[10] Ref: <u>New Straits Times</u>, 1st January 1970.

The two smelters offer to sell tin daily in quantities corresponding to the daily offtake from their various mining clients. Bids and orders are transmitted from overseas, especially Europe, U.S.A. and Japan. These bids may be transmitted directly to the smelters or through a local buyer (who subsequently sells it to the foreign buyer). The bids state the price and the quantity the buyer wishes to buy and they must be received before 10 o'clock every morning.

The smelters assemble the bids in order of price from the highest downwards, and they set against this the quantity of tin for sale. The price is fixed at the level at which this quantity can be absorbed.

Therefore contracts are drafted by the smelters and issued to the successful buyers (that is, those who bid at or higher than the established price).

A warrant is issued to the buyer when the buyer pays the contract price. This is done when the tin is ready. The warrant entitles the buyer to remove the tin for export.

In the above smelter/buyer transactions, the dominancy of the smelter is shown in the following respects:

a) The smelters reserve the right to restrict or suspend sales if a realistic market cannot be made.

The practice of restricting or completely holding sale is certainly a characteristic of a monopoly market.

If the smelters indeed claim that their tin market works on the free enterprise system (which in fact, they do claim), then there is no reason why a realistic market cannot be met at certain times. The words 'not realistic market' certainly mean to the smelters a market in which the price of tin is low. Therefore here the smelters are exercising their monopoly power to withhold supplies to speculate the price of tin.

Perhaps this practice is justifiable on the ground that the system ensures the high price of tin in the international market, which subsequently benefits the nation (being the largest producer of tin). After all, almost the entire tin product is sold overseas, with only about 1% for local consumption. But this practice benefits directly two private enterprises who are acting for their own interests and gaining substantial economic power. Therefore, the problem of economic concentration is not settled by merely trying to justify the practice in the above manner. Would it not be more beneficial to the nation if the government were to act as the sole buyer of the tin from the smelters at reasonable prices agreed by both parties, and subsequently sells it to the world market with the necessary market manipulation aimed at stabilising the price of the tin in conformity with the international tin market agreement. The above proposition would have the merit of, firstly, giving the government the opportunity of appropriating the excess monopoly profits that is at present reaped by the two smelters. Secondly, it reduces undue economic concentration in the tin smelting industry.

b) Due to the market power held by the smelters, unjust conditions are stipulated in the agreement of sale to the detriment of the local buyers. An example would make the picture clearer. One of the conditions in the warrant issued by the Datuk Kramat Smelting states:

> "Payment having been received, a warrant will be issued to the buyer on the day the tin is appropriated and upon issue of the warrant, the property in the tin appropriated to this contract shall pass to the buyer and the tin shall thereafter be at the risk of the buyer."[11]

The above condition means that even if the buyer has not collected the tin from the smelter's premises, the smelter is not liable if the tin is stolen, or destroyed by any means whilst in the premises of the smelter. This is notwithstanding the fact that the buyer has the right, as stated in the conditions, to store the tin at the smelter's works free of warehouse rent for a period of 15

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[11] Clause 4 of the warrant.

days from the date of appropriation and subsequently, a warehouse rent of 10 cents per ton per diem. will be chargeable if further storage is required until delivery.[12]

These conditions clearly show the superiority of bargaining power of the smelter.

c) The Straits Tin Market actually consists of the two smelter-firms. There is no independent body that acts as the market conditioner in fixing the price. Again, in this area, there may be some scope for manipulation of the market demand and supply.

Market Control

Straits Trading has stated that over 90% of its capital is held by local investors. This therefore means that the company is locally controlled.

On the other hand, Datuk Kramat Holding Berhad is a foreign controlled company. Local investors occupy only about 27.5% of the interests of the company. 50.5% of the shares are held by Amalgamated London who are in fact the controllers of the company. Another 22% is held by Singaporeans. According to the 1976 Annual Report of the company, the ultimate Holding company for Datuk Kramat is Patino N.V., a company incorporated in the Netherlands.

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[12] Clause 7 of the warrant.

According to the Business Times Survey of the leading 100 and 200 companies in Malaysia, Straits Trading rank number 14 in order of consolidated total assets with 162.6 million ringgit as at December 1973, while Sharikat Eastern Smelting(now Datuk Kramat) ranks 54th, with 84.4 million ringgit as at January 1974. These two companies therefore hold a substantial amount of the nation's wealth in the private sector. Certainly in terms of market control, as earlier pointed out, both the companies would neatly fall within the category of monopolistic companies, judging them by any legal standard practised in all the countries with laws regulating market concentration such as U.K., U.S., India, etc.

There are also clear indications of practices adopted in the two companies that point to their practice of monopolisation of the market. They are undeniably a duopoly with substantial economic power. It would seem that these companies would most probably be a prima facie case of a monopoly situation for investigation. Stress should be laid on the fact that the case of their monopolistic tendencies is only prima facie. Detailed investigations need to be made as would be done by the Monopolies Commission in U.K., etc., to ascertain the case as conducive or not to the public and national interests.

Paints and Allied Products Industry

This particular industry is dominated by two companies, namely, ICI Paints (Malaysia) Sdn. Bhd. and Sissons Paints (East)

Sdn. Bhd.

ICI is a Malaysian-owned company with complete shareholdings by its own holding company - ICI (M) Sdn. Bhd. - making up a total of 4.5 million dollars paid-up capital. Sissons, on the other hand, is a completely British-owned company with a total paid-up capital of two million dollars.[13]

Both the companies are capital intensive with substantial emphasis on mechanisation. Inspite of this, employment is still high among the two firms. ICI employed 232 persons with total wages of $1,985,284, while Sissons employed 118 persons with total wages of $708,000 in 1974.

Value of assets owned by ICI amounted to $2,449,746 while Sissons held almost half of this, amounting to $1,323,990.

In many respects, therefore, ICI is doubly superior to Sissons. This is especially true in terms of paid-up capital, employment and value of assets. And as shown by Figure 3, even in production and sales, the same is true.

Figure 3 clearly shows that while ICI remains the most dominant firm in this industry, its closest rival could only manage half of its achievements.

In terms of actual production, ICI has 34.7% of market control. This is certainly more than 1/3 of market share, thus

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[13] As at 31st December 1974.

Firm	No. of Estab	Unit	Actual Production	% of Firm's Production to Total Ind. Production	Total Sales (Local and Export) $	% of Firm's Total Sales to Ind. Total Sales
	18					
I C I		Litres	5,754,540	34.7%	22,536,487	36.4%
Sissons		"	2,911,768	17.6%	8,183,835	13.2%

Industry's Total Production = 16,568,000 litres

Industry's Total Sales = $61,908,000

Total % Production Contribution (of the 2 firms) = 52.3%

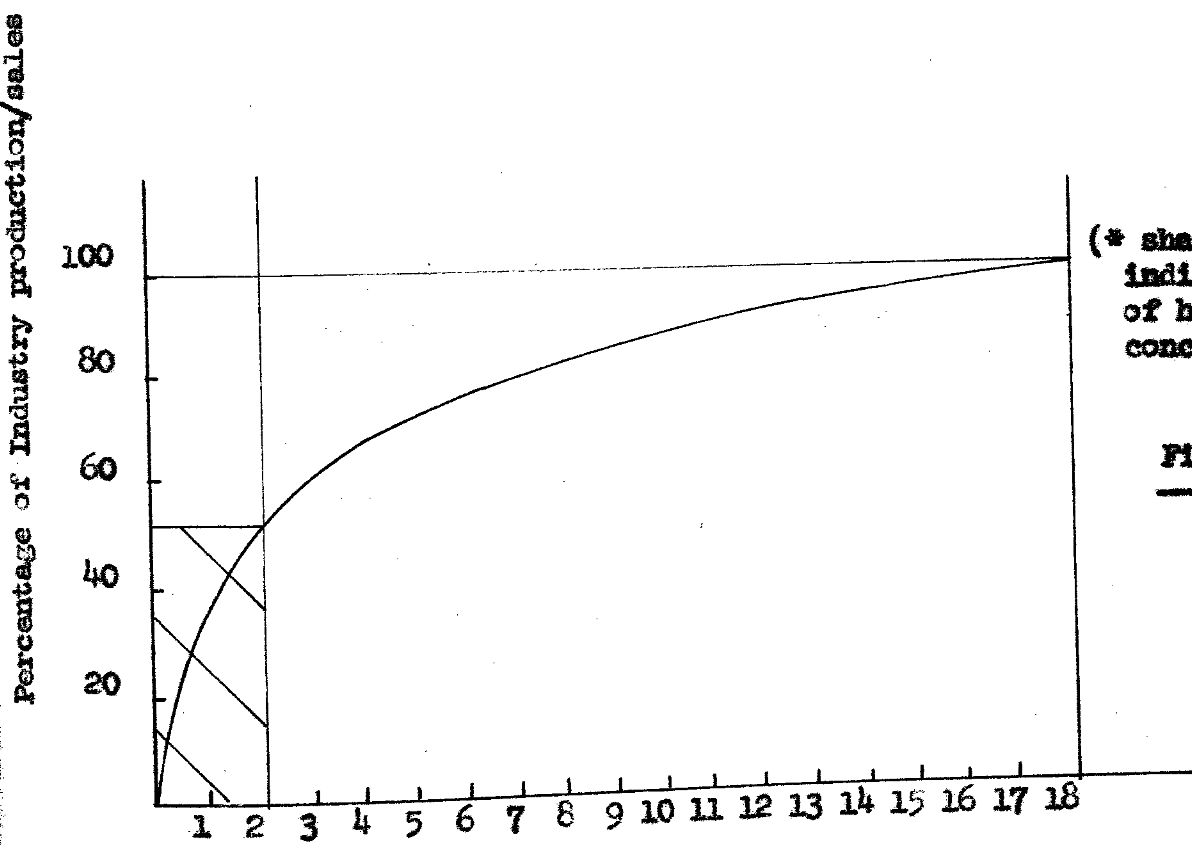
Total % Sales Contribution (of the 2 firms) = 49.6%

Concentration in the Paint Industry

(Measured By Production and Sales)

Calculated From 1974 figures - Source: Confidential

Figure 3



(* shaded part indicates area of highest concentration)

Figure 4

Concentration Curve in Paint Industry

(calculated from 1974 figures of Production)

Source: Confidential.

bringing it within the web of the concentration problem. This finding is further confirmed by the figure on percentage of ICI's total sales to industry's total sales, which reaches 36.4%. And it is most certain that if figures on value added is obtainable, the same picture would be reflected.

ICI has substantial diverse interests which gives the company the advantage of getting cheaper raw materials and at the same time ensuring the supplies. ICI obtains about 1/3 of its raw materials locally. Presumably some are from within its own ICI group of companies. Backward or forward integration of interests, as happens here, is again a factor to take into account. Sissons relies more on imports to get its raw materials and so do other firms in this industry. But even when the raw materials are imported by ICI, an advantage is still present because ICI being an established multi-national company has means of obtaining global supplies of raw materials.

Therefore here the issue of bigness and vertical integration giving rise to substantial advantages to ICI, have been acting as a serious barrier to competition from other companies, present and potential. Other barriers that possibly exist include:

a) an established brand, namely, ICI.

b) an established system of distributive outlets, and agency systems.

c) promotional techniques.

d) an established relationship with construction companies who are the major customers who ensure the existence of a market.

Mention should be made of the claim by ICI that it carries on active research activities in its laboratory. This may be true, but it is quite possible that its devotion to research is not as substantial as to give a reflection of its size, though in absolute terms it may have conducted more research than the other firms. Therefore, here justification of dominance may not be found on the merits of research. Moreover the claim may just be another boost for public confidence in its products. Competition would probably accelerate the growth of research in this company.

Dominancy has clearly been taken advantage of by ICI to capitalize on profits to the detriment of the consumers. This is reflected on the profit as a percentage to the production cost, the percentage being an excessive estimate of 140% or more ex factory. This is indeed alarming, if compared to Sissons' profit percentage which is 8.0%.

Figures on profit of the other firms in this industry shows that most of the companies are either making small profits comparatively, or just breaking even, or are in a spot of trouble. Could this be due to the squeeze effected by ICI?

Metal Boxes and Tin Cans Industry

In this industry, a detailed study was conducted on four of the leading firms, namely: Metal Box Berhad, Federal Metal Printing, Malaysian Can and Metal Pak.

The total number of establishments in this industry is twenty-seven, which can be classified as moderately adequate, considering the ever-increasing need for the product due to the expanding canning industry and the constant availability of tin in Malaysia.

Analysis of the four firms above[14] shows a peculiarity. Analysis of actual production of the various firms show that two of the largest firms by production statistics are Federal Metal Printing and Malaysian Can which contribute to the industry a percentage total of 40.3%. Therefore even by just considering two of the largest firms by production, (unlike U.K. and U.S. who use the top 3 or top 4 methods), it is established that there exists in our tin cans and metal boxes industry economic concentration in the form of two dominant firms, the concentration ratio being 40.3%.

But the analysis is not consistent when the sales figure is examined. The two dominant firms in this case change . By sales value, the two dominant firms in the industry are Metal Box and

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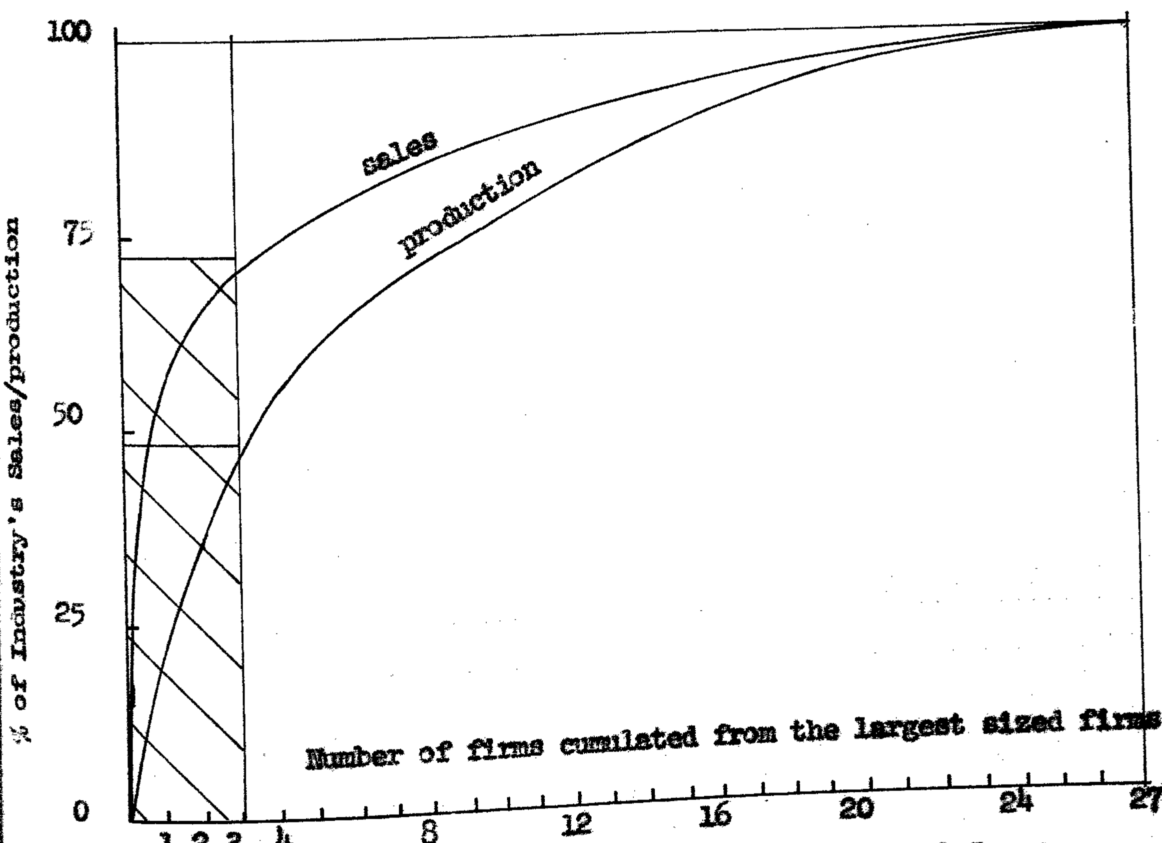
[14] See Figure 5.

Firm	Actual Production	% of Firm's Production To Total Industry's Production	Total Sales (Local + Export)	% of Firm's Total Sales to Industry's Total Sales
	(Pieces)		($)	
Metal Box	22,162,543	7.3%	35,650,846	52.3%
Federal Metal Printing	68,285,845	22.5%	4,903,010	7.2%
Metal Pak	9,475	0.003%	1,318,000	1.9%
M'sian Can	54,000,000	17.8%	6,817,062	10.0%

Total number of establishments in Industry - 27
Industry's total value of sales - $ 68,111,000
Industry's total value of production - 303,496,000 pieces
Total % of sales contribution (of 2 largest firms) - 62.3%
Total % of production contribution (of 2 largest firms) - 40.3%

<u>Concentration in the tin cans and metal boxes Industry. Measured by Production and Sales - 1974 figures. (Source: Confidential)</u>

Fig. 5



* Shaded part indicates area of highest concentration (by both sales and production).

Fig. 6

Concentration curve in Tin Cans and Metal Boxes Industry - 1974 figures. (Source: Confidential)

Malaysian Can. The consistent firm that forms the group that dominates both in terms of sales as well as production is Malaysian Can. Metal Box, which seemingly has only 7.3% of market control in terms of production actually has a giant dominance of 52.3% of the market in terms of sales. This is easily explained because Metal Box produces tin cans and metal boxes of a much more superior quality. This product differentiation is so distinct that Metal Box almost by itself forms a complete monopoly over the products bearing that quality. In fact, it is rather erroneous to group Metal Box with the other tin can firms in the industry because the products of Metal Box is a class by itself.

The total value of sales by Metal Box Bhd. was $35,650,846 in 1974. Compared to the sales value of Malaysian Can (which is second to Metal Box) in the same year, Metal Box is superior by about 6 times. Metal Box Bhd. has another subsidiary in Malaysia whose contribution to the industry is unknown but it is safe to assume that the figure is substantial. This second company is Sharikat Metal Box Tanah Melayu Berhad.[15]

Metal Box is a giant multi-national company with its ultimate holding company being Metal Box Ltd. which is incorporated in England. By virtue of Section 6 of the Companies Act, 1965, there are seventy-five overseas companies that are deemed related

[15] There is yet another subsidiary in Malaysia called Plasticon (Malaysia) Sdn. Bhd.

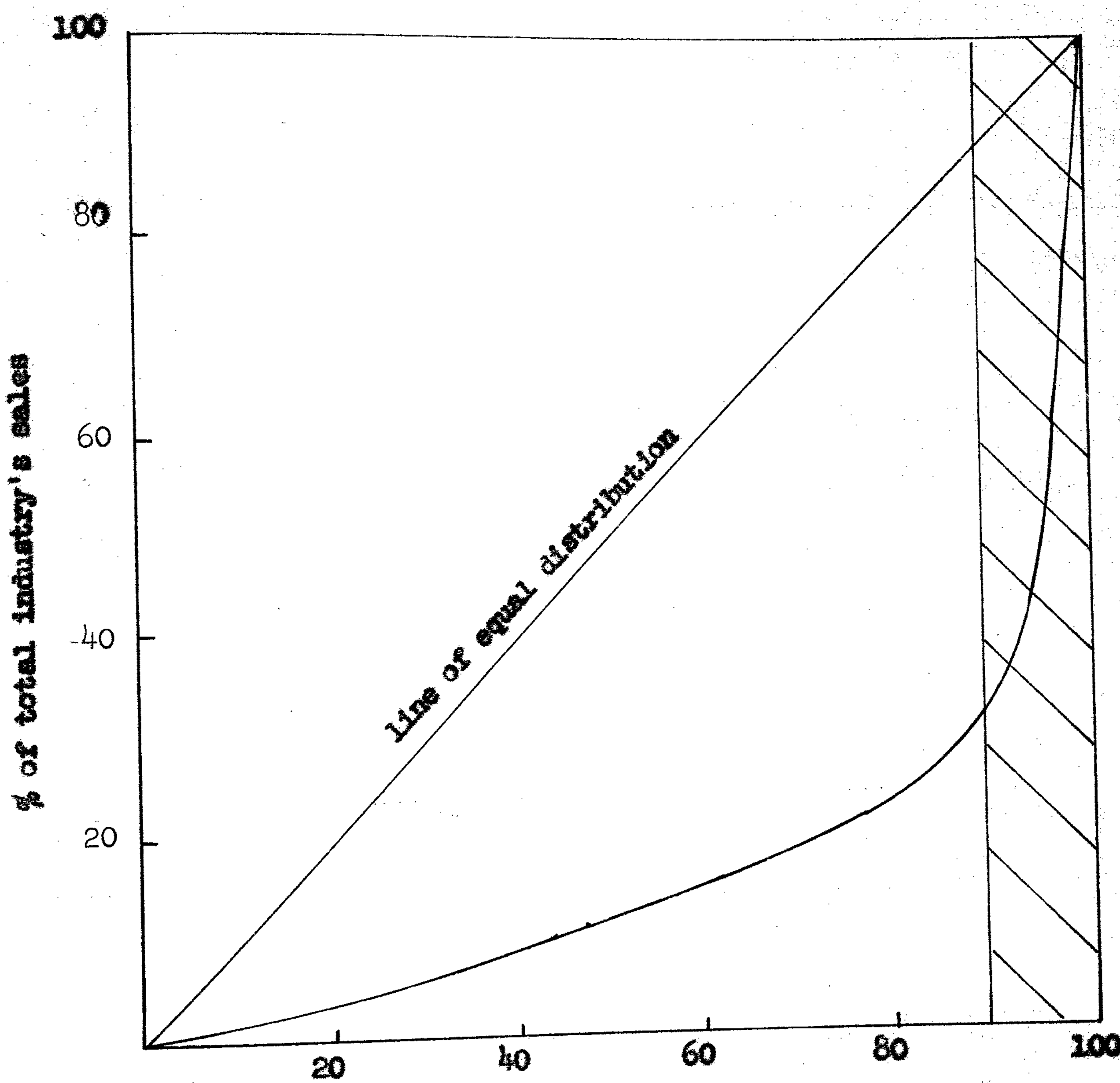


Fig. 7

% of firms cumulated from the smallest sized firm.

* shaded area indicates area of highest concentration.

Lorenz Curve for tin cans and metal boxes industry - 1974 figures - calculated from company sales.

Source: Confidential.

to Metal Box Bhd. Most of these companies are situated in England and in the African States.

Figure 6 shows the concentration curve in the industry. It is to be observed from the figure that about 24 remaining firms in the industry share the rest of the market, which makes up to about 25% of the industry's sales or slightly more than 50% of the industry's production.

Figure 7 shows the extent of concentration in the industry. Concentration is so great that the curve has deviated substantially from the line of equal distribution.[16]

The Cement Industry

The cement industry provides a special area where the problem of economic concentration is rather acute, although it is expected that production figures among the companies involved would be, or is, changing quite substantially.

The cement industry is highly capital intensive.[17] The cement industry is a very lucrative area and is growing at a rapid pace due to the need for construction materials in a developing nation like Malaysia.

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[16] The line of equal distribution indicates the proportional share of the market by the various competing firms in the industry.

[17] According to the Business Times, Tasek Cement ranks 57th in the top 100 companies in Malaysia by consolidated total assets. Tasek Cement has its assets at $71.6 million. APMC ranks at 79th position with assets amounting to $43.4 million.

The industry is monopolised by only four companies, namely:

a) Associated Pan Malaysian Cement (APMC);

b) Tasek Cement Bhd.;

c) Syarikat Perusahaan Cement Malaysia Sdn. Bhd.; and

d) Malayan Industrial and Mining Corporation (MIMC).

The industry's total production is 1,520,000 tons annually. Out of this amount, APMC alone takes a big slice of the cake, i.e. 50% share of the market represented by its annual production of 760,000 tons.[18] Another 32.9% of the industry's production is taken up by Tasek Cement Bhd. Therefore the concentration ratio of the industry represented by the two largest firms in term of production is 82.9%. This is certainly an area of concentration that is exceedingly more concentrated than the normal concentration.

The other two remaining companies collectively produces about 17.14% of the entire industry's production.

In other words, 50% of the companies in the industry produce 82.9% of the products, while the other 50% have to take a small share of 17.14% of the remaining products.

According to the latest reports,[19] the giant company of APMC which is now the leading company, is expanding its factory so as to be able to produce a total of 1.14 million tons of cement a year.

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[18] See Figure 8.

[19] New Straits Times, 17th July 1976, p. 9.

Firm	Actual production (tons)	% of Firm's production to total industry's production
Association Pan Malaysian Cement (APMC)	760,000	50%
Tasek Cement Bhd.	500,000	32.9%
Malayan Industrial and Mining Corporation	60,000	3.94%
Syarikat Perusahaan Cement Malaysia Sdn. Bhd.	200,000	13.2%
Total number of establishments - 4 Industry's total production - 1,520,000 tons Total % production contribution (of 2 largest firms) - 82.9%		

Figure 8

Concentration in the Cement Industry

- Measured by production figures 1975[5]

Source: Confidential.

Syarikat Perusahaaan Cement Malaysia Sdn. Bhd. too is expanding to produce more cement, possibly doubling its present output.

Tasek Cement is also going to double its output.

At present, the Ministry of Trade and Industry has placed some conditions on the companies on the output they can dispose of locally. Some of the companies are given export conditions to prevent excess of cement in the local market. But these conditions are not enforced at present, because of the shortage of cement in Malaysia. It is evident that the demand for cement is growing by leaps and bounds so much so that even the ever-increasing supply was not able to match it. The Ministry has released certain statistics that show this excess-demand situation. The production figures with the consumption figures in brackets are as follows:

1973 : 1.278 million metric tons (1.486 million metric tons)

1974 : 1.386 million metric tons (1.724 million metric tons)

1975 : 1.457 million metric tons (1.89 million metric tons)

With the above ever-increasing demand for cement, especially under the Third Malaysia Plan, the problem of concentration in the cement industry is going to get more complicated than it is now.

There is no overseas competition for this industry because cement is too bulky to be imported. Moreover, a duty of $2/- per bag is imposed on them. This in fact has the effect of sheltering the monopolists in the industry.

Although on paper cement is a price-controlled item ($5/- per bag ex-factory), in practice the price available in the market is exceedingly higher than what is reasonable.

The Ministry officials too have strong suspicions that some of the companies in the industry act unfairly by claiming that their machines break down when in fact they do not, for the sole purpose of restricting supply to jack up prices in the open market.

Petroleum refining industry

There are four companies in this industry of which only two are immensely gigantic that together they account for 90% of the total production contribution of the industry (that is, the concentration ratio for the industry - created by the two largest firms, in terms of production, is 90%). And by sales figure, they account for 95.4% of the industry's total sales.[20]

According to some officials from the Prime Minister's Department, one single factor for the high prices of petrol in Malaysia is the fact that these oil companies have become so gigantic that they possess a tremendous amount of bargaining power as against the government. This is certainly not admitted by the government officially. The authorities have been giving many other

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[20]See Figure 9.

Firm	Actual Production	% of Firm's Production to Total Industry's Production	Total Sales (Local and Export)	% of firm's Total Sales to Industry's Total Sales
	(Metric tons)		$	
Shell	1,474,749	n.a.	309,067,838	49.1%
Esso	1,450,000	n.a.	291,600,000	46.3%

Total number of establishments - 4

Industry's total production - n.a.

Industry's total sales - $629,230,000

Total % production contribution (of the 2 largest firms) - ≏ 90%

Total % sales contribution (of the 2 largest firms) - 95.4%

Figure 9

Concentration in the Petroleum Refinery Industry - measured by Production and Sales 1974 figures

Source: Confidential.

smaller reasons for the rise in price of petrol. At present, the petroleum refining industry, which is mainly dominated by Shell and Esso, is making excessive profits. The companies have so far been able to push their demands to jack up prices as they fancy, though officially they need approval from the government. Approval from the government has, as a result, become a pure formality and nothing more.

This is one industry, among many others, that exhibit the example of an economic power being transformed into political power. The mass of political turmoil in which these companies are involved can be studied from the recent developments in the oil-exploration controversy - the controversy that has even led to some oil-exploration companies like Exxon[21] to stop drilling for oil and further threatening to halt other interests planted in the country.

Until now, Malaysia's dealings with foreign oil companies have been on a concession basis. Foreign companies are expected to pay some royalties and a share of the profits with the government, in return for which there is to be no control at all over the companies' activities by the government. This has given rise to a great deal of exploitation which the government has realised - a realisation which has come late, though it is still not too late. The government has set up a national oil corporation (like that of Indonesia's Pertamina), which is called Petronas, with the aim of

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[21]Exxon is the parent company of Esso.

controlling these oil companies. Petronas is at present in the midst of negotiations with the petroleum companies to achieve the government's intention to participation in the petroleum industry.[22]

A critical look at the negotiations reveal the long-suspected case of economic-cum-political power of the oil companies.

According to the explanation of Petronas' former chief, Tengku Razaleigh Hamzah,[23] when he gave the reason for Exxon's suspension of its activities, Petronas had allocated to Exxon Production 7½% of its profits from oil-exploration revenue, but the company wanted 35%. He admitted that before the Petroleum Development Act, 1974 came into force, the government had obtained only 8% of revenue from oil exploration in the country. This actually meant that not only was the government not in control of management, price and development policies of the oil companies, but it was also deprived of revenue-sharing from these companies, who had and are still responsible for the substantial exploitation of the country and its people.

The main objection by these oil companies, however, lies in the second part of the amendment to the Petroleum Development Act, 1974, which provides that all companies engaged in the

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[22] According to the Minister of Primary Industries, Datuk Taib Mahmud, the concept of production-sharing is development-oriented rather than profit-oriented. Ref: Sunday Gazette, 6th January 1974.

[23] New Straits Times, 13th June 1975.

processing and marketing of petroleum and petroleum chemicals have to create a new class of shares, namely, management shares. The value would be about 1% or more of the company's capital and will be issuable only to Petronas. Each management share will carry voting rights equal to 500 ordinary shares.[24]

The above suggestion by Petronas would enable it to control the boards of the oil companies and therefore bring the companies under the strict control of the government.

Exxon has opposed the move, and Shell has not shown any response to the proposal.

The Prime Minister of Malaysia, Datuk Hussein Onn, has very recently given the dateline of 15th November 1976 to the companies concerned to conclude production-sharing agreements with Petronas. He had also warned that should there be no response to this call, the government would not hesitate to take over the rights of the companies with adequate compensation, as provided by the Malaysian Constitution.[25] The Prime Minister, in the same report, indicated the arrogant attitude of the oil companies. Negotiations have been conducted for already two years, and yet the companies have not come to terms with the government. In

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[24] Ref: Phillip Bowring, "Malaysia's Petronas: A Legislative Overkill", Far Eastern Economic Review, 16th May 1975, p. 63.

[25] Ref: New Straits Times, 29th July 1976.

giving the dateline to the delegates, the Prime Minister said:[26]

> "For this purpose, the government may perforce have no alternative but to take over the rights of the companies with payment of adequate compensation ....
>
> You are already aware that several nations today have found it necessary to take this course of action.
>
> You will also appreciate that this is a sovereign right of the government, and this right has been reaffirmed in various recent resolutions of the U.N. General Assembly.
>
> My government, of course, would naturally like to see agreement reached without having to take over the rights of the companies."

This move by the government is perhaps indicative of the unwillingness of the government to further tolerate the over-exploitive nature of the oil companies, who have been controlling the economy of the country to a great extent.

It is perhaps, more than justifiable for the government to take the present steps to stop this uncontrolled exploitation of Malaysian resources. Perhaps the government would also consider

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[26] *Ibid*

the already complex problems of economic concentration of these companies in the industry, and to take necessary steps to disperse them, so that no few companies or individuals as presently existing, could become too powerful economically which may later on take the appearance of a political power.

The Chemical Fertilizer Industry

The total number of establishments in this industry is eleven. The single most dominant company is the Chemical Company of Malaysia (CCM), which is a member of the giant ICI group of companies. ICI however, has another of its subsidiaries which solely deals with agricultural fertilizers. This subsidiary is known as ICI (Agriculture).

The concentration ratio, calculated from Figure 10, of the two largest companies seems to be 63% - which is already an alarming figure. But as indicated by Figure 10, this figure is most probably underrated because the calculation does not include the figures from ICI (Agriculture). This is because the figures of ICI (Agriculture) is unobtainable.

CCM has an issued capital of 30 million dollars. The profit and losses graph of the company shows that the company's profits has been rising steeply. In 1974, the profit before tax was 23½ million dollars, and in 1975 it rose up to nearly 30 million dollars. It is anticipated that the profit would be increased in 1976 and subsequent years.

Firm	Total Sales (Local & Export)	% of Firm's Total Sales to Industry's Total Sales
Chemical Company of Malaysia (ICI)	73,481,919	59.3%
Agricultural Chemicals	5,558	0.004%
Federal Fertilizers	4,629,440	3.7%
Total number of establishments - 11		
Industry total value of sales - $123,876,000		
Total % value of sales to industry (of 2 largest firms) - 63%*		

*This figure is most probably an understatement because of the omission of figures of yet another company - ICI (Agriculture) - which could prove to be the 2nd biggest company in this industry. The omission is due to the lack of information on the company. Therefore most probably, the concentration in this industry is more serious.

Figure 10

Concentration in the Chemical Fertilizers Industry

Measured by Company's Sales - 1974 Figures

Source: Confidential.

Apart from fertilizers CCM has a total monopoly of paraquat.[27]

In the production of Hydrochloric acid CCM was having 100% control of the market until the emergence of Malay Sino Company. In fact, according to the Ministry of Trade and Industry, Malay Sino was given the permit to produce hydrochloric acid because the company had agreed to sell the product at lower prices. CCM was making excessive profits. CCM is appealing to the Minister against Malay Sino involvement in this trade. The dominance of CCM in this area still persists because of its established market and its diversified trade structure. Malay Sino is forced to export most of its product.

According to an official of the Ministry of Trade and Industry, CCM has used unfair trade practices in attempting to stop rival companies from emerging. This it did by lowering its price on report of an emerging new competitor. This lowering of the price would discourage the potential competitor because it would be unprofitable to come into the business if it cannot produce as cheaply in order to compete with CCM. But as soon as the threat of competition is removed, the price is placed higher again.

The Tyres and Tubes Industry

It is widely known that the greatest names in tyre production in Malaysia are Dunlop and Goodyear. Dunlop was

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[27] A sort of weedicite.

established long ago, almost as old as the rubber industry in Malaysia. Goodyear is a comparatively recent establishment which is picking up speed fairly well.

Dunlop was and still is enjoying a supreme control of the tyre market with 43.5% of the industry's production coming from it. The reasons for Dunlop's vast control of the market are easy to understand. Dunlop was the only tyre manufacturer locally available before Goodyear and Fung Keong[28] came into existence. Dunlop being a multi-national corporation with even backward integration[29] in Malaysia enjoys the most efficient economies of scale locally. Owing to the fact that tyre manufacturing is capital intensive and needs a great deal of expertise, potential competitors were not available for a very long time. Dunlop is also very aggressive in its promotional campaign which had the effect of making the word "tyre" and "Dunlop" synonymous, that is, when one talks of tyres in Malaysia, one usually thinks of Dunlop tyres.

Anyway, Dunlop and Goodyear together form a high concentration ratio of 55.1%[30]. This ratio is high considering

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[28]Another local manufacturer of tyres and tubes.

[29]Dunlop has interests in rubber estates - a source of supply of raw materials.

[30]See Figure 11.

Firm	Actual production	% of firm's production to total industry's production
	(In pieces)	
Dunlop	1,466,074	43.5%
Goodyear	389,417	11.6%
Industry's total production - 3,367,000 pieces		
Concentration ratio (of the 2 largest firms) - 55.1%		

Figure 11

Concentration in the tyre industry

Measured by company's production

1975 figures

Source: Confidential.

the fact that Dunlop alone has taken the bulk of the market.

Both the companies are foreign-controlled. The paid-up capital of Dunlop[31] consists of about 2 million dollars from Bumiputra participation, 3½ million dollars from Malaysian Chinese, ¾ million dollars from Malaysian Indians and other Malaysians take about 3½ million dollars. Foreign participation, mainly from U.K., amounted to $19,977,152 (approximately 20 million dollars). The total paid-up capital is 30 million dollars.

Goodyear has Bumiputra share participation of about 4.2 million dollars. The others are held by Americans amounting to about 5.5 million dollars. Total paid-up capital is about 9.7 million dollars.[32] Therefore, Goodyear is an American-controlled company.

Dunlop has an employment of 894 persons, while Goodyear has about 534 persons in employment.[33] These employment figures again reflect the much-above-average sizes of the two companies.

It is not necessary to ask further whether Dunlop is a company that can be caught under the monopoly law if it had been in U.K. because the answer is obviously an affirmative one.

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[31] As at 31st December 1974.

[32] As at 31st December 1974.

[33] As at 31st December 1974.

Firm	Actual Production	% of firm's production to total industry's production
	(in Pieces)	
Dunlop	371,188	7.8%
Goodyear	229,639	4.8%
Industry's total production - 4,756,000 pieces Total % contribution of the two firms - 12.6%		

<u>Figure 12</u>

<u>Production of Tubes</u>

<u>by Dunlop and Goodyear</u>

<u>1975 figures</u>

<u>Source:</u> Confidential.

But contrary to the much-favoured impression that both these companies have also the same dominance in the production of inner tubes, Figure 12 does not seem to agree with this at all. The two companies contribute to only 12.6% of the entire production of the tubes industry. Therefore, as far as inner tubes are concerned, the two companies have not much dominance. Perhaps this is due to the fact that Dunlop and Goodyear are specializing more on the tyre industry, in which case they together have formed a high concentration ratio which need to be controlled, especially so in the case of Dunlop.

The Brewery Industry

The brewery industry is the case of an oligopoly. The total number of establishments in the industry is only three. The leading company by production is Guinness Malaysia Berhad, with its percentage production of 46.3% to total industry's production. Next comes Malayan Breweries with its production contribution of 38.0%, and lastly Carlsberg, which contributes about 15.7% to the industry's production.

The concentration ratio in this industry is perhaps one of the highest in the country, reaching up to 84.3% (calculated from the production figures of the two largest companies).

Guinness Malaysia Bhd. is a foreign-controlled company, with majority shareholdings from U.K. and Singapore. The total paid-up capital is 12 million dollars.

Firm	Actual production	% of firm's production to total industry's production
	(hectolitres)	
Malayan Breweries	234,810	38.0%
Carlsberg	97,000	15.7%
Guinness	285,950	46.3%

Total industry's production - 617,760 h.l.
Total number of establishments - 3
Concentration ratio (by 2 largest firms) - 84.3%

Figure 13

Concentration in the Brewery Industry

Measured by Company's production -

1974 figures

Malayan Breweries is another foreign-owned company with all its shareholdings held by Singaporeans, that is, amounting to the entire paid-up capital of also 12 million dollars, as in the case of Guinness.

A rough comparison of the sizes of Guinness and Malayan Breweries can be estimated by the employment figures of each company, that is, 580 and 173 respectively. And also, when compared in terms of assets owned, Guinness is certainly larger. Guinness' value of assets amounted to 22.7 million dollars in 1974, when Malayan Breweries had only 8.5 million dollars.

But it should be strongly noted that Malayan Breweries has diversified interests in other trades, which makes it a special case to consider in terms of economic concentration. Malayan Breweries happens to be a member of the Fraser and Neave group, which is the leading company in the soft drinks business. Since soft and hard drinks can be considered to be either substitute or complementary goods to one another, the category of trade of Fraser and Neave is expanded, and therefore a bigger monopoly share is controlled by the group.

Anyway, looking at the three companies in the brewery industry, one can come to the conclusion that a great deal of monopoly power is shared by each and everyone of them through many ways, some of which are aggressive advertisements, product differentiation, promotional sales, etc. It is also noted that

Carlsberg and Guinness have developed a collusive relationship that has demarcated their respective areas of trade. But Malayan Breweries is competing with Guinness to gain market dominance.

But a Ministry of Trade and Industry's official did comment that this industry is certainly a collusive oligopoly. All the three companies would have secret closed-door meetings between their directors or managers (who are foreigners) to discuss some matters of policy, in which case the Ministry of Trade and Industry would have no knowledge of such meetings.

There are three main barriers to competition of future firms in this industry. Firstly, there is the factor of economies of scale. All the three companies are multi-nationals with big investment power. A new firm that wants to come in must have an equal or even more investment capacity. Secondly, there is the problem of technical expertise needed by the potential firms – both in terms of management of the factory and in research of suitable formulae of their product to match the qualities of the others, who have had a substantial number of years of experience in manufacture. Lastly, the companies in this industry have their respective agents each to deal with distribution of their products. These agency agreements are exclusive, that is, no agent can deal with products from any competing firms. The three companies have almost flooded the agency system of the brewery industry, and any new firm must, against all odds, find new agencies to perform its distribution function.

The Iron and Steel Industry

The companies examined under this industry are those that manufacture bars and rods.

The single most dominant company in this industry is Malayawata Steel Bhd. It is a company of great size - rated within the top 20 companies in Malaysia. Malayawata has an investment of about 100 million dollars.

Malayawata produces about 160,000 tons of furnished products per year. This is about 60% of the industry's production and also by sales. Before the protection given by the government on the local iron and steel industry, Malayawata could only get 40% control of the market.

Malayawata's competitors are United Malaysian Steel Mills Berhad, Southern Iron Works, Dahyung (K.L.) and Malaysian Steel Works.

According to a Malayawata spokesman, there is no real competition locally, for Malayawata can easily obtain its 60% market control. Formerly, before the protection given by the government, competition with overseas products was real. Local firms had a hard time trying to sell to a limited Malaysian market.

It is submitted that here protection by the government is justified because the Iron and Steel Market is limited only to Malaysia. There is no export of iron and steel by any of our companies. This is because companies like those in Japan are producing and exporting at a much higher rate than ours. A single firm in Japan can produce up to 100,000,000 tons a year, and if we have no protection, a 1% to 2% of these Japanese products, if exported in this region, would flood our market and can drive our local iron and steel industry out of business. In fact, this was exactly what the Japanese did in the recession before the protection.

No doubt the barriers to competition in this industry are present, but these are natural barriers and are not created by the companies themselves. Moreover, to allow Malayawata to take a dominant position is justifiable because of the following reasons:

1) Iron and steel are commodities of extreme importance during war conditions. Therefore we need a company that is stable enough to provide this peace and wartime service.

2) The market in Malaysia is limited; there cannot be exports. Therefore there is much justification for a few dominant firms to exist in this industry. Overcrowding can cause inefficiency.

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2) The market in Malaysia is limited; there cannot be exports. Therefore there is much justification for a few dominant firms to exist in this industry. Overcrowding can cause inefficiency.

3) Iron and steel are controlled items.
   There cannot be an abuse in the pricing.

4) Malayawata, the dominant firm, is government-controlled, that is, through Pernas' 30% shareholdings.

The Cigarettes, Aluminium and Tractors Industries[34]

There is substantial economic concentration in the cigarette industry. The single most dominant firm is Malayan Tobacco Company (MTC), followed by Rothmans, the second leading company. The other company that is in this trade is R.J. Reynolds which is at present running at a loss due to the competition from the other two companies. All these companies are again foreign-owned.

Barriers to competition are caused by the attitude of consumers of being brand-conscious. The other important barrier is the usual factor of economies of scale.

In the Tractors industry, Tractors Malaysia has emerged almost unparallelled. Statistics are not obtainable to prove this case, but by impression it is obvious that Tractors Malaysia is a source of economic concentration in the tractors industry.

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[34] These industries are grouped together because no detailed studies were done on them for lack of data. The above comments on them are made solely based on strong corroborated impressions.

Another industry that is a clear case of monopoly is the aluminium-producing industry. The only company that produces aluminium in this country is Alcan Malaysia Bhd., now known as Aluminium Company of Malaysia Bhd.

Alcan produces about 8,357 tons per annum of aluminium products.[35] Its total sales value for 1974 was $2,235,421. Again, Alcan is a foreign-owned company with majority shareholdings held by Canadians.[36]

Although recently, the Board of Directors of the company has announced a reconstruction to enable more Malaysian participation, a 30% shareholdings is still in the hands of Canadians, en bloc. This means that though the company is Malaysian-owned, control is foreign.

C. Overall Concentration of Wealth and Power in the Top Corporations in Malaysia

This part of the chapter was originally not planned to be incorporated into the present study, because of difficulties faced by the writer in getting the relevant information. Moreover, the study on overall concentration would involve a tremendous amount of manpower, money and time. The writer was handicapped

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[35] Figures are for the year 1974.

36As at 1974.

in all three aspects.

But during the process of typing this project paper, a seminar was held in Penang[37] by the Malaysian Economic Association at their third convention. A paper was presented together by Lim Mah Hui and Dr. Mary Anderson, on the concentration of wealth and power in the top corporations in Malaysia. The seminar paper is part of the thesis of Lim Mah Hui for his Ph.D. degree.

The authors of the paper have gone to a great length in discussing the issues involved, illustrated with some very useful processed figures on overall concentration of wealth and power in the top corporations. It is these types of figures which the present writer was unable to obtain for the above-mentioned reasons. It is proposed that some references be made to the seminar paper, because the views and findings of the two authors are similar to the views and findings enumerated in the present study. The reference would lend further credence to the hypothesis of the present study.

The two authors (hereafter called "the authors") conducted their study of concentration by surveying 77 leading corporations in Malaysia.

According to the authors' findings,[38] in 1972 the top 10 companies (0.14% of the total number of companies) own 3% of

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[37] "Agenda for the Nation", August 21 - 24, 1976.

[38] See Figure 14.

Figure 14

(a) PERCENTAGE OF TOTAL ASSETS OF ALL LIMITED COMPANIES OWNED BY TOP 77 CORPORATIONS IN MALAYSIA 1972

Limited Companies	1972
Top 10 corps.	3.11%
Top 20 corps.	4.64%
Top 50 corps.	10.38%
Top 77 corps.	33.50%
All limited corps. N = 7009	$25,275.8 million

(b) PERCENTAGE OF FIXED ASSETS OF ALL LIMITED COMPANIES OWNED BY TOP 77 CORPORATIONS IN MALAYSIA 1972

Limited Companies	1972
Top 10 corps.	4.14%
Top 20 corps.	5.25%
Top 50 corps.	14.56%
Top 77 corps.	21.80%
All limited corps. N = 7009	$6,408.5 million

(c) PERCENTAGE OF NET PROFIT (BEFORE TAX) OF ALL LIMITED COMPANIES EARNED BY TOP 77 COMPANIES IN MALAYSIA 1972

Limited Companies	1972
Top 10 corps.	5.08%
Top 20 corps.	6.74%
Top 50 corps.	19.51%
Top 77 corps.	29.70%
All limited corps. N = 7009	$1,471.3 million

Source: Lim Mah Hui and Dr. Mary Anderson, "Concentration of Wealth and Power in the Top Corporations in Malaysia", Agenda for the Nation, Third Convention, Malaysian Economic Association, August 21 - 24, 1976.

the total assets of all operating limited companies. The top 50 companies (0.7%) own 10.4% of the total assets, and finally the largest 77 companies which were studied (1%) own 33% of the total assets. And in terms of profit, the same 77 corporations account for 30% of the total net profit of all limited companies.[39]

In the concentration of stock ownership, the authors' findings were more glaring. The findings were based on 39 large corporations. It was found that 0.5% of the total number of shareholders in the 39 companies own $716 million, or 73%, of the total paid-up capital of the 39 companies concerned. (See Figure 15).

But according to the study, concentration of the stocks occurs on two fronts. The first (as pointed above) is concentration of stocks in the top 25 shareholders of each of the 39 companies. The second concentration is a further concentration of the wealth in stock within the top 25 shareholders of each of the 39 corporations (the total top 25 shareholders in the 39 companies, excluding double-counting, was 576). The figures produced confirmed the existence of the second level of concentration. The top 1% of the shareholders own 25% of the stocks held by the 576 large shareholders. The top 5% own 63%; the top 10% own 78% and the top 50% own 98%. The bottom 35% of the top investors own 1% of the stocks. The authors again

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[39] Note that the figures were taken from the unconsolidated accounts. This means that the concentration was underrated.

Figure 15 *

Statistics on Shareholders and Shares owned in 39 large corporations 1974 - 1976

(1)	Total number of top 25 shareholders in 39 corporations	- 576
(2)	Total number of all shareholders in 39 corporations	- 102,507
(3)	Total value of all shares in 39 corporations	- $972,345,000
(4)	Total value of shares held by top 576 shareholders	- $715,950,000
(5)	Item (4) as percentage of item (3)	- 73%

* Extracted from: Lim Mah Hui and Dr. Mary Anderson, "Concentration of Wealth and Power in the Top Corporations in Malaysia", Agenda for the Nation, Third Convention, Malaysian Economic Association, August 21 - 24, 1976, p. 10.

cautioned that the figures are an understatement because:

a) Each shareholder was treated as a separate entity. The likelihood of them being related to one another, and thus having a consolidated effect, was not considered;

b) The analysis was not extended to cover the whole of Malaysia. If this were done, the concentration figures would be extremely high. It is said that no more than a few hundred families own the majority of stocks in Malaysia.

The authors did a detailed analysis of interlocking directorates - the popular device of concentrating wealth - and came to the same conclusion that the use of interlocking directorates in the Malaysian corporations is substantial, and that the mechanism has caused a great deal of concentration of wealth.

According to the findings of the authors, of the directors of the top 77 corporations surveyed, 53 or 68% of the companies interlocked.[40] Of these interlocked firms, 23 companies interlocked between 5 - 9 times; 5 firms interlocked between 10 - 14

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[40]Records for the year 1974.

times; and 4 firms interlocked between 15 - 19 times. Most of these companies that interlock more than 10 times are foreign-owned, and they come from the plantation, mining and processing sectors.

It was also estimated that Overseas Chinese Banking Corporation, the number 1 corporation in Malaysia, owns and/or controls, directly and indirectly, over 100 companies.

The authors finally concluded that the single most important source of economic inequality in our society is the extreme unequal ownership of the productive resources of the country. With respect to this conclusion, the present writer totally concurs.

D. Case Samples of Concentration Problems

Industries and Realty Group Berhad

Industries and Realty Group Berhad (I & RG Bhd.) was incorporated on April 4, 1969. This company was formed specifically to consolidate the various interests in realty and industrial ventures promoted by Datuk Sri Chan Swee Ho and also to invest or participate in the equity of other industrial companies. Figure 16 shows a list of the company's subsidiary and associated companies and its shareholdings in them.

An analysis of the shareholdings of the company as it stood in 1974, shows that Datuk Sri Chan Swee Ho's family holds approximately 3,864,826 shares or 46% of the company's then paid-

Industries and Realty G

Subsidiary and Associat

(Subsidiary Compan

Name:	Trans Malayan Fibre Products Berhad	Fenwood (M) Sdn. Berhad	Ipoh Realty Co. Sdn. Berhad	Impe S
Paid-up capital:	$4,125,000	$ 500,000	$3,000,000	$1
I & RG holding:				
Amount:	$3,485,000	$ 255,000	$3,000,000	$
Percentage:	84%	51%	100%	
Nature of business	Polypropolyene fabrics & bags	Prefabricated timber houses & other timber products	Realty	

(Associate Compan

Name:	Toyo Plastic (M) Sdn. Berhad	Carter Semiconductor (M) Sdn. Berhad	Paramount Garments Sdn. Berhad	Mar Stee
Paid-up capital:	$ 500,000	$2,300,000	$ 360,000	$2
I & RG holding:				
Amount:	$ 247,000	$ 210,000	$ 159,000	$
Percentage:	49%	9%	44%	
Nature of business:	Plastic refrigerator parts & plastic sheets	Integrated circuits	Garments	Ste

(Associate Comp

Name:	Pan Malaysia Plastic & Metal Industries Sdn. Berhad	Pacific Metal Industries Sdn. Berhad	Din Wai Electr Mfg. Co. (M Sdn. Berha
Paid-up capital:	$ 75,000	$ 270,000	$1,535,00
I & RG holding:			
Amount:	$ 23,000	$ 15,000	$ 1,00
Percentage	30%	0.5%	-
Nature of business:	Plastic shoe heels & soles & motor vehicle parts & electrical accessories	Steel strappings	Electrical f and ballasts

Figure 16

Source: Confidential

Industries and Realty Group Berhad

Subsidiary and Associate Companies

(Subsidiary Companies)

Fenwood (M) Sdn. Berhad	$ 500,000	$ 255,000	51%	Prefabricated timber houses & other timber products
Ipoh Realty Co. Sdn. Berhad	$3,000,000	$3,000,000	100%	Realty
Imperial Garments Sdn. Berhad	$1,270,000	$ 875,200	69%	Garments
Fujimori Plastic Industries (M) Sdn. Berhad	$ 700,000	$ 379,999	54%	Vinyl - asbestos
Manufacturers Trading Co. Sdn. Berhad	$ 120,000	$ 78,000	65%	Trading (marke arm of the gro

(Associate Companies)

Carter Semiconductor (M) Sdn. Berhad	$2,300,000	$ 210,000	9%	Integrated circuits
Paramount Garments Sdn. Berhad	$ 360,000	$ 159,000	44%	Garments
Maruichi (M) Steel Tubes Sdn. Berhad	$2,400,000	$ 194,000	8%	Steel tubes
Texsyn Fibre Industries (M) Sdn. Berhad	$22,000,000	$ 550,000	2.5%	Texturised polyester yarns & knitted fabrics
Apollo Bakeli & Electronics Mfg. Sdn. Berh	$ 575,000	$ 55,000	9%	Electrical fittings & ot household ele trical access

(Associate Companies)

laysia & Metal stries Berhad	75,000	23,000	30%	oe heels & tor vehicle ectrical ories
Pacific Metal Industries Sdn. Berhad	$ 270,000	$ 15,000	0.5%	Steel strappings
Din Wai Electrical Mfg. Co. (M) Sdn. Berhad	$1,535,000	$ 1,000	-	Electrical fans and ballasts
Hong Chee Engineering (Taiwan)	$ 200,000	$ 10,000	5%	Engineering consultants
Modern Label Mfg. Co. Sd	$ 8	$ 2		Garmen & r

Figure 16

s)

al Garments . Berhad	Fujimori Flastic Industries (M) Sdn. Berhad	Manufacturers Trading Co. Sdn. Berhad	Applied Management Consultants Sdn. Berhad
270,000	$ 700,000	$ 120,000	$ 100,000
375,200 69%	$ 379,999 54%	$ 78,000 65%	$ 65,000 65%
arments	Vinyl - asbestos	Trading (marketing arm of the group)	Management consultants

es)

chi (M) Tubes Sdn. erhad	Texsyn Fibre Industries (M) Sdn. Berhad	Apollo Bakelite & Electronics Mfg. Sdn. Berhad	Public Housing Dev.(Pte.) Ltd.
400,000	$22,000,000	$ 575,000	$ 75,000
194,000 8%	$ 550,000 2.5%	$ 55,000 9%	$ 25,000 33%
l tubes	Texturised polyester yarns & knitted fabrics	Electrical fittings & other household electrical accessories	Housing

ies)

cal	Hong Chee Engineering (Taiwan)	Modern Label & Ribbon Mfg. Co. Sdn. Berhad
	$ 200,000	$ 80,000
	$ 10,000 5%	$ 20,000 25%
ns	Engineering consultants	Garments, labels & ribbons

up capital. Datuk Chan himself personally held 1,114,000 shares. Therefore for all practical purposes, Datuk Chan, with the backing of his family, was the Controller of Industries and Realty Group.

In 1974, Industries and Realty Group had submitted an application to the Cappital Issues Committee seeking approval for a rights issue of 8,343,130 shares of $1 each at a premium of 20 cents per share on the basis of one new share for every one share held. The purpose of the rights issue was for the following purposes, among others:

i) To finance additional equity participation in Penwood (M) Sdn. Bhd.

ii) To invest 51% interest in Fujisash (M) Metal Industries Sdn. Bhd.

iii) To invest 51% interest in Metal Manufacturers (M) Sdn. Bhd.

iv) To create an Industry Promotion Fund to be utilised for the promotion and organisation of new industries.

According to a reliable source, the purpose of the rights issue at a premium of 20 cents was to benefit the promoters themselves, namely, Datuk Chan and group. Apparently this was realised by the Capital Issues Committee when deciding on the application. The CIC thought that the rights issue at a premium of

20 cents would not be taken up by the smaller shareholders. If the smaller shareholders do not take up the rights issue, there is a great likelihood that the promoters of the company will benefit once the market (which was in a depressed state) moves out of the depressed conditions. Apparently, it looks as though this was what was in fact intended by the promoters of the company in their bid to increase control of I & RG Berhad, at the exclusion of other smaller shareholders, and benefitting themselves in the process. This attempt seems to be a subtle oppression of the minority shareholders.

The Capital Issues Committee also disapproved of the creation of the proposed Industry Promotion Fund because there is no specific advantage accruing to the shareholders of the company arising from the creation of such a fund. Presumably, this fund was intended to benefit the promoters only, particularly Datuk Chan himself, who, as earlier pointed out, is specifically interested as a promoter to consolidate the various interests in realty and industrial ventures.

It is to be noted that the empire-building activities of Datuk Chan would be enhanced with the approval of the application for the rights issue of the shares (with premium), because in addition to the list of subsidiary companies under the I & RG Bhd., Fujisash (M) Metal Industries Sdn. Bhd. and Metal Manufacturers (M) Sdn. Bhd. would be the new subsidiaries. I & RG Bhd. would have a 51% interest in both of these companies.

Penwood (M) Sdn. Bhd. was also extending its tentacles in its proposed joint venture with Jengka Development Corporation. Again, Penwood proposed to take a 51% controlling interest in this joint-venture.

The activities of Datuk Chan as a controller of yet another company, namely, Federal Cables, Wires and Metal Manufacturing (FCW) contribute to the confirmation of the fact that Datuk Chan was attempting to form a giant monopoly of various industries and realty in a consolidated form.

In 1974, FCW, a company listed on the Stock Exchange of Kuala Lumpur and Singapore proposed to issue 3,100,000 new shares of $1/- each in consideration for the acquisition of 70% of the equity (4,200,000 shares of $1/- each) of Fujisash (M) Metal Industries Sdn. Bhd. and 100% of the equity (2,000,000 shares of $1/- each) of Rock Chemicals Industries Sdn. Bhd. The basis of exchange is one share in FCW for every two shares in the vendor companies, that is, for the purpose of this exchange of shares, FCW shares had been valued at $2/- each, while the vendor companies' shares had been valued at $1/- (par) each.

The then structure of the company and its subsidiaries before the proposed acquisition is as indicated in Figure 17.

It can be seen from Figure 17 that the major shareholders of FCW are: Datuk Chan Swee Ho and Group (8.8%); Fujikura Cables Works Ltd. (10.0%); Pacific Electric Wire (4.0%); and United

Before Acquisition

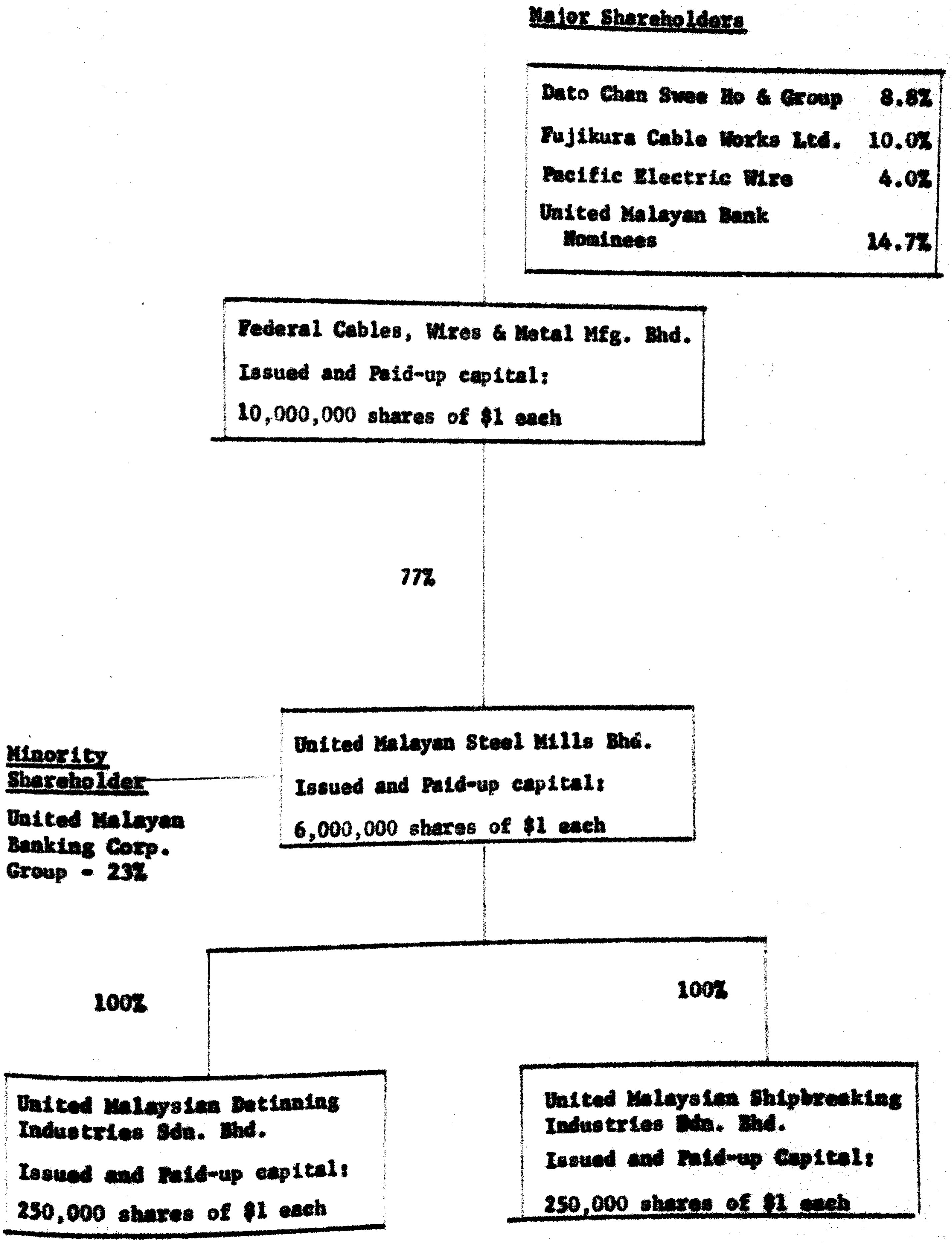

Figure 17

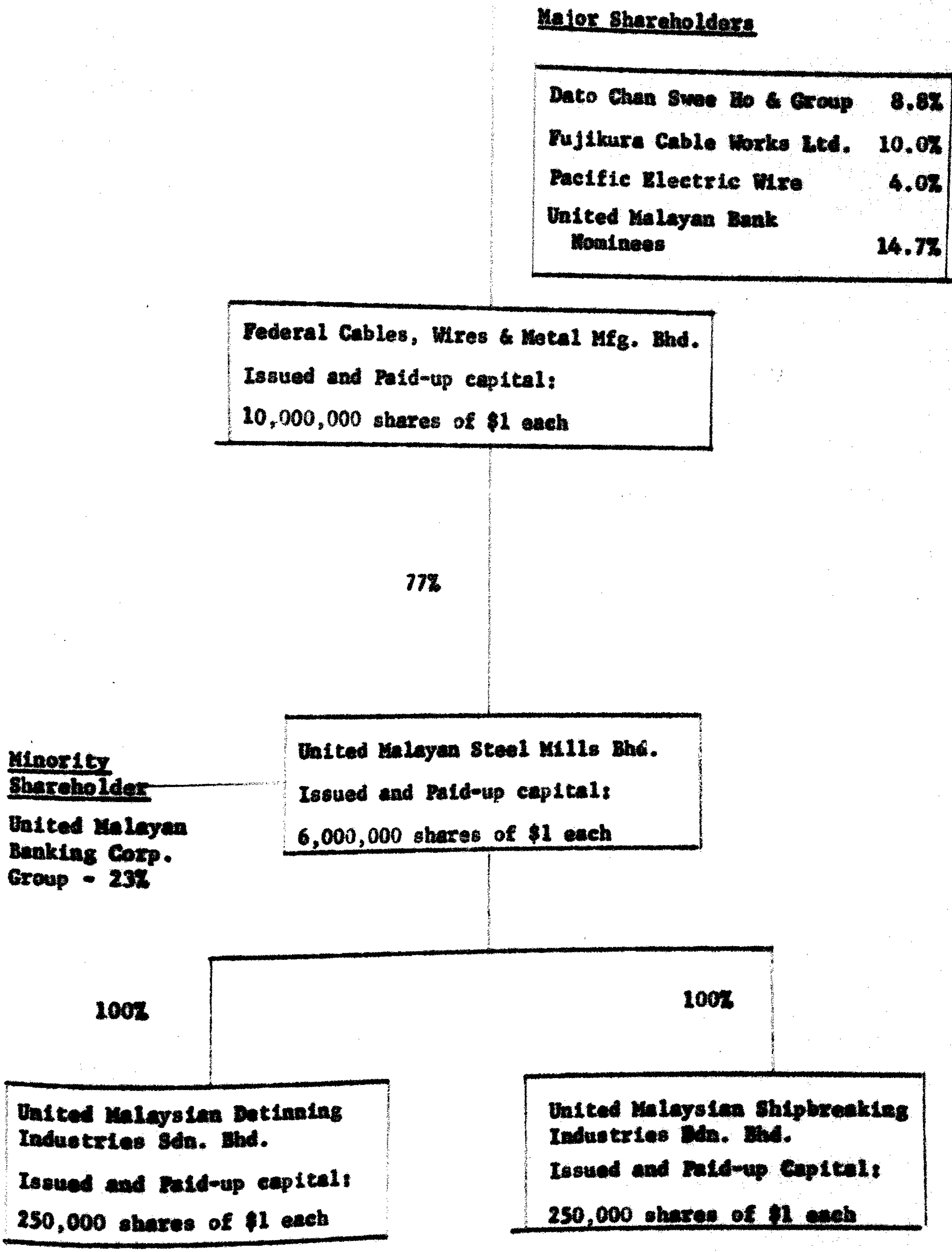

Figure 17

Source: Confidential.

Malayan Bank Nominees (14.7%).

Though United Malayan Bank Nominees had the largest shareholdings, they were not in control of the company because Datuk Chan had the backing of the Japanese and Taiwanese shareholders, namely Fujikura Cable Works and Pacific Electric, who collectively held about 14% of the equity. Therefore Datuk Chan was in fact exercising the power of 22.8% equity holdings (that is, 14% + 8.8%).

The proposed acquisition was motivated by the fear of Datuk Chan that the UMBC group may take control of FCW. He had indicated that this rival local group had been actively purchasing shares in the market.

The proposed acquisition would give Datuk Chan and his group a substantial direct control of 30.5% of the equity of FCW, while the rival local group's interest in the company would be reduced from 14.7% to 11.3% (See Figure 18).

This is a classic case of a company controller maintaining control of a company by preventing a take-over. This was proposed to be done by expanding the capital of the company (that is, issuing new shares) and allocating these new shares to the controller himself (or to a person or persons who can be dominated or influenced by the controller).

The structure of FCW, like most other enterprises, is pyramidal. The control of the apex of the pyramid would allow the

After Acquisition

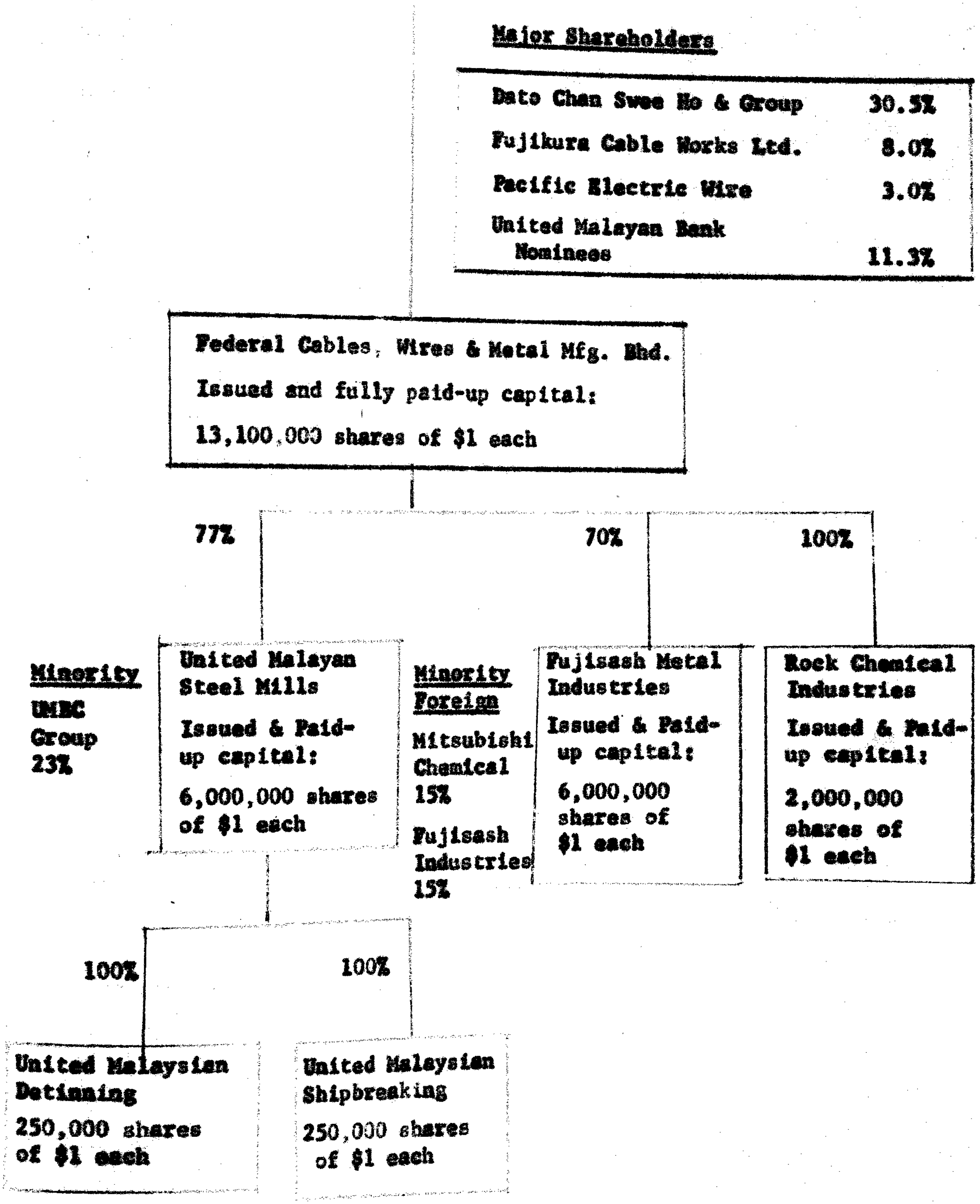

Figure 18

Source: Confidential

further control of all the subsidiaries. This is clearly illustrated by Figure 18. But Figure 18 is taken in isolation of the fact that there is a link between FCW and I & RG Bhd. As earlier pointed out, I and RG Bhd. was under the control of Datuk Chan (and group), but by the new proposition to acquire, Datuk Chan and his group's interest in FCW was substantially increased to give Datuk Chan the control of FCW too. In fact, I & RG Bhd. was also the shareholder of FCW. Therefore, to put it simply, I & RG Bhd. and FCW has the relationship of parent and subsidiary companies - the former being the parent and the latter the subsidiary.

Therefore here is a case of pyramidal structures and interlocking directorates that finally lead to the consolidation and an expansion of a business empire under the practical control of an individual, namely Datuk Chan (and his group).

Another very important point to be stressed here is the existence of some structures that further bring up the problem of economic concentration to a higher level. This is in regard to the fact that the entire business set-up of Datuk Chan is vertically integrated. The whole structure seems to have been planned to monopolise vertically and horizontally the interests in industries and realty.

The subsidiaries of I & RG Bhd. indulge in trade that deals with either realty or building materials or such like. And in the case of FCW, the point is even clearer. FCW manufactures enamel wires, telephone cables and copper rods and bars, PVC cables, copper wires and aluminium cables. All the subsidiaries of FCW would form its own raw material suppliers: United Malayan Steel Mills Bhd. manufactures mild steel bars and high tensile deformed bars of various sizes. United Malaysian Shipbreaking Industries Sdn. Bhd. deals with the breaking up of condemned ships and recover scrap metal (as raw materials for the holding company, FCW); United Malaysian Detinning Industries Sdn. Bhd. produces detinned scrap iron from tin-cans and tin cuttings (again as raw materials for the holding company); Fujisash produces aluminium products, presumably to partially supply FCW in its production of aluminium cables.

The proposed acquisition of Rock Chemical Industries Sdn. Bhd. is perhaps a sign of a new strategy of FCW to further diversify its interests in industries and realty - namely in the production of calcium carbonate cement - again another related product to industries and realty.

Empire-Building of Sime Darby Holdings Ltd.

The Sime Darby Group is a classic case of a company who has a monopoly structure and at the same time carries on subtle monopolisation activities.

Sime Darby has been chosen for the purposes of this study because it offers the picture of some of the activities that some of the biggest companies in Malaysia are involved in.

Sime Darby is listed in the top five companies in Malaysia and Singapore in terms of its capital value. According to the Business Times Survey, Sime Darby is second in the top hundred ratings, with capital market value of $232.4 million. Although Sime Darby Holdings Ltd. was incorporated in England, most of its assets are in Malaysia, and for the past two years almost all its earnings have come from Malaysia too.[41]

For the purposes of studying the diversification activities of Sime Darby that has made it into a giant monopoly structure with monopolisation activities, it is proposed that a brief historical development of Sime Darby Holdings Ltd. be outlined with special focus on its acquisition and diversification activities:

In 1910, Sime Darby & Co. Ltd. was incorporated in Singapore, to establish a rubber estate supply business in Malacca.

In 1918, it acquired Sellar, Murray & Co. Ltd. of Penang and therefore becoming engaged in general merchanting.

In 1928, it acquired Sarawak Trading Co. Ltd. of Kuching, another company dealing in general merchanting.

In 1958, two major events took place. Firstly, Sime Darby Malaysia Bhd., Sime Darby (Borneo) Sdn. Bhd. and Sime Darby Singapore Ltd. were formed as specialist subsidiaries of Sime Darby & Co. Ltd. to carry out mainly merchanting, technical engineering and financial services. Secondly, Sime Darby Holdings Ltd. was incorporated in England to take over undertaking of Sime Darby & Co. Ltd. Shares

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[41] Far Eastern Economic Review, 21st May 1976, p. 73.

were therefore subsequently listed in Stock Exchanges of Malaysia and Singapore and London Stock Exchange.

In 1946, Tractors Malaysia Bhd. of Malaysia was formed as subsidiary of Sime Darby Holdings Ltd. to undertake the distribution and service of tractors, heavy earth moving machines and ancillary equipment.

In 1970, it acquired the entire issued capital of Motion Smith & Son Ltd. of Singapore - a supplier of nautical and scientific equipment.

In 1971, Sime Darby acquired the entire issued capital of Seafield Amalgamated Rubber Co. Ltd. of U.K., a rubber and oil palm planting concern.

From 1972 onwards, the empire-building of Sime Darby took on a more rapid speed.

In 1972 itself, eight events took place that were worthy of mention:

a) Sime Darby Holding Ltd. acquired the entire issued capital of R.G. Shaw & Co. Ltd. of U.K. to effect a merger.

b) Sime Darby Far East Ltd. acquired 40% of the issued capital of Harper International Ltd. of Hong Kong, a leading automobile distributor.

c) Sime Darby Far East Ltd. acquired 50% of the issued capital of Amoy Canning Corporation (H.K.) Ltd. of Hong Kong, a food manufacturer.

d) Sime Darby Far East Ltd. acquired 37½% of the issued capital of The China Engineers (Holdings) Ltd. of Hong Kong, a company engaged in trading, contracting, manufacturing, shipping, property and civil engineering.

e) Sime Darby Holding Ltd. listed on Hong Kong Stock Exchange Ltd.

f) Pernas-Sime Darby Sdn. Bhd. of Malaysia formed as a joint-venture between Sime Darby Malaysia Bhd. (holding 49% of its issued capital) and Pernas (holding 51%).

g) Sime Darby Holdings Ltd. acquired 99% of the issued capital of Edible Products Limited of Singapore, a manufacturer of edible oils.

h) Sime Darby London Ltd. acquired the entire issued capital of Clive Holdings Ltd. of U.K., a money broking holding company.

In 1973, four major activities highlighted the expansionist policy of Sime Darby:

a) Sime Darby Holdings Ltd. acquired the entire issued capital of Woodward and Dickerson Incorporated of USA, a manufacturer of fertilizer and chemical.

b) Sime Darby Holdings Ltd. acquired 75% of the issued capital of Czarnikow Investment Services (CIS) of U.K., an investment holding and advisory company.

c) Sime Darby Holdings Ltd. acquired the entire issued capital of Golden Bay Realty (Pte.) Ltd. of Singapore, a property developer.

d) 66% of the issued capital of Consolidated Plantation of U.K., a rubber and oil palm plantation company, to be owned by Sime Darby Holdings Ltd. (previously 43%).

After this particular deal, Consolidated Plantations will become a fully owned subsidiary of Sime Darby which will become the second largest group in Malaysia (the largest being the Guthrie Corporation).

The tax residence of the company was proposed to be moved from U.K. to Malaysia.

As at 30th June, 1975, Sime Darby has 65 principal subsidiary and associated companies. The smaller members of the group are too many to be taken into account. There are nine principal subsidary and associated companies in Hong Kong; one in India; eighteen in Malaysia; one in the Netherlands; twenty-three in Singapore; and thirteen in the U.K.[42]

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[42] See Report and Accounts for the Year ending 30th June 1975, of Sime Darby Holdings Ltd.

Looking at the 10 year statistics of Sime Darby,[43] the growth rate of the group is alarming.

In 1966, the profit before taxation was £1 million as compared to £20.8 million in 1975 - an increment of 2080%.

By total assets employed, the increment from 1966 to 1975 is by 1898.5%.

Sime Darby is not merely achieving monopoly power through diversification - that is, in a conglomerate fashion, but the subsidiaries of Sime Darby have achieved the status of monopolies in their various respective industries too. Some of the industries in which Sime Darby has specific monopolies are: financing business, plantation, tractors, heavy equipment and motor vehicles industries.

To give a more specific instance, Tractors Malaysia Bhd. (a subsidiary of Sime Darby) is now the leading company for tractors in Malaysia. (This is not to mention Sime Darby's other tractor subsidiary, namely, Agricultural Tractors Sdn. Bhd.).

The quasi-political aspect of Sime Darby has recently been discussed by Phillip Bowring[44] with respect to Sime Darby's refusal to submit to the jurisdiction of the Capital Issues Committee of Malaysia, although the majority of the company's interests are located in Malaysia itself. This controversy lends

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[43] See Report and Accounts for the year ending 30th June 1975, of Sime Darby Holdings Ltd.

[44] See Far Eastern Economic Review, 21st May 1976, pp. 71 - 73.

further credence to the writer's hypothesis that bargaining power of companies in Malaysia is now taking on a political appearance.

One final important point to be said of the activities of Sime Darby is its habit of purchasing interests by way of issuing scrips instead of cash. In fact, the majority of its acquisitions were most probably done by this method, at least in Malaysia. The Malaysian company law does not prohibit purchase of interest by scrips (in contrast to the U.K. and Singapore's codes on take-overs). As a result of public confidence of the value of shares of big companies like Sime Darby, purchase of interests through issues of scrips could only be done by such reputed companies. But issues of scrips do not involve cash; this therefore means that companies like Sime Darby can pursue their expansionist policies without the need for cash. A $1/- share may at the time of issue of the scrips be at the value of $5/- and property is purchased by using the share at the value of $5/-. This actually means that the purchasing power of the issuing company has been increased by $4/- per share - a sum which is fictitious and yet capable of acting like a legal tender. This is indeed a powerful instrument used by companies in their acquisition activities. Therefore, under the present handicapped regulations in Malaysia, even money does not pose a limitation to the desire to purchase bigger assets, for the big companies can still purchase without the need of it all.

Interlocking Directorships in Merlin Hotels (M) Bhd. and the Faber Union group

The activities of Faber Merlin have been the subject of controversy for quite some time. The issues involved are varied ranging from non-compliance with the Capital Issues Committee requirements to the internal squabbles among the directors of the company in their attempt to get control of the company.

But for the purpose of the present exercise, only the issue of interlocking directorates in Merlin Hotels (M) Berhad and the Faber Union Group will be discussed. It is to be pointed out that the writer is not quoting the above companies as part of empirical evidence to show the extent of interlocking directorates in Malaysia.[45] The writer only intends to illustrate an example of a local interlocking directorate structure. Faber Merlin happens to be the choice purely by coincidence. The case of interlocking directorships is rather serious in Malaysia, but unfortunately the present study could not make an empirical study of the matter, because of lack of research resources.

Interlocking directorships in the above companies may be less serious compared to the other suspected cases in Malaysia of which information is not easy to obtain - it is up to the relevant authority to investigate into the matter. The writer only hopes that the present illustration will open up the eyes of the relevant authority.

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[45] The extent of interlocking directorates has been shown by the work of Lim Mah Hui and Dr. Mary Anderson; see pp. 114-115.

The chart represented by Figure 19 illustrates the interlocking directorate in the Board of Directors of the four companies - namely, Faber Union (H.K.) Ltd., Faber Union Ltd. Singapore, Faber Union Sdn. Bhd. and Merlin Hotels (M) Bhd. The chart is self-explanatory and need no explanation.

It is to be noted also that the group structural holdings are in some cases as in Faber Union Ltd. Singapore and Faber Union Sdn. Bhd. or between Faber Union Sdn. Bhd. and Merlin Hotels (M) Bhd. take the form of cross-holdings - that is, two companies holding the interests of each other (See Figure 19). This structural cross-holdings have the effect of giving the directors from both the companies a more perpetual control of their respective companies.[46]

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[46] See article by Murray A. Pickering, "Shareholders' Voting Rights", Vol. 81, L.Q.R. 248, for a detailed explanation of this point.

CHAPTER FIVE

FOREIGN MONOPOLY LEGISLATIONS

A comparative study of foreign legislations pertaining to the problem of economic concentration (commonly known as the monopoly laws) is an essential requirement before one can make any reasoned conclusion and recommendations. The final chapter of this paper embodies the writer's conclusion and his humble recommendations. The present chapter therefore seeks to make a prior study of the relevant foreign legislations.

Monopoly laws can be found in almost all the countries in Europe, America, and in some countries in Asia like Japan, India, Pakistan and Thailand. But the present chapter only seeks to study monopoly legislations of only three countries, namely:

(a) U.S.A.;

(b) United Kingdom; and

(c) India.

These countries have been chosen because they provide a good cross-section of the various legislative models available with respect to economic concentration.

<u>United States Legislation</u>

In the United States the legislations dealing with the monopolies and restrictive practices are called the Anti-Trust laws. Both the terms mean the same thing and in fact the present tendency is to use them interchangeably, even in the European countries.

The substantive provisions of the anti-trust laws are found in three main statutes, namely:

(a) The Sherman Act of 1890;

(b) The Clayton Act of 1914;

(c) The Federal Trade Commission Act of 1914.

For the present purpose of surveying the anti-trust laws of U.S., we need to consider only seven important sections taken from all the three statutes above together with their relevant amendments.

(a) The Sherman Act of 1890 [1]

This Act has been acclaimed as a "Charter of Freedom" for American Industry. Probably this is because the Sherman Act of 1890 is the first Act that attempts to control economic concentration in the United States. The passing of the Act was the result of the widespread concern of the concentrated state of American business and industry. This widespread concern was well summed up by the author of the Act itself; namely Senator John Sherman:

> "The popular mind is agitated with problems that may disturb social order, and among them all none is more threatening than the inequality of condition, of wealth, and opportunity that has grown within a single generation out of the concentration of capital into vast combinations to control production and trade and to break down competition. These combinations already defy or control powerful transportation corporations and reach State authorities. They reach out their Briarean arms to every part of our country. They are imported from abroad. Congress alone can deal with them, and if we are unwilling or unable there will soon be a trust for every production and a master to fix the price for every necessity of life." [2]

[1] See Appendix 'D' for excerpts of the Act.

[2] Earl W. Kintner and Mark R. Joelson, An International Antitrust Primer, Macmillan Publishing Co., N.Y. 1974, p. 4.

There are two substantial provisions to be looked at in the Sherman Act of 1890, namely Sections 1 and 2.

Section 1 of the Act reads:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States or with foreign nations, is hereby declared to be illegal ...... "

Section 2 of the Act further reads:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

Section 1 of the Act seems to be a general provision covering all kinds of 'restraint of trade or commerce'. In fact on the literal reading of the section, it is too sweeping in character because it declares every contract, combination, or conspiracy in restraint of trade or commerce to be illegal. Therefore if one is to interpret this section so strictly in its most literal sense there would be many useful trade or business arrangements that would be outlawed. One instance of this would be the case of a sale of business with the usual covenant over time and space not to compete. English and American laws have long recognised the validity of such reasonable restraints of trade.[3]

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[3] See the cases of Nordenfelt v Maxim Nordenfelt Guns and Ammunition [1894] A.C. 535; Herbert Morris v Saxelby [1916] 1 A.C. 688; Herreshoff v Boutineau 19 A.712 (S.C. R.I., 1890); etc.

The Courts in the United States did, however, construe the section strictly in its literal sense. Therefore when they first confronted the problem, every contract in restraint of trade was declared illegal. Fortunately, this was not to continue for a long time for the Courts later on began to realise the consequences of their strict literal interpretation.

Therefore in 1898, in the celebrated case of United States v Addyston Pipe and Steel Company,[4] Judge Taft, who became the President of the United States and who was then Chief Justice of the Supreme Court, gave an opinion that became the start of the modern anti-trust law in U.S. He propounded the 'rule of reason' which basically states that only unreasonable contracts in restraint of trade are illegal. He founded this rule by reference to the common law principles. He said:

> "....... no conventional restraint of trade can be enforced unless the covenant embodying it is merely ancillary to the main purpose of a lawful contract, and necessary to protect the covenantee in the enjoyment of the legitimate fruits of the contract, or to protect him from the dangers of unjust use of those fruits by the other party."

This statement is clearly a restatement of the common law rules on restraint of trade which are based on the rule of 'reasonableness'. The 'reasonableness' test is now the test in the 'rule of reason'.

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[4] 85 F. 271 (6th Cir. 1898), modified and aff'd, 175 U.S. 211 (1899).

only those restraints of trade which are unreasonable have been held to be in violation of Section 1 of the Sherman Act.

The 'rule of reason' has been adopted in the famous Standard Oil Case.[5] This case is important not only because it further strengthened the 'rule of reason', but because it expressed its opinion as to the meaning and inter-relationship of Sections 1 and 2. The court stated:

> "In other words, having by the 1st Section forbidden all means of monopolising trade, that is, unduly restraining it by means of every contract, combination, etc., the second section seeks, if possible, to make the prohibitions of the act all the more complete and perfect by embracing all attempts to reach the end prohibited by the 1st Section, that is, restraints of trade, by any attempt to monopolize, or monopolization thereof, even although the acts by which such results are attempted to be brought about or brought about be not embraced within the general enumeration of the 1st Section."[6]

What this actually means is that Section 1 of the Act condemns all unreasonable restrictions of trade in general terms. This section is very far reaching. But Section 2 places a special emphasis on the illegality of the practices that bring about the problem of monopoly and monopolisation. It can be said that both Sections 1 and 2 are aimed at dealing primarily with the monopolistic business practices that are not conducive to the economic good of the community.

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[5] Standard Oil Co. of New Jersey v U.S., 221 U.S. 1(1911).

[6] Earl W. Kintner and Mark R. Joelson, op. cit., p. 11.

The Sherman Act of 1890 is therefore an act aimed at tackling one of the causes of economic concentration - namely monopolistic practices and other general business practices that restrains trade.

Both the sections (and S. 3 too) carry a maximum penalty of fifty thousand (U.S.) dollars, or by imprisonment not exceeding one year, or by both the said punishments, in the discretion of the Court.

(b) The Clayton Act (including the Robinson-Patman Amendment) -

The Clayton Act was passed because of the varied defects present in the Sherman Act. The Clayton Act therefore seeks to reinforce the then existing anti-trust laws in the U.S. by getting rid of the defects.[7]

There are four important sections that need to be looked at under this Act, namely, Sections 2, 3, 7 and 8.

In brief, these sections declare illegal four specified types of restrictive or monopolistic practice:

(a) price discrimination (S. 2)

(b) exclusive-dealing and tying contracts (S. 3)

(c) acquisitions of competing companies (S. 7)

(d) interlocking directorates (S. 8)

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[7] The long title to the Clayton Act reads: 'An Act to Supplement existing laws against unlawful restraints and monopolies, and for other purposes.'

Section 2(a) of the Act reads:

> "That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchases of commodities of like grade and quality .... and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them ....."

Undoubtedly, this section aims at curbing price discrimination by traders who have as their aim the monopolisation of a certain trade. This is usually carried out by means of collusive agreements between traders and only those participating in the collusion receive the benefit and therefore the monopoly too.

Section 2(b) is the evidentiary section which talks of the burden of proof:

> "Upon proof being made, ... the burden of rebutting the prima facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorised to issue an order terminating the discrimination ...."

Sub-Sections (c), (d), (e) and of S. 2 deal with the detailed aspects of price discriminations appearing in various other forms.

Section 3 of the Act says:

> "That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies or other

> commodities ... . or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

The above section seeks to enforce the working of the free forces of the market by prohibiting such exclusive-dealing and tying contracts. It is important to note the underlined parts of the section which has the effect of a proviso: i.e. not every such dealings is prohibited - only those that tend towards creation of monopolistic situations are prohibited.

Section 7 of the Clayton Act is a lengthy one which spells out the details of conditions of acquisitions of companies by other companies. The gist of the prohibitory part of the section reads:

> "That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly...."

The above section is usually read in conjunction with S. 2 of the Sherman Act of 1890 because acquisitions are in fact a method of monopolising.

It is to be pointed out that the present S. 7 of the Clayton Act is the amended section.[8] This new section seeks to remedy the draw-backs of the previous section. The new section covers mergers by purchasing of assets which the old section did not contemplate. The new section, just as the old one, only prohibits acquisitions that aim at monopolising. Innocent purchases of stock for investment are still allowed. The far reaching effect of S. 7 is exhibited in its attempt to cover all types of mergers - namely, horizontal, vertical and conglomerate mergers.[9]

Section 8 of the Clayton Act tackles the problem of interlocking directorates. The most important part of the section says:[10]

> "........ no person at the same time shall be a director in any two or more corporations, any one of which has capital, surplus, and undivided profits aggregating more than $1 million, engaged in whole or in part in commerce ...... if such corporations are or shall have been theretofore, by virtue of their business or location or operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the anti-trust laws."

The usefulness of the above section has been proved by experience in U.S. and other countries (including Malaysia) that extreme economic concentration can occur if a group of individuals or corporations are linked by some common individuals through the process of inter-locking directorships. This section only affects the companies with

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[8] Amended by the Celler-Kefauver Act of 1950.

[9] Ref: Neale, The Antitrust Laws of the U.S.A., 2nd Edn., pp.180-183.
For cases on this matter, see: Brown Shoe Co. v U.S. (S.C. 1962)
U.S. v Philadelphia National Bank (S.C. 1963), etc.

[10] See Appendix 'E' for the fuller version of the section.

capital, surplus and undivided profits aggregating more than $1 million.

(c) The Federal Trade Commission Act of 1914

This Act establishes the Federal Trade Commission and lays down the duties and powers of the Commission. But apart from this, the Act contains a provision in its S. 5 which has become very important in the enforcement of the anti-trust laws of the U.S.

Section 5 of the Act reads:

> "Unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce are hereby declared illegal." 11

The interpretation of the courts on the phrase 'unfair methods of competition' as to include conduct that would violate the Sherman Act too, has given the FTC the power to exercise jurisdiction that would otherwise be only within the purview of the Sherman Act.

United Kingdom Legislation

For the purposes of surveying the monopoly laws of U.K., three main statutes are relevant, namely:

(a) The Monopolies and Restrictive Practices (Inquiry and Control) Act, 1948;

(b) The Monopolies and Mergers Act, 1965; and,

(c) Fair Trading Act, 1973.

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11 As amended by the Wheeler - Lea Act of 1938. See Appendix 'F' for extract of the Act.

The Restrictive Trade Practices Act, 1956, though forming part of the law on competition is not strictly a law dealing with monopolies. They are related no doubt, but for the purposes of the present study only laws relating to monopolies and monopolistic practices will be considered.

(a) The Monopolies and Restrictive Practices (Inquiry and Control Act, 1948.

This Act was made for the purpose of enacting 'provision for inquiry into the existence and effects of, and for dealing with mischiefs resulting from, or arising in connection with, any conditions of monopoly or restriction or other analogous conditions prevailing as respects the supply of, or the application of any process to, goods, buildings or structures, or as respects exports'.[12]

As the title suggests, this Act also deals with matters relating to restrictive practices which as earlier on indicated will not be the subject of our present discussion. As such only provisions relating to monopoly will be looked into.

Section 1 of the Act makes provision for the establishment of a Commission to be called the Monopolies and Restrictive Practices Commission. And S. 2 lays down the general duties of the Commission. The duties of the Commission are mainly in relation to the reference made to it by the Board of Trade in matters of which the Act applies as respects either:

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[12] Cited as the long title of the Act.

(a) the supply of goods of any description; or

(b) the application of any process to goods of any description; or

(c) exports of goods of any description from the U.K., either generally or to any particular market.

When a matter is referred to the Commission by the Board of Trade, the Commission is expected to investigate and make a report on it.

S. 2 follows up by giving the meaning of "conditions to which the Act applies" in relation to supply:

> S. 3(1) "Conditions to which this Act applies shall be deemed for the purposes of this Act to prevail as respects the supply of goods of any description if either -
>
> (a) at least one-third of all the goods of that description which are supplied in the United Kingdom or any substantial part thereof are supplied by or to any one person, or by or to any two or more persons, being inter-connected bodies corporate, or by or to any such two or more persons as are described in subsection (2) of this section, or ...."

Therefore by the above section, one of the circumstances in which the Board of Trade would refer a matter to the Commission is when it thinks that a third or more of the goods specified or a substantial part of it were supplied or acquired in the U.K. either by a single firm, or by several who restricted competition.

But unlike the Federal Trade Commission of the United States, the Monopolies Commission of U.K. has limited power. This is especially conspicuous in its inability to initiate an inquiry.[13] The Board of Trade is to refer cases to the Commission and in this respect the Board has an unfettered freedom to choose matters to be referred to the Commission. The Board of Trade receives a lot of complaints that may fall within the ambit of the Act either through individual members of the public or interested groups or organizations.

By virtue of S. 6 of the Act, the Board of Trade is empowered to prescribe the types of references it may wish to refer to the Commission - it may ask for a factual report stating whether the conditions do apply or not. If the conditions do apply then their manner and extent have to be considered too.

Again, if the Board of Trade wishes, it may even ask the Commission to report whether these conditions and practices are against the public interest or not.

And as regards the concept of 'public interest', S. 14 of the Act attempts to lay down some of its ingredients. S. 14 reads:

> "In determining whether any conditions to which this Act applies or any things which are done by the parties concerned as a result of, or for the purpose of preserving, any conditions to which this Act applies, operate or may be expected to operate against the public interest, all matters which appear in the particular circumstances to be relevant shall be taken into account and, amongst other things, regard shall be had to the need, consistently with the general position of the United Kingdom, to achieve -

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[13] S. 2 of the 1948 Act.

(a) the production, treatment and distribution by the most efficient and economical means of goods of such types and qualities in such volume and at such prices as will best meet the requirements of home and overseas markets;

(b) the organisation of industry and trade in such a way that their efficiency is progressively increased and new enterprise is encouraged;

(c) the fullest use and best distribution of men, materials and industrial capacity in the United Kingdom; and

(d) the development of technical improvements and the expansion of existing markets and the opening up of new markets."

Therefore, basically the Act defines public interest in conjunction with, inter alia, the best allocation of the country's resources; efficiency of production and improvement in the respective technology; encouraging competition and the opening up of new markets. Therefore those trade practices that do not constitute a hindrance to the achievement of the above objectives would most probably be allowed by the Act as being not against public interest.

The definition in <u>S. 14</u> of 'public interest' is of course very general in character and difficult to make use of.

It has been widely stated that the Commission's work under the 1948 Act had been mainly in the area of restrictive trade practices rather than in the area of monopoly proper.

In 1956, the Commission's power to consider whether restrictive agreements made between companies were contrary to public interest was transferred to a new court - the Restrictive Practices Court by the <u>Restrictive Trade Practices Act 1956</u>. Therefore the name of the Commission was changed from Monopolies and Restrictive Practices Commission to just Monopolies Commission in accordance with its new functions.

(b) <u>The Monopolies and Mergers Act, 1965</u>

By the above Act, an extension was made for the government to refer to not only matters relating to goods but also to the supply of services. This therefore filled the drawbacks of the previous Acts which were severely criticised for their omission of matters relating to services.

Two sections of the Act are relevant for the present purpose, namely <u>Section 3</u> and <u>Section 6</u>.

The earlier part of Section 3 deals with price discrimination and other forms of discrimination prohibited by the Board of Trade in relation to monopoly situations. It also spells out the powers of the Board.

<u>S. 3(5)</u> is an important section. This provision gives the Board the power:

> "to prohibit or restrict the acquisition by any person of the whole or part of the undertaking or assets of another person's trade or business, or the doing of anything which will or may result in any bodies corporate becoming inter-connected bodies corporate, or may require that, if such an acquisition is made or anything is done which has that result, the persons concerned or any of them shall thereafter observe any prohibitions or restrictions imposed by or under the order."

The whole idea behind this provision is the prevention of monopoly formation through the mechanism of inter-connected companies. One such structure can take the form of parent/subsidiary relation.

S. 3(6) of the Act gives the Board of Trade the power to disintegrate certain trade or business by the sale of any part of the undertaking or assets or otherwise and also for the division of any group of inter-connected bodies corporate or to do any such matters as may be necessary to effect or take account of the division, including -

(a) the transfer or vesting of property, rights, liabilities or obligations;

(b) the adjustment of contracts, whether by the discharge or reduction of any liability obligation or otherwise;

(c) the creation, allotment, surrender or cancellation of any shares, stock or securities;

(d) the formation or winding up of a company or other association, corporate or unincorporated, or the amendment of the memorandum and articles or other instruments regulating any company or association; etc.

Section 6 of the Act gives the Board new powers in relation to mergers. The Board of Trade may refer certain matters pertaining to mergers to the Commission for investigation and report and the Board then shall publish the reference to bring it to the notice of the persons affected. But there are several conditions that have to be met before the Board makes the merger reference to the Commission:

(a) Firstly, it must appear to the Board that there are two or more enterprises, one at least carried on in U.K., or by or under the control of a body corporate incorporated in the U.K., have, not earlier than six months previously, ceased to be distinct enterprises;

(b) Secondly, there must be one of the following two conditions met:

   (i) as a result of the above enterprises ceasing to be distinct enterprises, at least one-third (or a substantial part thereof) of the supply of goods of a certain description which are supplied in the U.K., are supplied by any one person or to any one person, or by or to the persons by whom the enterprises are carried on. (almost similar provision is made for the supply of services);

   (ii) where the value of the assets taken over exceeds five million pounds.

In a nutshell, the Monopolies and Mergers Act, 1965, gives wide powers to the Board of Trade to prohibit proposed mergers or to dissolve existing monopolies on the recommendation of the Commission. It can also delay the completion of a merger. Investigations of mergers under the Act pertains only to the taking over of assets worth more than five million pounds or where such mergers bring about a 'monopoly situation'. The 'monopoly situation' spelt in the 1965 Act is based on the 1948 Act - i.e. on the one-third or more market control of supplies.

(c) <u>Fair Trading Act 1973</u>

The <u>Fair Trading Act, 1973</u> made some important organisational changes. Under the Act, the office of the Director-General of Fair Trading was created. The Director is given the power to make monopoly references to the Commission (the Minister is also free to do the same). The previous monopoly legislations are, by this Act, consolidated and tightened up.

<u>S. 6</u> of the Act has an important provision that redefines the monopoly situation. The new definition enables goods or services to be referred to the Commission if a single firm supplies or acquires a quarter of them, rather than a third.

<u>S. 64</u> of the Act allows the Minister to refer a merger situation to the Commission for investigation and report where it appears to him that:

(i) two or more enterprises ceased to be a distinct enterprises;

(ii) the value of the assets taken over exceeds 5 million;

(iii) as a result of a merger, the monopoly situation relating to the supply of goods or services is created or enhanced.

S. 65(1) of the Act provides that:

> "..... any two enterprises shall be regarded as ceasing to be distinct enterprises if either -
>
> (a) they are brought under common ownership or common control (whether or not the business to which either of them formerly belonged continues to be carried on under the same or different ownership or control), or
>
> (b) either of the enterprises ceases to be carried on at all and does so in consequence of any arrangements or transactions entered into to prevent competition between the enterprises."

The definition of 'common control' has been given a wide definition for purposes of the Act. Section 65(2) reads:

> "enterprises shall ...... be regarded as being under common control if they are -
>
> (a) enterprises of inter-connected bodies corporate, or
>
> (b) enterprises carried on by two or more bodies corporate of which one and the same person or group of persons has control, or
>
> (c) an enterprise carried on by a body corporate and an enterprise carried on by a person or group of persons having control of that body corporate."

The definition of 'inter-connected bodies corporate' is derived by reference to S. 154 of the English Companies Act of 1948 which lays down the conditions where parent-subsidiary relations exist.

But there can be situations where no such relation exists and yet influence can still be maintained on a body corporate by person or group of persons. With this in view, S. 65 of the Fair Trading Act, 1973 was drafted to extend the meaning of common control.

S. 65(3) reads:

> "a person or group of persons able, directly or indirectly, to control or materially to influence the policy of a body corporate, or the policy of any person in carrying on an enterprise, but without having a controlling interest in that body corporate or that enterprise, may .... be treated as having control of it."

Experience showed that the previous English monopoly legislations had a serious drawback in that they do not cater for situations where a monopoly is formed by inter-connection of bodies corporate not through one person only but through persons associated with him. Apperently this control of bodies corporate through associates was a method of circumventing the then monopoly legislations in U.K. But S. 77 of the Fair Trading Act, 1973 has taken care to consider and amend this serious drawback.

S. 77(1) of the Act thus reads:

> "associated persons, and any bodies corporate which they or any of them control, shall (subject to the next following subsection) be treated as one person."

Subsection 4 defines what persons are 'associated':

> "the following persons shall be deemed to be associated with one another, that is to say -
>
> (a) any individual and that individual's husband or wife and any relative, or husband or wife of a relative, of that individual or of that individual's husband or wife;
>
> (b) any person in his capacity of trustee of a settlement and the settlor or grantor and any person associated with the settlor or grantor;
>
> (c) persons carrying on business in partnership and the husband or wife and relatives of any of them;

> (d) any two or more persons acting together to secure or exercise control of a body corporate or other association, or to secure control of any enterprise or assets."

It can therefore be seen that the English (like the Americans) have, through a number of years, amended and consolidated their monopoly legislations to include all foreseeable circumstances and situations that would affect the economic concentration of U.K., especially so in the field of monopoly and restrictive practices.

Indian Legislation

The Indian laws on monopolies are set out in detail in the Monopolies and Restrictive Trade Practices Act, 1969. The Act was passed after the Government had studied the economic concentration problems in India through the Monopolies Inquiry Commission which was appointed in 1964. The report of the Commission was published in December 1965.

The background of the Indian Monopolies and Restrictive Trade Practices Act is traceable to the Constitution of India itself. Article 39(c) of the Indian Constitution declares that:

> "The State shall, in particular, direct its policy towards securing that the operation of the economic system does not result in the concentration of wealth and the means of production to the common detriment."

The provisions in the Indian Constitution were spelled out clearly to achieve the objectives of a 'Welfare State'. In 1955, the question of distribution of wealth was taken a step further when the Indian

National Congress, the ruling party, adopted a socialistic pattern of administration throughout India. This political background provides a support for the constitutional and municipal laws that are presently governing matters relating to monopolies and restrictive practices.

The objectives of the Indian Monopolies and Restrictive Trade Practices Act, 1969 are:

(a) ensuring that there would not be concentration of economic power in carrying out the economic policies of the State which may result in common detriment;

(b) to control monopolies;

(c) to prohibit any monopolistic and restrictive trade practices that prejudice the public interest;

(d) to promote competition in the economic system.

To achieve the above objectives, the government has appointed a permanent statutory body called the Monopolies and Restrictive Trade Practices Commission. The Commission is empowered with mandatory powers in respect of restrictive trade practices and advisory powers in respect of monopolistic practices.

With respect to expansions of companies, there are few provisions that regulate and control the conduct.

S. 21 of the Act makes it compulsory for an undertaking proposing to expand substantially to require approval from the government. The government will consider the application along the line of national policies and public interest. The government can also refer the matter to the Commission for a fuller report.

S. 22 of the Act regulates and controls establishment of new undertakings which after establishment would become an inter-connected undertaking of an undertaking having assets worth more than rupees twenty crores. Permission from the government is needed on such projects. Again here the Commission may be consulted.

SS. 23, 24 and 25 of the Act seek to restrict mergers, take-overs and amalgamations. It is provided that any such schemes of undertakings having assets worth rupees twenty crores or more, or dominant undertakings[14] having assets of rupees one crore or more are to receive approvals by the government.

The government may act on advice of the Commission. Where a merger, amalgamation or take over has taken place in contravention of the provisions of the Act, the government can issue cease and desist orders and to give further directions as is necessary.

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[14] S. 2(d) of the Indian Monopolies and Restrictive Trade Practices Act, 1969 defines a 'dominant undertaking' as one in which either alone or along with its inter-connected undertakings:

(i) produces, supplies, distributes or otherwise controls not less than one third of the total goods of any description produced, supplied or distributed in India or any substantial part thereof, or

(ii) provides or otherwise controls not less than one-third of the total goods of any description produced, supplied or distributed in India or any substantial part thereof.

S. 25 of the Act regulates interlocking directorates. The section prohibits a director of an undertaking having assets worth rupees twenty crores or more, or of a dominant undertaking having assets worth rupees one crore or more, to be directors of more than ten inter-connected companies without the permission from the Government.

We first survey the plot, then draw the model;
And when we see the figure of the house,
Then must we rate the cost of erection which,
if we find outweighs ability,
What do we then but draw anew the model.

- Shakespeare (Henry IV, Part II).

The World will always be governed by self-interest. We should not try to stop this; we should try to make the self interest of cads a little more coincident with that of decent people.

- Samuel Butler.

CHAPTER SIX

CONCLUSIONS AND RECOMMENDATIONS

A. Conclusion

It is only proper to sum up the present paper by looking back at the hypothesis stated at the beginning of the exercise. It is proposed that we conclude by addressing ourselves to the issues raised in the hypothesis and to make a brief judgement as to whether sufficient proof has been enumerated or not in support of the hypothesis.

In the general hypothesis, it was stated that the prevailing economic situation in Malaysia is indicative of the existence of high economic concentration that justifies the introduction of legal and extra legal means of regulating or controlling it and that the economic concentration referred to here exists as both market and overall concentrations. This general hypothesis has been elaborated in the form of specific hypothesis. It is appropriate therefore to analyse the specific hypothesis to arrive at the truth of the general hypothesis.

(1) Market dominance (either by commodity or service wise) in the various respective industries has been proven to exist in all the industries surveyed under the present exercise. The only industry that seems to be not so is the tubes industry. But as we have seen, though the companies[1] surveyed were not the dominant producers of tubes, they were nevertheless the dominant producers

[1] Namely Dunlop and Goodyear.

of tyres.

The industries that were surveyed and found to be facing the problem of dominant sellers or producers controlling the market are as follows:

(1) Cement industry;

(2) Tin Smelting industry;

(3) Steel industry;

(4) Chemical Fertilizer industry;

(5) Aluminium industry;

(6) Tractors industry;

(7) Petroleum industry;

(8) Brewery industry;

(9) Cigarettes industry;

(10) Tyres industry;

(11) Metal Boxes industry;

(12) Paints industry.

It is to be clearly noted that in all the industries above, the concentration ratios calculated were found to be high. This is particularly true in the cases of the following industries (with their respective concentration ratios shown against them):

(a) Petroleum Refining industry - (90-95)%

(b) Chemical Fertilizer industry - 63 %

(c) Tyre industry - 55.1%

(d) Brewery industry - 84.3%

(e) Iron and Steel industry - 70%

(f) Tin Smelting industry - 100%

(g) Tin Cans and Metal Boxes industry - 62.3%

(h) Cement industry - 82.9%

One important fact must be seriously given due consideration with respect to the concentration ratios calculated here, i.e. these ratios were calculated from the top two firms in the industry and not from the top three or four as are usually practised overseas such as in U.K. and U.S.A. This means that if we had calculated the concentration ratios of the industries surveyed by considering the top three or four corporations in their respective industries, a much higher concentration ratios would be recorded. Another way of looking at it is that in spite of the 'top-two system' used in the calculation of the concentration ratios, the concentration ratios of the industries surveyed were found to be very high and in some cases were much higher than those ratios recorded overseas which use the 'top-three' or 'top-four' systems. This alone is a notable factor that we can use to support the conclusion that market dominance by few firms in Malaysia is more concentrated here than in some countries overseas.

The survey has also shown by examples cited that there are many corporations in Malaysia that seek to achieve market dominance by growing either horizontally, vertically or in a conglomerate fashion. And the mechanisms commonly used to achieve these growth strategies are by way of establishing the parent/subsidiary or interlocking directorates relationships. Take-overs, mergers and other reconstructions are means whereby such relationships were sought to be achieved.

(2) It was also sufficiently proved that among other concentrations that constitute economic concentration in Malaysia, concentration of wealth among the top corporations and individuals forms the major aspect of it all. It was also hypothesised that most of the top corporations in Malaysia that contribute to the problem of wealth concentration are the multinational corporations (MNEs) which are foreign-controlled. This finding also shows the existence of the second type of concentration, namely overall concentration. Further support on this is rendered by the report from the Treasury[2] that during the period of 1957-70, the Gross National Product of Malaysia has more than doubled. The top 10% of the families in Malaysia have increased their share of household income from 34% to 40%. But the bottom 20% find that their share has dropped from 5.8% to 4.0%.

(3) The third specific hypothesis was illustrated by way of examples and strong corroborated impressions that there is a great deal of synonymity of economic powers and political powers. Though it was difficult for the writer to give emphirical evidence of such a hypothesis, it was shown that there is a likelihood that in certain sectors of the economy, economic powers have taken the appearance of political powers. The writer is confident that if a study is made to relate politicians with the private business activities in the

[2]Economic Report 1973-74 (The Treasury, Malaysia), p. 63.

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[2] Economic Report 1973-74 (The Treasury, Malaysia), p. 63.

country, the present hypothesis would be proven beyond doubt.

(4) Chapter two of this paper has surveyed the existing legal instruments in Malaysia that relates to matters of trade and commerce. There is no need for more to be said about this other than the fact that the present laws in Malaysia are not adequate at all to deal with the economic imbalance. In fact there are strong indications pointing to the ignorance of our system on the problem of concentration that we are now facing. Perhaps the problem is within the knowledge of the politicians but they prefer to sweep the issue aside.

The foregoing study has shown that the dangers arising out of the economic concentration are not imaginary but real and therefore it is only necessary for the present study to complete the discussion by recommending to the relevant authorities some measures to avert or at least to minimise these existing and potential dangers.

B. Recommendations

The Malaysian Constitution does not spell out the system of economy that we wish to pursue. Many countries have found it necessary to do so.[3] Incorporating the type of economic system that the country wish to adopt ensures that subsequent economic laws passed under the authority of the Constitution do not conflict with the economic ideals stated in the Constitution.

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[3] E.gs. India, U.S.A. etc.

The Indian Constitution declares that:

> "The State shall, in particular, direct its policy towards securing that the operation of the economic system does not result in the concentration of wealth and the means of production to the common detriment." [4]

The above declaration by the Indian Constitution confers a right to the Indian people to legitimately demand for a system that distributes the country's wealth more equitably.

The Malaysian government seems to have the same ideals as far as the concept of distribution of wealth is concerned. But these ideals are produced only in the various five-year plans which do not carry any legal sanction. The five-year plans cannot be used as an authority to challenge a law that goes against the spirit of the plans.

It is therefore proposed that the Malaysian Constitution be amended to incorporate the economic ideals of the nation. Such an amendment would give the nation a clear-cut path in its pursuance of economic development and economic justice. It would also act as a check on the present and future economic policies of the ruling body.

Having established a prima facie case that there exist serious economic concentration in Malaysia, the present paper proposes that an Inquiry Committee be set up to investigate the issues relating to economic concentration in Malaysia and to submit its report to the

[4] Article 39(c), Constitution of India.

Parliament together with its recommendations on measures to be taken to solve the problems. In this respect we can adopt the structure and powers of the various Inquiry Commissions set up by other various countries when they first tackled the issue of economic concentration.[5]

Should the Inquiry Committee finds that legal measures, inter alia, should be introduced to control and regulate economic concentration in Malaysia, a Monopolies Commission should be set up to deal with the problem.

It would be premature at the present stage to suggest the details of the legal instrument under which the Monopolies Commission is to be set up. These details can be worked out by the Inquiry Committee. But the writer wish to state some major outlines of the proposed Commission and the legal instrument.

(1) Firstly, the proposed Commission has to be an independent tribunal. Members of the Commission must be comprised of persons who are experts in the field of economics, business, law, accounting, etc.

(2) The Commission must be given the power to initiate its own inquiry in addition to receiving references from the government.

(3) The reports of the Commission must be tabled in both Houses of Parliament. This measure is designed to attract publicity to the reports and to provide for

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[5] See for example, the Report of the Monopolies Inquiry Commission 1965 of India.

discussion and dissemination of the findings. In laying the reports before the Parliament, the Minister concerned may with the consent of the Commission omit sections where publication would not be in the public interest or where disclosure involves the trade secrets and other legitimate interests of any person. In deciding what portions to omit, the Commission and the Minister must be satisfied that 'the portions of the report embodying that information could be omitted from the report without substantially affecting the sense, clarity or cogency of the report, or the value thereof as an aid to the proper understanding of the subject matter of the reference'.[6]

(4) In these monopoly references, the powers of the Commission should be advisory only. This is because in a developing country like ours, economic decisions are very much inter-twined with political decisions and therefore it is only proper that the ultimate decision on the reports be given to the government.

(5) But if the government decides to reject the reports and recommendations thereof of the Commission, the Minister concerned must give a reasoned explanation for such rejection to both the Commission and the Parliament.

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[6] S. 9(b) of 1948 Act, U.K.

(6) The Commission's powers to criticise the government's policies must not be curtailed at all.

This paper also seeks to propose that the government differentiates corporations that deal with export trades and those that deal with local consumers only. It is the latter that strict anti-trust enforcement must be maintained. In the former, emergence of monopolies do not raise anti-trust objections locally because they do not affect the local consumers, but concentration of wealth has to be checked. This differentiation is necessary because on the international level it is observed that a corporation would be more successful if it is monopolistic in nature. This is seen clearly in the Japanese experience.

It is also proposed that strict discipline be maintained among politicians and political parties in matters relating to political donations given by the business sectors. Such donations should be made illegal because they do not free the politician's thought and action from the incumbrance of favours received.

Pernas should further increase its present activities to bring more governmental participation in the private business sectors.

In the final analysis, the writer wish to suggest that ways and means should be found to bring a closer cooperation between lawyers and economists, accountants and others. The gap between lawyers and these other disciplines is especially serious in this country. As such economic laws drafted in Malaysia by lawyers are not in line with the economic objectives of the nation. There are numerous cases where laws have formed the stumbling block in the attainment of proper regulations and controls of business activities.

APPENDIX 'A'

SURVEY

Name of Company ______________________________

CAPITAL STRUCTURE

	As at 31.12.75 M$
A. AUTHORISED CAPITAL	
B. PAID-UP CAPITAL/PARTNERSHIP CAPITAL	
Malaysian (i) Bumiputra	
(a) Institution/Government Agency/Public Corporation	
(Please State) ______________________________	
______________________________	
(b) Individuals/Companies	
(ii) Chinese	
(iii) Indian	
(iv) Others	
Non-Malaysian (i) Singapore	
(State Name of Country) (ii)	
(iii)	
(iv)	
(v)	
TOTAL	

I. Value of Stocks Owned

	Book Value	
	Owned at 1.1.75	Owned at 31.12.75
1. Raw Materials, Components & Supplies		
2. Fuels		
3. Goods in Process		
4. Finished Goods		
TOTAL		

II. Value of Assets Owned

	Book Value		Depreciation/ Amortization Allowance in 1975
	Owned at 1.1.75	Owned at 31.12.75	
1. Machinery & Equipment			
2. Transport Equipment			
3. Land			
4. Building (including Factory Owned Houses)			
TOTAL			

III. New Assets Acquired/Sold During 1975

	Additions at Cost	Sold (Book Value)
1. Machinery & Equipment		
2. Transport Equipment		
3. Land		
4. Building		
TOTAL		

IV. Cost of Materials & Supplies Consumed During 1975

A. Materials

Items	Unit	Local		Imported	
		Quantity	Value	Quantity	Value
1.					
2.					
3.					
4.					
5.					
6.					
7.					
8.					
TOTAL					

B. Supplies

Items	Local ($)	Imported ($)
Packing Materials		
Other Supplies (if any)		

C. Others

No.	Items	Unit	Quantity Consumed	Cost Delivered at Factory
1.	Water	Gallons		
2.	Lubricants	Gallons		
3.	Fuels			
	(a) Fuel Oil	Gallons		
	(b) Diesel	Gallons		
	(c) Petrol	Gallons		
	(d) Others	Gallons		
4.	Electricity			
	(a) Purchased	k.w.h.		
	(b) Generated	k.w.h.		XXXX

V. Production Capacity, Actual Production, Sales & Exports During 1975.

Products	Unit	Maximum Capacity (One shift per annum)		Actual Production		Total Sales (Local & Exports)		Export Sales*	
		Quantity	Value	Quantity	Value+	Quantity	Value+	Quantity	Value
1.									
2.									
3.									
4.									
5.									
6.									
7.									
8.									
9.									
10.									
11.									
12.									
TOTAL									

* Excluding those to Sabah and Sarawak.

\+ Ex-factory

APPENDIX 'B'

Extract from the Guidelines for the Regulation of Acquisition of Assets, Mergers and Take-overs (FIC)

20th February 1974.

IV. Guidelines for Regulation of Acquisitions, Mergers and Take-overs

5. The guidelines are as follows:

(i) Against the existing pattern of ownership, the proposed acquisition of assets or any interests, merger or take-over should result directly or indirectly in a more balanced Malaysian participation in ownership and control;

(ii) The proposed acquisition of assets or any interests, merger or take-over should lead directly or indirectly to net economic benefits in relation to such matters as: the extent of Malaysian participation, particularly Bumiputra participation, ownership and management, income distribution, growth, employment, exports, quality, range of products and services, economic diversification, processing and upgrading of local raw materials, training, efficiency, and research and development;

(iii) The proposed acquisition of assets or any interests, merger or take-over of companies and businesses should not have adverse consequences in terms of national policies in such matters as defence, environmental protection, or regional development;

(iv) The onus of proving that the proposed acquisition of assets or any interests, merger or take-over of companies and businesses are not against the objectives of the New Economic Policy is on the acquiring parties concerned.

6. The above guidelines will apply to the following:

(i) Any proposed acquisition by foreign interests of any substantial fixed assets in Malaysia;

(ii) Any proposed acquisition of assets or any interests, mergers and take-overs of companies and businesses in Malaysia by any means, which will result in ownership or control passing to foreign interests;

(iii) Any proposed acquisition of 15% or more of the voting power by any one foreign interests or associated group, or by foreign interests in the aggregate of 30% or more of the voting power of a Malaysian company and businesses;

(iv) Control of Malaysian companies and businesses through any form of joint-venture agreement, management agreement, and technical assistance agreement or other arrangements;

(v) Any merger and take-over of any company or business in Malaysia whether by Malaysian or foreign interests;

(vi) Any other proposed acquisition of assets or interests exceeding in value of $1 million whether by Malaysian or foreign interests.

7. The above guidelines will not apply to specific projects which are approved by the Government.

V. Submissions of Proposals

8. Proposals for any acquisition of assets or any interests, mergers and take-overs of companies or businesses in Malaysia as set out in the above guidelines should be submitted and addressed to the Secretary of the Foreign Investment Committee (F.I.C.), Economic Planning Unit, Prime Minister's Department, Jalan Dato' Onn, Kuala Lumpur 11-01.

9. Proposals should be accompanied by all relevant information and documents to enable the Foreign Investment Committee to determine whether the proposed acquisition of assets or interests, mergers and take-overs of comapnies and businesses are consistent with the national interest. Such documents and information will include:

(i) The scheme of acquisition of assets or interests, mergers and take-overs, including distribution of shareholdings and any other type of securities, by citizenship;

(ii) Financial statements relating to the existing company or business being acquired, for the last three years;

(iii) Financial statements relating to projections for the next three years following the proposed acquisition of assets, or any interests, mergers or take-overs;

(iv) A list of existing substantial shareholders and their nominees showing details of substantial shareholdings by indiviudal foreign interests and associated groups of foreign interests, substantial shareholdings by individual Malaysian interests and associated groups of Malaysian interests, the proportions of ownership held by foreign interests in the aggregate and by Malaysian interests in the aggregate and the proportion of voting rights exercisable by each of the foregoing classes of shareholder. Shareholding and voting rights held by persons or companies known to be nominees should be identified separately. Similar details in respect of all the foregoing classes of shareholder should be provided in respect of the ownership of any voting share option granted by the offeree including options exercisable under the terms of debenture or preference share issues. The list of information should show the existing structure of ownership and control as well as the structure after the proposed acquisition of assets, or any interests, mergers and take-overs of companies and businesses;

(v) Details of any existing associations with the offer or including the date(s) on which the equity was acquired, the means of acquisition, mergers, or take-overs (e.g., a new share placement, a public offer or market purchases) and the proportion of the offeree's voting power associated with any existing equity holding. Details should also be given of other associations between the offeror and the offeree, including agreements relating to the provision of financial and technical assistance and to production and marketing. Particular reference should be made to any rights exercisable by the offeror under the terms of any such agreements to participate in the management and control of the company or business;

(vi) Present employment structure of company or business to be acquired and projected employment structure following acquisition of assets or any interests, merger or take-over for the next three years;

(vii) All management, service and technical assistance agreements, joint-venture agreements and other agreements;

(viii) Expert valuation and similar reports of assets, company or business to be acquired;

(ix) Terms of acquisition, mergers or take-overs and financial position of company or business to be acquired;

(x) Details of the activities of the offeree including its economic performance in terms of production, sales, employment, exports and estimates of the value of each Malaysian market for the output of the company or business concerned and the offeree's share of each such market. Estimates should be given of the likely effects of the acquisition, merger or take-over on the relative balance of Malaysian and foreign ownership and control;

(xi) Information regarding any relevant experience and special skills by the offeror in the offeree's areas of management, production and marketing;

(xii) Details of competition and/or complementarity between the offeror and offeree in production or marketing and of any degree of dependence between the offeror and the offeree in production or marketing.

(xiii) Details of special licences, concessions, leaseholds, special permits from any Government authority in Malaysia, enjoyed by the company or business, and patents, manufacturing rights and export franchises;

(xiv) Details of the economic benefits and costs which as a result of the acquisition, merger or take-over, could be expected to accrue;

(xv) Details of changes expected as a result of the acquisition, merger or take-over in the offeree's practices in matters such as employment, investment, exports, imports, processing and upgrading of local materials, research and development and industrial relations including employee protection.. Where the offeree considers that the acquisition is likely to have environmental effects this should be indicated;

(xvi) Details on the proposed extent of Malaysian participation in ownership and management following the acquisition, merger or take-over. With regard to shareholders' interests the offeree company should state the attitude of its board of directors to the offer; and

(xvii) All other relevant information, particularly evidence to prove that the acquisition of assets, or any interests, merger and take-over is not against the national interest.

10. All proposals and communications addressed to the Foreign Investment Committee will be treated in confidence.

APPENDIX 'C'

A. Composition of the Capital Issues Committee:

(1) The Governor,
Bank Negara Malaysia;

(2) Secretary General,
Ministry of Trade and Industry;

(3) Deputy Secretary General,
Treasury;

(4) Registrar of Companies and Businesses;

(5) A member from the business community.

B. Composition of the Foreign Investment Committee:

(1) Special Economic Adviser to Y.A.B. Prime Minister;

(2) Secretary General,
Treasury;

(3) Governor,
Bank Negara, Malaysia;

(4) Director General,
Economic Planning Unit,
Prime Minister's Department;

(5) Secretary General,
Ministry of Trade and Industry;

(6) Chairman,
Federal Industrial Development Authority;

(7) Registrar of Companies and Businesses,
Malaysia.

APPENDIX 'D'

SHERMAN ACT[1] (U.S.A.)

/ As amended by Public No. 314, 75th Congress, August 17, 1937;
15 U.S.C. §§ 1-7 (1970) /

An Act to protect trade and commerce against unlawful restraints and monopolies.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that

Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: Provided, That nothing herein contained shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity

[1] Sections 1, 2 and 3 of this Act were Amended to increase criminal penalties from $5,000 to $50,000 by Public Law 135, 84th Cong., H.R. 3659, approved July 7, 1955.

is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 5, as amended and supplemented, of the act entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved September 26, 1914: Provided further, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity, herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year or by both said punishments, in the discretion of the court.

Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Sec. 3. Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is hereby declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy shall be deemed guilty of a misdemeanor and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

APPENDIX 'E'

CLAYTON ACT (including the Robinson-Patman Amendment) (U.S.A.)

Sec. 2. (a) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchasers involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia, or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: Provided, That nothing herein contained shall prevent differentials which make only due allowances for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: Provided, however, That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: And provided further, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: Any provided further, That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: Provided, however, That nothing herein contained shall prevent a seller rebutting the prima facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

(c) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

(d) That it shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

(e) That it shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.

(f) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section.

Sec. 3. That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies or other commodities, whether patented or unpatented, for use, consumption or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

Sec. 4. That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Sec. 7. That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more corporations engaged in commerce, where in any line of commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly.

This section shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation engaged in commerce from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition.

Nor shall anything herein contained be construed to prohibit any common carrier subject to the laws to regulate commerce from aiding in the construction of branches or short lines so located as to become feeders to the main line of the company so aiding in such construction or from acquiring or owning all or any part of the stock of such branch lines, nor to prevent any such common carrier from acquiring and owning all or any part of the stock of a branch or short line constructed by an independent company where there is no substantial competition between the company owning the branch line so constructed and the company owning the main line acquiring the property or an interest therein, nor to prevent such common carrier from extending any of its lines through the medium of the acquisition of stock or otherwise of any other common carrier where there is no substantial competition between the company extending its lines and the company whose stock, property, or an interest therein is so acquired.

Nothing contained in this section shall be held to affect or impair any right heretofore legally acquired: Provided, That nothing in this section shall be held or construed to authorize or make lawful anything heretofore prohibited or made illegal by the antitrust laws, nor to exempt any person from the penal provisions thereof or the civil remedies therein provided.

Nothing contained in this section shall apply to transactions duly consummated pusuant to authority given by the Civil Aeronautics Board, Federal Communications Commission, Federal Power Commission, Interstate Commerce Commission, the Securities and Exchange Commission in the exercise of its jurisdiction under section 79J of this title [15 U.S.C. § 79J], the United States Maritime Commission, or the Secretary of Agriculture under any statutory provision vesting such power in such Commission, Secretary, or Board.

Sec. 8. No private banker or director, officer, or employee of any member bank of the Federal Research System or any branch thereof shall be at the same time a director, officer, or employee of any other bank, banking association, savings bank, or trust company organized under the National Bank Act or organized under the laws of any State or of the District of Columbia, or any branch thereof, except that the Board of Governors of the Federal Research System may by regulation permit such service as a director, officer, or employee of not more than one other such institution or branch thereof; but the foregoing prohibition shall not apply in the case of any one or more of the following or any branch thereof:

(1) A bank, banking association, saving bank, or trust company, more than 90 per centum of the stock of which is owned directly or indirectly by the United States or by any corporation fo which the United States directly or indirectly owns more than 90 per centum of the stock.

(2) A bank, banking association, saving bank, or trust company, which has been placed formally in liquidation or which is in the hands of a receiver, conservator, or other official exercising similar functions.

(3) A corporation, principally engaged in international or foreign banking or banking in a dependency or insular possession of the United States which has entered into an agreement with the Board of Governors of the Federal Reserve System pursuant to section 601 to 604A of Title 12.

(4) A bank, banking corporation, savings bank, or trust company, more than 50 per centum of the common stock of which is owned directly or indirectly by persons who own directly or indirectly more than 50 per centum of the common stock of such member bank.

(5) A bank, banking association, savings bank, or trust company, not located and having no branch in the same city, town, or village as that in which such member bank or any branch thereof is located, or in any city, town, or village contiguous or adjacent thereto.

(6) A bank, banking association, savings bank, or trust company, not engaged in a class or classes of business in which such member bank is engaged.

(7) A mutual savings bank having no capital stock.

Until February 1, 1939, nothing in this section shall prohibit any director, officer, or employee of any member bank of the Federal Reserve System, or any brank thereof, who is lawfully serving at the same time as a private banker or as a director, officer, or employee of any other bank, banking association, savings bank, or trust company, or any branch thereof, on the date of enactment of the Banking Act of 1935, from continuing such service.

The Board of Governors of the Federal Reserve System is authorized and directed to enforce compliance with this section, and to prescribe such rules and regulations as it deems necessary for that purpose.

No person at the same time shall be a director in any two or more corporations, any one of which has capital, surplus, and undivided profits aggregating more than $1,000,000, engaged in whole or in part in commerce, other than banks, banking associations, trust companies, and common carriers subject to the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, if such corporations are or shall have been theretofore, by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the antitrust laws. The eligibility of a director under the foregoing provision shall be determined by the aggregate amount of the capital, surplus, and undivided profits, exclusive of dividends declared but not paid to stockholders, at the end of the fiscal year of said corporation next preceding the election of directors, and when a director has been elected in accordance with the provisions of this Act it shall be lawful for him to continue as such for one year thereafter.

When any person elected or chosen as a director or officer or selected as an employee of any bank or other corporation subject to the provisions of this Act is eligible at the time of his election or selection to act for such bank or other corporation in such capacity his eligibility to act in such capacity shall not be affected and he shall not become or be deemed amenable to any of the provisions hereof by reason of any change in the affairs of such bank or other corporation from whatsoever cause, whether specifically excepted by any of the provisions hereof or not, until the expiration of one year from the date of his election or employment.

APPENDIX 'F'

FEDERAL TRADE COMMISSION ACT (U.S.A.)

(An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes)

Sec. 5.(a)(1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce are declared unlawful.

APPENDIX 'G'

THE MONOPOLIES AND RESTRICTIVE PRACTICES (INQUIRY AND CONTROL) ACT, 1948

(i) Extract from Section 3

Conditions to which Act applies

3. - (I) Conditions to which this Act applies shall be deemed for the purposes of this Act to prevail as respects the supply of goods of any description if either -

(a) at least one-third of all the goods of that description which are supplied in the United Kingdom or any substantial part thereof are supplied by or to any one person, or by or to any two or more persons, being interconnected bodies corporate, or by or to any such two or more persons as are described in subsection (2) of this section; or

(b) any agreements or arrangements (whether legally enforceable or not) are in operation the result of which is that, in the United Kingdom or any substantial part thereof, goods of that description are not supplied at all.

(2) The two or more persons referred to in subsection (I) of this section are any two or more persons who, whether voluntarily or not, and whether by agreement or arrangement or not so conduct their respective affairs as in any way to prevent or restrict competition in connection with the production or supply of goods of the description in question (whether or not they themselves are affected by the competition and whether the competition is between persons interested as suppliers or producers or

between persons interested as customers of suppliers or producers);

Provided that in considering whether or not any two or more persons so conduct their affairs as aforesaid, practices as to the workers to be employed or not to be employed by them or as to the remuneration, conditions of employment, hours of work or working conditions of workers, or any class of workers, so employed shall be left out of account.

Monopoly and Restrictive Practices

(Section 4 makes the same provision in respect of the application of any process to goods.)

(ii) Section 14: THE PUBLIC INTEREST

14. In determining whether any conditions to which this Act applies or any things which are done by the parties concerned as a result of, or for the purpose of preserving, any conditions to which this Act applies, operate or may be expected to operate against the public interest, all matters which appear in the particular circumstances to be relevant shall be taken into account and, amongst other things, regard shall be had to the need, consistently with the general position of the United Kingdom, to achieve -

(a) the production, treatment and distribution by the most efficient and economical means of goods of such types and qualities, in such volume and at such prices as will best meet the requirements of home and overseas markets;

(b) the organization of industry and trade in such a way that their efficiency is progressively increased and new enterprise is encouraged;

(c) the fullest use and best distribution of men, materials and industrial capacity in the United Kingdom; and

(d) the development of technical improvements and the expansion of existing markets and the opening up of new markets.

APPENDIX 'H'

THE MONOPOLIES AND MERGERS ACT, 1965

(i) Section 3, Subsections (4),(5) and (6): POWERS OF BOARD OF TRADE IN RELATION TO MONOPOLY SITUATIONS

(4) The Board may -

(a) declare it to be unlawful, except to such extent and in such circumstances as may be provided by or under the order -

(i) to discriminate in any manner specified or described in the order between any persons in the prices charged for goods or services so specified or described, or to do anything so specified or described which appears to the Board to amount to such discrimination, or to procure others to do any of the things above mentioned;

(ii) to give or agree to give in other ways any such preference as respects the supply of goods or services, or the giving of orders for goods or services, as may be so specified or described, or to do anything so specified or described which appears to the Board to amount to giving such a preference, or to procure others to do any of the things above mentioned;

(iii) to charge for goods or services supplied prices different from those in any published list or notification, or to do anything so specified or described which appears to the Board to amount to charging such prices;

(b) require a person supplying goods or services to publish a list of or otherwise notify prices, with or without such further information as may be so specified or described;

(c) regulate to such extent and in such circumstances as may be provided by or under the order the prices to be charged for any goods or services so specified or described,

but the Board shall not, in relation to goods or services of any class to which the report relates exercise the power conferred by virtue of paragraph (c) above unless it appears to the Board on the facts found by the Commission as stated in the report that proces charged in the case of goods or services of that class are, or have been, such as to operate or to be expected to operate, against the public interest.

(5) The Board may prohibit or restrict the acquisition by any person of the whole or part of the undertaking or assets of another person's trade or business, or the doing of anything which will or may result in any bodies corporate becoming interconnected bodies corporate, or may require that, if such an acquisition is made or anything is done which has that result, the persons concerned or any of them shall thereafter observe any prohibitions or restrictions imposed by or under the order.

(6) The Board may provide for the division of any trade or business by the sale of any part of the undertaking or assets or otherwise (for which purpose all the activities carried on by way of trade or business by any one person or by any two or more interconnected bodies corporate may be treated as a single trade or business), or for the division of any group of interconnected bodies corporate, and for all such matters as may be necessary to effect or take account of the division, including -

(a) the transfer or vesting of property, rights, liabilities or obligations;

(b) the adjustment of contracts, whether by the discharge or reduction of any liability obligation or otherwise;

(c) the creation, allotment, surrender or cancellation of any shares, stock or securities;

(d) the formation or winding-up of a company or other association, corporate or unincorporated, or the amendment of the memorandum and articles or other instruments regulating any company or association;

(e) the extent to which, and the circumstances in which, provisions of the order affecting a company or association in its share capital, constitution or other matters may be altered by the company or association, and the registration under any enactment (including an enactment of the Parliament of Northern Ireland) of the order by companies or associations so affected;

(f) the continuation with any necessary change of parties of any legal proceedings.

(ii) Section 6, Subsections (1) and (2): **NEW POWERS IN RELATION TO MERGERS**

6. - (1) Where it appears to the Board of Trade that it is or may be the fact that -

(a) two or more enterprises, one at least carried on in the United Kingdom or by or under the control of a body corporate incorporated in the United Kingdom, have not earlier than six months previously, ceased to be distinct enterprises; and

(b) either -

(i) as a result, the following conditions prevail, or do so to a greater extent, as respects the supply of goods or services of any description, that is to say, as respects the supply of goods of any description, at least one-third of the goods of that description which are supplied in the United Kingdom or any substantial part thereof are supplied by or to any one person, or by or to the persons by whom the enterprises (so far as they continue to be carried on) are carried on, or, as respects the supply of services of any description, the supply of services of that description in the United Kingdom or any substantial part thereof is, to the extent of at least one-third, by or for any one person, or by or for the persons by whom the enterprises so far as they continue to be carried on) are carried on; or

(ii) the value of the assets taken over exceeds five million pounds; the Board of Trade may, if they think fit, refer the matter to the Commission for investigation and report and, if they do so, shall publish the reference in such manner as they think most suitable for bringing it to the notice of the persons affected: Provided that paragraph (b)(i) above shall not apply where the prevalence of the conditions in question is expressly authorized by or under any enactment, other than the enactments relating to patents and trade marks.

2. On a reference under this section the Commission shall investigate and report on the facts, that is to say (subject to subsection (4) below)

on the question whether subsection (1)(a) and (b) above are satisfied; and if the Commission find they are satisfied, the Commission shall also investigate and report whether the fact of the enterprises having ceased, in the circumstances of the case, to be distinct enterprises operates or may be expected to operate against the public interest; and if the Commission so find, the Commission shall consider whether any and if so what action (whether under this Act or otherwise and whether by a Minister of the Crown, Government department or other authority or by the parties concerned themselves) should be taken to remedy or prevent any mischiefs which result or may be expected to result, and may, if they think fit, include recommendations as to such action in their report.

APPENDIX 'J'

FAIR TRADING ACT 1973

Definition of monopoly situation in relation to the supply of goods.

6. - (1) For the purposes of this Act a monopoly situation shall be taken to exist in relation to the supply of goods of any description in the following cases, that is to say, if -

(a) at least one-quarter of all the goods of that description which are supplied in the United Kingdom are supplied by one and the same person, or are supplied to one and the same person, or

(b) at least one-quarter of all the goods of that description which are supplied in the United Kingdom are supplied by members of one and the same group of interconnected bodies corporate, or are supplied to members of one and the same group of interconnected bodies corporate, or

(c) at least one-quarter of all the goods of that description which are supplied in the United Kingdom are supplied by members of one and the same group consisting of two or more such persons as are mentioned in subsection (2) of this section, or are supplied to members of one and the same group consisting of two or more such persons, or

(d) one or more agreements are in operation, the result or collective result of which is that goods of that description are not supplied in the United Kingdom at all.

APPENDIX 'J'

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(b) at least one-quarter of all the goods of that description which are supplied in the United Kingdom are supplied by members of one and the same group of interconnected bodies corporate, or are supplied to members of one and the same group of interconnected bodies corporate, or

(c) at least one-quarter of all the goods of that description which are supplied in the United Kingdom are supplied by members of one and the same group consisting of two or more such persons as are mentioned in subsection (2) of this section, or are supplied to members of one and the same group consisting of two or more such persons, or

(d) one or more agreements are in operation, the result or collective result of which is that goods of that description are not supplied in the United Kingdom at all.

(2) The two or more persons referred to in subsection (1)(c) of this section, in relation to goods of any description, are any two or more persons (not being a group of interconnected bodies corporate) who whether voluntarily or not, and whether by agreement or not, so conduct their respective affairs as in any way to prevent, restrict or distort competition in connection with the production or supply of goods of that description, whether or not they themselves are affected by the competition and whether the competition is between persons interested as producers or suppliers or between persons interested as customers of producers or suppliers.

Definition of the public interest

84. - (1) In determining for any purposes to which this section applies whether any particular matter operates, or may be expected to operate, against the public interest, the Commission shall take into account all matters which appear to them in the particular circumstances to be relevant and, among other things, shall have regard to the desirability-

(a) of maintaining and promoting effective competition between persons supplying goods and services in the United Kingdom;

(b) of promoting the interests of consumers, purchasers and other users of goods and services in the United Kingdom in respect of the prices charged for them and in respect of their quality and the variety of goods and services supplied;

(c) of promoting, through competition, the reduction of costs and the development and use of new techniques and new products, and of facilitating the entry of new competitors into existing markets;

(d) of maintaining and promoting the balanced distribution of industry and employment in the United Kingdom; and

(e) of maintaining and promoting competitive activity in markets outside the United Kingdom on the part of producers of goods, and of suppliers of goods and services, in the United Kingdom.

(2) This section applies to the purposes of any functions of the Commission under this Act other than functions to which section 59(3) of this Act applies.

Order bringing under control restrictive agreements relating to services.

107. - (1) The Secretary of State may by statutory instrument make an order in respect of a class of services described in the order (in this Act referred to, in relation to an order under this section, as "services brought under control by the order") and direct by the order that, subject to the following provisions of this Part of this Act, the agreements to which Part I of the Act of 1956 applies shall include agreements, whether made before or after the passing of this Act and whether before or after the making of the order, which -

(a) are agreements between two or more persons carrying on business within the United Kingdom in the supply of services brought under control by the order, or between two or more such persons together with one or more other parties, and

(b) are agreements under which restrictions, in respect of matters specified in the order for the purposes of this paragraph, are accepted by two or more parties.

(2) A class of services described in an order under this section, as being the services brought under control by the order, may consist -

(a) of services of one or more descriptions specified in that behalf in the order, or

(b) of all services except services of one or more descriptions so specified, or

(c) of all services without exception.

(3) The matters which may be specified in such an order for the purposes of subsection (1)(b) of this section are any of the following, that is to say -

(a) the charges to be made, quoted or paid for designated services supplied, offered or obtained;

(b) the terms or conditions on or subject to which designated services are to be supplied or obtained;

(c) the extent (if any) to which, or the scale (if any) on which, designated services are to be made available, supplied or obtained;

(d) the form or manner in which designated services are to be made available, supplied or obtained;

(e) the persons or classes of persons for whom or from whom, or the areas or places in or from which, designated services are to be made available or supplied or are to be obtained.

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