Identifying and Overcoming Political Economy and Governance Constraints to the Effective Implementation of Competition & Regulatory Law – the case of Zambia

ABSTRACT

Since the advent of economic and political liberalisation in most developing countries following the collapse of the Centralised Economic principles in the 1990s, there have been considerable policy changes, with increased reliance being placed on market forces. A common aspiration underlying these reforms has been that the reduction of government's direct involvement or intervention in economic activity would, by providing enterprises with more freedom and stronger incentives, stimulate entrepreneurial activity, business efficiency, productive investment and economic growth, as well as enhance consumer welfare through improved quality and quantity of goods and services at prices determined by the market rather than administrative decision or action.

While competition and regulatory laws may be in place to ensure that certain minimum standards are complied with, unfortunately, the political economy and governance constraints do often have a toll on the effectiveness of implementing competition and other regulatory laws. At the moment, most developing and least developed countries have passed the stage of contemplating whether they would want to have a competition or other regulatory law or not, but rather have reached the stage where the debate on the matter is how to structure their laws, and how best to implement an effective enforcement regime within given constraints.

(Key words: competition, regulation, structural adjustment, political economy, governance)

Executive Summary

1. Zambia is a landlocked country surrounded by 9 neighbours and has been independent from the United Kingdom since 1964. Since then, the country has undergone three Republican phases, each with its peculiar economic focus. The post-independence period between 1964 and 1972 is popularly referred to as "the First Republic" – post independence economic and political structure; the period between 1973 and 1991 as "the Second Republic" – commandist economy with a single-party Constitution; and the period from 1991 to date as "the Third Republic" – a return to market economy and multi-party Constitution.

2. The enactment of the competition law in Zambia was a culmination of a series of events that are not peculiar to Zambia but most of the developing countries that were caught up in the anti-commandist wave of the late 1980s going into the early 1990s. The failure of the economic reforms in the Second Republic of Zambia and/or the lack of political fortitude during the time for the Government to fully implement requisite SAP measures led to industrial stagnation and an economy that was not competitive in any sector. The economy was characterised by legal barriers to entry in key economic sectors while a struggling and largely informal SME sector thrived on smuggled and/or pilfered essential commodities from the SOEs and neighbouring countries. Introducing competition in the economy started with the privatisation programme, the purpose of which was to attract private investment. However, privatisation was not in and of itself the only panacea to the economic ills that beset Zambia. There was need for a total overhaul of all laws that affected not only business entry, but its existence, growth and development on a sustainable scale.

3. At the behest of the World Bank and the IMF, the *Competition and Fair Trading Act,* 1994, Chapter 417 of the Laws of Zambia was hurriedly passed in May 1994 and assented to on 3rd June 1994. There appeared to be clearly lack of political will towards the enactment of both the legislation and the establishment of the enforcement agency as this was not part of the Government's priorities. While the law was passed by Parliament in May 1994 and assented to by the President in June 1994, its effect was from February 1995. Thus the law had no retrospective effect to redress and/or address any anti-competition matters such as preference of structural and behavioural undertakings on any anti-competitive dominant or monopoly firms that were established at privatisation or investment that occurred through mergers and acquisitions. The competition authority itself was operationalised in May 1997 when its Chief Executive was appointed. On the other hand, it took only months to draft and enact the Privatisation Act, as well as establish the ZPA.

4. Few officials in the public service and political establishment would appear to have really understood what it really meant or took to have a well functioning competition authority. This approach appears to be contrasted from post-war Japan where the Government was fully behind the anti-monopoly law and used it to remove barriers to entry, growth and expansion of industries. The holistic approach towards improving the competitiveness of the Japanese industrial base is one that is worth emulating for least developed countries. Any which way, the enactment of the competition legislation in Zambia and the competition authority marked a landmark point in Zambia's regulatory environment, ushering in rules and regulations that were to govern the competitive market place in the face of vigorous privation that was being carried out.

5. Significantly, the role and importance of the Zambia Competition Commission has been experienced to not only being an authority to prevent anticompetitive business practices, but also to pro-actively strengthen market forces in a liberalised economy through active advocacy and public awareness. However, much remains to be desired for the successful and effective enforcement of competition in Zambia is so far as the overall legal, regulatory laws or Government policies remain at variance with the spirit and/or principles of competition.

6. The effective implementation of competition and regulatory law in Zambia has been affected by a number of political economy and governance constraints. The political economy constraints in competition and regulatory reform have included

   - The exemption of the State and its enterprises from the application of the competition law and various regulatory laws that are proposed by the State itself
   - The consideration of public interest issues in matters of competition and regulatory enforcement that would appear to expand the jurisdiction and even competence of some institutions
   - The non-binding nature of Advisory opinions of competition and regulatory agencies on the Government
   - The political influence of Trade Associations on economic policy
   - The lack of sufficient financing of the operations of the competition authority
   - Maintenance or enactment of laws and other regulations that appear to be at variance with the competition law
   - The problems that may be encountered due to lack of policy certainty and stability

7. Governance constraints in implementation of competition and regulatory law have been identified as being:

   - Lacunas in the existing regulatory laws that make enforcement problematic
   - Lack of regulations and other enforcement guidelines that have a legal force
   - Fragmentation of the regulatory environment that makes it expensive to regulate commercial activity
   - Lack of a comprehensive national competition policy to raise competition awareness in all aspects of commercial activity, including that of the State
   - Independence of the competition and industry specific regulators does need to be ascertained and protected to ensure that the rule of law is enhanced.
   - There is need to ensure security of tenure of the head of the agency
   - While exemptions to the application of a law have their place, such exemptions should not make the law discriminatory in application.
   - Regulatory capture is a possible constraint to the effective enforcement of the law and would affect proper enforcement
   - Time is of the essence in relation to decision making that is useful to commercial activity. There is need to ascertain the decision making period.
   - Judicial scrutiny is relevant to ensure that there are checks and balances in the competition and regulatory laws implementation. For this, the adjudicators must be properly trained if they are provide the useful checks and balances.

8. In conclusion, the enforcement of competition law and policy in Zambia has peculiarly been a success story despite the financial constraints and the clear lack of overt political support. It would appear perhaps that the Commission is too structurally independent for the comfort of the politician who is desirous to having things under their tight control. The

professionalism exhibited by the Commission as well as the independence in adjudication enjoyed by the Board of Commissioners is testimony perhaps of a good foundation in the governance of competition law enforcement in Zambia.

9. There is an obvious need for more technical assistance and other training from developed national and multinational competition authorities to assist in raising the levels of competence and confidence in the enforcement of competition law. While at the moment desire for a multilateral mechanism for enforcement of competition has been frustrated, there may be a requirement to prepare developing authorities for any future multilateral system through sustainable training and association with developed authorities.

10. If at all there is something that can be learnt from the Zambian experience it is this: The law has to be enforced within the existing political economy and governance constraints, and results to the general public to justify the continued existence of a competition authority or regulator must be produced. Both competition authorities and regulators in developing countries must learn to walk the tight rope of professionalism in the midst of undue overt or covert political interference.

11. Both least and developing countries would appear to face the same competition and regulatory hurdles. Strong advocacy ought to be a priority that should be implemented concurrently with enforcement efforts. The competition authority needs to come down from a high pedestal and interact with the opinion leaders both in civil society and the political establishment. Added to this are the senior public servants who implement policy.

1.0 Introduction and Relevant Background

Zambia is a landlocked country surrounded by 9 neighbours and has been independent from the United Kingdom since 1964. Since then, the country has undergone three Republican phases, each with its peculiar economic focus. The post-independence period between 1964 and 1972 is popularly referred to as "the First Republic"; the period between 1973 and 1991 as "the Second Republic"; and the period from 1991 to date as "the Third Republic".

The First Republic from 1964-1972 was characterised by a political and economic structure that was inherited from the British colonial establishment. The post-independence economy was to a large extent closely aligned to the British economy in terms of raw material exports and imports of manufactured products. This economic relationship appeared to work to the advantage of the settler community and did not address the very essence or goal of political emancipation, namely wealth distribution. There was general discontent and pressure on Government over the slow pace at which the pre-independence promises of wealth were taking. It was thus not surprising that barely 4 years after independence, the then young and charismatic President Kenneth Kaunda announced the famed "Mulungushi Reforms"[1] in 1968 in which declarations of wealth ownership by the State and redistribution was seen as a driving force for economic empowerment of the majority of the indigenous African populace. The Government declared its intention to establish monopoly State Owned Enterprises (SOEs) by compulsory acquisition of equity holding of 51% or more in a number of key foreign and/or privately owned firms. The colonial political and economic legacy thus began to be dismantled from 1968.

The effective implementation of the Mulungushi declarations appeared to be inhibited by the plural political regime and again, the commandist-oriented and ruling United National Independence Party – UNIP, began to toil with the idea of a single-party system. The desire was also floated that in order to forestall regionally based politicking in the country, a single-party State would be the solution. The country, it was argued, had to concentrate on economic development issues than expend its efforts in the intensity and waste of multi-party political activity, which was presumed to be retrogressive. A one-party State was thus seen as an avenue to ensure a strong Government that could concentrate on economic development without the disturbance that was inherent with plural politics.

The Second Republic was tentatively ushered in 1973. After a heated national debate, the "One-party Participatory Democracy" was ushered in after Parliament endorsed a Commission of Inquiry's recommendations in the Constitution to have a one-party State. Multi-party political activity was thus "unconstitutional" and all economic planning and direction was to be made through the one-party *participatory* structures such as the Central Committee, the National Council and the General Congress.

To give effect to the Government's command and control economic policy[2], a parastatal conglomerate Industrial Development Corporation (INDECO) was established under the *Industrial Development Act*. Besides consolidating nationalisation of the economy, the Act and INDECO were promoted as catalysts for investment, industrial development and growth. INDECO was later merged with other conglomerates that presided over the financial and

[1] Also referred to as "the Watershed Speech".

[2] Most of the historical-economic background is in the public domain and also other sources on the internet including the online encyclopedia, Wikipedia – www.en.wikipedia.org/wiki/Economy_of_Zambia

mining sector to form an omnibus parastatal, the Zambia Industrial and Mining Corporation (ZIMCO). ZIMCO was the State vehicle that owned 51% equity in all targeted firms. President Kenneth Kaunda was the Chairman of the Board. With the establishment of ZIMCO, all SOEs fell under it and the Chief Executives were all appointed directly by the President, at whose pleasure they served.

The process extended to the lucrative mining industry which finally in 1982 were merged into the giant Zambia Consolidated Copper Mines (ZCCM) which was independent from ZIMCO although the Chief Executive and Chairman was appointed by and reported to the President. As blue-chip SOEs, ZIMCO and ZCCM controlled all industrial, commercial and mining activities in Zambia and the latter of which brought in at least 85% of foreign exchange earnings for the country and was the largest employer outside the public service.

The disappointing performance and failure of the SOE to create wealth other than distribute it led to the collapse of the Commandist-experiment and the end of the Second Republic and its One party Constitution.

The Third Republic from 1991 re-introduced a multiparty Constitution as well as a market economy. In many ways, the frustration of the commandist economy made the U-turn to the political and economic system of post-Independence Zambia. The thrust of this paper tilts heavily to the Third Republic regulatory reform and their implementation under the topic "Identifying and Overcoming Political Economy and Governance Constraints to the Effective Implementation of Competition & Regulatory Law – the experience of Zambia". The paper first tackles dynamics of political economy decisions in Zambia, before narrowing down to identification of the political economy and governance constraints to the effective implementation of competition and regulatory law before ending with the conclusions and recommendations.

2.0 Political economy and policy dynamics in Zambia

The "Three Republics" under which Zambia has gone through would appear not to be peculiar amongst least developed and developing countries. Each of these phases posed different political economy issues and governance constraints. Evidently, economic policy formulation has a strong political influence, and in country of Zambia's standing, policy origination and sustenance has a strong link to the person and office of the President or Head of State, with external cooperating partners or "Donors" increasingly playing an influential role Socialism appeared to be working in the Eastern Block during the 1960s and its "wealth distribution" attribute was attractive enough to the average African leader, more so that African traditional life stresses closely knit social values and shared wealth. It was thus not surprising that socialism and the subsequent command economy and nationalisation of industry was easily adopted without fierce opposition. Having even made considerable constitutional and other statutory legal amendments to embrace the command economy, economic decisions began to be made and implemented with a seemingly high social agenda and strict control of the forces of supply and demand.

In the Second Republic, government played the conflicting roles of investor, manager, regulator and policy formulator. The visible hand of the Government controlled the market forces through influencing SOE operational decisions, price controls, investment programmes that prevented, restricted or distorted competition in favour of subsidised SOEs under an import substitution strategy. Under this strategy, the products and/or services that were produced by the SOE were not permitted to be imported into Zambia, even where local

production did not meet demand. A National Import and Export Corporation (NIEC) was established under ZIMCO to coordinate imports and exports of permitted essential products.

In the absence of import competition, the monopoly SOE undertakings had no incentive to innovate and produce quality products. A policy analyst, Thomas P. Sheehy[3] of the Heritage Foundation, has observed that economic inefficiencies caused by these economic policies were masked temporarily in the 1970s by huge revenues from copper exports, as the world price for most raw materials surged. In 1974, for example, Zambia earned approximately $1.2 billion from exporting copper. These revenues financed generous welfare programs. As a result, the standard of living of most Zambians grew in the 1970s as tens of thousands fled the impoverished countryside seeking not only city jobs in the growing state-owned industries, but also the cities generous care, and consumer subsidy benefits provided by the government. Copper prices crashed some 40 percent between 1974 and 1978. Government could not longer support subsidies without borrowing.

Besides the copper crush was oil crisis that had adverse effects on Zambia's Balance of Payments. In addition to this, the geo-political dynamics of Southern Africa was against Zambia. Strong political differences between the minority governments in South Africa and Southern Rhodesia (now Zimbabwe) on one hand and their independent neighbours led by Zambia made economic interaction in Southern Africa uncertain and unreliable[4]. The Government openly supported the liberation struggles in South Africa and then Southern Rhodesia. The open hostility led to less economic interaction, much to Zambia's detriment as "the Southern Route" through Southern Rhodesia to South African ports was the main gateway for Zambia's imports and exports. In the face of hostilities, the Government chose to open "the Northern Route" to Dar-es-Salaam in Tanzania as the new gateway for the country's imports and exports. The decision to open the Northern Route came with astronomical costs that had a toll on the country's reserves. It comprised four unprecedented strategic investments by the government. The first one was the resurfacing and/or maintenance of the "Great North Road[5]" from Lusaka through the hinterland to connect to the south Tanzanian town of Mbeya enroute to Dar-es-Salaam. The Second strategy was to construct with Chinese assistance, a 1,800km rail line, the Tanzania Zambia Railways (TAZARA)[6] parallel to the road. The third one was the construction of an oil Refinery – Indeni Oil Refinery[7]; and the fourth being the parallel construction of an oil pipeline, Tanzania Zambia (TAZAMA) Oil Pipeline, running through a 1,500km stretch from Dar-es-Salaam to the refinery in the Copperbelt town of Ndola.

During this Second Republic phase, the Zambian Government was evidently faced with a number of enormous challenges in the process of trying to develop the country. As noted by Thurlow and Wobst[8] in their paper "*The Road to Pro-Poor Growth in Zambia: Past Lessons and Future Challenges*" the fast growth of the late 1960s ended when there was the oil crisis and at the same time world copper prices fell sharply in the early 1970s. Export earnings were eroded, placing considerable pressure on the current account. The government, believing this

[3] *Up From Poverty: Advancing Economic Development in Zambia***,** Backgrounder #884, February 27, 1992, http://www.heritage.org/Research/MiddleEast/bg-884.cfm

[4] It was only in 1980 that Southern Rhodesia got its independence and changed its name to Zimbabwe the early 1990s that apartheid was abolished in South Africa. Zambia resumed official trade with South Africa after 1991.

[5] Then known as the "Hell Run" due to the numerous accidents and rough terrain.

[7] Which is discussed later in this paper

[8] James Thurlow and Peter Wobst**,** International Food Policy Research Institute**,** Paper submitted to the Department for International Development as part of the project "Operationalizing Pro-Poor Growth", International Food Policy Research Institute 2033 K Street, N.W. Washington, D.C. 20006

negative terms-of-trade shock to be temporary, borrowed heavily to lessen the sharp decline in imported consumer and investment goods. Foreign debt mounted rapidly while GDP growth dropped to 0.5 percent. Rather than initiate a process of structural adjustment and encourage diversification, the government chose to adopt regulatory policies. Subsidies and fixed consumer prices protected urban consumption, while the mining sector and state-owned manufacturing were favored through import-licensing and foreign exchange allocation. Growth remained unresponsive to this new interventionist strategy. By the mid-1970s, Zambia's Balance of Payments fortunes drastically dwindled after the oil crisis.

The Government approached the IMF and the World Bank for assistance. This would appear to have began the process of what Kwame Nkurumah[9] termed as "Neo-Colonialism" i.e. economic colonisation where key economic decisions were explicitly if not implicitly externally derived. Henceforth, Zambia's reliance of these two institutions meant that economic and governance policies were to be somewhat influenced by these two institutions and other donors such as the United States and the European Union. The emergency of "the Donor Community" has been a major strong influence in policy formulation in the late 1970s and more conspicuously in the Third Republic. Apart from the events in Eastern Europe and in particular the Soviet Union, strong Donor pressure on removal of price controls as well as trade liberalisation contributed to the collapse of the Third Republic. For instance, IRIN[10], under the headline "*EU ties aid to constitutional reforms*" quoted the European Union as warning that "…*the European Parliament allayed fears of punitive action against Zambia over governance concerns in the wake of controversial elections held in December 2001*." Donor influence on the political economy and governance issues has been paramount in recommendations through "Structural Adjustment Programs", which in Zambia have been viewed to be externally exerted on government. These are explained in detail below.

3.0 Structural Adjustment Programmes

The first Structural Adjustment Programme (SAP) was entered into by the Government in 1978 following the drop in copper prices and the oil crisis during the period. The geo-politics of Southern Africa at the time led to costly infrastructural investments to re-route Zambia's imports and exports as earlier explained. This first SAP was however not successful as the Government failed to instill enterprise innovativeness and/or relinquish its control of the SOEs and/or attract investment in an economy which was practically not attractive to foreign investment due to both structural and behavioral barriers to entry.

With the failure of the **first SAP**, Zambia entered a period of economic transition in the mid-1980s when the government attempted a second SAP aimed at correcting price distortions. The first comprehensive Investment Act was enacted in 1986 to provide for fiscal and other incentives to attract investment especially in the agriculture and tourism sectors. The Investment Act 1986 was, as per the preamble, "an Act to revise the law relating to investment in Zambia and in particular to revise the provisions relating to the granting of incentives…to establish the Investment Council…. repeal the Industrial Development Act. While the second SAP recognized the need for diversification (including agriculture), it was again conditioned on the support of the ruling elite. The said Investment Act still retained the tenets of a command economy as its Chairman was the Prime Minister and Government retained control of the Investment Council. Price and exchange controls were actually intensified and an investor could not readily appeal against a decision of the Investment

[9] first President of Ghana

[10] LUSAKA, 27 March 2002 (IRIN), http://www.irinnews.org/print.asp?ReportID=26993

Council, which decision was final. In any case, the State still retained control of the economy with a 51-49% shareholding threshold in key industrial sectors, with an outright 100% shareholding through Statutory Corporations in telecommunications, electricity, railways, national retail, all postal services, and in oil procurement and storage.

The **second SAP** did not assist in improving the economy as the legislative framework remained commandist in nature and failed to attract private and/or additional investment into the key industrial sectors. When unrest in the urbanized Copperbelt province threatened mining revenues, which represented the government's main source of income and political support, the government bowed to political and economic pressures by backtracking on reforms. A new set of interventions were announced, signaling a partial return to a command-style economy. Following some positive growth during the mid-1980s due to removal of substantial subsidies, the economy however entered a recession in 1989 after Government backtracked on both agricultural subsidies and subsidies to loss making SOEs.

The **third SAP** was negotiated in which the IMF insisted that the Zambian Government should introduce measures aimed at stabilising the economy and restructuring it to reduce dependence on copper. The proposed measures included:

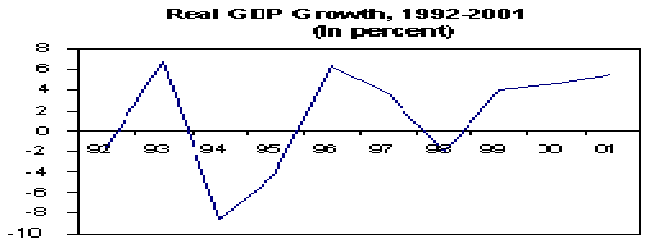
(i) the ending of price controls
(ii) devaluation of the kwacha
(iii) cut-backs in Government expenditure
(iv) cancellation of subsidies on food and fertiliser
(v) creased prices for farm produce.

Although the program was far-reaching, it failed to achieve its objectives when the government again backtracked on reforms in order to win urban support in the run-up to the 1991 elections. Maize and fertilizer reforms were halted, and the money supply was expanded to cover civil service wage-increases. Many donors withdrew support due to the government's lack of commitment to economic reform. In another surprise move, the Government decided to expropriate all the major private milling plants in order to ensure that the price controls of the main staple food, maize meal, were under Government control. With the State firmly in charge of the economy in the Second Republic between 1973 and 1991, Zambia's economy reached its lowest ebb as the SOEs could not provide goods and services that satisfied both quality and quantity demands. President Kaunda and his United National Independence Party (UNIP) lost the elections by 85% to a seemingly more robust Frederick Chiluba of the Movement for Multiparty Democracy (MMD), which won the elections on a platform of return to multi-party politics and market economic reforms. A key component of the new Government was privatisation of the SOEs, which had been projected to have siphoned about US$450million in subsidies and only provided $22 million in dividends between 1972 and 1990.

The Third Republic era began in 1991 and with it came the **fourth SAP**. The new Government of the capitalist-oriented Frederick Chiluba and his MMD party inherited a bankrupt Treasury with a US$7 billion debt. Despite the pre-election salvos against IMF and World Bank influence on the economic policies of Zambia, the new Government approached the two institutions for assistance and Zambia once again began a fourth SAP (1991-1998). The fourth SAP encompassed macroeconomic stabilization; public sector reform; external liberalization; the privatization of state assets; and agricultural reforms. During the period, not only was the Constitution changed, but major economic related laws were amended, repealed and new laws enacted. Although these reforms hoped to stimulate growth and diversify the

economy, GDP growth remained stagnant at 0.2 percent throughout the 1990s because of the massive economic restructuring and agricultural and industrial collapse, especially of the Mines. After 1998, Zambia entered into the so-called **Enhanced Structural Adjustment Programme**, which in effect was a **fifth SAP** since 1978. In a paper titled "*Enhanced Structural Adjustment Facility Policy Framework Paper, 1999-2001*"[11] prepared by the Zambian authorities in collaboration with the staff of the IMF and the World Bank, the following graph was derived showing the impact in GDP terms of this enhanced SAP:

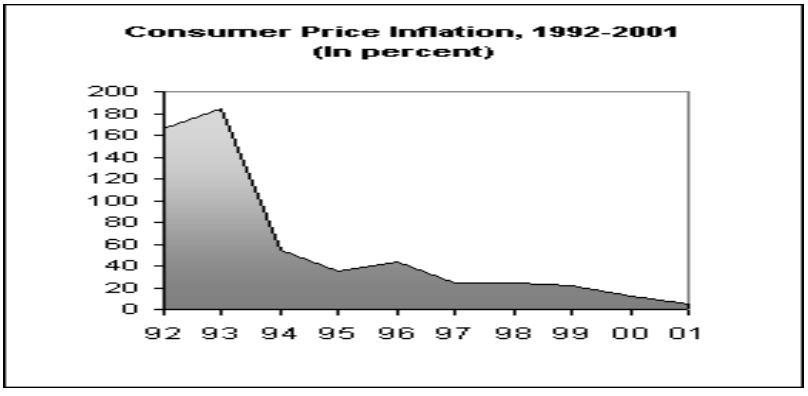
Graph 1



During 1991-98, average growth was negative, annual growth rates being positive in only three out of the eight years. GDP per capita declined from US$ 375 in 1980 to US$ 305 in 1990 and US$ 257 in 1995 (in 1987 US$ prices). In 1998, the economy contracted by 2 per cent, thus lowering income per capita by around 5 per cent. Real GDP however grew by 2.4% and 3.6% in 1999 and 2000, respectively. The economy did not perform so well in 1999 largely because of mining's poor performance (almost 1 million USD was lost in subsidising the mines per day). The year 2001 saw the real GDP growing by 5.2%.

It would be noted from the graph below that the fourth SAP ushered at the birth of the Third Republic appeared to have paid dividends in terms of controlling and lowering the rate of inflation. An increase from 165% in 1992 to about 180% in 1993 was covered by a steep drop from to 60% in 1994, with a steady downward slop since then.

Graph 2



[11] March 10, 1999, Source: http://www.imf.org/external/np/pfp/1999/zambia/index.htm

Implications of the various policy decisions have been aptly summed up by Thurlow and Wobst (*supra*). Their presentation on Zambia's macroeconomic performance and social outcomes between 1964-2002 is as follows:

Table 1

Macroeconomic Performance and Social Outcomes in Zambia					
	1964-72	**1973-84**	**1985-90**	**1991-98**	**1999-02**
	Market Economy	**State Control**	**Economic Transition**	**Structural Adjustment**	**Growth renewed**
Macroeconomic Indicators	***Average annual percentage change***				
GDP (1995 LCU)	5.1	0.5	1.8	0.2	3.7
GDP per capita (1995 LCU)	2.1	-2.6	-1.4	-2.4	1.9
Exports (1995 $US)	3.4	-1.8	-3.4	4.3	6.5
Imports (1995 $US)	8.0	-8.6	2.4	1.3	2.9
Fixed capital formation (1995 LCU)	-	-8.7	-1.0	6.3	11.0
External debt (1995 $US)	-	10.8	14.8	0.9	6.5
Inflation (deflator)	6.9	11.4	67.8	71.7	23.9
Exchange rate (LCU/$US)	0.0	9.0	69.4	76.2	24.9
Real interest rate*	9.5	-1.1	-25.4	0.9	13.4

Note 1*: Social outcomes omitted from table as they are not relevant for this paper*
Note 2: Zambia has recorded a steady 5% average GDP growth since 2002

4.0 The Transition from the Socialist to the Capitalist Economy

The fourth SAP had the most daring and far reaching macro as well as micro economic reforms in Zambia since the 1968 watershed Mulungushi Reforms in which President Kaunda had announced Government's vision to nationalise key industrial sectors. Privatisation of the economy was at the core of the 1991 reforms. The speed at which the process was conducted would appear to be unprecedented. Post facto, the modalities of the privatisation of SOEs has been a subject of endless debate in Zambia amongst both political and economic commentators. Two approaches have been proposed, namely the "Big Bang" approach and the "Gradualist" approach. In an article titled *The Political Economy of Transition*[1], Gérard Roland analysed the two approaches as contained in Box 1 below:

Box 1: The Big Bang and Gradualist transitional reform strategies

The theory of the political economy of transition is part of a recent economic research that attempts to integrate the political process into the analysis of economic problems. Political economy arguments have been at the heart of debates and controversies about strategies of transition from socialism to capitalism. Roland recognised that two options that are used in the reform process. The first advocated for a "Big Bang" approach to transition for a speedy and comprehensive implementation of all major reforms. Speed was of the essence because there was a "window of opportunity" (or a "honeymoon period" or a "period of exceptional politics") created by the establishment of democracy. During this period governments were expected to adopt reforms as fast as possible and attempt to make them irreversible.

The opposite to Big Bang is the Gradualist Strategy that emphasizes the need for a precise sequencing of reforms. The political economy argument in favour of gradualism was that an appropriate sequencing of reforms would provide demonstrated successes to build upon, thereby creating constituencies for further reforms. Thus Roland (*supra*) argued that political economy arguments, in addition to shedding light on the pace and sequencing of reforms, have also been extensively used to explain or justify many aspects of the transition process. Transition countries were observed to have been creating institutions of democracy and governance, including the executive, legislative, and judiciary branches of government; a free press; new social norms and values; an openness to private organizations and to entrepreneurship; a network of regulators; and a new network of contractual relationships, both domestically and abroad. The economic transition is intimately related with these institutional transformations.

Whether the 4th SAP brought in better reforms and commitment thereto by Government is also a subject of debate. Undoubtedly, the Government was bankrupt in 1991 and could no longer sustain subsidising loss making SOEs. They had to be gotten rid of as quickly as they were acquired. Some researchers have commented that, on their own, policy changes will not redress decades of mismanagement, especially when the degree of commitment of the elite remains unaltered, as noted by Bigsten and Kayizzi-Mugerwa, in their paper titled *The Political Economy of Policy Failure in Zambia* [12].The authors rightly observed the situation in Zambia that policy failure has been due to the nature of a government whose primary concern is its own short-term survival and is unlikely to develop institutions and regulations that are good for economic growth. The events leading to calls for the privatization of the SOEs were well founded in view of the lack of expected deliverables in terms of timely and adequate production and supply of essential goods and services. The SOEs were also used to support the single party political system, especially for logistical purposes during presidential campaigns. It would appear that the gradualist approach to disposing off of the loss making SOEs had no political economy benefits, hence the reliance on the Big Bang. Government desire was however to "get out of business" hence a wholesale Big Bang was used, except for the mining industry where a gradualist approach was used – unfortunately at great economic and social cost since there was both low production and prices of copper in the 1990s.

Whichever approach, the privatisation of the SOEs was a major Government decision to transform the economy from a commandist economy to a market economy and appeared to follow the "Big Bang" approach espoused by Roland[13] above. Private investment was viewed as a panacea to the economic ills under the fourth SAP. The political drive to nationalise private enterprises from 1968 for socio-economic reasons was tantamount to the political drive and will to sale off the SOEs after 1991 for market economic reasons. The market economy reasons included the need to have the Government's desire to focus on policy guidance as opposed to being a business operator. The buzz words were "Government has no business in business". Privatization of SOEs was key to the government's efforts to raise efficiency, promote private sector development, and bolster economic growth. As part of the program, the government enacted a sound legal framework and established the Zambia Privatization Agency (ZPA). Privatisation opened up the economy to private investment by effectively abolishing the 51-49% equity threshold that in the Second Republic was in favour of the State.

Thus the Privatisation Act[14] was passed in record time after the new Government came in power and ZPA was quickly established. Under Section 2, the Privatisation Act defined State owned enterprise as "*…a corporation, board, company, parastatal or body in which the Government has direct or indirect ownership, equity or interest and includes partnerships, joint ventures or any other form of business arrangement or organisation in which the Government has direct or indirect interest but does not include a Government department*".

[12] Bigsten, Arne and Kayizzi-Mugerwa,Steve *Working Papers in Economics no 23* May 2000, Department of Economics, Göteborg University
[13] ibid.
[14] CAP 386 of the Laws of Zambia.

The political will, thrust and vigour to get rid of the financially draining SOEs overshadowed other economic priorities. This focus appeared to be one-dimensional as the Government was presumed to be in a hurry to get rid of the SOEs without concurrent laws that were, for instance, to provide a mechanism to monitor, control and prohibit anti-competitive trade practices in the economy. Between 1992-2002 more than 200 units/companies were privatised. Three thousand state trade sector jobs were lost by 1994. Major parastatals collapsed e.g. airline (Zambia Airways) and bus company (United Bus Company of Zambia)[15].

While the Investment Act and the Securities Act were both enacted in 1993 to attract investment to SOEs, as well as assist in share-listing and purchase of shares respectively, large-scale public participation in the trading of shares has not been overly evident. In addition to lack of sufficient income to warrant long-term saving as well as the lack of affordable investment capital, there is generally a low culture of share purchase amongst the greater part of the population. On the whole, the debate is still on in Zambia and amongst the donor community whether privatization was successful or not. For the State, success meant getting rid of the SOEs that had a parasitic effect on the treasury through subsidies. For the technocrat, success meant a successful negotiation of a sale and receipt of the sale proceeds. For the ordinary person, success meant maintenance and creation of jobs and security thereof, improved terms and conditions employment, and continued Government protection through appropriate legislation.

Dr Rodger Chongwe, a prominent lawyer in Zambia and former member of the first Cabinet in the Third Republic aptly summed up what he called "Government's hasty implementation of the structural adjustment programme". In a review of Dr Kenneth Mwenda's book on "*Zambia's Stock Exchange and Privatisation Programme: Corporate Finance Law in Emerging Markets*"[16], Dr Chongwe held that the Government and its bureaucracy were ill prepared to implement measures such as those spelt out in the Securities Act and the Privatisation Act. Dr Chongwe observed that there was very little input from both the civil service and the politicians in the drafting of these pieces of legislation. As widely held, they were all enacted at the behest of the World Bank and the IMF. Dr Chongwe's remarks were not far fetched, considering that he was a lawyer, a Member of Parliament and a Cabinet Minister at the time all these laws were being enacted. The same pattern appeared to follow the enactment of the competition law, notwithstanding

5.0 Enactment and enforcement of Competition Law

The enactment of the competition law in Zambia was a culmination of a series of events that are not peculiar to Zambia but most of the developing countries that were caught up in the anti-commandist wave of the late 1980s going into the early 1990s. The failure of the economic reforms in the Second Republic of Zambia and/or the lack of political fortitude during the time for the Government to fully implement requisite SAP measures led to industrial stagnation and an economy that was not competitive in any sector. The economy was characterised by legal barriers to entry in key economic sectors while a struggling and largely informal SME sector thrived on smuggled and/or pilfered essential commodities from the SOEs and neighbouring countries. Introducing competition in the economy started with

[15] Details from paper titled "Privatisation – the Zambian Experience" by Valentine Chitalu, then Chief Executive of the Zambia Privatisation Agency

[16] Studies in African Economic and Social Development, Lewiston, NY: Edwin Mellen Press, 2001

the privatisation programme, the purpose of which was to attract private investment. However, privatisation was not in and of itself the only panacea to the economic ills that beset Zambia. There was need for a total overhaul of all laws that affected not only business entry, but its existence, growth and development on a sustainable scale.

Several experts have posited that competition policy refers to government measures that directly affect the behavior of enterprises and the structure of industry. An appropriate competition policy includes both:

(a) policies that enhance competition in local and national markets, such as liberalized trade policy, relaxed foreign investment and ownership requirements, and economic de-regulation, and

(b) competition law, also referred to as antitrust or antimonopoly law, designed to prevent anticompetitive business practices by firms and unnecessary government intervention in the marketplace.

The rise of competition policy in developing countries since the late 1980s is associated with a change in the role of the State in the direction of less intervention in the markets, where trade liberalization, deregulation, and privatization have changed economies dramatically since the early 1990s[17]. The introduction of competition policy and law in Zambia, like in other transition market economies, was adopted by the new Government in 1994 as part of the structural adjustment programme. For Zambia, this was the fourth SAP aimed at repositioning and/or re-orienting an economy that had been predominantly State controlled for almost 20 years. The reforms were targeted at achieving the following:

(i) Commercialisation and privatisation of State-owned enterprises
(ii) Open the economy to private investment
(iii) Reduce Government direct involvement in economic activity
(iv) Propel national industry to national and international competitiveness
(v) Stop Government subventions to industry
(vi) Create sustainable employment and wealth creation
(vii) Improve the welfare of the citizens

The said Government policies led to the enactment and establishment of several legislations and regulatory bodies between 1992 and 1998, which included the following:

Legislation	Regulator
Privatisation Act, 1992	Zambia Privatisation Agency
Investment Act, 1993	Zambia Investment Centre
Securities Act, 1993	Securities & Exchange Commission
Competition and Fair Trading Act, 1994	Zambia Competition Commission
Telecommunications Act, 1994	Communications Authority
Energy Regulation Act, 1995	Energy Regulation Board
Pensions and Insurance Act 1996	Pensions and Insurance Authority
Water and Sanitation Act 1998.	National Water & Sanitation Council

[17] In a paper titled *Anti-trust Policy in Brazil – Recent Trends and Challenges Ahead*, Professor Gesner Oliveira[17], President of the Brazilian competition agency (CADE) as detailed the transitional experiences of Brazil.

All the given laws were meant to be instruments to accelerate the transformation process where economic activity was to be primarily determined by private ownership and market forces instead of State ownership and controls, which had failed lamentably between 1968 and 1991.

The ushering in of competition in both the political and economic lifelines of the country heralded the emergency of several regulators to ensure that the gains of liberalisation were not lost to any adverse conduct likely to forestall the benefits of competition (both in politics and in commerce).

At the behest of the World Bank and the IMF, the *Competition and Fair Trading Act,* 1994, Chapter 417 of the Laws of Zambia was hurriedly passed in May 1994 and assented to on 3rd June 1994. There appeared to be clearly lack of political will towards the enactment of both the legislation and the establishment of the enforcement agency as this was not part of the Government's priorities. While the law was passed by Parliament in May 1994 and assented to by the President in June 1994, its effect was from February 1995. Thus the law had no retrospective effect to redress and/or address any anti-competition matters such as preference of structural and behavioural undertakings on any anti-competitive dominant or monopoly firms that were established at privatisation or investment that occurred through mergers and acquisitions. The competition authority itself was operationalised in May 1997 when its Chief Executive[18] was appointed. On the other hand, it took only months to draft and enact the Privatisation Act, as well as establish the ZPA[19].

Enactment of the competition law in Zambia was novel, and in the absence of the critical legal and economic expertise, as in many other transition countries that adopted such a laws. As noted by Gal [20], the number of developing countries that have adopted a competition law has grown exponentially over the past two decades. Often the passing of a competition law has been treated as one of the cornerstones of the liberalization and pro-market reforms that have swept many developing countries. Yet the mere adoption of a competition law is a necessary but not sufficient condition for it to be part of market reform. Just as ecological conditions determine the ability of a flower to bloom, so do some preconditions affect the ability to apply a competition law effectively. Gal noted further that competition law is susceptible to political influences given its nonsector- specific and long term nature.

Few officials in the public service and political establishment would appear to have really understood what it really meant or took to have a well functioning competition authority. This approach appears to be contrasted from post-war Japan where the Government was fully behind the anti-monopoly law and used it to remove barriers to entry, growth and expansion of industries. The holistic approach towards improving the competitiveness of the Japanese industrial base is one that is worth emulating for least developed countries. Any which way, the enactment of the competition legislation in Zambia and the competition authority marked a landmark point in Zambia's regulatory environment, ushering in rules and regulations that

[18] George Lipimile, who has documented more elaborately in several of his papers and speeches the genesis of the competition law in Zambia and its implementation.

[19] The new Government came in office after elections held on 31October 1991 and the Privatisation Act was drafted and reviewed within the public service system, debated and passed in Parliament by August 1992.

[20] Gal, Michal S, *The Ecology of Antitrust Preconditions for Competition Law Enforcement in Developing Countries*, New York University School of Law New York University Law and Economics Working Papers, *Year* 2004 *Paper* 10

were to govern the competitive market place in the face of vigorous privation that was being carried out.

Significantly, the role and importance of the Zambia Competition Commission has been experienced to not only being an authority to prevent anticompetitive business practices, but also to pro-actively strengthen market forces in a liberalised economy through active advocacy and public awareness. However, much remains to be desired for the successful and effective enforcement of competition in Zambia is so far as the overall legal, regulatory laws or Government policies remain at variance with the spirit and/or principles of competition.

6.0 Political economy constraints in Competition enforcement and Regulation

The origination of laws in Zambia is, in effect, the preserve of the Executive branch of Government. The Executive branch, who promulgate policy, propose new laws or amendments to existing laws to Parliament, and Parliament debates and passes the laws according to any amendments that may be compromised in Parliament. While it may be that the enactment of the law in Zambia was at the behest of external factors, its relevance in a liberalised or market economy cannot be overemphasised. It is however difficult to make a firm position whether the Government and Parliament were really aware of the political economy implications of enacting a competition law and giving the powers and independence to the Zambia Competition Commission as that was contained in the law. Regardless of how the law came about and its content, the law was a milestone in Zambia's economic transition and in the protection of the competition process. The enforcement of the law has faced a number of political economy constraints that perhaps are not peculiar to Zambia. As noted by Gal[21], the actual enforcement of a competition law is no less important than its adoption. Enforcement is determined, to a large extent, by the organisational and institutional conditions in which the enforcing bodies operate. Such conditions determine whether antitrust is workable and its enforcement is credible and reputable: whether there exist efficient and effective tools for antitrust enforcement, and whether appropriate measures are implemented to ensure that the motivations of the enforcers to apply the law in specific cases are not limited by political pressures. Gal explained that the institutional and organisational conditions in which the enforcing bodies operate are, thus, the sun and water of competition law, as they allow it to develop and take root.

Guasch and Hahn (1997) in their paper titled *The Costs and Benefits of Regulation: Some Implications for Developing Countries*, posited that there were two reasons for inefficient regulation. One is economic and the other is political. The economic reason was given as the difficult for a government authority to regulate companies because it lacks the necessary information to make economically sound decisions. The political problems with regulation were also given as likely to lead to inefficient economic results since regulation redistributes resources and rents, politicians often use it to secure political gains rather than to correct market failures. It was revealed that a large array of regulatory instruments, such as quotas, licenses, and subsidies, are used to transfer significant amounts of wealth from consumers to small groups of producers. A government that pursues social efficiency counters these failures and protects the public through regulation. Thus the active and direct involvement of Government market interventions leads to distortions, which likely affect the implementation of competition and other regulatory laws. Guasch and Hahn (*supra*) observed that

[21] ibid.

specifically, regulation aimed at controlling prices and entry into markets that would otherwise be workably competitive is likely to reduce the average standard of living.

As noted already, there are a number of political economy constraints that beset the enforcement of competition and regulatory law in Zambia. Some of these constraints are a result of the political, economic and social environment under which the law operates, while some may be exacerbated by legal limitations, which may also overlap into governance constraints. Some of the political economy constraints faced in competition and regulatory law in Zambia are as follows:

6.1 Exemption of the State

Generally the wholesale exemption of the competition law from commercial activities to which the Government and its agents are a party under Section 3(f) of *the Competition and Fair Trading Act* has rendered it very difficult to enforce competition provisions in some sectors where Government and/or its agents still retain and has continued to insist on retaining control. Even where there is competition, the law would appear to be vigorously targeted at private firms and not SOEs. For example, in the telecommunications industry, the State has retained control of the previous Posts and Telecommunications Corporation (PTC) which has now been transformed into a commercialised SOE, the Zambia Telecommunications Company Limited (Zamtel). While competition has been opened in mobile phones and internet service segments of the industry, competition has been closed on the international gateway and the fixed terrestrial or land lines (PSTN). While the private mobile telephony and internet service providers have been paying a pre-entry license fee of US$100,000 and a 5% annual operating fee based on turnover to the Communications Authority for the last 10 years, Zamtel has not been doing so. There have been recent calls to compel the entity to pay all the statutory fees payable by private operators but there is no legal base to enforce such a requirement.

Since the industry was liberalised in 1994, the Government has refused to allow private entry and/or competition in the international gateway and the fixed telephony system. An international gateway license fee of US$18 million was announced by Government, which was later reduced to US$12 million after the Commission, among others, advocated the entry barrier effects that this was to have in the sector. This is still unreasonably high and the Commission has continued to advocate for its reduction. The result has been that no major investment has been made in these sectors resulting in inefficiencies, lack of innovation and rampant complaints of high tariffs. The Commission has written several position papers[22] advocating the need to have a more restructured and less of a vertically protected Zamtel.

There may be need to ensure that the exemption of the State is not wholesale but that where notably a SOE controls essential facilities and is in competition with other private players, the anti-competitive conduct of the SOE in the market place must not be construed as protected from action of the competition authority. It may also be prudent, in future proposals to amend the law, to ensure that provisions are inserted that address the commercial activities of quasi-government institutions in so far as they do and/or are likely to infringe on competition and fair trading matters. This will make enforcement of the law more holistic and rewarding.

6.2 Public Interest considerations

[22] ZCC Position Paper on the International Gateway – 2006; ZCC Submission to the Parliamentary Committee on Telecommunications, April 2003; ZCC Position Paper on Zamtel Privatisation - 2001

Clearly, the enforceability of competition law does not exist in a vacuum and its effective implementation is dependent, inter alia, on the practicability of the law itself, the environment in which it operates and its enforceability in terms of resources. With the explicit exemption of the Sovereign from the application of the Competition law in Zambia, the Government does often show interest in what appear to be significant private investments in a key Government directly or through intermediaries sometimes sends leads to the competition authority as to the importance e.g. of a proposed merger and the benefits therefrom. Where as the competition decision is based purely on competition issues of substantial lessening of competition, dominance and abuse thereof as well as efficiencies likely to arise from a proposed transaction, Government interest would often consider matters of socio-economic nature in what is popularly laced as "public interest". For instance in 2000/2001, the Commission rejected the proposed takeover of the only cement plant in Zambia, Chilanga Cement PLC by the Lafarge Group. This was despite Government pressure to have the takeover authorised because of the "huge" investment that Lafarge was going to make, which was going to increase employment.

While the investment was substantial, the Commission was desirous to have a market situation for cement in Zambia that did not foreclose entry of prospective players and or lead to a situation where vertical integration of the monopoly upstream and downstream was not entrenched. Notwithstanding the investment through acquisition, the Commission demanded for undertakings that would address these competition concerns if the takeover was to be authorised. When Lafarge refused to give undertakings, the Commission rejected their takeover bid. Lafarge resubmitted the application with undertakings which were acceptable to the Commission and the transaction was subsequently authorised. Some of the salient undertakings are reproduced in the Box 2 below:

Box 2 – Salient Undertakings given by Lafarge to the Zambia Competition Commission

(i) The parties undertake not to use methods of price announcements, which have the effect of imposing a selling price to retailers (price fixing) and to refrain from excessive advertisement of recommended retail prices;

(ii) The parties, their affiliates, representative or subsidiaries undertake not to engage in any activities or conduct or enter into any agreement, which have the purpose or effect of price fixing

(iii) The parties together with their affiliates or subsidiaries doing business in the Republic of Zambia hereby give their full commitment that they will provide company management with the desirable understanding and support of the concept of the competition policy

(iv) It is hereby agreed and accepted that the parties shall not operate, engage or enter into any form of anti-competitive vertical restraints as provided for under Section 7(2) of the Act, without formal notification of such an agreement or arrangement with the ZCC. For the purpose of this provision, the concept of agreement shall include a contract, gentleman's agreement, oral and written arrangement, unsigned agreement, concerted practices, etc

(v) Chilanga Cement shall not charge different prices other than for justifiable reasons to different customers, or to categories of customers, for the same product (goods or services), where differences in prices f\do not reflect any difference in relative cost, volumes, quality, service to be provided or any other characteristics of the products supplied.

(vi) Chilanga shall not distinguish without substantial justifiable reason among customers of Chilanga interms of price, quality or range of goods offered to different customers, differences in accessory services provided, speed of delivery, credit terms, guarantees, and any other differences in terms of sale or purchase.

(vii) The parties shall not use the profit from the Zambian market to finance or cross-subsidise its under-performing activities from its other markets or businesses in the region

(viii) Chilanga shall not refuse to supply an existing customer without objective justification for the behaviour. Refusal to supply shall not be used to bring about an unlawful vertical restraint

(ix) Chilanga together with its affiliates of subsidiaries doing business in the republic of Zambia hereby gives its full commitment that it will provide company management with the desirable understanding and

Consideration of public interest as the primary assessment tool has been a matter of great debate and concern for the Commission. The Commission's approach has largely been primary consideration of the core competition issues pertaining to a transaction before secondary matters of public interest are considered. From the Commission's previous practice, public interest becomes decisive only in the case of a failing firm as was the case when South African Breweries (SAB), who at the time owned Zambian Breweries (with 90% market share) took over the only competitor in clear beer, Northern Breweries (with 10% market share).

Government has continued to fix the "floor price" of maize/corn[23] annually, which in turn is used by the commercial millers of maize meal/flour to fix the end price. Operating under the trade association guise of Millers Association of Zambia, the commercial millers have continued to raise prices concertedly in tandem with the maize prices. Government fixing of the maize price has been argued that it is aimed, inter alia, to ensure that the micro and small scale farmers are not exploited by the middle-men who buy from them at prices below the cost of production and resale at higher prices in the urban areas. Notwithstanding the public interest in Government fixing the floor price, a substantial part of the maize is bought by speculators before the price announcement and even then, the speculators who buy and hoard the maize until there is a deficit appear to benefit more from the price arrangements than the small farmers who are the targeted beneficiaries.

Further, 50% subsidies on fertiliser to farmers have, inter alia, affected the sustainable operations of the State-owned Nitrogen Chemicals of Zambia as Government buys the bulk of the fertiliser at transfer prices and the distributes them largely to the rural farmers at a 50% subsidy. Government's major concern and argument has been the need to control the adverse effects of market forces in the agricultural sector. Other arguments have been that there is no country in the world that does not control and/or subsidise key agriculture sectors.

It has become increasingly difficult to ignore pertinent public interest issues for a country that has a myriad of social economic challenges, inter alia, a large informal sector as well as high unemployment. It is arguably a matter of "common law" that a regulator has to take into account matters of public interest in their decision making process as the laws themselves are enacted in the public interest. It is clearly contradictory to have a law that is enforced against the public interest. There appears to be a widespread public acknowledgement of this view. It would appear that on the face of it, it sounds plausible to consider public interest such as employment creation in the consideration of a merger under competition law in a country which has high unemployment. The enforcement of competition law based solely on best international practices may be a toll order in some cases that ignite public attention and

[23] The national staple food

passion in a country of Zambia's standing. The debate goes on within the competition authority itself whether public interest should be considered in a broader context other than in the case of a failing firm context.

6.3 Government consideration of Advisory Opinions and other recommendations

Politics and regulation may not always see eye to eye, especially where transparency and due process are required. Generally, there has not been overt political support for competition as compared to other sector regulators such as those in privatisation, energy, telecommunications, water and environment. In the background, there would appear to be numerous Government confidence and requests made to have the Commission investigate certain market failures. Following such investigations and submission of recommendations in a report, there is lack of implementation where Government action is required to give effect to the recommendations. In the second half of 2006, the Commission was engaged to investigate reports of high sugar prices in Zambia vis-à-vis lower existing regional prices as well as export prices. The sugar industry in Zambia is for all intents and purposes a monopoly undertaking of Zambia Sugar PLC, which was then under the control of Illovo Group[24]. The Commission did a comprehensive study[25] of the market dynamics in the industry and proposed the removal of the statutory requirement to have sugar used and/or consumed in Zambia to be fortified with Vitamin 'A'.

This requirement has led to the foreclosure of imports as feasible trading partners do not fortify their sugar. The Government has defended the fortification on account of overriding public health interests. This has led to a situation where Illovo's monopoly has been entrenched and led to Zambia having the highest domestic sugar prices in the region. There would appear to be two conflicting public interests – one being floated by the fortification promoters being that there is Vitamin A deficiency in the population, and the other being the fortification acting as a barrier to entry for imports hence the higher prices of locally produced sugar. The latter ties in well with the competition concern.

Illovo's clincher of an export quota to the European Union and the increased employment and foreign exchange earnings that it has claimed would appear to have pacified Government and thus the Commission's recommendations have been implemented.

A dilemma in cases of this nature is that the Commission cannot enforce its decision against the Government. A decision of the Commission is binding on the non-State parties unless overturned by the High Court on successful appeal. However, the decisions of the Commission are not binding on a Government official and/or the Government itself - even where there is commercial necessity. The sugar problem was also faced in the upstream petroleum sector where the Government has a direct shareholding in the refinery.

During the latter months of 2005, the Commission received a notification from Total Outre Mer SA to takeover Mobil Zambia Limited. Total owns 50% of the only oil refinery in the country, Indeni Oil Refinery, an essential facility of which it also has a management contract with the Government. Total is the only vertically integrated oil marketing company (OMC) in Zambia and its market power had a vertical than horizontal dimension. Because of the removal of a vigorous competitor doctrine and the subsequent alteration of the market

[24] Illovo Sugar sold its interests to Associated British Foods (ABF) PLC of the United Kingdom

[25] *Report on allegations of Excessive Pricing of Industrial Sugar against domestic sugar producers in Zambia by Industrial Sugar Users*" - Staff Paper No. 270, March 2007

structure (notwithstanding the vertical integration), the Commission raised competition concerns and Total gave undertakings to address the Commission's concerns.

At the time of writing this report, the Government had acknowledged the Commission's undertakings and issued a statement that it was going to reduce its shareholding along with Total in the refinery. Government owns 50% of the Indeni Oil Refinery, to which the Commission sought undertakings that both Total and the Government should reduce their shareholding to 35% each to allow for other willing downstream players to invest upstream. The undertakings given by Total are reproduced below:

Box 3: Undertakings given by Total Outre Mer to the Zambia Competition Commission

(i) TOM undertakes to work with other shareholders of Indeni to establish a management structure independent of current and would be shareholders of Indeni six months following a revised import parity pricing formula determined by an independent expert and approved by the Energy Regulation Board.

(ii) Total undertakes to reduce its shareholding in Indeni to 35% subject to the following:

(a) a uniform disposal of GRZ shares to an independent shareholder, in order to maintain the existing parity between the current A and B shareholders;

(b) the sale of such shares to an entity or entities independent of Total Outre Mer and GRZ; and

(c) the conclusion and execution of a new shareholders agreement between Total Outre Mer and GRZ

(iii) Total Zambia Limited shall not engage in predatory pricing i.e. sell of its fuel products at prices below average variable or production costs.

(iv) Given the enhanced oligopoly market structure, which shall come as a result of the proposed takeover, Total Zambia Limited shall not enter into any arrangement, and shall avoid any situation which may allow for collusion with other OMCs in price, output, customer, market allocation, etc.

(v) Total Outre Mer SA or its affiliates shall not engage in any exclusive dealing arrangements that disadvantages any OMC in the Zambian market unless with the express authorisation of the Zambia Competition Commission.

(vi) Total Outre Mer SA should recommit itself to the Undertakings it made to the Commission when it took over AGIP and 50% shareholding in 2001.

6.4 Trade Association Influence

The vigorous enforcement of competition law in the country would appear to be a concern to the entrenched strong business men and women operating under the guise of trade associations. These associations usually have a membership that includes leading politicians and/or actually fund political activities such as election campaigns and thus have great influence over the economic decisions that politicians make and the priorities thereof. Such

associations would appear to include Sugar Producers Association of Zambia (SPAZ), Millers Association of Zambia (MAZ), United Transport and Taxis Association (UTTA) and now seemingly defunct Oil Marketing Companies (OMCs) loose alliance. After vigorous competition advocacy by the Commission due to various anti-competitive conduct involving price fixing as well as the realisation by Government that the UTTA was becoming more of a political than trade association, the UTTA was de-registered by the Government in 2004. Following an investigations by the Commission into price fixing allegations against the OMCs in 2000/2001, the OMC secretariat that was under the auspices of Caltex was finally disbanded in 2002.

Trade associations representing the interests of local companies have often called for a discriminatory application of the competition law in favour of local firms against those of foreign origin. The current competition law appears to be "blind" as regards local versus foreign firm interactions in the local economy. With the consequent financial and political influence of a powerful trade association, these have been used to influence politicians to either reduce the powers of the competition authority and/or to amend the law so that it is able to address local business interests through a discriminatory enforcement in favour of local firms. In other words, when local firms are price fixing in order to win market share against a multinational or other firm of foreign origin, the competition authority should not stop such conduct, late alone prosecute the offending local firms. Discriminatory competition enforcement is almost a fallacy on the face of it. Rather, the Commission's view has been that the Effect Doctrine does in and of itself address, in effect, the discriminatory concerns in as far as firms whose conduct are deemed not to have a substantial effect on competition are allowed to continue with the conduct.

6.5 Financing the Competition Commission

The Commission relies solely on Government subventions for its operations, which subventions are usually below the projected budget. The Commission has generally been under-funded with budgetary disbursements approved by Parliament to the Ministry of Commerce, Trade and Industry, which accounts to Parliament. This is a major constraint affecting the Commission's ability to effectively carry out its advocacy and enforcement programmes. Box 4 below is a reproduction of Clause 11 of the First Schedule to Section 4 of the Competition & Fair Trading Act, which addresses the Commission's funding:

Box 4: Funding of the Commission

Funds of Commission

11. (1) The funds of the Commission shall consist of such moneys as may-
- (a) be appropriated by Parliament for the purposes of the commission;
- (b) be paid to the Commission by way of grants or donations; and
- (c) vest in or accrue to the Commission.

(2) The Commission may-
- (a) accept money by way of grants or donations;
- (b) raise by way of loans or otherwise from any source in Zambia and, subject to the approval of the Minister, from any source outside Zambia, such money as it may require for the discharge of its functions; and
- (c) charge and collect fees in respect of programmes, publications, seminars, consultancy and other services provided by the Commission.

(3) There shall be paid from the funds of the Commission-
- (a) the salaries, allowances, loan, gratuities and pensions of the staff of the Commission and other payments for the recruitment and retention of staff;
- (b) such reasonable traveling and subsistence allowances for

The Budget is prepared by the Commission secretariat and approved by the independent Board of Commissioners. After this, the Ministry scrutinises the budget and determines the subvention. The constraint comes in that the appropriations are finally determined by the Ministry and if in their determination competition is not a priority compared to other areas under the Ministerial purview such as investment, privatization, trade and SME issues, then the disbursements are not alive to the budget and the programs therein. This matter appears to be outside the control of the Commission. Regulators in energy, water and telecommunications are self-financing as they are able to retain funds that they collect in form of licence application and other operational fees, which support their operations. Lack of sufficient funds for its programs is not an ideal situation for an economy-wide regulator, thus making some of the critical programmes such as court process/litigation, business and consumer awareness being sidelined. Although the Commission does retain the notification fees it collects, these account for less than 10% of its approved Budget.

A remedy to this would be to have direct subventions from the Parliament. Another remedy would be to have about 5% or other percentage of the fees collected by the industry specific regulator be appropriated to the competition authority. Unequal financial capabilities of the competition authority vis-à-vis other sector regulators has made the work of the Commission constrained within the limited financial subventions.

6.6 Maintenance or enactment of Laws that are at variance with competition principles

The extensive involvement of Government in economic activity in many least developed and developing countries often leads to entrenched business laws, regulations and pronouncements that foreclose entry and/or restrict innovation, growth and development. There has been a shift in this regard in Zambia following active advocacy by the competition commission in the legal drafting process. The Commission has played an active role in the formulation of the Industrial, Commercial and Trade Policy as well as the Fifth(5^{th}) National Development Plan, which is the focus of the Government's "Vision 2030" development plan. Shan Ramburuth, then Acting Director of the Competition Commission of South Africa, in his paper titled *Challenges faced by New Competition Agencies*[26], acknowledged that many developing countries are characterized by extensive government involvement in the economy, either as policy and lawmakers or as providers of services through state-owned entities in competition with the private sector. He noted that this created two potential problems. Firstly, as lawmakers, governments may introduce laws and regulations that stifle competition in their pursuit of other socio-economic and political goals. The advocacy activities of competition

[26] ABA Antitrust Section's 2006 Spring Meeting Washington, D.C.

authorities are therefore relevant especially in situations where the law is new and yet to be understood by all stakeholders.

Secondly, Rumburuth has noted that the state-owned entities might exploit and abuse their relationship with government by engaging in anticompetitive conduct in the hope that they are beyond competition law scrutiny, or precisely because the competition authorities may be wary of hauling them before the courts. Alternatively, such state-owned entities in certain countries might be exempt from competition law. This creates an uneven playing field between state entities and private entities. As the Zambia Competition Commission has nurtured and developed its position in the economic life of Zambia, it is increasingly being called upon to comment on proposed new laws and other amendments to laws of an economic nature. Recently, the Commission was invited to comment on proposed amendments to the Insurance Act in which proposals were made to separate the life from the non-life business segments of insurance. There was a caveat which the Commission opposed that the Zambia State Insurance Corporation (ZSIC) be exempted for a period of two years from this arrangement. In the current market set up, ZSIC already enjoys a fairly competitive market position and the Government intention to assist it to gain a stable market position before it can separate the two business segments appeared to be anti-competitive.

6.7 Policy Certainty and Stability

The political and economic phases that Zambia and similar countries have gone through have undoubtedly led to a number of policy changes. However, for Zambia, these have been consistent and predictable within a given time period when there is a particular government. Where policy shift has been prominent, it would appear to be anchored to a situation where Government has back-tracked on certain reforms due to financial or other social political constraints. As Zambia has only had two political parties forming Government since independence in 1964 and perhaps this has provided some policy certainty and predictability, especially since 1991. Policy certainty is relevant not only to regulators but also to the private sector who invest their monies to yield specified benefits within a given legal framework. Hafeez (2003)[27] in *The Efficacy of Regulation in Developing Countries* submitted that policy stability reduces the uncertainty and risk from business decisions; transparency and accountability. As a whole, the legal, institutional and policy framework provides the setting for the economic and social regulation to be effective. Frequent change of governments in some countries may appear to pose this threat to policy certainty and/or stability and thus adversely affect implementation of competition and regulatory law.

There would however appear to be no empirical evidence in the last 10 years of the Commission's existence to point to a situation when Government changed its policy regarding competition or other regulatory laws. This has however been a general concern regarding changes in policy regarding republican constitutional issues.

Within the civil/public service system in Zambia, the Government has set up a division under Cabinet Office to deal with policy analysis and coordination – the Policy Analysis and Coordination Division, which is headed by a Permanent Secretary who reports to the Secretary to the Cabinet.

7.0 Governance constraints in implementation of competition and regulatory law

[27] Discussion Paper of the United Nations Department of Economic and Social Affairs

Governance issues have generally been a target of criticism leveled against countries such as Zambia by the donor community, who increasingly tie their development aid to governance. Governance issues concern all law enforcement agencies in their interaction with their stakeholder constituents. Lack of adherence to established principles of good corporate governance may lead to questionable decisions in the effective implementation of both competition and regulatory laws.

In a paper entitled *Sector Organization, Governance, and the Inefficiency of African Water Utilities*, Antonio Estache[28], acknowledged that the institutional capacity of the country as well as governance are significant driving factors in the performance of firms, limiting the impact of corruption when this interferes with the process of reform. In a speech on "Governance" that perhaps drew some inspiration from the Zambian experience, the IMF Director – Africa Department, Mr Abdoulaye Bio-Tchané[29] highlighted the influence of the Fund that its main relevant economic issues of good governance fell in the areas of the management of public resources (including sales of public assets), and the development and maintenance of a transparent economic and regulatory environment conducive to private sector activity. He emphasised that the criterion for Fund involvement in a governance issue was whether it would have a significant current or potential macroeconomic impact in the short and medium term on the government's ability to credibly pursue policies aimed at external viability and sustainable growth. He went on to state that economic governance issues include corruption and transparency, efficient rule making, discretion, and the scope for abuse of power. Similar sentiments have been echoed by James J Emery of the International Finance Corporation in his paper *Governance, Transparency and Private Investment in Africa*.

The following paragraphs highlight the governance constraints in competition and regulation in Zambia and provide solutions, where possible.

7.1 Lacunas in the current legal framework

The legal framework underwhich the Commission operates has been implemented since 1997. During this time, certain enforcement issues that impede effective implementation of the law have been identified. Cardinal has been the lack of administrative fines in the Act and the lack of power to summon witnesses and call for submission of information. The Commission has to take culprit firms to court before fines and other penalties are preferred on them for refusal to comply with an order or direction made under the Act[30]. However, while this may appear to provide for due process and accountability, it does appear to equally play an adverse role of limiting speedy resolution and/or enforcement decisions. The lack of both financial and qualified legal or prosecution officers within the Commission and the open market have made it difficult to adequately deal with those who, though in the minority, refuse to cooperate with the Commission in its investigations. There is a drive currently to amend the legislation and have some adequate administrative powers for the Commission to deal with instances that adversely disrupt its investigations.

[28] The World Bank Institute, and ECARES, Universite Libre de Bruxelles Eugene Kouassi *Universite de Codody,* and *Resource Economics* – West Virginia University

[29] Speech given at the AfDB Symposium on New Partnership for Africa's Development (NEPAD) Addis Ababa, May 27, 2002, Source: https://www.imf.org/external/np/speeches/2002/052702a.htm

[30] Section 16 of the Competition & Fair Trading Act, CAP 417 of the Laws of Zambia.

Criticism has been labeled against the competition authority that there would appear to be insufficient natural justice in the approach taken in investigations, where accused persons are investigated by the Commission and "tried" by the Board of Commissioners based on the "prosecutor's" docket. Invariably, this is not overly true as the Commission's reports to the Board always contains the views of the accused. The only lacuna being that the accused does not appear before the Board to present their own case and/or to hear whether the Commission's representation of their position is correct. The current system where the Commission secretariat takes its report and recommendations to the Board of Commissioners to adjudicate without the affected parties being given a hearing or to present their own cases before the Commissioners is perhaps not unique to Zambia.

The decision of the Commission has a quasi-judicial connotation as it is largely binding and parties aggrieved with the decision of the Commissioners have to appeal to the High Court, with subsequent appeal to the Supreme Court[31]. It would appear that this system forecloses transparency in adjudication at the Board of Commissioners level. This may be a matter that could be addressed in the proposed amendments to the current legislation.

7.2 Regulations and other enforcement guidelines

Under Section 17 of the *Competition and Fair Trading Act*, the Commission may issue guidelines and other regulations through a Statutory Instrument signed by the Minister. Such regulations assist in creating a transparent and predictable enforcement environment, especially when dealing with matters of dominant firms and mergers and acquisitions. These regulations have not been passed through this process. However, the Commission does have a wealth of publications containing guidelines to assist staff as well as the public in understanding the investigation and assessment process. Merger guidelines have for instance been adopted by fusing some elements from the Australian Merger Guidelines and the US Horizontal Merger Guidelines. However, the legal standing of such guidelines may be questioned. With a relatively high staff turnover, there is need for sustainable technical assistance in form of staff training in the area of developing regulations and other guidelines to ensure transparency in the implementation of both the competition and regulatory laws. This perhaps goes for most of the developing competition authorities.

There is an increasing interaction both at formal and informal levels between competition officials in developed and developing authorities and best practices are being understood and adopted along the way. Zambia has benefited greatly from this process.

7.3 Fragmentation of the regulatory environment

The regulatory framework in Zambia in terms of operation on the ground is evidently fragmented, especially in as far as competition and technical regulation is concerned. While it is neither the jurisdiction nor the competence of the Commission to have enforcement competence over technical regulatory matters, there is need to ensure some form of coordination (formally or informally) to avoid duplication of efforts while at the same time not compromising the independence of both the competition authority and the sector specific regulators. While policy formulation upstream is coordinated through Cabinet Office, the operationalisation on the ground would appear to be left to the goodwill of the regulators.

[31] Section 15 of the Competition & Fair Trading Act

In the case of *Allegations of Bid-Rigging against Nitrogen Chemicals of Zambia Limited by PJC Holdings*[32], the complainant alleged that bidders tendering for the supply of chemicals for the production of "Compound D" fertiliser were supposed to comply with the tender requirements as follows:

- Quoting prices for all the requested products (CIF Kafue);
- Product Samples of the requested products;
- Bid security at 2% of bid price;
- Validity of the quotations; and
- Delivery period for the products.

The complainant explained that the tender was awarded to two bidders who were not responsive at the preliminary stage.The complainant added that NCZ also contacted them to review the prices before the tender was opened. The Commission constituted investigations under Section 9 (on bid rigging and collusive tendering) of the Competition and Fair Trading Act.

On the basis of the investigations carried out by the Commission, the Commission did not establish a tight case that NCZ had violated Section 9 of the Competition and Fair Trading Act. This was principally because there was no evidence found to conclude that NCZ engaged in *collusive tendering* or bid rigging by awarding a tender to parties whose bids had not been responsive.

While the Commission was investigating the case, the Anti-Corruption Commission (ACC) were also investigating the same case under the Corrupt Practices Act, while the ZNTB has also investigated the case but appeared reluctant to cooperate with the Commission. While the ACC approached the Commission to find out whether the Commission had found any information relevant to their case, there was no such

It is possible that the lack of coordination of enforcement efforts may confuse the regulated. The laws would need to be redrafted but in the mean time, loose formal arrangements could be made such as the Regulatory Network (RegNet) think-tank in Australia to which the Australian Competition and Consumer Commission and other regulators belong and use it to syncronise their common goals. A similar arrangement may be tried by developing competition authorities and regulatory agencies.

Concurrent jurisdiction on competition enforcement remains largely a "gentleman's understanding". There is need for a less ambiguous regulatory environment as would appear to have been the drafters thinking in the Energy Regulation Act[33], which under Section 6(1) states that: (The Board Shall) "*in conjunction with the Zambia Competition Commission established by the Competition and Fair Trading Act, monitor the levels and structures of competition within the energy sector with a view to promoting competition and accessibility to any company or individual who meets the basic requirements for operating as a business in Zambia"*

Section 5 of the current Telecommunications Act[34] grants the telecommunications regulator the power to deal with competition and consumer matters in the industry. The Act does not compel the regulator to refer to the principal competition legislation administered by the

[32] Staff Paper No. 222, July 2005
[33] CAP 436 of the Laws of Zambia
[34] CAP 469 of the Laws of Zambia

Zambia Competition Commission, neither does it stipulate a requirement for consultation. In the mean time, Section 6 of the *Competition and Fair Trading Act* grants the Commission economy-wide oversight over competition and fair-trading matters "that are likely to adversely affect competition and fair trading in Zambia". The Commission's understanding has been that this provision grants it overriding influence over other statutes in as far as competition and fair trading matters are concerned. This lacuna has to be addressed. Where persons are faced with a case that is captured both in the Telecommunications Act and in the competition legislation, the parties have had to approach both regulators for clearance. Inherently, this would appear to increase transaction costs.

As a case in Zambia, a leading South African mobile cellular service provider, MTN, notified the Zambia Competition Commission of its intention to acquire the second largest mobile cellular service provider in Zambia, Telecel Zambia Limited in April 2005. The Commission assessed the transaction and found no competition concerns. However, the license conditions required that 10% of the shares be offloaded to the Zambian public (without specifying how this was to be done). The Commission addressed this issue with the parties to the transaction, of which modalities were worked out and a Memorandum of Undertakings was signed. The Communications Authority came up with a variation of the same undertakings and refused to authorise the transfer of the license until the parties had addressed their version of the undertakings. The telecommunications legislation does not provide powers for the regulator to be involved in the assessment of mergers and acquisitions in the sector. It would appear that the specific statutory function under Section 5 of the legislation should have been syncronised with the existing competition legislation at the time of legal drafting stage to avoid the regulatory contradictions in enforcement.

This case, among other cases, illustrated the cumbersome situation that enterprises would be found in a matter where there is regulatory concurrence and the interfacing regulators do not cooperate. It not only unnecessarily increases the transaction costs but creates regulatory uncertainty for business.

The concurrent competition enforcement functions between the competition authority and the telecommunications regulator has not assisted in churning out the benefits of regulatory confluence in enforcement strategies, tactics and consumer welfare and protection despite the fact that there is a lot of formal and informal contacts between the staff of the two institutions at other non-competition fora as well as at personal levels. There was close cooperation during the preparation of the draft Information and Communication Technologies Policy between 2004 and 2005, during which issues of access to the essential facilities as well as removal of both regulatory and other administrative barriers to entry were advocated by the Commission.

While transparency and accountability are critical in any regulatory interrelationships, there is often a confusion as to whether two independent regulators and/or the competition agency are accountable to each other as opposed to being accountable to Parliament, the Board of Regulators/Commissioners or to the Minister as the case may be. Clearly, each statutory body has a specific legal framework under which it operates and reporting systems are again specified in the statute. A clash is usually unavoidable where one regulator, notably the competition authority, has "overriding" jurisdiction in its statute – more so when this is implicit than explicit. Regulatory confluence cannot be avoided in enforcement and such confluence must not lead to regulatory friction as this is likely to lead to uncertainty.

It is however inconceivable that core anti-competitive practices prohibited under the principal competition legislation such as predatory pricing, cartels (price fixing, market allocation, bid-rigging), anticompetitive mergers and acquisitions, etc could be allowed by a sector-specific regulator purporting to have an overriding jurisdiction over an industry-wide economic regulator.

Further, multiplicity of actions by both firms and consumers between two or more regulatory agencies have been a cause of concern in fragmented regulatory roles e.g where a consumer complains to a Government official, then to two different regulatory agencies. Where a consumer fails to get a desired result from one regulator, then he or she waits to hear from another. There is need to strengthen the regulatory environment in Zambia through more coordinated than fragmented and unilateral efforts that would appear to have taken their toll – regrettably to the detriment of optimal business and general welfare development. Regulatory unilateralism should preferably not be allowed to progress where consultation is mandatory or otherwise required. This problem has also been identified in South Africa[35] where Memorandum of Understandings have been identified to address regulatory convergence.

7.4 Lack of a comprehensive national competition policy

There is lack of centralised coordination of enforcement efforts for competition. This has led to a situation where competition principles are not strictly followed e.g. going by public allegations of corruption in tender procedures in public procurements, in particular during selective tendering by Government departments and parastatals. Most if not all allegations of malpractices in tenders such as "bid-rigging" or "collusive tendering" are difficult to prove as they are criminal offences that require proof beyond reasonable doubt. An enhanced competition culture may be facilitated through having a national competition policy that should permeate all commercial activity, including that of the State. It is not likely that the Commission's programmes would be fully funded by Government to culminate into an extensive and sustainable advocacy programme and enhancement of media awareness to competition policy. A national competition policy would inherently raise such due to the publicity which is generated by Ministerial and or Presidential pronouncements of this nature. Presently, the situation is being addressed through targeted advocacy and awareness programmes aimed at senior public servants, key Ministries and submission of reports to select committees of the National Assembly.

7.5 Independence of the competition authority and regulators

Institutional arrangement of a competition authority and the powers given to it are both a political economy and a governance issue. Independence of the competition and regulatory authority goes a long way in ensuring that there is no or at least less political interference in the operations of the agencies. Institutional arrangements of the regulators is a necessary step in guaranteeing their independence in making decisions according to the law that they are established to enforce. There is need to ensure that the investigating and adjudicating wings are fairly separated from each other's undue influence as well as ensuring transparency. Section 1 of the Schedule to the Competition and Fair Trading Act establishes a Board of Commissioners which is the adjudicating authority, separate from the investigating wing. The Secretariat is the investigative and enforcement wing headed by the Executive Director. The Board representation is by nomination from 13 institutions as specified in the statute, of which the Minister formally appoints. The Board members, referred to as Commissioners,

[35] *supra* note 25Shah Rumburuth

appoint their own Chairperson and Vice Chairperson from amongst their number. The Board is as given in Box 5 below:

Box 5 – Board of Commissioners of the Zambia Competition Commission

(i) a representative from each of the Ministries responsible for finance, and commerce, and industry;
(ii) a representative of the Zambia Bureau of Standards;
(iii) two representatives from the Zambia Council of Commerce and Industry, each representing different sections of that body;
(iv) a representative of the Law Association of Zambia;
(v) a representative of the Zambia Federation of Employers;
(vi) a representative of the Zambia Congress of Trade Unions;
(vii) two persons representing consumer interests and appointed by the Minister;
(viii) a representative of the Engineering Institution of Zambia;
(ix) a representative of the accounting profession; and
(x) the Economics Association of Zambia.

7.6 Security of Tenure of the Head of the Agency

A secure head of the competition or other regulatory agency is most likely to perform his or her functions more objectively and adhere to good corporate governance in the day to day administration of the agency. Most notable is the appointment of the head of the competition authority, where a public tender for the position is made and the highly independent Board of Commissioners interview the applicants and selects a suitable candidate. Once appointed, the Chief Executive is answerable to the Board and can not ordinarily be removed from office for any reason by the Minister. The statute also restricts the power of the Minister over the Board by prescribing the process of removal of the Board members.

Where they exist, ministerial powers to hire and fire Chief Executives and Boards in the national interest have been criticized for want of the tenets of natural justice as such powers tend to create insecurity of tenure for the CEO, as well as for the Board where such is the case. In March 2006, the head of the Zambia Wildlife Authority (ZAWA), who served as the first Director of Consumer Welfare at the Zambia Competition Commission between 1998 and 2001, had his contract terminated by the Board allegedly after some pressure from the Executive. The Minister was reportedly not happy with, inter alia, the high degree of independence that was exhibited by the ZAWA head in relation to granting hunting licenses and other concessions.

Interesting legal issues also emanated from the latter months of 2005 when the Minister of Transport and Communications purported to appoint the Chief Executive of the Road Safety and Transport Agency (RSTA), a function that was by statute reserved for the Agency Board (which was appointed by the Minister). The Chairman of the Board, surprisingly, challenged the decision of the Minister. The Minister then purported to suspend the Board and dismissed the Chairman. The Chairman sought the Court's intervention by obtaining leave for judicial review, which in effect acted as an injunction to stay the Minister's order. This is a rare occurrence in Zambia's governance structure (especially when compared to the ZAWA case above) and a development that was welcomed by a cross-section of legal observers as good

for regulatory independence or autonomy in decision making. The events at the RSTA showed that management and Boards that properly understand their role and relationship with the policy makers could fight for their operational independence or autonomy effectively to challenge the seemingly excessive powers of politicians.

7.7 Exemptions to the applications of the law

Exemptions and exceptions, whether express or implied, must not be entrenched where these make enforcement discriminatory vis-à-vis other market players under the competition legislation. Exemptions from the application of a law must be limited to non-commercial activities, of both professional associations and Government. Section 3 of the Competition and Fair Trading Act appears to exempt the application of the Act from activities of professional associations. Thus the Commission has not been able to enforce the law to professional associations even in matters of possible collusion. There have been price fixing concerns raised over the practice fees which the Law Association of Zambia prescribes through a legislative proposal to Parliament. This may an area for the Commission to intervene in future. There may be need to address the exemptions of professional associations and the extent of the exemption of commercial activities of State so as to make the law less discriminatory in this regard.

7.8 Regulatory capture

Industry regulators are susceptible to regulatory capture and thus the public may tend to look to the Competition authority for guidance in matters of competition and fair trading. Regulatory capture generally is less likely to be problematic in competition law enforcement since the competition authority does not involve repeated interactions to the same extent as other types of regulation. However, it is likely that as staff remain in their positions for a long time and mingle with the same big business officials particularly in a small economy, regulatory capture may affect the competition authority officials in their being objective in enforcing the law on, e.g. big business interests. Staff rotation within the department must be practiced as well as an appropriate mix and change of adjudicators through a staggered office-tenure system to ensure that regulatory capture is restricted to the barest minimum.

7.9 Time constraints

Time is relevant in the enforcement of any law and its misuse may frustrate business decisions. Time constraints in case assessment and decision making would also appear to be a major factor, so is the predictability aspect of decisions where there is a combination of two or more regulators addressing the same issue. With regulatory fragmentation, as well as less coordinated regulatory confluences, time and predictability appear blurred and this creates regulatory uncertainty for business. While completion times may be made, as well as guidelines for assessment of cases put in place, much of the execution on the ground is dictated by a lot of other factors that include the timely receipt of critical information from the parties to a matter, submissions of any of the interested parties, and the investigative complexity of the matter. It may be prudent that regulators find a way of dealing with a similar case notified to two or more regulators in a more coordinated matter to avoid procrastinating even the simplest of matters.

Another factor in time constraints is the insufficient numbers of skilled staff to handle the increasing workload in the developing competition and regulatory authorities. This affects speedy decision making and often would create an impression of an authority being "anti-business", a tag that is at variance with the heralded objective of "promoting the efficiency of production and distribution of goods and services". The time aspect may be addressed through increased budgetary allocations, increase in staff, nurturing of special staff competencies, and use of up to date information technology equipment. Selective handling of cases could also be engaged where a fast track system is administratively used to deal with cases that do not, on the face of it, have no plausible effect on competition or consumer welfare. This approach may be properly implemented with a staff complement that is properly trained and well versed with the mischief that the legislation is intended to cure. In this regard, international technical assistance in capacity building for staff is indispensable to the success of any developing agency.

7.10 Judicial Scrutiny of Competition and Regulatory Authority Decisions

The judiciary in Zambia is yet to be tried in the area of competition law adjudication. Neither the Commission nor the parties to competition decisions have taken either to court. This has left the competition legislation to be largely untested and withheld useful case law to provide interpretation to the provisions of the law and its enforcement. Accusations of arbitral interpretation of the law have been preferred on the Commission especially in dealing with matters of mergers and acquisitions, which under Section 8 of the *Competition and Fair*

Trading Act does not prescribe any notification thresholds. Whether the ordinary courts of common law are able to comprehensively handle competition issues remains to be tried. The Communications Authority was sued in 2002 by the two private mobile cellular service providers, Telecel and Celtel for attempting to repossess some of the unused frequencies on the limited Spectrum Band, which repossession was aimed at allowing another prospecting entrant to invest in the market. The two separately sued the Communications Authority. The High Court, perhaps properly so, directed that the matter be dealt with under Arbitration as the matters appeared too complex and the case was likely to take a long time for the court process to exhaust.

Judicial scrutiny of decisions of an executive agency is necessary for accountability and good governance. The Commission has realised this constraint and has engaged the judiciary in training programmes under the auspices of the United Nations Conference on Trade and Development (UNCTAD).

8.0 Conclusions and recommendations

The emerging challenge for policy makers in Zambia at present, is the need to ensure that regulatory reform and the implementation of competition policy are complementary strategies for the attainment of competitiveness and economic growth, which are critical success factors to poverty alleviation. The existence of a coherent and consistent mechanism to regulate competition constitutes a necessary condition for companies to attain market success locally and internationally. Zambia has undergone several political economy transformations since attaining independence from the UK in 1964. During the 1960s, the world-wide appeal of socialist principles affected the young republic and from 1968 a policy shift was made. The wind of change in the Eastern Block again had its toll on policy shift in Zambia in the 1990s. Identifying and Overcoming Political Economy and Governance Constraints to the Effective Implementation of Competition & Regulatory Law is important in a developing country such as Zambia as it does assist policy analysts and legal drafters to predict the environment underwhich they operate. More importantly, it creates regulatory and governance certainty. There is need to strengthen such certainty through sustainable and consistent enforcement of the law.

As aptly noted by Hafeez (2003)[36] submitted that the efficacy and extent of regulatory reform is a function of the level of the economic, political and institutional development in a country. Whereas the cornerstone of the new development paradigm is a private-sector led growth strategy, the challenge to deregulate and reform becomes unique in developing countries which may have a lack of a rule of law and property rights, weak judicial institutions, and ineffective or nonexistent commercial codes and bankruptcy laws. Likewise, it has been submitted in this paper that state management of the regulatory reform process is not always free of political constraints. Government interference and corruption impact on private sector firms by increasing business risks and costs.

For least developed and developing countries who are still grappling with structural adjustments, there is need for the competition authority to continue to play an overt lead role in matters of advocacy and target key stakeholder constituents and/or opinion leaders to understand the role of competition in an economy. Entrenched business interests are likely to continue to influence Government officials and politicians and probably influence public opinion against the competition and regulatory enforcement. A fine combination of strategic

[36] *supra* Note 20

enforcement as well as advocacy would assist is creating a public sympathy and support for competition enforcement. While the macro environment in which regulators operate has a lot of uncontrollable factors, regulators would appear to be well poised to influence a number of these factors through their enforcement efforts.

As argued by Hafeez (*supra* Note 27), the new role of the State must focus on building regulatory regimes within the context of its constitutional, economic, legal and political systems. Establishing a well-functioning system of market institutions with clear and transparent rules, effective checks and balances and strong enforcement mechanisms is the cornerstone for a good regulatory framework. The existence of an appropriate and effective legal and regulatory framework is a key factor in successful efforts to promote the private sector and achieve sustainable economic growth.

Major challenges remain to be overcome. A major challenge for competition than other regulatory law enforcement in countries such as Zambia remains the need to justify their existence and attract adequate public funding in order to effectively carry out their work. In an environment where other key national issues such as public health, education and housing are obvious priorities, the consideration of competition enforcement would appear secondary. However, it is increasingly recognized that national economic development is not likely to be sustainable in the absence of a strong competition authority. An improved economy would inherently in the long run attract private investment is areas of health, education and housing.

The enforcement of competition law and policy in Zambia has peculiarly been a success story despite the financial constraints and the clear lack of overt political support. It would appear perhaps that the Commission is too structurally independent for the comfort of the politician who is desirous to having things under their tight control. The professionalism exhibited by the Commission as well as the independence in adjudication enjoyed by the Board of Commissioners is testimony perhaps of a good foundation in the governance of competition law enforcement in Zambia.

There is an obvious need for more technical assistance and other training from developed national and multinational competition authorities to assist in raising the levels of competence and confidence in the enforcement of competition law. While at the moment desire for a multilateral mechanism for enforcement of competition has been frustrated, there may be a requirement to prepare developing authorities for any future multilateral system through sustainable training and association with developed authorities.

If at all there is something that can be learnt from the Zambian experience it is this: The law has to be enforced within the existing political economy and governance constraints, and results to the general public to justify the continued existence of a competition authority or regulator must be produced. Both competition authorities and regulators in developing countries must learn to walk the tight rope of professionalism in the midst of undue overt or covert political interference.

Both least and developing countries would appear to face the same competition and regulatory hurdles. Strong advocacy ought to be a priority that should be implemented concurrently with enforcement efforts. The competition authority needs to come down from a high pedestal and interact with the opinion leaders both in civil society and the political establishment. Added to this are the senior public servants who implement policy.

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