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The Need for Antitrust Laws in the Caribbean and Their Actual or Possible Impact on Trade

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INTRODUCTION

It is my privilege to talk with you today on the application of antitrust principles to Caribbean countries. The antitrust concepts I will use are basic — conduct and structure.[1] By that I mean conduct such as price-fixing, territorial allocation, tie-ins and the like, on the one hand, and merger policy on the other. I will discuss these in the context of two economic areas — export-import issues and internal island economic problems.

Let me first give the standard governmental disclaimer. I speak for no one but myself. My views are my own and not those of the Subcommittee or any of its Members. This is perhaps an application of the Caribbean

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1. W. MUELLER, A PRIMER ON MONOPOLY AND COMPETITION (1970).

saying that "the higher up the pole the monkey go . . . ."; or, as Eddie Laing reminded me when we were discussing my remarks, there is another Caribbean saying which begins, "Jackass will jump and bray . . . ."

I try not to hedge what I say with obscurantist phrases such as "it would seem as though," or "it might perhaps be argued that," so I hope you will understand that I mean no offense if I sometimes sound overly dogmatic. Finally, my viewpoint is, for the moment, that of an attorney for some hypothetical Caribbean nation.

I do not believe that standard United States antitrust principles, or for that matter antitrust concepts current in Great Britain, Canada or the Common Market, can or should apply across the board to the Caribbean Countries and their economic problems. These concepts deserve study but without modifications dictated by regional realities, they will not prove very useful.

There are, in my view, three major Caribbean economic problems. First, internal prices for many basic commodities and staples are very high. Second, Caribbean nations have difficulty exporting their products — raw materials or finished goods — in the face of sophisticated competition from what I call the overdeveloped countries, and the cost of getting materials into the Caribbean is very high. These latter two problems are interrelated and I will treat them together. Finally, merger policy is complicated by geographical factors.

HIGH INTERNAL PRICES

Turning to the first issue — that of the internal price of commodities and staples — I am sure no one will dispute the argument that, whatever the cause, these prices are in many cases exorbitant.[2]

In a large, diffuse and dynamic economy such as that found in the United States, prices are theoretically subject to the buffeting forces of competition. We all know, of course, that even in the United States this is not necessarily true. There are monopolies — many of them government-mandated or encouraged — and there are numerous markets in which brand names and product identification have created very high barriers to entry.[3]

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2. Rubin, *Competition Policy and the Caribbean Community,* 9 J.W.T.L. 398, 404 (1975) [hereinafter cited as Rubin].

3. This theory is the framework for the Federal Trade Commission's suit against the three (Quaker Oats having been dropped as a respondent on February 24, 1978) major cereal manufacturers. The FTC alleges that a shared monopoly has existed in a large and growing market which has seen no new entrants because of brand proliferation, product differentiation supported by intensive advertising,

In a smaller economy, however, particularly one dependent on imported necessities, the small scale can magnify imperfect competition, and a monopoly can be more quickly formed and entrenched. Certain facets of some island economies, for example, are controlled by the remains of old *plantocracies.* These, in some cases, have evolved into vertically-integrated distributional monopolies, either over desirable brand names or over a type of commodity.[4]

The theoretical solution in cases where natural competition will not work — and I stress the word *theoretical* — is price regulation based on disclosure of costs and profits. However, this solution runs into a host of philosophical and socioeconomic roadblocks that are ingrained in Caribbean societies[5] and even more deeply ingrained in the United States.

Furthermore, in a small country with less population and a smaller economic universe, the challenge to price-gouging or monopoly-profiterring is not likely to come *completely* from the injured private sector, especially in view of the traditional Caribbean reluctance to use the law as a means of challenging established practices of any kind.

To solve these problems, Caribbean governments should, as a matter of economic and social policy, have statutory power to examine profit margins, shipping charges, mark-ups and the general state of competition in certain sectors of the economy. This should, of course, apply most forcefully to natural monopolies or government-granted monopolies, such as power companies, telephone companies and the like.[6] It should also apply over the broad range of consumer necessaries, although there are obvious definitional problems presented here.

I realize that these ideas are an anathema to anyone who considers him or herself a classical, free-market capitalist. But the plain fact is that it is extremely doubtful whether many nations on this good earth — particularly smaller island nations — can play by the rules of that classical game and win, or simply stay even. These rules have been

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and shelf-space allocation programs. Kellogg Co., FTC Docket No. 8883, Transcript at 2760, *et seq.* (1972). Even if the case is proven, problems of relief are significant. One suggestion has been to treat advertising expenses for entrenched brands as a capital item rather than as an expense. *See* Weiss, *Advertising, Profits, and Corporate Taxes,* 51 REV. ECON. & STATISTICS 421 (1969).

4. *See* Rubin, *supra* note 2, at 404. While there are, of course, countervailing considerations, *see* also the discussion at the conclusion of Part IV — some Caribbean governmental policies such as tax relief for new businesses and tariffs for competing goods help preserve entrenched market power.

5. *Id.* at 400.

6. *See* H. BREWSTER, WAGE POLICY ISSUES IN AN UNDERDEVELOPED ECONOMY: TRINIDAD AND TOBAGO (1969) [hereinafter cited as Brewster].

arbitrarily applied to much of the globe by the overdeveloped countries. If this is taken as a given, and there are some Caribbean nations that would agree with this, then a limitation of the amount of profit that can be extracted from a finite number of people with low incomes is a reasonable social and economic policy that ought to be implemented.

As the government of Barbados has put it:

> The main danger [with regard to high prices charged for basic consumer goods] so far as under-developed countries are concerned is that elasticity of demand and supply (*i.e.*, the ease with which demand and supply respond to price changes) may be so low that the price system may become relatively ineffective — thus an increase in demand for a commodity sometimes elicits no increase in output because in the given period supply is fixed — hence prices increase considerably. Where income levels are low, moreover, a decrease in price produces no increased consumption because the limited number of buyers does not expand consumption at lower prices and no more buyers are added to their numbers.[7]

In fact, in a setting where the expansion of the market is so small that a given product or brand cannot reasonably be expected to be provided by more than one local outlet, standard notions of competition may not work. The buying power of the community may be so small that attempts by government regulation to force a product or brand to be distributed by more than one outlet may be counterproductive, forcing several companies to invest in the purchase of independent supplies of the same item, thus causing an overall excessive supply. This will mean that the items will not sell as fast as they should; money will be tied up for too long; there will be a need for larger profit margins on fewer items sold on longer-term financing; and the result will be higher, rather than lower, consumer prices as a result of enforced, artificial competition.

But none of these issues can be resolved without adequate information. There is a method for implementing the information disclosure necessary to achieve the competition policy decided upon by the Caribbean nations. It is the Line of Business Program instituted by the FTC in 1972,[8] or more accurately, a Caribbean version thereof.

If one of the antitrust enforcement agencies of the most developed country in the world thinks there is reasonable ground for obtaining such

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7. MINISTRY OF TRADE AND LABOUR (Barbados), PRELIMINARY SURVEY OF THE DISTRIBUTION SYSTEM AND MARKETS 7–8 (1965).

8. *See* Long, FTC Memorandum: Collection of Line of Business Data for 1977 (May 9, 1977); FTC, Supporting Statement, from LB, 1974 Survey Version (July 1, 1975).

detailed information concerning "the organization, business, conduct, practices and management of any person, partnership or corporation engaged in . . . commerce"[9] in the United States, as is sought in the Line of Business Program, the same reasoning should *a fortiori* apply in a country where individual items or lines of business are fewer, where they have a more profound impact on its citizens and where much less economic data is available.

The FTC Program was motivated by several factors. Two of the most important were the diversification and merger waves in the 1960s, with a consequent serious loss of information on industrial performance. In many cases (such as synthetic rubber, soaps and detergents, turbogenerators, refrigerators, washing machines, electric lamps and storage batteries), the Commission was of the opinion that "it is virtually impossible to obtain accurate statistics on financial performance because all or most of the leading producers are highly diversified corporations whose financial reports are not broken down to provide such information."[10]

Schedule 3 of the Line of Business questionnaire is designed to elicit "gross margin, contribution margin, and operating income figures [which] measure various dimensions of price structure and profitability, with important implications for the efficiency with which markets allocate resources to meet consumer demand."[11] The schedule also seeks to obtain media advertising expenditures, selling expenses, research and development expenses and other information designed to judge the economic performance of an industry. The Line of Business reports are designed to pinpoint industries of persistently high profitability. Needless to say, to many in the United States, this smacks of incipient government control and radical socialism, and the requests for data have been bitterly litigated.[12]

Caribbean nations are economic microcosms, and the logical case for a similar program in the Caribbean is very compelling. I do not mean to minimize the difficulty of this. Many influential companies in the

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9. Federal Trade Commission Act of 1914, § 6; 15 U.S.C. § 46(a) (1976). This is extremely broad power. The operative provision is § 5: "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful." 15 U.S.C. § 45(a) (1976).

10. FTC, Supporting Statements, *supra* note 8.

11. *Id.*

12. *See* A.O. Smith Corp. v. FTC, 417 F. Supp. 1068 (D. Del. 1976). *In re* FTC Corporate Patterns Report Litigation, 1977-1 TRADE REP. (CCH) ¶61,399. The Corporate Patterns Program differs from the Line of Business Program in that the former is more narrowly focused on sales by product lines, and not profits by product lines.

Caribbean are multinational and they doubtless would view with extreme disfavor any country that instituted such a program.[13] Furthermore, there exists the problem of obtaining information located in another country. This is a political and legal problem with which I shall not here attempt to deal. But the logical case for obtaining such data is compelling.

Such a Line of Business approach would have beneficial effects in several areas. First, Caribbean economists would be able to more accurately assess the state of their island economies, and collective efforts such as CARICOM would be facilitated. A uniform disclosure law, carefully controlled as to access and the use to which the data is put, would also have a salutary effect on import-export policy, to which I shall turn in a moment.

In many cases, market competition is a direct function of market structure. Very little is known of monopoly elements in the Caribbean economy. As one author has put it: "[I]t is ironic that even though the disparate economies in the region all indicate strong monopolistic tendencies, there is almost no evidence available that places the burden of such poor performance on highly concentrated market structures."[14] In a word, it is simply impossible for West Indian economists to do industry-by-industry analyses because they do not have adequate data.

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13. *See, e.g.,* Seers, *A Step Towards A Political Economy of Development,* 18 SOC. ECON. STUD. 217, 249 (1969).

14. Rubin, *supra* note 2. As Connor and Mueller have put it:

> Three key determinants of the degree of competition in a market are the level of market concentration, the relative market position of the individual firm, and the barriers facing new competitors wishing to enter the market. The analysis confirmed that each of these factors had a significant impact on MNC [Multinational Corporations] profitability in both Brazil and Mexico. The profits of MNC affiliates were higher when they operated in markets where a few firms dominated the market. This is consistent with the theory of oligopoly that firms compete less vigorously in markets of few sellers than many sellers. Similarly, profits were higher for firms holding dominant positions in the market (as measured by their share of the market compared to their leading rivals) than for those holding lesser positions. Finally, profits were higher for firms when entry barriers created by product differentiation (as measured by advertising-to-sales ratios) were larger than when they were low.

J. CONNOR & W. MUELLER, MARKET POWER AND PROFITABILITY OF MULTINATIONAL CORPS. IN BRAZIL AND MEXICO, REPORT TO SUBCOMMITTEE ON FOREIGN ECONOMIC POLICY, SENATE COMMITTEE ON FOREIGN RELATIONS, 95th Cong. 1st Sess. (1977).

See also R. NEWFARMER & W. MUELLER, MULTINATIONAL CORPS. IN BRAZIL AND MEXICO: STRUCTURAL SOURCES OF ECONOMIC AND NON-ECONOMIC POWER, REPORT TO SUBCOMMITTEE ON MULTINATIONAL CORPORATIONS, SENATE COMMITTEE ON FOREIGN RELATIONS, 95th Cong. 1st Sess. (1977).

NECESSITY FOR THOROUGH EXAMINATION OF EXPORT-IMPORT PROBLEMS

The export business of the Caribbean is complicated by the fact that no one nation can export enough of anything to significantly affect world markets or market prices. In other words, output is simply too small to make a dent in anything. This is so, for example, even with respect to bauxite in Jamaica or oil in Venezuela. Theoretically, the simple answer is to cartelize. I realize that, coming from an antitrust lawyer, this sounds like heresy, but you must remember that antitrust concepts tend to be molded by those who are applying them. If you have the bad end of a cartel you rage and scream and call it a price-fixing. However, if you are too low, you talk in terms of "the orderly marketing of goods" and the beneficial effects of cartels.

United States cartel law contains some very subtle variations.[15] One is that we tend to modify our legal position when faced with a strong cartel such as the oil cartel. The reason for this is rooted in both law and economics. The legal rationale is that it is often difficult to obtain jurisdiction over, or to enforce a judgment against, a foreign corporation, particularly if it is a quasi-governmental entity. The economic rationale (and the diplomatic and national security reasons) are more important. Using oil as an example, it is better to modify your antitrust concepts than to freeze in the dark.

As another example, the consent decree in the *Bechtel* case[16] makes it very clear that some types of boycotts are extremely complex, and

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15. *See generally* Timberg, *Sovereign Immunity and Act of State Defenses: Transnational Boycotts and Economic Coercion*, 55 TEXAS L. REV. 1 (1976); Joelson & Griffin, *The Legal Status of Nation-State Cartels Under United States Antitrust and Public International Law*, 9 INT'L LAW. 617 (1975); Victor, *Multinational Corporations: Antitrust Extraterritoriality and the Prospect of Immunity*, 8 J. INT'L L. & ECON. 11 (1973); DEP'T OF JUSTICE, *Guide: Antitrust and International Operations*, 1977 TRADE REP. (CCH) No. 266 PART II [hereinafter cited as DEP'T. OF JUSTICE *Guide*]. Speech by Farmer during Seminar on Antitrust Problems and Restrictive Business Practices in Latin America (Cleveland, Ohio, June 8, 1977); *See also* Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1602 (1978) *et seq.;* U.S. DEP'T. OF COMMERCE, Domestic and International Business Administration — Restrictive Trade Practices or Boycotts, Proposed Rules, 42 Fed. Reg. 48,556 (Sept. 23, 1977).

16. United States v. Bechtel Corp., No. C-76-99 (D. N. Cal., filed Jan. 16, 1976). The relief requested in the original complaint consisted of four short paragraphs. The final proposed decree, entered into without testimony, trial or adjudication, runs to ten Kantian pages. *See* Comment in Opposition to Proposed Consent Judgment No. C-76-99 (GBN, April 14, 1977) (comments of Congresswoman Holtzman, *et al.*)

consequently, attempts to prevent them are almost unenforceable. On the other hand, there is the prosecution of the uranium price-fixing cartel both by private parties[17] as plaintiffs and the United States government.[18] Traditionally, such suits are complicated by diplomatic considerations. For example, the British have protested the actions of American antitrust enforcers obtaining British documents and testimony from British officials.[19] This is natural enough as governments do not like to have their sanctioned cartels examined by some other government. The Canadian government in effect politely told the U.S. government investigators of the uranium cartel to get very lost;[20] so did the Australians.[21] The United States, however, is quite capable of forming export cartels of its own and frequently does.[22] It may be that a common

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17. Kansas Gas & Elec. Co., *et al* v. Westinghouse Elec. Corp., No. 75-250-C6 (D. Kan., filed Oct. 1, 1975); *In re* Westinghouse, MDL Docket 235 [1977] 3 All E.R. 703.

18. Grand Jury Investigation of the Uranium Industry No. 76-0128 (D. Colo., 1977).

19. The House of Lords forbade the discovery requested by the United States, Rio Tinto Zinc v. Westinghouse, MDL Docket 235, [1978] 1 All E.R. 434. (The decision involved five other appeals as well.)

As Viscount Dilhorne put it:

> For many years now the United States has sought to exercise jurisdiction over foreigners in respect of acts done outside the jurisdiction of that country. This is not in accordance with international law and has led to legislation on the part of other States, including the United Kingdom, designed to protect their nationals from criminal proceedings in foreign courts where the claims to jurisdiction by those courts are excessive and constitute an invasion of sovereignty.

Id. at 21.

20. *In re* Application for Judicial Review, pursuant to The Judicial Review Procedure Act, STAT. O. & R., Chap. 48 (Sup. Ct. Ont., Toronto Weekly Ct., Released Nov. 9, 1977).

21. Foreign Proceedings Act (Prohibition of Certain Evidence) No. 121, ACTS AUSTL. P. 1976. Ever forthright, the Australians simply entitled the legislation, "An Act to Make Provision for Preventing the Prohibition of Certain Documents, and the Giving of Certain Evidence, for the Purposes of Proceedings in Foreign Courts."

22. This is the purpose of the Webb-Pomerene Act of 1918, 15 U.S.C. § 61, *et. seq.* (1973). Indeed, the DEP'T OF JUSTICE *Guide, supra* note 5, at 7 reads:

> By contrast, to apply the Sherman Act to a combination of United States firms for foreign activities which have no direct or intended effect on United States consumers or export opportunities would, we believe, extend the Act beyond the point Congress must have intended. This could encroach upon the sovereignty of a foreign state without any overriding justification based on legitimate United States interests. In fact, antitrust laws and enforcement programs various foreign nations have adopted (or

export cartel — if it is an answer — is *the* answer. Other possibilities include combining with cartels from other parts of the world that export goods to the United States, or doing the same within a regional group such as CARICOM.

On the import side, the major problem is the effect of import cartels, *viz.*, those imposed by carriers. Although they are legal, rate-making conferences are a particularly egregious form of price-fixing. The nations of the Caribbean are natural victims of the simple fact that most of what they need to import has to come by ship. The United States Department of Justice, as part of a very strong move to eliminate certain antitrust exemptions and to eliminate regulatory inefficiency, has been vigorously filing briefs before the Federal Maritime Commission taking the position that certain rate-making practices are anticompetitive.[23] In fact, the

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could adopt) may offer a more direct means for redressing unreasonable trade restraints which have their primary impact on the residents of those jurisdictions, but have no significant impact on United States consumer interests and export opportunities.[16]

Footnote 16 to the *Guide* reads:

> The U.S. Government is a party to voluntary guidelines which discourage participation by international businesses (including U.S. Businesses) in anticompetitive trade practices wherever they occur. *See* Code of Conduct for Multinational Enterprises adopted by the Council of the Committee on International Investment and Multinational Enterprises of the Organization for Economic Cooperation and Development (June 1976). The United States is committed to a program of cooperation with foreign antitrust agencies, including joint efforts to improve the enforcement efforts of each participating nation under its own national law. *See, e.g.,* Agreement between the Government of the United States of America and the Government of the Federal Republic of Germany Relating to Mutual Cooperation Regarding Restrictive Business Practices, signed June 23, 1976. In addition, the Department of Justice has been, and will continue to be, quite active in urging governmental bodies to be less restrictive in regulating international trade where public goals can be served by less restrictive measures.

There is no reason why Caribbean governments could not engage in similar cooperative efforts.

23. *See, e.g.,* Comments of the United States Dep't of Justice Before the Federal Maritime Commission on Agreement No. 57-109 — Application of Pacific Westbound Conference For Extension of Agreement, 57-96 (Jan. 30, 1978). The "benefits" assented to by the carriers are:

1. The elimination of a multiplicity of competing tariffs;
2. The development of intermodalism through the conference system;
3. The creation of uniform tariff rules; and
4. A reduction in the potential for malpractices.

Simply stated these "benefits" translate to the elimination of price competition, conference control over intermodal shipping, uniform charges and services, and the power to police price-cutters. The Department of Justice took the position that

Department has recently published a mammoth report entitled "The Regulated Ocean Shipping Industry."[24] The conclusion read as follows:

> [C]onference [rate-making] power is not effectively constrained by market forces or by regulation . . . . [T]he evidence shows that current regulation may well have promoted rather than hindered cartelization of the industry.
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> The result has often been, instead, the creation of a monopoly possessing all the attributes Congress sought to avoid. Government regulation seems to have abandoned a balancing of interests in favor of promoting 'stability' and increased cartelization of the industry. Shipper choice and consumer welfare are subordinated to these goals on the presumption that they are concomitantly benefited.[25]

Nor is this the only criticism of ocean-shipping conference practices. The House Judiciary Committee issued a report which was just as critical of conference rate-making practices under the earlier Federal Maritime Board.[26]

There are several ways in which Caribbean nations could take advantage of this. One involves increased public participation in United States regulatory practice. To the extent that U.S. conference rate-making is approved by the Federal Maritime Commission, Caribbean nations ought to file views and opinions concerned with this practice. Second, Caribbean nations ought to seek, through their own legislation, detailed price, cost and profit margin information. To the extent that U.S. legislation affects Caribbean shipping, I see nothing wrong with seeking appropriate provisions concerning disclosure of economic information related to shipping in that area.

Third, the United States Supreme Court has recently held in *Pfizer, Inc. v. India*[27] that a foreign nation is a "person" within the meaning of

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the Federal Maritime Commission (FMC) had no authority to approve the agreement, or if it did, the agreement violated the standards of FMC v. Swenska Amerika Linien, 390 U.S. 238 (1968).

24. U.S. DEP'T OF JUSTICE, The Regulated Ocean Shipping Industry (Jan., 1977).

25. *Id.* at 237-39.

26. H.R. REP. NO. 1419, 87th Cong., 1st Sess. (1962). The Subcommittee Report stated that it would have been consistent with Congressional policy to withdraw the antitrust exemption because it had been abused. *Id.* at 385. *See Monopoly Problems in Regulated Industries: Hearings Before the Antitrust Subcomm. of the House Comm. on the Judiciary,* 86th Cong., 1st Sess. (1959). These hearings are fascinating reading. *See also* STEAMSHIP CONFERENCES AND DUAL RATE CONTRACTS, S. REP. NO. 860, 87th Cong., 1st Sess. (1961).

27. 1978-1 TRADE REP. (CCH) ¶61,812 (1978). (hereinafter cited as Pfizer).

Section 4 of the Clayton Act and may sue for treble damages under the U.S. antitrust laws to the same extent as a domestic plaintiff. The Court, in an opinion which is strongly supportive of antitrust principles, quoted the earlier case of *Georgia v. Evans*[28] as follows:

> We can perceive no reason to believe that Congress wanted to deprive a [foreign nation], as purchaser of commodities shipped in [international] commerce, of the civil remedy of treble damages which is available to other purchasers who suffer through violation of the Act. . . . Nothing in the Act, its history, or its policy, could justify so restrictive a construction of the word "person" in section 7 . . . . Such a construction would deny all redress to a [foreign nation], when mulcted by a violator of the Sherman Law, merely because it is a [foreign nation].[29]

The court also noted that this was no novel concept and that

> This Court has long recognized the rule that a foreign nation is generally entitled to prosecute any civil claim in the courts of the United States upon the same basis as a domestic corporation or individual might. To deny him this privilege would manifest a want of comity and friendly feeling.[30]

Specifically defining its holding, the Court said,

> We hold today only that a foreign nation otherwise entitled to sue in our courts is entitled to sue for treble damages under the antitrust laws to the same extent as any other plaintiff. Neither the fact that the respondents are foreign nor the fact that they are sovereign is reason to deny them the remedy of treble damages Congress afforded to "any person" victimized by violations of the antitrust laws.[31]

I suggest that this principle may be broader than the Court put it. The Legal Advisor to the Department of State advised the Court of

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28. 316 U.S. 159 (1941).

29. 1978-1 TRADE REP. (CCH) ¶ 73,375-76.

30. *Id.* at 73,376, *quoting,* The Sapphire, 11 Wall. 164, 167 (1870).

31. *Id.* This position is in interesting contrast to that taken in the DEP'T. OF JUSTICE *Guide, supra* note 22. There, the U.S. government contends that it does not take the position that a conspiracy affecting commerce is within the reach of the Sherman Act, as enforced by the U.S. government. However, the Department supported the result in *Pfizer* by a Memorandum as *Amicus Curiae,* as did the Department of State by letter. *See* Pfizer, at ¶ 73,376, n.20 *supra* note 27. Thus, it supports suits in the United States by foreign governments but will not bring such an action itself. *But see* n.22 *supra.*

Appeals that the Department would not anticipate foreign policy problems if foreign governments were held to be "persons" within the meaning of Section 4 of the Clayton Act. Thus, the State Department approves of the opinion. Further, as the Court noted, the Sherman Act specifically provides that the word "person" shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the territories, the laws of any State, or the laws of any foreign country.[32] Thus, an association such as CARICOM will have the same access to our courts. So also would a governmentally-created importing firm, for example. That access ought to be used, although I recognize that those trained in the British and Caribbean legal system are somewhat more reluctant to litigate than their U.S. brethren.

The Department of Justice also supported this broad concept. It noted that this principle of allowing foreign sovereigns access to the courts is "firmly imbedded in English law," citing the English Statute of Monopolies of 1623.[33] It would be interesting to determine whether this would extend to regulatory proceedings in the United States, tariff hearings, etc.

MERGER POLICY — A SOCIOLOGICAL PROBLEM AS WELL AS A LEGAL PROBLEM

Merger problems in the Caribbean are complicated by one major factor — water. In many industries, total regional demand can be supplied by the output of a single firm producing at its most efficient rate.[34] What this means, of course, is that in many areas *other* than those we normally think of as natural monopolies, the industry structure will be highly concentrated and many businesses will be, in effect, natural monopolies. Logically, this means that one applies a monopoly theory — a natural monopoly must be price controlled. Even though ideally one would like to have free and open competition in which, if profit margins rise to a certain point, new investment and new businesses will be attracted to that business, it may be that the small size of a natural monopoly as an island economy can effectively preclude development of its new competitor.

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32. Pfizer, *supra* note 27.

33. Pfizer Inc. v. India, No. 76-749, (U.S. S.Ct.), Memorandum for United States as Amicus Curiae on Writ of Certiorari, at 7, n.8.

34. *See generally* Tyler, *Export Promotion with Increasing Returns to Scale Under Imperfect Domestic Market Conditions,* 18 SOC. ECON. STUD. 402 (1969); Helleiner, *Manufactured Exports from Less Developed Countries and Multinational Firms,* 83 ECON. J. 21 (1973).

While the normal theory is that competition within an integrated economic system is greater than it is within a purely national framework, this picture is complicated within the Caribbean by high transportation costs. Thus, for example, if a natural monopoly for product *X* is in, let us say, Trinidad and Tobago, the shipping costs for that product will vary depending upon where it is being shipped, and the price at the point where the shipping costs is highest may be so high as to invite the entry of a local firm. This obviously is good, but then one runs into the problem that if the price of that commodity is fixed too low, the necessary investment to enter may be so high that it is not possible to recover one's investment within a reasonable time. Thus, what you have is a situation in which the firstcomer gets all. You can see that the theoretical problems in such a situation, to say nothing of the regulatory and administrative problems, are astronomical.

Given the finite scope of Caribbean economies, it makes sense, if the decision is that competition is maintainable in a given area, to prohibit certain mergers. However, the basis of this type of decision in a small economy, should be broader than the standard "relevant line of commerce" inquiry made in the United States. As a social policy, it can be decided simply that certain mergers should not occur.

In fact, U.S. merger law leaves room for such analysis. In *Brown Shoe Co. v. United States*,[35] the Supreme Court said:

> [W]e cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally-owned businesses. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization. We must give effect to that decision.[36]

At this point, it is worth using this philosophical concept to ask a more fundamental question bearing on basic notions of competition, monopoly and antitrust in the Caribbean. Given the unemployment situation in the West Indies, the seasonal character of part of the employment and the lack of significant possibilities for creating additional employment (because of the lack of natural resources and skilled labor), it may make socioeconomic sense to keep in operation business ventures which, in non-island areas, would be considered marginally, or even sub-marginally, efficient. In other words, are

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35. 370 U.S. 294 (1961).
36. *Id.* at 344.

concepts such as cost-benefit analysis and profit margins really relevant in geographically restricted areas such as the islands of the Caribbean, particularly when one considers that the only alternative to a low-efficiency service business might well be no service at all?

There are a number of vehicles for accomplishing whatever goals the governments of the West Indies may set. Modification of the Companies Acts would be one. In this context, authors have noted serious deficiencies in the present Caribbean Companies Acts.[37] For my part, I will content myself with the suggestion that automatic exemptions for certain private corporations, particularly where those private corporations control tremendous wealth, is inappropriate. It also makes little sense to use outmoded or inapplicable British or American models which were never intended for, and bear little or no relationship to, West Indian economic problems. This is just not sensible.

It would also be of benefit, with regard to both internal Caribbean antitrust principles and litigation abroad, that some thought be given to modernizing fee concepts to some limited extent. Although contingent fees are now allowed in Barbados and Jamaica, current fee practice in the West Indies generally discourages litigation. There are some areas, directly related to economic problems, where this is disadvantageous, simply because you want a firm with the ability to abuse its market position to have concern for what it does in the marketplace. Thought should be given to any concepts which encourage the private sector to police itself. For example, it might be possible to split fees between the parties evenly if the plaintiff survives a motion for summary judgment, or each could pay his own. I realize that these ideas will not sit well with many who are trained in the concepts of British law. But many of those concepts simply have no bearing to the realities of West Indian economic life.

CONCLUSION

There are significant underlying problems of national psyche as well. As J.P. Fonteyne pointed out in a private criticism of this paper, given the transnational nature of entire sectors of the economy of most West Indian nations — whether it be shipping, transportation, import of consumer goods or export of raw materials — it is apparent that any attempt to regulate economic activities in the area, particularly by reference to such issues as competition, transfer pricing and taxation, will have to take their aspects of the region's economic structure into consideration. Cooperation between the governments of the States in the area is an

37. Rubin, *supra* note 2, at 402.

essential prerequisite for successful management of the region's economy. Such cooperation will be needed both in the formulation of uniform policies and regulations and in their enforcement.

While CARICOM would be an ideal vehicle for the delicate negotiations that will be required to achieve the necessary inter-governmental consensus on goals and methods, the States in the Caribbean are nearly all newly independent nations and their recently acquired freedom, coming in the wake of centuries of foreign rule, may prove to be a psychological hurdle making it extremely difficult for political leaders and for the general population alike to give up even a fraction of the self-determination they have taken so long to acquire.[38]

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38. *See* F. KNIGHT, THE CARIBBEAN — THE GENESIS OF A FRAGMENTED NATIONALISM (1978).