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Competition law in the developing world: A fish out of water?

Competition legislation and policy – is it necessary in a developing economy?*

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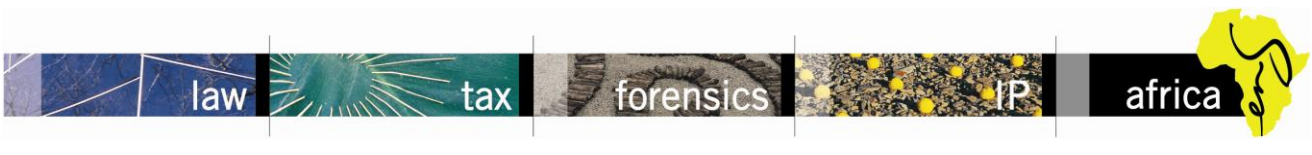

COMPETITION LAW IN THE DEVELOPING WORLD: A FISH OUT OF WATER?

1. INTRODUCTION

1.1. It is an old proverb that if you give a man a fish, you feed him for a day, but if you teach a man to fish, you feed him for a lifetime. In the context of the developing world, however, one often needs to ask who actually owns the pond. Competition law seeks to ensure the efficient allocation of scarce economic resources through the protection of free market competition. It is said that the benefits occasioned by such an objective are the enhancement of productive and allocative efficiency which leads to, *inter alia*, consumer welfare being improved through the creation of a market which encourages lower prices and which welcomes product innovation.[1]

1.2. Further, is it generally accepted that the implementation of competition law[2], which is intended to regulate a variety of anti-competitive practices including cartel conduct, mergers and acquisitions and abuses of dominance, can give rise to far-reaching benefits for the economic development of a particular nation, as well as for the individual consumers of the nation in question. This is especially so in the case of developing countries, whose markets are often concentrated and characterised by high barriers to entry and significant levels of state ownership in the form of state-owned monopolies.

1.3. Whilst this theory certainly appears attractive in its written form, owing to an inherent lack of resources, skills and capacity, some propose that the adoption and implementation of competition policy (more specifically competition law) is not, and should not be a priority in developing countries in light of the various other more immediate social concerns which require attention in such countries. These concerns may range from poverty to illiteracy, high levels of unemployment to a high prevalence of endemic diseases. In circumstances such as these, whilst it may be prudent to ask who owns the proverbial pond, in some instances the pond does not even exist.

1.4. Complicating this debate even further is the fact that the economic effect of implementing competition policy and law is often difficult to accurately quantify. In this regard, it may be argued that the discrete nature of each particular economy renders it virtually impossible to fashion an "apples with apples" comparison. Each jurisdiction or economy is characterised by its own particular and unique features. These features may take the form of war, poverty, corruption, political uncertainty, the existence of extensive natural resources and the like. In addition, inputs required to facilitate this assessment, such as the size of markets, market

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[1] Dr Philip Marsden and Peter Whelan "*Consumer Detriment" and its application in EC and UK Competition Law* 2006 E.C.L.R. Issue 10 at page 569.

[2] It bears mentioning that the enactment of a law regulating competition in a particular jurisdiction is generally only one component of a broader competition policy that may be enforced by various regulators in a particular country to attain high levels of competition and an equitable distribution of wealth and assets between members of society.

shares or concentration levels, are often unavailable[3]. As such, evidence which is utilised to assess the impact of competition is often inconclusive, or at best, ambiguous[4], in that the existence of a strong economy characterised by low prices and relatively high levels of productivity may be the result of features of that particular market completely removed from the existence of a competition law. Moreover, since competition law policies are often implemented as one of a basket of government regulatory reforms, it is similarly difficult to attribute any resultant benefits solely to the adoption of a competition law.[5]

1.5. This paper will review literature, anecdotal evidence and case law to evaluate the arguments for and against the implementation of competition law in developing countries. In particular, the first section below discusses the challenges faced by developing countries which may hamper the implementation of a law of this ilk, the second section will outline the arguments in favour of enacting competition law in developing countries and finally, the third section will provide recommendations to ensure that the adoption and implementation of competition law in developing countries is conducted in such a manner that the ultimate objectives of the policy are achieved.

2. MURKY WATERS: THE CHALLENGES FACING DEVELOPING COUNTRIES

2.1. Many of the market features of developing countries are inherently opposed to competition, for instance a lack of resources, slow and imperfect market structures, large networks of informal markets[6], negative exchange rate movements, the existence of high transport costs, a lack of technological infrastructure, high taxes and weak government support systems.[7] In addition, developing countries are exposed to a higher degree of state intervention, in the form of state-owned enterprises comprising monopolies, with elements of cronyism, privilege and preference by government creating almost insurmountable barriers to entry.[8] It has thus been argued that the adoption and enactment of competition law in developing countries is too difficult and does not render results.

2.2. More specifically, much trade in developing countries is conducted by means of the **informal sector** where such traders are unrestrained by legalities such as registration and licensing requirements, health and safety policies and taxation and labour laws. Owing to the fact that

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[3] Preston J *Competition, Growth and Poverty Reduction* (published as a discussion paper by the Department for International Development, London, 2004) at page 8.
[4] Cernat L (2004) *The role of competition in the promotion of competitiveness and development: Experiences from a sample of developing and least developed countries,* (unpublished paper prepared for the Third International CRC Conference, Cape Town 2004) at page 4.
[5] Godfrey N *Why is competition important for growth and poverty reduction?* (published as a discussion paper for the OECD Global Forum on International Investment VII 2008) and Owen BM *Competition Policy in Emerging Economies* (published as a discussion paper by the Stanford Institute for Economic Policy Research No. 04-10, 2005) at page 14.
[6] Cernat (2004) supra n4 at page 3.
[7] Alvarez AM *et al*. *Chapter 3*: *Anti-competitive practices and the attainment of the millennium development goals: Implications for competition law enforcement and inter-agency co-operation*, (published as part of United Nations Conference on Trade and Development: Trade and Competition Issues: Experiences at regional level, Geneva and New York, 2007) at page 93.
[8] Fox EM *Antitrust, Economic Development and Poverty: The Other Path* (2007) New York University Law and Economics Working Papers, Paper 102 at page 18.

trade may occur by means of *ad hoc* negotiations, there is no formal means in accordance with which prices or trading conditions may be monitored and regulated. The nature of these markets further renders it difficult to assess the prevalence of anti-competitive conduct, the size of the market, the levels of concentration, the market shares attributable to incumbent players and the extent to which firms hold dominant positions therein.[9]

2.3. In addition, the markets in developing countries are also generally **smaller** than their developed counterparts. As such, there is only scope for a limited number of firms to realise an equitable distribution of resources and economies of scale which are vital to keep prices low and productivity and efficiency levels high.[10]

2.4. Moreover, developing countries are also often characterised by **high barriers to entry**, asymmetries of information, which may be the result of controlled media, corruption, an inadequate education system and so on.[11] These inadequacies may limit the ability of new competitors to enter the relevant market.[12] In this regard, the impact of international cartels, predatory dumping, the existence of large monopolies (which are often state-owned) controlling basic infrastructure and "staple services",[13] as well as unfair competition through counterfeit goods can not only prejudice the domestic trader in his business, but will make it challenging for a new entrant to gain access to the relevant market.[14]

2.5. Assuming that a developing country could fund the drafting of a suitable competition law policy, its adoption would be rendered useless without properly trained personnel to enforce the legislation in question. Developing countries often suffer from a **severe shortage of trained professionals**, especially economists that are qualified to assess the complex competition law concepts.[15] Moreover, there is a **lack of available training courses** and seminars and scarce monetary resources available to facilitate such training. Furthermore, to the extent that competition law policies are misapplied owing to a failure to understand the underlying concepts, the adoption of the legislation would be without benefit, and could in fact be detrimental to the economy. Owing to such monetary and capacity constraints, it has been argued that there are numerous other policies, such as trade liberalisation, deregulation and foreign direct investment policies which are less cost intensive and serve to promote the same interests as competition law policies.[16]

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[9] Stewart T *et al*. *Competition Law in Action: Experiences from Developing Countries* (published by the International Development Research Centre as part of the Globalization, Growth and Poverty Program, 2007) at page 25.
[10] Adam and Alder *Abuse of Dominance and its Effects on Economic Development* (published as part of United Nations Conference on Trade and Development, Geneva and New York, 2008) at page 571.
[11] Owen (2005) supra n5 at page 11.
[12] Adam and Alder (2008) supra n10 at page 573.
[13] The impact that competition law may have on the existence of monopolies in developing countries is discussed in more detail hereunder.
[14] Alvarez *et al.* (2007) supra n7 at page 93.
[15] Fox (2007) supra n8 at page 18.
[16] Cernat (2004) supra n4 at page 6. For more information in this regard, kindly see paragraph 3 hereunder in which it is argued that these policies cannot function in uncompetitive markets. As Serra notes, as opposed to serving as a substitute to competition law,

2.6. In addition to the foregoing, many argue that the implementation of competition law in developing countries **should not be a priority**, especially considering the existence of other, more pressing social concerns prevalent in these nations, such as poverty and unemployment. Famine, war, political uncertainty, corruption and a host of other shortcomings further taint the landscape of these nations. Consequently, it is often argued that the intensive amounts of capital resources that would be required to facilitate the adoption, and thereafter the implementation and enforcement of competition law in developing countries, would be better placed serving these other social and public interest concerns, notably access to food and water, housing, education, healthcare and the like. In this regard, the United Nations (the "**UN**") has launched an initiative in terms of which it identified various "millennium development goals", the attainment of which is expected to curb rising poverty levels, especially in developing countries[17].

2.7. On the basis of that set out above, many argue that the enactment of competition law is of little, if any, relevance in developing countries. It is further suggested that if competition law is to be adopted in these underdeveloped countries, the resultant policy should not include provisions pertaining to merger control or abuses of dominance, but should focus solely on regulating and prohibiting cartel conduct. However, in our view, it is the shortcomings mentioned above which result in the fact that developing countries, perhaps more so than their developed counterparts, require the implementation of competition law to attain much needed economic growth and consumer welfare. There are limited available alternatives in accordance with which developing countries can attain the aforementioned goals. It is thus our submission that the use of competition law may be an indispensable tool in ameliorating these shortcomings, provided the legislation which is enacted is done so mindful of the recommendations discussed in paragraph 4 hereunder.

3. HOOKED, LINE OR SINKER?: ARGUMENTS FOR THE IMPLEMENTATION OF COMPETITION LAW IN DEVELOPING COUNTRIES

3.1. As indicated above, it is our view that the very inadequacies faced by developing countries are, in fact, indicative of a need for the implementation of an appropriate competition law which should necessarily include both merger control and abuse of dominance provisions. Of particular importance in the context of a developing country is the fact that competition regulators will generally fight the battle on behalf of the poor and disenfranchised masses that are unable to take on large conglomerates themselves. It is our submission that the

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these regulatory reforms work in concert with competition law to promote economic growth and development, consumer welfare, economic efficiency and a better and more equitable distribution of resources in developing countries (Serra P *Regulation, Competition and Privatisation: Evidence from Utility and Infrastructure Privatisation in Chile* (published for the Twelfth Plenary Session of the OECD Advisory Group on Privatisation in cooperation with the Finnish Ministry of Industry and Trade, Helsinki 1998) at page 44).

[17] For an indication of the role that the enactment of competition law may play in realising these millennium development goals, kindly see paragraph 3 hereunder.

simple lodging of a complaint to a competition authority (alternatively the self-initiation of a complaint by the competition authority) can result in the use of competition law to address the abovementioned shortcomings and to, *inter alia:*

3.1.1. Counteract the underdeveloped infrastructure evident in developing countries to attain higher levels of competition in each relevant market;

3.1.2. Regulate incumbent monopolies to ensure that such firms do not abuse their positions of power in any relevant market;

3.1.3. Facilitate economic growth and development in a particular developing nation;

3.1.4. Permit the equitable distribution of wealth and assets between members of society; and

3.1.5. Contribute to the alleviation or eradication of poverty.

The underdeveloped infrastructure of developing countries

3.2. As indicated in paragraph 2 above, the markets in developing countries are often small and informal with higher barriers to entry than their developed counterparts. These market characteristics are exacerbated by the poorly developed infrastructure which is often evident in developing countries. As stated in their 2008 article, Brusick and Evenett[18] note that the very fact that developing countries suffer from an **underdeveloped infrastructure** limits the competitiveness of the domestic market, but simultaneously signals a need for competition law to rectify such natural defects. For example, the transportation systems in developing countries are often poorly developed and badly maintained. Consequently, manufactured goods, as well as intermediary goods are not easily transportable (either within the borders of the country or as exports); with the effect that markets remain small and fragmented with only a few available alternatives supplying substitutable goods. However, the enactment of competition law has served to improve the prices of infrastructure in various developing countries, by way of example the enactment of competition law has resulted in the dissolution of cartels in the cement manufacturing market[19].

3.3. The typical market characteristics of developing countries, as discussed above, often contribute to the argument that developing countries function better in the absence of a merger regime in that the existence of such control mechanisms would stifle the ability of the small players active therein to attain economies of scale imperative to the success of their

[18] Brusick P and Evenett SJ "Should Developing Countries Worry About Abuse of Dominant Power?" (2008) Wisconsin Law Review at page 287.
[19] See paragraphs 3.41 – 3.46 for more information in this regard.

businesses[20]. Jamaica's competition legislation for instance does not regulate mergers as it argues that merger control could suppress the ability of local firms to unite and compete against larger and stronger foreign firms[21]. Of course, as Brusick and Evenett note, these arguments do not take account of the incentive which the lack of a merger regime will provide dominant firms (either local or foreign firms) to buy-up smaller domestic firms without restraint, to attain monopoly status[22]. For instance, in the early 2000s in Belize, one of the local bus operators implemented various strategies (including predatory pricing) to slash the prices of its rivals, such that it was then able to acquire control of 5 of its competitors. Its sole remaining competitor in the market thereafter purchased the combined entity and increased bus fares by almost 200%. This form of conduct would have been detected and prevented in a country that had a well-functioning merger control regime[23] and appropriate abuse of dominance provisions.

3.4. Therefore, while the inherent nature of the markets in developing countries may render its implementation challenging, the enactment of a competition law may also serve to rectify some of the abovementioned deficiencies[24]. For instance, the introduction of competition law can be utilised to diminish barriers to entry and foster entry into a relevant market, this in turn can result in lower prices and a wider product range for consumers. In the Vietnamese beer market, a potential new beer manufacturer was barred entry to the market owing to the extensive exclusive distribution agreements utilised by the incumbent firms. While no competition law had yet been enacted in this country, it is anticipated that its existence would have permitted such entry, which would, in turn, have lowered market prices in the relevant market[25]. The use of competition law also serves to restrain the activities of monopolies as discussed directly hereunder.

<u>The existence of monopolies</u>

3.5. In developing countries, especially developing countries in Africa, the legacies of tyranny, war and colonialism have contributed to the prevailing *status quo* where the bulk of the wealth of a country is held by a disproportionate minority of its population. Competition law is often used as a tool by which these inequalities may be addressed in developing countries. However, the effect of these inequalities is such that certain major industries (typically, the "staple service" industries such as water, electricity, transportation and telecommunication services) in developing countries tend to be dominated by monopolies.

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[20].Brusick and Evenett (2008) supra n18 at pages 287-290.
[21] Stewart *et al.* (2007) supra n9 at page 38.
[22] Brusick and Evenett (2008) supra n18 at page 287.
[23] Stewart *et al.* (2007) supra n9 at page 24.
[24] Brusick and Evenett (2008) supra n18 at pages 287 – 290.
[25] Ellis K and Singh R *Assessing the Economic Impact of Competition* (published by the Overseas Development Institute, London, 2010) at pages 44 – 45.

3.6. In this regard, there is a risk that monopolistic firms will abuse their positions of dominance to the detriment of both consumers and competition.[26] In the first instance, dominant firms may exploit their position of power to the detriment of consumers by charging excessive prices, bundling or tying goods and services and / or selling goods or services of inferior quality. Moreover, to the detriment of competition, dominant firms may engage in acts designed to raise barriers to entry and foreclose other (perhaps more efficient) competitors from the relevant market. In this regard, dominant firms may limit the access of others to scarce resources, engage in the practice of predatory pricing, conclude exclusive vertical arrangements or offer customers and suppliers incentives that cannot be matched by any other participant, to retain business.

3.7. For example, in the preliminary investigations initiated in respect of the clear beer brewing and distribution industry in Zimbabwe, the Zimbabwean Competition Commission found that National Breweries Limited (an incumbent monopoly that was found to hold approximately 90% of the relevant market) ("**NBL**") had run a promotion in Chiredzi, the only geographic region in which its sole competitor Nesbitt Brewery (Pvt) Limited ("**Nesbitt**"), was active. The Zimbabwean Competition Commission found that during the promotional period, NBL had priced its beer products in a predatory manner. The Zimbabwean Competition Commission obliged NBL to formally undertake that it would, in future, refrain from attempting to eradicate Nesbitt from the market, by abusing its position of dominance.[27]

3.8. In addition, in a comparison between the markets for the production of clear beer in Zambia, Kenya and Ghana, in the markets of each of Zambia and Kenya were found to be dominated by a single incumbent firm in the relevant market, possessing an approximate 90% and 100% market share respectively. The Ghanaian market had two incumbent firms, with the largest possessing an estimated 60% market share. It was argued that the strength of competition between the two incumbent firms in the Ghanaian market was part of the reason for the reduced price levels evident in the Ghanaian market as opposed to the higher prices in the Zambian and Kenyan markets.[28]

3.9. While incumbent monopolistic firms in developing countries can abuse their positions of power to the detriment of the economy, where such monopolies are owned or controlled by the state, the scope for abuse is aggravated in that it has the incentive to protect its business from competition as it shares in the monopolistic profits earned.[29] Moreover, owing to the

[26] Adam and Alder (2008) supra n10 at page 573.
[27] Adam and Alder (2008) supra n10 at page 584.
[28] Ellis and Singh (2010) supra n25 at pages 44-45.
[29] Adam and Alder (2008) supra n10 at page 587 and Ellis and Singh (2010) supra n25 at page 29.

fact that competition authorities are often themselves subject to government control, it becomes difficult for such authorities to intervene in instances of abuse.[30]

3.10. In this regard, state-owned enterprises may benefit in the form of nepotistic treatment, preference and cronyism by government. For instance, Alvarez *et al*. noted that state-owned enterprises regulated under the laws governing budgetary procedure in Thailand are exempted from the provisions of the Thai Competition Act.[31] In Thailand, state-owned enterprises concentrate their activities in natural monopolies such as telecommunications, electricity, railroad services and agricultural co-operatives.[32] It is further noted that since many individuals in Thailand simultaneously hold positions in government and business, decisions taken in either capacity may be clouded by political will and the personal interests of such individuals. The Thai competition law may thus function to suppress competition and protect the incumbent state-owned monopolies without the need for such firms to actively engage in acts of innovation to retain customers.[33]

3.11. In addition, Zamtel, the Zambian state-owned telecommunications operator, benefitted from state intervention when it was exempted from various taxes that private competitors were required to satisfy.[34] Furthermore, while the existence of monopolies are prohibited in the Guatemalan market[35], the state, allegedly due to a lack of political will to do so, have refrained from taking actions to enforce such laws.[36]

3.12. While, the true effects of incumbent state-owned monopolies are difficult to quantify, it is clear that the implementation of competition law serves to restrain all forms of dominant firms from abusing their positions of power, which may give rise to consumer welfare, as well as economic growth in the relevant developing nation.

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[30] As indicated previously, it is thus vital that developing countries promulgate strong abuse of dominance provisions and ensure that their autonomy is protected by applicable legislation.
[31] Alvarez *et al.* (2007) supra n7 at page 95.
[32] *Ibid* and United Nations Conference on Trade and Development Edition 2005: *Review of Recent Experiences in the Formulation and Implementation of Competition Law and Policy in Selected Developing Countries: Thailand, Lao, Kenya, Zambia, Zimbabwe,* United Nations 2005 at page 12.
[33] Mehta PS and Agarwal M *Politics Trumps Economics* (unpublished research paper prepared for CUTS International: Competition, Regulation and Development Research Forum, India 2007) at page 8.
[34] Godfrey (2008) supra n5 at page 7.
[35] In this regard, article 130 of the Political Constitution of the Republic of Guatemala of 1985, as amended in 1993, indicates that "*Monopolies and privileges are prohibited. The State will limit the operation of enterprises that absorb or tend to absorb, at the expense of the national economy, production in one or another industrial branch or of an entire commercial or agricultural-livestock activity. The laws will determine that which is relative to this matter. The State will protect the market economy and prevent those associations which tend to restrict market freedom or to cause prejudice to consumers*".
[36] Mehta and Agarwal (2007) supra n33 at page 5.

Economic growth and development in developing countries

3.13. The effect which competition law has on the economic growth and development of a nation manifests in various different forms, examples of which are discussed below.

3.14. Firstly, the existence of competition law in particular economies has been found to contribute to the formulation of and success of **trade liberalisation, privatisation and deregulation policies**[37], each of which have been found to enhance economic development and growth.

3.15. Numerous authors have concluded that the abovementioned policies work in concert with competition policy to encourage growth and foster development in the economy.[38] In this regard, Alvarez *et al*. argue that the benefits of trade reform, deregulation and privatisation cannot be realised absent the existence of an active and effective competition law.[39] By way of example, a policy of privatisation contemplates the transfer of the ownership of a state-owned enterprise (generally a monopolistic firm) to the private sector to reduce the degree of government power in a particular sector. It is generally expected that a transfer of this nature facilitates higher levels of capital investment and the introduction of new technology by the private firm to the benefit of the industry[40] as a whole, as well as to each individual consumer therein. However, it is argued that where ownership of a monopoly is simply transferred from the hands of a public to a private owner, the economic incentives of the controllers to abuse the firm's position of power remain unchanged. As Lipimile notes, it is the degree of competition, not ownership, that determines economic performance.[41] Consequently, to the extent that privatisation occurs in the absence of a competition law policy that functions to regulate, *inter alia*, dominant firms, it is likely that economic growth and consumer welfare will continue to be hindered. This is confirmed by Serra, who, in his analysis of the effect of privatisation on the Chilean economy, notes that only in competitive markets will productivity gains made by privatised firms be transferred to consumers.[42]

3.16. Moreover, Adam and Alder[43] note that where new entrants refrain from entering a relevant market, notwithstanding the fact that barriers to entry (such as trade barriers) have been dismantled by the introduction of trade liberalisation policies, the lack of competition faced by incumbent firms therein is often due to the fact that anti-competitive practices and abuses of dominance are permitted to continue without consequence, potentially resulting in the formation of new barriers that would impede potential players from entering the relevant

[37] Cernat (2004) supra n4 at page 4.
[38] Serra (1998) supra n16 at page 43.
[39] Alvarez *et al.* (2007) supra n7 at page 76.
[40] Brusick and Evenett (2008) supra n18 at page 280.
[41] Stewart *et al.* (2007) supra n9 at page 37.
[42] Serra (1998) supra n16 at page 43.
[43] Adam and Alder (2008) supra n10 at pages 589-590.

market.[44] These new barriers may take the form of exclusionary practices, a refusal to grant competitors access to scarce resources, excessive pricing and the like. Consequently, the adoption of trade liberalisation policies may be of little effect without an appropriately drafted competition law.

3.17. Secondly, competition law affords **infant industries** a certain degree of protection from potential abuses by well-established firms seeking to earn monopoly profits. In this regard, competition law would restrain incumbent firms from denying infant firms access to scarce resources or facilities, which provides such infant and developing industries the opportunity to enter the market and robustly compete for customer base therein.[45] It bears mentioning that the objective of implementing competition law cannot be said to be to protect smaller inefficient players against their more efficient counterparts.[46] As it is often repeated: competition law is intended to protect competition, not competitors.[47] As such, in this context competition law serves to deliver the necessary protection required to empower smaller or infant firms such that they may tackle any potential acts of exploitation or abuse by larger or dominant firms in the market place.[48] Of course, this form of empowerment cannot be ascribed to smaller firms to the detriment of consumers[49], rather the activities of these smaller empowered firms should serve to constrain the competitive decisions of larger firms, such that consumers are not exposed to unreasonable and excessive prices.

3.18. Similar to that which is described above, the implementation of competition law can also serve to empower firms in developing countries in their interaction with foreign firms to place both such firms on a level playing field in their dealings with each other.[50] It is thus likely that the strength of competition within the domestic borders of a developing country bears a correlation to the ability of such developing countries to earn export-related profits or compete against imports within its own jurisdiction.[51]

3.19. For example, the telecommunications regulator in Peru, OPSITEL[52] (charged with the task of regulating competition in the country's telecommunications sector), intervened in the instance where a Spanish company (Telefónica) engaged in exclusionary conduct, allegedly to the detriment of its sole competitor in the relevant market (TELE 2000). Telefónica had refused to permit TELE 2000 access to the mobile-telephony net outside of Lima (the capital

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[44] Evenett SJ *What is the Relationship between Competition Law and Policy and Economic Development?* (published paper by the University of Oxford, 2005) at page 32.
[45] Cernat (2004) supra n4 at page 9.
[46] *Ibid*.
[47] As stated by the former chairman of the South African Competition Tribunal Judge David Lewis in *Nationwide Poles and Sasol (Oil) (Proprietary) Limited* (72/CR/Dec03) [2005] ZACT 17 (31 March 2005).
[48] Qaqaya H and Lipimile G (eds) *The effects of anti-competitive business practices on developing countries and their development prospects* (published as part of United Nations Conference on Trade and Development, Geneva and New York, 2008) at page xi.
[49] Fox (2007) supra n8 at pages 1-2.
[50] Cernat (2004) supra n4 at page 8.
[51] Godfrey (2008) supra n5 at pages 4-6.
[52] Organismo Supervisor de la Inversión Privada en Telecomunicaciones. It is thus clear that various regulatory bodies have been charged with the task of monitoring competition in the market place.

city of Peru), thereby restricting TELE 2000's activities to the capital city. Pursuant to its consideration of the complaint, OPSITEL ordered that Telefónica grant TELE 2000 access to the mobile telephony-net outside of Lima. OPSITEL ordered the parties to, *inter alia*, reach a mutual agreement regarding the terms and conditions in accordance with which such access would be granted. This would, of course, have offered customers a wider choice as regards mobile telephony services outside of Lima.[53] In another instance, the Zambian Competition Commission approved the proposed acquisition of Telcel Zambia Limited by the MTN Group of South Africa, subject to certain specified conditions to ensure that the competitive process in the Zambian telecommunications sector would not be injured post the entrance of the larger foreign firm into the relevant market[54].

3.20. Finally, the appearance of a well monitored and competitive market that has enacted legislation to protect both consumers and participants active therein, encourages **foreign direct investment.**[55] The 2005 Report of the Commission for Africa identified the key role which an effective and well implemented competition law plays in creating a good business environment to attract and retain confident investors.[56] It has further been found that foreign investors are more likely to invest, especially in developing countries, where such countries already have a competition policy in place. By way of explanation, to the extent that competition law is effectively and appropriately enforced, the resultant marketplace is generally more transparent, which serves to both pacify potential investors and maximise anticipated returns on resultant investments.[57]

3.21. Moreover, domestic levels of investment have also been found to increase in instances where competition laws have been enacted. For example, the implementation of competition law in Tanzania has had a positive effect on the levels of investment, productivity and export performance of the country. In this regard, Kahyarara notes:

> "*Firm-level investment after the adoption and implementation of competition law in Tanzania was one-fold higher than firm-level investment in the pre-competition period. At the same time, firms that seem to be affected by anti-competitive practices invest 30% less than otherwise*".[58]

3.22. As indicated above, anecdotal evidence exists to suggest that there is a correlation between the existence of competition law in a particular jurisdiction and the level or rate of economic development and growth of that nation. Of course, the impact that competition law has on

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[53] Brusick and Evenett (2008) supra n18 at pages 283-284 and 287.
[54] *Ibid*.
[55] Stewart *et al.* (2007) supra n9 at page 5.
[56] Godfrey (2008) supra n5 at page 5.
[57] Cernat (2004) supra n4 at page 9. Of course the converse is also true, where competition law has not yet been implemented, foreign investors may be wary of investing therein, absent knowledge of the form such a policy will take.
[58] Cernat (2004) supra n4 at page 5.

such economic growth, often has a "domino-effect" effect on the individual consumer, which is discussed hereunder.

The attainment of equality in developing countries

3.23. In certain developing countries, such as South Africa, where the wealth and assets of the country have not, historically, been fairly distributed between all members of society, it is argued that a more equitable distribution of prosperity has been facilitated by constitutional dispensations and the onset of a democratic era.[59]

3.24. Adam and Alder submit that another tool by which equality may be attained, especially in the context of developing countries, is via the promulgation and enforcement of a well-designed competition law.[60] For example, it is argued that the introduction of provisions to curb abuses by dominant firms, will have a positive impact on the proper functioning of markets, the growth rate of the developing economy and by extension the equitable distribution of wealth.[61]

3.25. The use of competition law in this manner is clearly contemplated in the policies effective in certain developing countries. For example, in Namibia, the Namibian Competition Commission requests information pertaining to the effect that a proposed transaction will have on the ability of small undertakings, in particular those owned or controlled by historically disadvantaged persons, to gain access to or to be competitive in any relevant market.[62] The information it receives will be considered in its decision to approve or prohibit proposed mergers falling within its jurisdiction. Similarly, section 59(2)(f) of the draft Botswana Competition Act of 2009 permits the competition authority to assess whether a proposed merger may advance citizen empowerment initiatives or enhance the competitiveness of citizen-owned small and medium size enterprises.[63]

3.26. Of course, even the use of competition law to eradicate cartel conduct and abuse of dominance in any relevant market, which results in subsequent cost savings for the consumer, can be deemed a form of ensuring an equitable distribution of wealth. It bears mentioning that the equitable distribution of wealth and assets between members of a developing country will also assist in the alleviation or eradication of poverty levels therein, as discussed directly hereunder.

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[59] Adam and Alder (2008) supra n10 at page 588.
[60] *Ibid*. Moreover, it is argued that to ensure that competition law contributes to the alleviation of inequality; good political institutions are required to ensure that an appropriate balance is struck between efficiency and equality.
[61] Adam and Alder (2008) supra n10 at page 589.
[62] Section 47(2)(f) of the Namibian Competition Act No 2 of 2003. In addition, this piece of legislation cites two of its objectives as (i) to ensure that small undertakings have an equitable opportunity to participate in the Namibian economy and (ii) to promote a greater spread of ownership, in particular to increase ownership stakes of historically disadvantaged persons. A similar provision is included in section 2(e) and (f) of the South African Competition Act No. 89 of 1998, as amended.
[63] Certain sections of the Botswana Competition Act of 2009, especially pertaining to the functions and composition of the competition authority, came into force during July 2010. The remainder of the proposed legislation is not yet in effect.

The alleviation or eradication of poverty

3.27. Sappington and Weisman state:

> "*….vigorous competition is often the ideal regulator. It can compel firms to minimise production costs, keep prices close to operating costs, and deliver high quality and innovative services to customers*".[64]

3.28. Owing to the fact that competition law, *inter alia*, proscribes the practice of price fixing, market division and bid-rigging, firms are obliged to offer their wares at a price proportionate to the quality and value-add associated therewith in competitively regulated markets. As such, owing to the price sensitive nature of any marketplace, firms will strategise to ensure that costs are kept as low as possible, such that the maximum amount of profit may be attained. This may be achieved by, *inter alia*, increasing levels of productivity and efficiency, to attain much-needed economies of scale. For example, immediately post the implementation of the Tanzanian Fair Competition Act in 1994, it was noted that markets with five or more incumbent firms achieved increases in productivity levels of between 13 and 24%.[65]

3.29. Similarly, entrepreneurial development is bolstered in competitive markets as firms are encouraged to constantly adapt and innovate in response to changing market circumstances.[66] It is intended that these market-related responses of firms will translate into lower prices and innovative goods and services. Moreover, where price competition is fierce and the cost per unit output renders it difficult to earn large margins, firms may engage in forms of non-price competition where value-added services may also justify the imposition of a higher price[67]. This non-price competition may take the form of offering additional services to consumers such as favourable credit terms, free delivery, technical support, extended warranties, promotional benefits and the like.

3.30. In addition to the foregoing, the advent of competition law in various jurisdictions worldwide has sought to eradicate the occurrence of cartel conduct. Often, such collusive behavior is seen in the markets for the manufacture and sale of staple goods and services, such as bread, sugar, dairy products, meat, poultry, pharmaceutical products, cement, steel, insurance services, telecommunications, transportation services and the like. Consumers are thus benefitted in that they are relieved of the extra burden of inflated prices caused as a result of this anti-competitive conduct. Our own South African experience has demonstrated

[64] Serra (1998) supra n16 at page 43.
[65] Stewart *et al.* (2007) supra n9 at page 14.
[66] Godfrey (2008) supra n5 at page 4.
[67] Alvarez *et al.* (2007) supra n7 at page 76.

that authorities are empowered with the tools to detect and deter such cartel conduct for the benefit of society.

3.31. In the context of developing countries, especially developing countries where various communities therein are poverty-stricken for reasons including war, natural disaster and a lack of resources, competition law can be used as a catalyst to benefit the consumers, facilitate economic growth, productivity and the efficient allocation of resources. It is expected that these benefits will give rise to a corresponding reduction in poverty levels.[68]

3.32. In order to make a positive contribution to the alleviation or reduction of poverty in developing economies, Qaqaya and Lipimile argue that efforts must occur to create wealth (which may occur in the form of efficiencies), to create jobs (which may occur through the entry of new potential entrants) and to reduce prices (which may occur through competition).[69] Furthermore, they argue, to the extent that the implementation of competition law does not give rise to these results in developing countries, its continued existence should be questioned.[70]

3.33. As previously indicated, the UN, as part of its attempt to curb poverty in developing countries worldwide, has identified certain key goals (coined "millennium development goals"), the attainment of which it deems vital to the success of its initiative. Simplistically, some of the goals identified by the UN include the eradication of extreme poverty and hunger (which would necessarily include the improvement of employment levels), the achievement of universal primary education, the combating of HIV / AIDS, malaria and other endemic diseases and ensuring environmental sustainability (which includes improving the access of the poor to safe drinking water and basic sanitation).[71]

3.34. In this regard Alvarez *et al*. propose that competition law may target social concerns, *inter alia*, including the attainment of some of the millennium development goals.[72] To the extent that competition law is found to improve or augment the attainment of any of the millennium development goals, it has been argued that competition law policy makes a positive contribution to the alleviation of poverty in developing countries, the degree of which is discussed in more detail hereunder.

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[68] Alvarez *et al* (2007) supra n7 at page 75 and Godfrey (2008) supra n5 at page 4.
[69] Qaqaya and Lipimile (2008) supra n48 at page 136.
[70] *Ibid*.
[71] http://www.un.org/milleniumgoals/ (accessed 12 September 2011).
[72] Alvarez *et al*. (2007) supra n7 at pages 75-76.

Food

3.35. One of the UN's priority millennium development goals is the alleviation of poverty and hunger levels in developing countries. In this regard, the UN has cited as one of its primary objectives, the goal to halve, between 1990 and 2015, the proportion of people who suffer from hunger, in an attempt to curb the global death toll pertaining to hunger and hunger-related diseases (which is estimated to total 10 million people annually).[73]

3.36. In South Africa, an article published by the National Consumer Forum recently indicated that food products comprising approximately 30% of the average consumer basket are currently, or have been, under investigation by the competition authorities. In this regard, it has been alleged that the prices of staple items such as poultry products, bread, dairy products, flour and maize meal have been fixed by big businesses to earn monopoly profits.[74] The situation in South Africa is not unique, with other countries such as Chile, Kenya, Zambia, Tanzania and Malawi suffering similar fates. In this regard, it has been estimated that rising foods prices (which may be the result of cartel conduct) have been found to push more than 100 million people worldwide deeper into poverty.[75]

3.37. One the means in accordance with which the millennium development goal to alleviate hunger may be realised, is by using competition law policy to ensure that the prices of food, especially staple items on which the majority of developing countries survive, are calculated pursuant to a rational and competitive process, taking into account cost-related variables. In South Africa, the competition authorities admonished cartel members for engaging in collusive practices pertaining to staple food products, such as bread, stating:

> "*Naked cartel behavior is not justifiable under our legislation and is presumptively harmful. In this particular case, the offences are more so repugnant because they have affected the poorest of the poor*".[76]

3.38. During 2010, the Overseas Development Institute (the "**ODI**") conducted an analysis across five developing countries to assess the levels of competition (or lack thereof) evident in the market for milled sugar used for household consumption.[77] Sugar, found to be a staple item in any household, especially rural households, was found to be produced by only a handful of manufacturers in each relevant jurisdiction (the jurisdictions that were assessed being Kenya, Zambia, Ghana, Vietnam and Bangladesh). In this regard, it was found that

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[73] United Nations: *The Millennium Development Goals Report 2011*, United Nations 2011 <http://www.un.org/millenniumgoals/pdf/(2011_E)%20MDG%20Report%202011_Book%20LR.pdf> (accessed 13 September 2011).
[74] National Consumer Forum "Food price fixing going on in many staple foods" *Consumer Fair* November – December 2007 at 4.
[75] United Nations (2011) supra n73.
[76] *Competition Commission and Pioneer Foods (Proprietary) Limited* (15/CR/Feb07, 50/CR/May 08) [2010] ZACT 9 (3 February 2010) paragraph 158. In this instance, the South African Competition Tribunal imposed an administrative penalty of just under R 1 billion on Pioneer Foods (Proprietary) Limited for its involvement in fixing the price of bread in South Africa.
[77] It bears mentioning that this relevant market specifically excluded the markets for raw sugar, as well as sugar that is utilised by the pharmaceutical industry.

Zambia's sugar was produced by approximately 3 privately-owned firms, with the dominant firm therein possessing an approximate 93% market share.[78]

3.39. While the Zambian sugar market was found to be the most efficient with the highest levels of production during 2007 (approximately 33% more sugar was produced by Zambia than the next most efficient jurisdiction, being Vietnam), Zambia was also found to charge the highest retail prices to consumers. In economic terms, it is generally a rational presumption that higher levels of production give rise to better economies of scale and thus reduced retail prices. Thus, while it is argued that the higher retail price levels may be attributable to factors other than the highly concentrated nature of the Zambian sugar market, it is interesting to note that the markets characterised by a larger pool of participants, charged consumers lower prices. For instance, Vietnam whose sugar market is inhabited by approximately 40 different sugar millers (the most significant participant therein holding a scant 9% market share) charged retail prices that were almost 45% lower than those charged in Zambia. Similarly, retail prices charged to consumers in Bangladesh, whose sugar market is inhabited by approximately 20 millers (the most significant player therein was found to hold approximately 47% of the Bangladeshi market)[79], were found to be 52.5% lower than those charged in Zambia. As such, while the most dominant firm in Bangladesh still, on its own, accounted for a significant portion of the relevant market, it may be argued that the existence of the other 19 participants in the relevant market comprised a significant constraint to the pricing activities of the dominant firm. In light of the foregoing, while it is perhaps not conclusive that the existence of competition in these relevant jurisdictions is the sole reason for the lower retail prices experienced therein, it is overwhelmingly clear that there is a direct correlation between the number of firms active in the relevant market and the resultant retail prices charged to consumers.[80]

3.40. On the basis of the foregoing, it may be concluded that competition law is at least a tool that may be used to curb rising food prices in developing countries. Competition authorities are robustly opposed to market participants establishing cartels to increase retail prices to the detriment of consumers, especially in the context of staple foods. The use of competition law can further be used to reduce barriers to entry, preventing incumbents from foreclosing new entrants. Moreover, it has been established that even the pricing activities of a dominant firm will be constrained by competition, in that the presence of other participants in the relevant market will serve to ensure that prices are kept low.

[78] Ellis and Singh (2010) supra n25 at pages 12-31.
[79] The ODI found that there were 16 state-owned mills and 4 private refiners active in the sugar market in Bangladesh during 2008 (Ellis and Singh (2010) supra n25 at pages 12-31).
[80] *Ibid.*

Infrastructure and housing

3.41. Not only is access to housing for the populations of developing countries of critical social concern in the context of achieving the UN's goal to improve the lives of 100 million poverty-stricken individuals, of equal importance is the development of roads, buildings, transportation systems and other forms of infrastructure to aid economic development and growth. In this regard, the implementation of competition law in developing countries has assisted in eradicating cartel conduct in the infrastructure and construction industries and similarly has ensured that mergers and acquisitions do not result in a substantial lessening or prevention of competition in these industries.

3.42. By way of explanation, as a basic input for this form of development, the cost of cement and cement products may have a significant influence on the overall cost of such construction. Cement is utilised as the foundation for the creation of roads, housing, buildings, irrigation systems and the like. Owing to the nature of the product (in that it is heavy, bulky, difficult to transport and thus import competition plays an insignificant role), the cement market in a particular region is generally characterised by high levels of concentration.[81] Consequently, competition in this particular market is usually stagnant in that cartels are abundant and collusion is commonplace.

3.43. Countries such as the Republic of Korea, Malawi, the Philippines, Egypt and South Africa have fallen victim to cement cartels in recent years.

3.44. In the Republic of Korea, it was alleged that cement manufacturers were inhibiting entry into the relevant market by means of group boycotts. Contemporaneously with the initiation of criminal investigations to assess the veracity of these allegations, the Korean Fair Trade Commission imposed surcharges on the cement manufacturers in the amount of $22 million.[82] During 2011 in South Africa, the competition authorities were informed of widespread cartel conduct in the construction industry, worth approximately R 29 billion. Consequently, the Competition Commission formed an *ad hoc* fast track settlement process in terms of which firms involved in cartel conduct were invited to come forward and disclose information pertaining to the cartel in exchange for the imposition of reduced administrative penalties.[83]

3.45. Pursuant to a study that was conducted between the cement markets of five developing countries, it was found that Zambia's cement market had only two incumbent firms active therein, with the leading firm holding approximately 85% of the relevant market. It was

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[81] *Ibid*.
[82] Alvarez *et al*. (2007) supra n7 at page 87.
[83] Competition Commission: *Competition Commission invites construction firms to settle*, Competition Commission 2011 <http://www.compcom.co.za/assets/Uploads/AttachedFiles/MyDocuments/Media-Release-Competition-Commission-invites-construction-firms-to-settle.pdf> (accessed 13 September 2011).

further found that the retail price of a 50kg bag of cement during 2007 and 2008 in Zambia, was approximately US$15 more expensive than the corresponding price for the same period in Vietnam, whose cement market was inhabited by almost 90 different cement manufacturers with the leading firm possessing a 40% market share. Moreover, in 2009 when a new privately-owned firm entered the Zambian cement market, the price of a 50kg bag of cement had dropped by almost 10% from its 2007 level. However, owing to the lack of accurate evidence available to assess or quantify the impact of competition law, it is difficult to attribute this price reduction solely to the entrance of the new firm in the relevant market. [84]

3.46. The abovementioned study found that where a cement market is characterised by more players, the result is generally lower prices and more non-price competition (perhaps in the form of generous offers of credit, technical support and promotional benefits for consumers).[85] As such, it is clear that the implementation of competition law in the cement market serves to ensure that cement manufacturers are discouraged from engaging in anti-competitive behavior, such as price fixing, bid-rigging and abuse of dominance, therein. Moreover, incumbent firms will be prohibited from "cementing" their position in the relevant market by unduly and illegally raising barriers to entry to the detriment of potential new entrants. To the extent that the price of cement is constrained to cost-related levels, construction of infrastructure and housing will benefit in that a principal input in these activities would be available at more reasonable prices. This reduction in price will, in turn, contribute to the attainment of the millennium development goal to make housing more accessible to the communities of developing countries.

Education

3.47. The cost of and access to quality education is a major concern in various developing countries around the world. In this regard, the UN, as well as its numerous partners seek to ensure that by 2015, children everywhere, boys and girls alike, will be able to complete a full course of primary schooling.[86] However, in 2008 one in four children of primary-school age in various sub-Saharan African countries, had not attended primary school.[87] It is argued that one of the main deterrents against children attending school is the cost associated with school uniforms, teaching aids, textbooks and the like.

3.48. In addition to the fact that the quality of education in developing countries is often hampered by a lack of resources and qualified teachers, the cost of schooling renders it almost impossible for a large proportion of the population to obtain an education.

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[84] Ellis and Singh (2010) supra n25 at pages 33-34.
[85] *Ibid*.
[86] United Nations (2011) supra n75.
[87] *Ibid*.

3.49. In this regard, Alvarez *et al*. have indicated that competition policy (particularly competition law) may be used to eradicate anti-competitive conduct in the provision of schooling support services, as well as the cost of school uniforms, textbooks, stationery, teaching materials, furnishings for schools, transportation and construction services.[88]

3.50. For instance, the implementation and enforcement of competition law led to the discovery of a cartel in the market for the manufacture of student uniforms in the Republic of Korea. In this instance, three incumbent firms, accounting for approximately half the relevant market had reached an agreement on price levels which, it was estimated, resulted in a consumer cost of approximately US$ 64 million per annum. As punishment, the Korean Fair Trading Commission, *inter alia*, imposed penalties on the contravening firms of 11.5billion won.[89]

3.51. In addition, the Trade Law Centre for Southern Africa ("**TRALAC**") recently conducted a study in which it was noted that the cost of reading materials and textbooks was almost 100% higher in South Africa than other foreign countries. It was proposed that a lack of competition in the relevant market was one of the key reasons for the heightened price levels in South Africa. For instance, 62% of the market for the publication of textbooks for tertiary education is held by only three publishers, with 71% of the market for the publication of primary and secondary education textbooks being held by five publishers. Moreover, the distribution market for academic reading materials is even more condensed with only two players therein accounting for almost 100% of the market.[90] It is expected that a convincing case can be brought before the competition authorities of South Africa to consider allegations of excessive pricing and abuse of dominance in the relevant markets, which could assist in alleviating its populations' financial burden in procuring an education, in line with the UN's millennium development goal.

Access to healthcare

3.52. Populations in developing countries, especially developing African countries, often fall victim to pandemic diseases such as HIV / AIDS, malaria, measles and tuberculosis. In this regard, the UN estimates that 33.4 million people were living with AIDS in 2008, 66% of which are living in sub-Saharan Africa.[91] Owing to the fact that the control and prevention of such diseases depends on the pricing of medicines and health care services, as well as the availability of and access to such care, Alvarez *et al*. are of the view that an effective

[88] Alvarez *et al*. (2007) supra n7 at pages 82-83.
[89] Stewart *et al.* (2007) supra n9 at page 15. It bears mentioning that 11.5 billion won is approximately US$ 10.4 million, which is only a fraction of the total cost of the cartel on the consumer. As discussed in paragraph 4 hereunder, this may be an instance where the Korean competition authorities have not been sufficiently empowered to enforce its country's competition law.
[90] Rens A *et al. Intellectual Property, Education and Access to Knowledge in Southern Africa* (published by Trade Law Centre for Southern Africa in conjunction with UNCTAD, 2006) at pages 11-13.
[91] United Nations (2011) supra n75.

competition law may assist in ensuring better public access to medicines and healthcare services.[92]

3.53. For instance, the merger regime contemplated in Zimbabwe's Competition Act of 1996 was used to regulate the acquisition by Premier Services Medical Investments (being the investment arm of the Premier Service Medical Aid Society) of the Shashi Private Hospital in Bindura, which, due to substantial financial and capacity constraints, was failing. Owing to the subsequent vertical relationship that would result between the two merging parties, the Zimbabwean Competition Commission opted to approve the acquisition subject to various conditions intended to restrict the acquirer from abusing its dominant position in the relevant market post-merger. Pursuant to the implementation of the merger, it was recorded that the Shashi Private Hospital offered vastly improved service levels, including the establishment of a drug dispensing facility and laboratory on the hospital's premises, which service levels were subsequently matched by other hospitals in the surrounding area. The Shashi Private Hospital thereafter also became the first and only hospital to establish an X-ray facility in the Mashonaland Central Province. From an employment perspective, the merger also resulted in the retention of all of the staff of the Shashi Private Hospital and further facilitated the employment of additional personnel to staff the new facilities.[93]

3.54. In the South African medical industry, two pharmaceutical giants were accused of engaging in the excessive pricing of branded antiretrovirals ("**ARVs**") to the detriment of consumers. Owing to the fact that these ARVs were sold absent any competition from the generic medicines market, the pricing activities of the pharmaceutical companies were permitted to subsist without competitive constraint. Since the complaint, which was concluded by means of two settlement agreements, the price of certain brands of ARV medication has fallen by between 58% and 88% in South Africa[94]. Similarly, the existence of robust levels of competition in Brazil's generic medicine market resulted in price reductions in branded medicinal products of almost 79%.[95]

3.55. It is thus clear that the enactment of competition law can contribute to the attainment of lower prices facilitating better access to healthcare services. It is intended that this can assist the UN in attaining its goal of, *inter alia*, halting and reversing the incidence of endemic diseases in developing countries.

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[92] Alvarez *et al.* (2007) supra n7 at pages 79-82.
[93] Qaqaya and Lipimile (2008) supra n48 at pages 111-113.
[94] Alvarez *et al.* (2007) supra n7 at pages 79-82.
[95] *Ibid.*

Conclusion

3.56. The potential benefits of adopting and implementing an effective competition law are far-reaching, pertaining not only to the individual consumer, but also to the broader community. In this regard, in a speech delivered by Mario Monti, the former Commissioner charged with the responsibility for competition policy in the European Union states:

> "*I am convinced that a rigorous application of competition policy is the best way of guaranteeing economic freedom. Economic freedom, within a proper regulatory framework, is a precondition for the development of a free society. Freedom of competition is thus a public freedom. It impacts not only on the economic environment but also on the organization of society at large. It is in this way that competition policy is a "people's" policy.*"[96]

4. CHOOSING THE PERFECT BAIT: RECOMMENDATIONS FOR THE ADOPTION AND IMPLEMENTATION OF COMPETITION LAW IN DEVELOPING COUNTRIES

4.1. As can be seen from the above, there are compelling arguments both for and against the implementation of competition law in developing countries. However, in order to ensure that the enactment of a competition law in a developing country facilitates the attainment of the anticipated optimal benefits discussed in paragraph 3 above whilst minimising any unintended negative consequences, the content of the legislation needs to cater for the specific needs of the nation in question. The failure of a competition law is often due to its inadequate drafting, which may be rectified by considering the points hereunder.

Policy objectives

4.2. As a starting point, in considering the discrete characteristics of each developing country, it is important to identify the specific policy objectives which the legislation aims to achieve. In this regard, the policy objectives cited in the legislation of developing countries are often too broad or too narrow to adequately serve as the underlying basis for the implementation of the policies therein.[97] Moreover, the legislative documents of certain developing countries, such as Swaziland, Zimbabwe, Kenya and Uganda[98], do not have dedicated provisions setting out the purposes / objectives of the legislation at all.[99]

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[96] Monti M (2004) "Competition for Consumers' Benefit", Speech given by the form Commissioner with responsibility for competition policy in the European Union, Amsterdam, 22 October 2004 <http://www.adb.org/Documents/Others/OGC-Toolkits/Competition-Law/complaw040000.asp> (accessed 15 September 2011).

[97] Preston (2004) supra n3 at page 10. Evenett also indicates that developing countries should state, as an objective, the attainment of **dynamic efficiency** which specifically contemplates the maximisation of the sum of producer and consumer surpluses over time, which would include contributions made by technical progress, innovation and investments of various types (Evenett (2005) supra n44 at page 4).

[98] While the Ugandan officials have not yet promulgated a competition law policy, a draft bill pertaining to competition law was published during November 2004.

[99] Swaziland Competition Act, 2007; Zimbabwe Competition Act, 1996; Kenya Competition Act, Chapter 504, 2009 and Ugandan Competition Bill, 2004.

4.3. On the one hand, too-narrow policy objectives may serve to harm competition, in that the failure to include the full spectrum of anti-competitive practices within the ambit of the legislation may result in sophisticated firms abusing their positions and committing anti-competitive practices detrimental to both the market and the consumer, without consequence. This sequence of events may result in acquitting an industry participant of its anti-competitive conduct, termed a "Type II error".[100]

4.4. On the converse, policy objectives that are too broad may divert the attention of the competition authorities to matters that technically fall outside of the scope of their expertise. This may, in fact, hamper competition, usurp the power of other regulators and lead to a duplication of functions and a misuse of scarce resources.[101] This is often termed a "Type I error" which has the effect of "finding a firm that has behaved perfectly competitively liable of anticompetitive acts".[102]

4.5. For instance, David Lewis (the former chairman of the South African Competition Tribunal) has been quoted as stating that the role of the competition authorities in defending certain public interest considerations as listed in the South African Competition Act No. 89 of 1998, as amended, is, at most, secondary to the role played by other statutory and regulatory instruments. He further states that the competition authorities, however well intentioned, are advised to refrain from overstepping the boundaries of their mandate, lest they impair the very interests they seek to protect.[103]

The export of foreign experience

4.6. The novelty of introducing competition law in developing countries has the effect that those charged with the task of its development and enforcement are often not suitably trained and / or too inexperienced, to do so effectively. The cost of inefficiently conducted investigations may raise the cost of conducting businesses in these countries and lead to the establishment of incorrect and damaging case precedent.[104] Moreover, obstacles such as language barriers, inadequate drafting, a lack of transparency in the decision-making process and a lack of publicly available guidance[105] make it difficult for firms to navigate through the often inappropriate competition laws in force in developing countries.

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[100] Schinkel MP and Tuinstra J *Imperfect Competition Law Enforcement* (unpublished research paper by Department of Economics, ACLE, Department of Quantitative Economics and CeNDEF, University of Amsterdam, 2004) at page 16.
[101] Owen (2005) supra n5 at page 16.
[102] Schinkel and Tuinstra (2004) supra n100 at page 16.
[103] *Shell South Africa (Proprietary) Limited and Tepco Petroleum (Proprietary) Limited* (66/LM/Oct01) [2002] ZACT 13 (22 February 2002), paragraph 58.
[104] Louise du Plessis "Different competition laws for different economies?" Business Law & Tax Review, *Business Day* August 2011 at 10.
[105] In this regard, developing countries often do not publish interpretational guidelines which make it difficult for both foreign and local legal advisors to assess the legality of certain conduct in the domestic marketplace.

4.7. To compensate for its lack of expertise, the competition authorities of developing countries may turn to their more experienced counterparts in developed countries for assistance in the drafting, implementation and / or enforcement of appropriate competition laws.

4.8. While the contemplation of foreign experience may provide much-needed guidance and contribute to the attainment of legal certainty[106], the failure to consider the political, commercial, cultural and structural nuances unique to each particular economy prior to the mere adoption of foreign legislation, may actually stifle, rather than promote, competition therein. Owen notes that while the goal of competition law across the globe is constant, the content of the laws formulated specifically for rich and developed countries will have no aptitude to achieve the same goal in their poorer and underdeveloped counterparts.[107] For example, the presumption that a relatively high market share automatically confers market power in developing economies, could result in a misapplication of abuse of dominance provisions, penalising dominant firms unnecessarily.[108] Inexperienced authorities may further fail to take account of the fact that positions of dominance may be attained by a single firm acting in isolation, or by a group of firms acting in concert.[109] In addition, the inclusion of overbroad or inflexible merger control provisions may result in the unwarranted prohibition of acquisitions by foreign firms. In this regard, Alvarez *et al*.[110] note that developing countries that enforced a pre-merger notification regime reduced the occurrence of cross border mergers and acquisition by American firms by half.

The scope of substantive provisions

4.9. In addition to the fact that the underlying policy objectives should be as focused as possible, the substantive provisions to be implemented require clarity and lucidity for success. The legislation must outlaw *all* forms of anti-competitive conduct. Furthermore, detailed formulae to calculate administrative penalties (which should be serious enough to constitute a real deterrent), as well as specificity regarding thresholds in accordance with which dominance and merger notifiability can be assessed should be included.[111]

4.10. By way of explanation, Fox[112] suggests that the relevant law to be implemented should equip educated and well-trained staff at competition authorities an appropriate scope of power to implement and enforce the legislation, including sufficient jurisdictional power and mechanisms by which the satisfaction of administrative penalties by offending firms can be

[106] Fox (2007) supra n8 at pages 21 - 22.
[107] Owen (2005) supra n5 at page 7.
[108] Fox (2007) supra n8 at page 20.
[109] Adam and Alder (2008) supra n10 at page 580.
[110] Alvarez *et al.* (2007) supra n7 at page 78.
[111] Stewart *et al.* (2007) supra n9 at page 8. In contrast, countries such as El Salvador and Mexico have introduced mechanisms in terms of which the imposition of sanctions will be reversed, where cartelites assist the competition authorities in the eradication of the collusive conduct in which they have engaged. It is anticipated that this initiative will have a dual effect in that it will both deter anti-competitive conduct and incentivise cooperation with the authorities (Stewart *et al.* (2007) supra n9 at page 32).
[112] Fox (2007) supra n8 at pages 21 – 23.

enforced.[113] In this regard, Stewart *et al*. note that as of 2007, only 10% of fines imposed by the competition authority in Panama had been satisfied. Similarly, only 14% of fines imposed by the Mexican competition authorities were paid during the period 1994-2007.[114] Hylton and Deng further note that "*increasing the range of remedies available to enforcement authorities has the largest impact on perceived competition intensity*".[115]

4.11. Moreover, the monetary thresholds stipulated in the Tanzanian Fair Competition Act of 2003 (being TSH800million[116] or approximately R3.6 million[117]) require an assessment of the worldwide turnover and asset value of the merging parties, which may result in the fact that almost all mergers meeting the definition and jurisdictional requirements will require notification to the competition authorities prior to its implementation. In addition, the pre-implementation of a notifiable merger could result in monetary penalties and / or imprisonment in certain instances.[118] The broad scope of Tanzania's merger regime may make it difficult for its authority to detect and effectively prosecute contravening conduct and may impede acquisitions by foreign firms, as well as local mergers.

4.12. From an abuse of dominance perspective, it is further suggested that the provisions regulating abuse of dominance in each particular developing country need to ensure that the authorities assess not only market shares in its analysis of dominance, but also considerations such as market position, positions of collective dominance, buyer power, barriers to entry and the size of competitors' market shares[119], to ensure that "dominant" firms are not unduly prejudiced.

4.13. Finally, developing economies are often subject to high levels of corruption in that underpaid government officials may accept bribes to supplement their, often, low incomes.[120] Moreover, owing to the strong presence of government as a player in the economy, there is often a failure to appropriately enforce a separation of powers. As such, competition authorities may be subject to political pressures in that its decision-making process is influenced by state intervention exacerbating the legacies of nepotism and cronyism.[121] Fox suggests that an effective competition law should include a provision to guarantee the autonomy of the regulatory authority[122], a key strategy by which this may be achieved is to

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[113] *Ibid*. This consideration is discussed in more detail hereunder.
[114] Stewart *et al.* (2007) supra n9 at page 27.
[115] Alvarez *et al.* (2007) supra n7 at page 77.
[116] Section 11(2) of the Tanzanian Fair Competition Act, read with the Fair Commission Order 2006.
[117] This figure was determined utilised the exchange rate applicable on 14 September 2011.
[118] Section 9(a) and (b) of the Tanzanian Fair Competition Act.
[119] Adam and Alder (2008) supra n10 at page 579.
[120] In their 2008 article, Brusick and Evenett state that for a competition policy to be effective, it must be in the interest of government officials to resist the temptation to engage in corrupt activities and provide authorities with the necessary resources to ensure compliance. (Brusick and Evenett (2008) supra n18 at page 279).
[121] For example, there was a substantial period of time during which a competition law was not enacted in Guatemala owing to the reluctance of government officials (who simultaneously acted as business leaders in many industries) to approve the legislation. (Stewart *et al.* (2007) supra n9 at page 27).
[122] Fox (2007) supra n8 at pages 21 – 22.

prescribe high levels of transparency in the decision-making process and mechanisms for public consultation[123], which, it is expected, will provide legal certainty and act as a deterrent against future contraventions.[124] However, it has been argued that in drafting an appropriate competition law, legislature should be cognisant of the degree to which political will and intervention can disrupt the enforcement of the legislation and cater for these difficulties appropriately.[125]

5. CONCLUSION

5.1. From the foregoing it is clear that competition law in both developed and developing countries is essential to spur growth and development and to protect consumers therein.

5.2. While there are some that still question both the necessity (owing to the other more serious and immediate social concerns which plague developing countries) and the efficacy (owing to the lack of both financial aid and qualified staff to properly enforce the adopted competition law), these concerns can be easily alleviated by the introduction of a suitable competition law that has been specifically crafted to cater for the individual needs of each developing economy. To the extent that tailor-made legislation is drafted, adopted and thereafter enforced, research and case precedent have indicated that the implementation of such a policy (often in conjunction with the implementation of other similar reforms) has resulted in lower prices and more choice to the benefit of both the economy, as well as the individual consumer, without squandering precious assets.[126] Moreover, as discussed above, competition law is often used as a catalyst to stimulate the attainment of the UN's millennium development goals, which are of special focus for developing countries worldwide. In this regard, the implementation of competition law in developing countries may just be the perfect bait by which to lure the benefits described above.

5.3. It is thus overwhelmingly clear that competition law is a tool to be utilised in the attainment of economic freedom and prosperity, irrespective of its country of application. As Judge Learned Hand stated in the case of *United States v. Aluminium Co of America*[127]:

> "*Possession of unchallenged economic power deadens initiative, discourages thrift and depresses energy…Immunity from competition is a narcotic and rivalry a stimulant to industrial progress*".[128]

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[123] Stewart *et al.* (2007) supra n9 at page 28.
[124] Fox (2007) supra n8 at pages 21 – 22.
[125] Mehta and Agarwal (2007) supra n33 at page 3.
[126] For more information in this regard, we kindly see Stewart *et al.* (2007) supra n9 at page vi in which the authors cite ten key recommendations to the formulation of a successful competition law policy in developing countries.
[127] *United States v. Aluminium Co of America* 148 F.2d 416, 427.
[128] Evenett (2005) supra n44 at page 30.

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