

# *Competition Regimes in the Caribbean Community and Sub-Saharan Africa: A Comparison*

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*Competition regimes are usually analysed through legal and economic lenses, taking existing markets as given, and examining the extent to which competition is present and identifying obstacles and market failures that hinder competition and enforcement of the law. In a pioneering study, Fox and Bakhoun interrogated the competition regimes in Sub-Saharan Africa through a historical and political-economy approach, revealing those market failures deeply rooted in the colonial experience. They then examined the competition regimes of those countries in that context. In this paper, a similar approach is used to examine economies in the Caribbean Community, providing historical insights into how those societies were created by European expansion and imperialism, with the resulting market failures that persist today, making diversification and transformation of these economies very challenging. Against this grid, the competition regimes of this region are examined, and some proposals advanced for transformational strategies for Sub-Saharan Africa and the Caribbean.*

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## *Objectives*

This brief paper is inspired by the path-breaking work of Eleanor Fox and Mor Bakhoun, *Making Markets Work for Africa: Markets, Development, and Competition Law in Sub-Saharan Africa*,<sup>1</sup> and attempts to provide a preliminary comparison between the experiences of Sub-Saharan Africa and the Caribbean Community (CARICOM) in developing their competition regimes. The work of Fox and Bakhoun is path-breaking among competition law research efforts because it takes a political economy approach to explore the legacy of colonial history of these countries as an entry into explaining the economic and political environment into which competition law is introduced.

In this comparative brief, I first provide a synopsis of the findings of the study on Sub-Saharan Africa. Then, using a political-economy approach similar to that used in that study, I specifically target the following areas for comparison between the findings of Fox's and Bakhoun's research and conditions in CARICOM States.

1. Economic, social, and political overview of CARICOM.
2. Treatment of State Owned Enterprises (SOEs) versus the Private Sector.
3. Corruption, the judiciary, and rule of law.
4. The colonial experience and its impact on the current socio-economic landscape and distribution of wealth and power.
5. Current economic and political conditions derived from the colonial past that close and capture markets.
6. Competition policy in the region.
7. Competition laws in the region and enforcement experience.
8. Regional competition law and its enforcement.

Because South Africa's competition regime is so mature compared to CARICOM's and those in other Sub-Saharan states, I chose not to delve too deeply into the South African regime. Finally, I consider the analysis and recommendations in the study for applicability to CARICOM.

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1 ELEANOR FOX & MOR BAKHOUM, *MAKING MARKETS WORK FOR AFRICA: MARKETS, DEVELOPMENT, AND COMPETITION LAW IN SUB-SAHARAN AFRICA* (Oxford Univ. Press, 2019).

## I. SUMMARY OF FINDINGS OF THE STUDY ON SUB-SAHARAN AFRICA

*Our thesis is that Africa needs more “market” but not the kind that simply works for powerful interests. It needs markets governed by rules that control the powerful and unleash the talents and energies of the masses of people long left out of the economic enterprise.<sup>2</sup> (Fox and Bakhoun, p.2)*

The study initially explores the colonial experience, provides a profile of the economies, and measures the level of human development using indicators: Gross Domestic Product (GDP), Population levels, Human Development Index (HDI), Ranking in Doing Business chart, and Democracy Index. Fox and Bakhoun then explore the economic and political conditions that close and capture markets by powerful local and foreign interests: SOEs dominating markets, highly concentrated markets with high barriers to entry, and dominance of multinational corporations in key extractive sectors that vertically integrate to capture profits. Findings are that the economies and societies of Sub-Saharan Africa were transformed by colonialism from production primarily for domestic consumption and self-reliant food security to export oriented extractive industries dominating economic activities, to the benefit of the metropole. With this shift in production came growing import dependence on the metropole for consumables, creating a demand for goods and services from the metropole.<sup>3</sup> A large part of the labor force was redirected into export oriented industries of agricultural and mineral products, and away from production for domestic consumption. Despite this, there remains a residentiary sector, producing for local consumption. In Sub-Saharan Africa today, most of the working people are employed in agriculture—60 % to 70 % of the population—and most agriculture is subsistence farming and most of the farm families live below the poverty line.<sup>4</sup>

The findings in Francophone Sub-Saharan Africa show an extreme level of naked exploitation during the colonial period that has resulted in paucity of institutions and lack of experience in self-government.<sup>5</sup> With independence, local elites replaced the colonial administrators, patterned their rule by the colonial example, and favored foreign elites and capitalists rather than seeking the interests of the local population.

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2 *Id.* at 2.

3 FOX & BAKHOUM, *supra* note 1, at 27.

4 *Id.* at 3.

5 *Id.* at 24, 30.

Political instability, coups, and authoritarian governments prevail. Anglophone Africa's colonial experience offered a higher level of institution building and later on, opportunities for locals to gain political experience through representation in government, leading to greater tendencies toward democracy and political maturity in these countries. Yet, there are high levels of dysfunctional markets in both West and East/South Africa, the origins of which can be traced to market structures created by colonial policies which enabled the capture of wealth and power by the privileged colonizers<sup>6</sup> and reinforced through racial discrimination and segregation. In southern African countries, apartheid policies imposed racial segregation, with Africans relegated to the most infertile lands, and resources captured by the white colonizers, condemning the indigenous peoples to extreme poverty that persists today despite the dismantling of apartheid in the 1990s.<sup>7</sup>

Markets in Sub-Saharan Africa were found to be highly concentrated, with high barriers to entry and SOEs dominating markets and competing unfairly with the private sector. The study found that corruption and cronyism are rampant in several of these economies.<sup>8</sup> There is a high presence of Multinational Corporations (MNCs) that dominate key sectors, further capturing markets through vertical integration.<sup>9</sup> These conditions leave little room for new firms to enter markets and challenge the status quo. In East/South Africa, a greater measure of stability, rule of law, functioning institutions, and economic opportunities were observed, as compared with Francophone Africa.<sup>10</sup>

Fox and Bakhoun then explore the competition regimes in the two areas of Sub-Saharan Africa. There is a marked difference between the competition regimes that emerged in Francophone Africa versus East/South Africa, and the study explores in detail the provisions of the national laws, the extent of and constraints to enforcement, regional laws and enforcement, and the weaknesses of these regimes but also the successes. National competition regimes were being introduced in Francophone Africa, and Senegal in particular had started enforcing its domestic competition law.<sup>11</sup> In a reversal of this progress, the national institutions were defanged by the West African Economic and Monetary Union (WAEMU). The WAEMU Court of Justice

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6 *Id.* at 54.

7 *Id.* at 57.

8 *Id.* at 27, 54, 107.

9 *Id.* at 27.

10 *Id.* at 54.

11 *Id.* at 43–44.

interpreted the law to give exclusive competence to the WAEMU Commission, thus assigning to it both cross border and national jurisdiction. So, the national authorities could only enforce unfair competition (because WAEMU's law does not include unfair competition) and not competition law, even though they do have competition provisions in their national laws.<sup>12</sup> To compound the problem, the regional authority has been feeble and ineffective, and the national authorities are reluctant to cooperate with them. An effort was made in 2016 to return power to national authorities, but this floundered and has been in abeyance since.

South Africa has emerged as one of the strongest regimes in the developing world, and did this in an amazingly short period of time, enabled by the positive and supportive environment for competition law in the wake of the dismantling of apartheid.<sup>13</sup> East/South Africa fares much better than Francophone Africa in the design of their competition regimes, provisions in the laws, and enforcement successes. Kenya<sup>14</sup>, Zambia<sup>15</sup>, Mauritius<sup>16</sup>, and others have been making good progress in strengthening their institutions and enforcing their laws. This good progress is evidenced by successes in enforcement of some of the competition regimes as illustrated in some examples below.

An example is bid-rigging in fertilizer procurement by the Zambian state. The findings of the investigation by the Zambian Competition Authority not only proved the bid-rigging, but also found that government officials in the procurement department designed the request for tenders to exactly match the companies involved, and that there were links between the officers and the companies. The effect of the bid-rigging was that smaller companies were foreclosed from selling fertilizers to the government, and the government overpaid for fertilizer by about US\$20 million over four years, leading to increase in prices. There are many other success stories recounted in the study which benefitted consumers, particularly the poor.<sup>17</sup>

The study reports on several successful interventions by the Commissions in Anglophone Africa. The Kenyan Competition Commission, for instance, has taken cartel decisions in cement, fertilizer, advertising, insurance, and the retail industry, and three of the decisions led to fines of US\$170,000.<sup>18</sup> A major victory was that the

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12 *Id.* at 41–42.

13 *Id.* at 119.

14 *Id.* at 67–71.

15 *Id.* at 76–78, 93–94.

16 *Id.* at 82–84.

17 *Id.* at 10.

18 *Id.* at 86.

Commission forced the company that created the local mobile money, M-Pesa, to drop its exclusivity clauses with agents which allowed rivals like Airtel to enter markets. South Africa has a wealth of cases that can be cited as very successful enforcement.<sup>19</sup>

Finally, the study explores regional arrangements in Sub-Saharan Africa: West African Economic and Monetary Union (WAEMU) and the West African Monetary Zone (WAMZ) with the CFA franc as the common currency, a Francophone Africa Customs Union and Common Currency; Economic Community of West African States (ECOWAS) (customs union that includes Anglophone Western Sub-Saharan Africa); Common Market for Eastern and Southern Africa (COMESA), a Free Trade Area & Customs Union; East African Community (EAC), a Customs Union; and South African Development Community (SADC), an organization to facilitate cooperation in Eastern and Southern Africa. There is also the African Free Trade Zone (AFTZ), consisting of EAC, SADC, and COMESA. In 2018, the African Continental Free Trade Area (AfCFTA) was formed that brings all African countries into an overarching trade arrangement, in an attempt to increase intra-African trade and to strengthen Africa's voice in global trade negotiations. While AfCFTA is still in its infancy, there is much optimism on the potential of this arrangement.<sup>20</sup>

WAEMU, COMESA and EAC have regional competition regimes. The issues in the WAEMU's competition regime has already been raised above, and regional enforcement is weak while there is no national enforcement. Regional arrangements were found to be still in its infancy in East/South Africa, but are in the process of being developed. There are issues, though. Both COMESA and EAC have regional competition regimes, but have overlapping jurisdictions between COMESA and EAC that spell trouble for the future if there are different judgements for the same case, and disagreements over cases. SADC is a cooperative arrangement, with no competition law and enforcement, but is working very well as South Africa extends capacity building and technical assistance to its members.<sup>21</sup> Finally, Fox and Bakhom make strong recommendations for reform of laws and enforcement strategies that could open up spaces for entrepreneurship and lift these economies and societies out of poverty.<sup>22</sup> These recommendations are summarized concluding, as interrogated for relevance to CARICOM countries.

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19 *Id.* at 105–06.

20 *Id.* at 164, 165–90.

21 *Id.* at 191–205

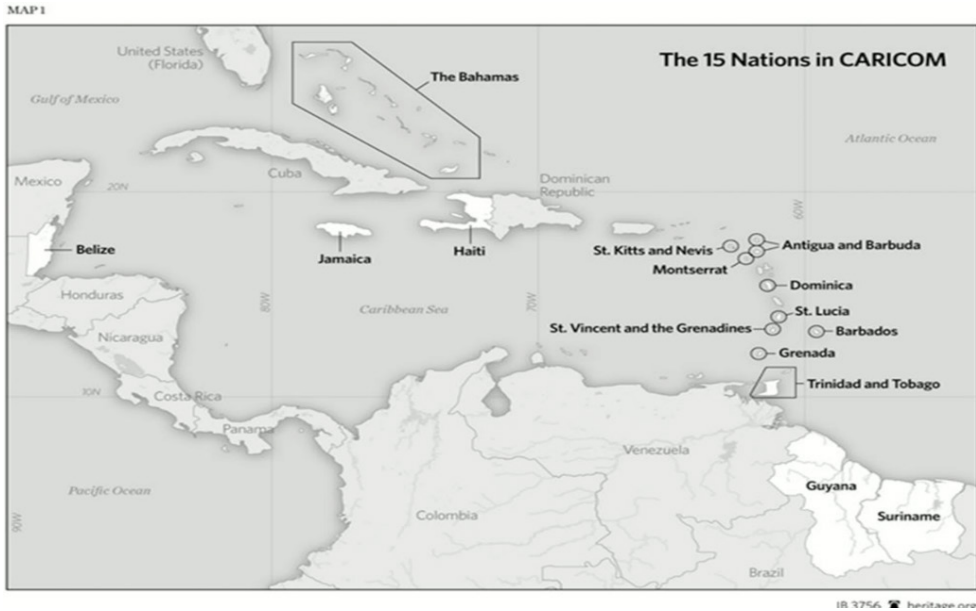
22 *Id.* at 233–58.

## II. CARICOM: ECONOMIC, SOCIAL AND POLITICAL OVERVIEW

### A. Economic Conditions

Like Sub-Saharan Africa, Member States (MS) of CARICOM<sup>23</sup> are all former colonies of Europe, mainly of Britain, but include Suriname which was Dutch, and Haiti which was French. Belize, Guyana and Suriname are on the mainland of Central and South America, and the rest are small island states in the Caribbean Sea. The three mainland territories have vast geographic territory in comparison to the island states, but have small populations and small economies comparative to their geographical size as seen below in the map of CARICOM and in Table 1.

*Figure 3.01 showing the map of CARICOM and the greater Caribbean 10*



23 The Caribbean Community (CARICOM) includes the following countries: Antigua & Barbuda, The Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Haiti, Jamaica, Montserrat, St. Lucia, St. Kitts & Nevis, St. Vincent and the Grenadines, Suriname and Trinidad and Tobago. There are five associate members and several observer countries.



*Table 1: Statistical Profile of Member States of CARICOM*

Country	Popu. 2020	Land area Sq. Km.	GDP current prices US\$ billions 2019	GDP per capita US\$ units 2019	Current acct. BOP US\$ billions 2019	HDI *
Antigua / Barbuda	97,929	442	1.688	18,109	-0.102	0.780
Bahamas	393,244	13,939	12.660	33,261	-0.933	0.807
Barbados	287,375	431	5.189	18,069	-0.203	0.800
Belize	397,628	22,966	2.001	4,925	-0.141	0.708
Dominica	71,986	750	0.593	8,380	-0.141	0.715
Grenada	112,523	345	1.238	11,381	-0.140	0.772
Guyana	786,552	216,970	4.121	5,252	-0.936	0.654
Haiti	11,402,528	27,750	8.819	784	-0.292	0.498
Jamaica	2,961,167	10,991	15.702	5,460	-0.389	0.732
Montserrat	4,992	103				
St. Kitts/Nevis	53,199	269	1.032	18,245	-0.065	0.778
St. Lucia	183,627	616	1.992	11,075	-0.049	0.747
St. Vincent & the Grenadines	110,940	389	0.856	7,750	-0.099	0.723
Suriname	586,632	163,820	3.774	6,310	-0.217	0.720
Trinidad & Tobago	1,399,488	5,128	22.607	16,365	0.533	0.784

*World Economic Outlook Database, October 2019; CARICOM Statistics, [www.caricom.org](http://www.caricom.org); World Population Review: Country Review 2020, <https://worldpopulationreview.com/countries/caricom-countries/>; United Nations: Human Development Index 2019.*

*\*UN, HDI index measures health, education, standard of living, life expectancy, among other indicators of human development, with the higher the measurement, the better the quality of life.*

Table 1 above illustrates the smallness of economies, with small size populations and smallness of landmass, isolated in the Caribbean Sea. The continental countries have large land mass, but their population, GDP, GDP per capita and Balance of Payments (BOP) are not dissimilar to the small island economies (Bahamas, Barbados, and St.

Kitts/Nevis stand out with higher levels of GDP per capita). Yet, all of these countries with the exception of Haiti did very well on the Human Development Indicator compared to Sub-Saharan Africa where the average was 0.5 with the highest being Mauritius with 0.781, Botswana with 0.69 and Namibia with 0.64.<sup>24</sup> While Trinidad and Tobago (T&T) is the only country that shows a positive Balance of Payments (BOP), this is rapidly eroding given the drastic fall in the price of oil and the economic contraction taking place now: BOP 2018 US\$ 1.856 billion and 2019 US\$0.533.<sup>25</sup> Severe constraints have been placed on access to foreign currency in this country, reflecting the shortage of foreign reserves. Most of the small island states rely heavily on tourism, as sector that is prone to external shocks from hurricanes and from a fall in tourist arrivals in situations of crisis, as is the case with the current COVID-19 pandemic. More is said on this extreme vulnerability below.

## B. Regional Integration

Recognizing that these small colonies were not economically viable as independent nation states, the movement towards integration of these countries started back in 1958, before independence was granted, with the formation of the West Indian Federation. The British forged a political union of its former colonies in the West Indies, but this quickly collapsed because Jamaica opted out on a referendum: its people were unhappy that they would have to share the country's wealth (gained through extraction and export of bauxite) with the less wealthy ones. Jamaica and Trinidad and Tobago were granted independence soon after, in 1962, with independence of the rest of the colonies following over the next decade and a half. In 1965, the Caribbean Free Trade Area (CARIFTA) was formed, which was a multilateral free trade agreement amongst the Anglophone Caribbean to undertake measures to increase, diversify and liberalize trade in the economic area. It came into effect in 1968<sup>26</sup>. This arrangement was deepened in 1973 to move towards economic integration of the countries with the formation of a common market: the Caribbean Community (CARICOM)<sup>27</sup>.

There is disparity of development levels in CARICOM, and for this reason, the Community recognizes that there are more developed countries (MDCs)

24 Fox & BAKHOUM, *supra* note 1, at 56.

25 IMF, *The Great Lockdown*, World Economic Outlook (Apr. 2020). Given the abrupt decline in global industrial activity leading to a drastic decline in demand for oil, the failure of OPEC to reach an agreement, and the Saudi's increase in production, the price of oil has fallen more than \$30 in the month of March 2020.

26 *Brief History of CARIFTA*, CARIBBEAN ELECTIONS (updated July 25, 2020), <http://caribbean-elections.com/education/integration/carifta.asp>.

27 *Our Mandate*, CARICOM CARIBBEAN COMMUNITY, <http://www.caricom.org>.

and less developed countries (LDCs) in the group. The Treaty of Chaguaramas, the legal agreement for the formation of the Common Market, recognizes this disparity and include special and differential treatment of the LDCs. A sub-regional group, the Organization of the Eastern Caribbean States (OECS)<sup>28</sup>, was established, and, together with Belize, are designated the LDCs of CARICOM. The MDCs are The Bahamas, Barbados, Guyana, Jamaica, Suriname, and Trinidad and Tobago. A CARICOM Single Market and Economy (CSME) was established in 2002 by the Revised Treaty of Chaguaramas (The Bahamas declined to be a part of the CSME because of the clauses on free movement of peoples). While the instruments for finalizing this union are still not fully in place, there is deep functional cooperation between the member states of the CSME. While CARICOM and the CSME are generally patterned after the integration movement in Europe, a fundamental difference is that, unlike Europe, there is no supra-national authority equivalent to the EU Parliament and the EU Commission. Instead, member states were reluctant to give up sovereignty and so the regional arrangement is managed through a Heads of Government Conference and a Secretariat.

### C. Openness of Trade and Investment Policies in CARICOM

CARICOM economies are extremely open, with few constraints on Foreign Direct Investment (FDI), and directed mainly at the tourism sector.<sup>29</sup>

ECLAC's report analyzes the situation of 16 MS in the Caribbean. Tourism is the sector that receives the most FDI in countries such as Antigua and Barbuda, the Bahamas, Barbados, Belize, Dominica, Grenada, St. Kitts and Nevis, St. Lucia and St. Vincent and the Grenadines, while in other nations natural resources predominate (Guyana, Suriname and Trinidad and Tobago). In Haiti and Jamaica FDI is principally aimed at the transportation and telecommunications sector.<sup>30</sup> For instance, The Bahamas received 5.1% less FDI in 2018 —US\$ 947 million— than it had in 2017 and was the second-biggest destination for FDI in the Caribbean.

28 Antigua/Barbuda, Dominica, Grenada, Montserrat, St. Kitts/Nevis, St. Lucia, St. Vincent and the Grenadines.

29 See, e.g., U.S. Dep't of State, 2019 Investment Climate Statements: Trinidad and Tobago (2019), <https://www.state.gov/reports/2019-investment-climate-statements/trinidad-and-tobago/>; U.S. Dep't of State, 2019 Investment Climate Statements: The Bahamas (2019), <https://www.state.gov/reports/2019-investment-climate-statements/bahamas-the/>.

30 Press Release, UN Economic Commission for Latin America and the Caribbean, The Caribbean Received \$6.027 Billion Dollars in Foreign Direct Investment in 2014, Down Nearly 5% from 2013 (May 27, 2015), <https://www.cepal.org/en/comunicados/el-caribe-recibio-6027-millones-de-dolares-de-inversion-extranjera-directa-en-2014-casi>.

Equity flows were higher (rising by 63.3%) and accounted for the largest share of inflows (61%). The attractiveness of these islands for tourists continues to drive investment.<sup>31</sup> There are in some countries restrictions on access to hard currency because of decline in export earnings and therefore decline in foreign reserves needed to import, for example, Trinidad and Tobago's current plight because of the fall in the price of oil and contraction in tourism in the region. That being said, the region has formed a Single Market, seeking to unify the internal market and with a Common External Tariff (CET) regime applied by all member states of the CSME. Divergence from the CET is allowed in special circumstances.

All CARICOM member states (i.e., the CSME plus the Bahamas) have developed extremely investment-friendly regimes to attract FDI, providing tax exemptions for 20 years and more, duty free imports for their businesses, and many other concessions that provide the investors with maximum profit making while considerably reducing gains to the local economy. The direction of foreign investment policy has been largely in the tourism sector, and in export zones. Foreign-owned hotels are an example, and few restrictions are placed on the investors who are free to capture the higher levels of employment, import inputs, and internalize services. The experience of FDI in The Bahamas is an example, with the Heads of Government Agreements with Atlantis Hotel on Paradise Island, Baha Mar Hotel on Cable Beach and other resorts.

Intra-regional trade is minimal in relation to trade with the rest of the world. Between 2011 and 2016, intra-regional imports in the CSME was 12.6 % of total imports, and the major source of imports was the USA with 32.9%. In the same period, intra-regional exports was 15.2%, with the USA receiving 42.9 % of exports from the region. Trinidad and Tobago dominates intra-regional trade, representing in the period from 2011 to 2016, 42.5% of imports, and 68.3% of exports.<sup>32</sup>[These statistics do not include The Bahamas which is not a member of the CSME,

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31 U.N. ECON. COMMISSION FOR LATIN AM. & CARIBBEAN (ECLAC), FOREIGN DIRECT INVESTMENT IN LATIN AMERICA AND THE CARIBBEAN (2019), [https://repositorio.cepal.org/bitstream/handle/11362/44698/10/S1900447\\_en.pdf](https://repositorio.cepal.org/bitstream/handle/11362/44698/10/S1900447_en.pdf). In The Bahamas, for instance, the cruise ship segment, Royal Caribbean International invested US\$ 200 million in renovating its properties on CocoCay, an island that it leases in its entirety (Chicago Tribune, 2018). The Walt Disney Company has purchased a large part of Eleuthera Island from the United States conglomerate Meritage Hospitality Group (GlobeNewswire, 2018), where it will spend between US\$ 250 million and US\$ 400 million to construct a port for its cruise ships and other facilities; as part of the deal, it has made a commitment to provide jobs and business opportunities for citizens of the Bahamas (Government of the Bahamas, 2019). Margaritaville Enterprises has also announced plans to build a new luxury hotel complex in Nassau; that project is valued at an estimated US\$ 250 million (Hospitality Net, 2019).

32 CARICOM SECRETARIAT, *Snapshot Of Caricom's Trade Series 2: Caricom's Total Trade Summary By Trading Partners: 2011-2016* (2018), <https://statistics.caricom.org/Files/Publications/Snapshot/>

but, the major export of The Bahamas is tourism, and the majority of tourist arrivals are from the US]. Figure 1 above showed the negative BOP in all countries (except Trinidad and Tobago at that time, but which now has a negative BOP (April 2020)).

According to the study by the Inter-American Institute for Cooperation in Agriculture (2018)<sup>33</sup> on non-tariff barriers, although Caribbean countries have historically maintained trade ties, intraregional trade only accounts for 16.6 % of total food imports. In Trinidad and Tobago, for instance, in 2015, agriculture contributed 0.5% of GDP and 3.4% of employment while agrofoods export was only 2.6% of total exports. Trinidad and Tobago imports 85% of its food supply.<sup>34</sup> Reliance on extra regional sources for import of food is therefore substantial. The sugar industry came to a standstill in Trinidad and Tobago in 2007, but is still a major part of agricultural production in Guyana: production for export. There is a high level of food insecurity in the region, given this dependence on imports, particularly from extra-CARICOM sources. As Table 1 above illustrated, there is negative balance of payments in all CARICOM countries except Trinidad and Tobago. This positive balance for Trinidad and Tobago has to be evaluated against the severe clamp down on access to foreign currency which dampened imports. The IICA report also indicated that there has been a reduction of non-tariff barriers in the Caribbean and most of the remaining barriers are based on outdated regulations, such as those that are linked to technical barriers to trade (TBTs) and to sanitary and phytosanitary measures (SPS). There is a regional effort to update and regularize SPS rules and measures.<sup>35</sup>

#### D. Social and Political Profile

The region is not without problems. Social stability is threatened by an exponential increase in crime with Trinidad and Tobago ranking number 6 of 133 countries evaluated for their crime rate, Guyana, number 8, Jamaica, number 11, and The Bahamas, number 18.<sup>36</sup>

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Series\_2\_2011-2016.pdf.

33 Press Release, Inter-American Institute for Cooperation in Agriculture, Caribbean Market Seeks to Strengthen Trade Links by Eliminating Non-Tariff Barriers, (Oct. 23, 2018), <https://www.iica.int/en/press/news/caribbean-market-seeks-strengthen-trade-links-eliminating-non-tariff-barriers>.

34 INTER-AMERICAN DEVELOPMENT BANK, AGRICULTURAL POLICY REPORTS: ANALYSIS OF AGRICULTURAL POLICIES IN TRINIDAD AND TOBAGO (Jan. 2018), <https://publications.iadb.org/>

35 See Facilitating Intra-Regional Agri-Food Trade, CARICOM Thematic Group Business Development Technical Brief # 1 /2018 (2018), <https://caricom.org/documents/16578/ronnie.pdf>.

36 *Crime Index by Country 2020 Mid-Year*, NUMBEO, [https://www.numbeo.com/crime/rankings\\_by\\_country.jsp](https://www.numbeo.com/crime/rankings_by_country.jsp).

The Chair of CARICOM Heads of Government Conference commented on the unacceptable rates of crime in the region reporting that a brief snapshot of crime and security as articulated in the Caribbean Community Security Strategy (CCSS), shows high rates of homicide and violent crimes; trafficking in guns, ammunition and illegal narcotics; organised crime. rising cybercrime; and the growing power of transnational and organised crime networks.<sup>37</sup>

Many of these countries, particularly Trinidad and Tobago, were being used as transshipment conduits to the United States for the drug trade from Columbia.<sup>38</sup>

The increase in crime escalated in the last two decades when the US started deporting criminals to their country of citizenship, including the Caribbean. The United States has deported thousands of convicted criminals to the Caribbean annually since 1996, when Congress mandated that every non-citizen sentenced to a year or more in prison be kicked out of the country upon release. In all, the US is responsible for about three-quarters of the region's returning criminal deportees, with the United Kingdom and Canada accounting for most of the other ex-cons arriving in the islands.<sup>39</sup>

The result was that criminals who were brought to the US as children and were socialized and nurtured in the US, but never obtained US citizenship, were sent back to Caribbean islands, sometimes with no contacts and family ties, only to slip into the underworld of crime and bringing the sophistication of criminality and weaponry of the US with them. And so, currently, violent crime is the most important social issue in these island states.

Vulnerability to increasingly ferocious hurricanes and erosion of beaches by rising sea levels are serious issues that have consequences for development planning and demands on government revenues.<sup>40</sup>

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37 <https://www.caricom.org>; Press Briefing at the Close of the Thirty-First Intersessional Meeting of the Conference of Heads of Government (Barbados, Feb. 19, 2020).

38 Christopher Woody, *Drug traffickers may be returning to a popular smuggling route into the US*, BUSINESS INSIDER (Oct. 25, 2016), <https://www.businessinsider.com/drug-trafficking-caribbean-smuggling-routes-2016-10> (US Customs and Border Protection Air and Marine Operations intercepted a small wooden vessel carrying two men and \$3.6 million in cocaine on Sunday, the latest sign that the Caribbean smuggling routes popular in the 1980s are seeing renewed traffic.).

39 Mike Melia, *Caribbean Crime Wave Linked to US Deportations*, INDEPENDENT (Sept. 26, 2017), <https://www.independent.co.uk/news/world/americas/caribbean-crime-wave-linked-to-us-deportations-2089388.html>.

40 Statement by Prime Minister Holness at the Regional Conference, Building Resilience to Disasters and Climate Change in the Caribbean: From Vulnerability to Sustainable Prosperity, CARICOM (Nov. 27, 2018), <https://caricom.org/building-resilience-to-disasters-and-climate-change-in-the-caribbean-from-vulnerability-to-sustainable-prosperity-pm-holness/> ("Moody's Analytics in its Economics of Natural Disasters, published earlier this year states that among the 20 most vulnerable countries in the world, more than half represent small island states across the Caribbean

Additionally, a significant level of poverty and unequal distribution is an enduring feature of Caribbean economies. For instance, Haiti is third in the world for unequal distribution of wealth, and Suriname is fifth and Belize is ninth. Trinidad and Tobago<sup>41</sup> is now further challenged to meet the needs of mass illegal migrants from Venezuela, fleeing their troubled country to this little island, seeking safety and basic needs and stretching social services to limits. Relative to the percentage of its population, it has received more Venezuelans than almost any other country.<sup>42</sup> Haiti is the only country in CARICOM that has many of the features of Francophone Sub-Saharan Africa: an extremely exploitative colonial master in the French, a history of dictatorships following independence, extreme poverty, social and political fragility and unrest, and weak institutions. Indeed, it is the only country in this Community that won its independence through uprising and war, but paid heavily for its fierce spirit, for France extracted reparation until 1947, and in the process stripped the country of its forests. Haiti's current dire circumstances are rooted in this 127 years of reparation payments to France for the loss of planters' property, that is, the slaves (estimated at 150 million gold francs in 1825, later reduced to 90 million).<sup>43</sup> Here lies the explanation for this country's extreme poverty and absence of opportunity for pursuing human-centered socio-economic development and political stability. In this brief comparison between the experiences of sub-Saharan Africa and CARICOM, Haiti will not be included, given its very different history and experiences from the Anglophone countries, its current circumstances, and the fact that it does not even have the beginnings of a competition regime.

Suriname was, for the most part, a Dutch colony, with forays of control by the British during and immediately after the Napoleonic wars. It was granted full self-government by the Dutch in 1954, with defense and foreign policy retained by the metropole. In 1975, Suriname gained its independence, but was plagued thereafter by civil unrest, military coups and remained under questionable democratic rule in

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and Pacific Regions. To illustrate this point further, let us recall that the 2017 Atlantic Hurricane Season – a watershed year for the region – left 18 countries in the Caribbean severely battered with an estimated damage and loss of \$130 billion US dollars.”)

41 Benjamin Elisha Sawe, *Countries with Uneven Distribution of Wealth*, WORLD ATLAS (July 18, 2019), <https://www.worldatlas.com/articles/the-world-s-most-unequal-countries.html>.

42 Melanie Teff, *Report: Forced Into Illegality: Venezuelan Refugees and Migrants in Trinidad and Tobago*, REFUGEES INTERNATIONAL (Jan. 27, 2019), <https://www.refugeesinternational.org/reports/2019/1/27/forced-into-illegality-venezuelan-refugees-and-migrants-in-trinidad-and-tobago>

43 Kim Ives, *Haiti: Independence Debt, Reparations for Slavery and Colonialism, and International "Aid"*, GLOBAL RESEARCH (May 10, 2013), <https://www.globalresearch.ca/haiti-independence-debt-reparations-for-slavery-and-colonialism-and-international-aid/5334619>.

the last decade. In a military coup, Bouterse, the head of the army, seized power in 1980 and consolidated his power by eliminating opponents. Bouterse recaptured power in Suriname in a bloodless coup in 1990 and has held the country in his grips since then, but became the first elected President in 2010. On November 28, 2019, he was convicted and sentenced to 20 years imprisonment by the Surinamese Military Court for the 1982 killing of 15 political opponents. The court decision stands, but in a boost for democracy, Bouterse was voted out in the elections of May 2020, and victory for the opposition was declared July 2020. His prison sentence is still to be enforced, but poses risk of instability due to reactions of dire hard supporters.<sup>44</sup> Suriname's political history lacks the democratic institutions of the Anglophone Caribbean.

Finally, a caveat on Guyana, a former Dutch, then British colony, which experienced civil unrest in the 1950s and 60s that were based on ethnic rivalry between Afro and Indo Guyanese. It is now verified that the racial strife was instigated by the United States (US) during the height of the Cold War, when the US was paranoid about the rise of socialist/communists leaders in Guyana: Forbes Burnham and Cheddi Jagan.<sup>45</sup>

Despite the fragility of the ethnic divide between peoples of Indian and African descent, the basic Westminster model of government and democracy has prevailed, and racial rivalry was largely contested through democratic elections and contestation for the spoils of government.

This accommodation is now being sorely tested since March 2020. Parliamentary elections took place on March 2, but controversy erupted when the officer of the Guyana Elections Commission (GECOM) in charge of the count in the most populous region declared victory for the incumbent party without counting all the votes. The diplomatic missions of the EU, US, Canada, the Organization of American States and CARICOM amongst others called for a full recount in order to secure legitimacy of the elected government. The Opposition Party secured a court injunction to stay the declaration of the election until a full recount was done and the Court ruled in its favour. After several court hearings and appeals, instigated by the incumbent, a recount was done under the supervision of a team from CARICOM. However, the incumbent still stalled and the case taken to the Caribbean Court of Justice, the highest Court

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44 *Suriname election: Preliminary results show opposition winning*, ALJAZEERA (May 27, 2020), <https://www.aljazeera.com/news/2020/05/suriname-election-preliminary-results-show-opposition-winning-200527174008725.html>

45 MATTHEW LANGE, *LINEAGES OF DESPOTISM AND DEVELOPMENT: BRITISH COLONIALISM AND STATE POWER* 130 (U. Chicago Press, 2009).



of Appeal, by the Opposition, and the Judges pointed to several discrepancies in the submission of the ruling party. Issues turned to whether the votes counted should be all the votes or only the recount, with the rest of the results standing. Finally, on July 20, 2020, the Chief Justice ruled that only the recounted votes should be considered. Meanwhile, there had been expressions of disapproval from international organizations and US, Canada, Britain. The Commonwealth Secretariat also took a keen interest in the issues surrounding the elections results and supported CARICOM's efforts.

<sup>46</sup>The Organization of American States convened a meeting with CARICOM on July 21 to discuss the political crisis in Guyana; and expert, Sir Ronald Sanders, warned that Guyana is in grave danger of being ostracised in the regional, hemispheric and global communities.

<sup>47</sup>The US State Department imposed visa restrictions on those engaged in denying democracy in Guyana, and the UK has started the process to sanction those thwarting democracy.

<sup>48</sup>Finally, on August 2, the result of the election was declared in favour of the Opposition Party, and there was peaceful transfer of power.

What is interesting about this political crisis in Guyana is that the battle was fought in the Courts of Law. A second interesting aspect is that the CARICOM Heads of Government intervened, offering good offices, and to supervise a re-count, based on the Charter of Civil Society which Heads of Government adopted in 1997. Article VI.1 provides that "States shall ensure the existence of a fair and open democratic system through the holding of free elections at reasonable intervals, by secret ballot, underpinned by an electoral system in which all can have confidence and which will ensure the free expression of the will of the people in their choice of their representatives."

<sup>49</sup>All in all, despite the very fragile political situation in Guyana, democracy and rule of law prevailed.

Thus, in general, Anglophone countries have a different experience from Haiti and Suriname; democratic institutions were built that have proved to be enduring, and have

46 *Commonwealth SG Lauds Guyana's Leaders for Committing to Respect, Adhere to Recount Results*, INEWS GUYANA (June 7, 2020), <https://www.inewsguyana.com/commonwealth-sg-lauds-guyanas-leaders-for-committing-to-respect-adhere-to-recount-results/>.

47 *OAS to Meet on Guyana's Electoral Crisis Today*, INEWS GUYANA (July 21, 2020), <https://www.inewsguyana.com/oas-to-meet-on-guyanans-electoral-crisis-today/>.

48 *Guyana Elections 2020*, STABROKE NEWS, <https://www.stabrokenews.com/topics/guyana-elections-2020/>; *See also, Guyana will find itself more isolated than any other country in the world-Ram*, GUYANA STANDARD (July 20, 2020), <https://www.guyanastandard.com/2020/07/20/guyana-will-find-itself-more-isolated-than-any-other-country-in-the-world-ram/>

49 CARIBBEAN COMMUNITY SECRETARIAT, CHARTER OF CIVIL SOCIETY FOR THE CARIBBEAN COMMUNITY (1997), available at [https://caricom.org/documents/12060-charter\\_of\\_civil\\_society.pdf](https://caricom.org/documents/12060-charter_of_civil_society.pdf). *See also* Sir Ronald Saunders, *CARICOM Should Help But Guyana Must Save Itself*, CARIBBEAN NEWS GLOBAL (Apr. 3, 2020), <https://www.caribbeannewsglobal.com/caricom-should-help-but-guyana-must-save-itself/>.

secured for these countries a far greater measure of stability. They are ruled by governments chosen through parliamentary elections every five years and based on the Westminster model of government. The separation of the Executive branch from the Judiciary is respected, the Judiciary is independent, and generally, there is a greater level of rule of law.

<sup>50</sup>Having said this, these countries are not immune to corruption and the plundering of state resources, and this will be addressed later. These pillars of democracy prevail despite the current socio-economic problems.<sup>51</sup>

There is a level of accountability demanded by the citizenry, and this will be addressed below.

### **E. State Owned Enterprises in CARICOM as Compared to Sub-Saharan Africa**

The work by Fox and Bakhoun points to economic and political conditions in Francophone Africa that close and capture markets, with State-Owned Enterprises (SOEs) dominating highly concentrated markets with high barriers to entry and competing unfairly with private sector firms. For instance, the authors give an account of the pyrethrum industry in which the Kenyan Competition Commission, working in tandem with the World Bank, identified bottlenecks in the industry created by the SOE, the Pyrethrum Board, which led to the plummeting of production and exports, so that Kenya's share of the world market fell from 82 % in 1980 [and 91 % in 1995] to 4 % in 2004. Corruption was rampant and the farmers were given little support, were not paid in a timely manner, and sometimes had to wait up to four years to get payment. Furthermore, nurseries were abandoned making it difficult for farmers to obtain certified seeds and the Board allowed processing plant and equipment to deteriorate. The Commission succeeded in getting legislation passed in 2013 to break the monopoly power of the Pyrethrum Board. This case demonstrates how state intervention in the market can be detrimental to farmers and the economy

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50 See, e.g., U.S. Dep't of State, 2019 Investment Climate Statements: Trinidad and Tobago 1 (2019), <https://www.state.gov/reports/2019-investment-climate-statements/trinidad-and-tobago/>. "Some of the positive aspects of TT's investment climate include TT's stable democratic political system, its educated and English-speaking workforce, and well-capitalized and profitable commercial banking system and insurance industry. In addition, investors have noted that there is an established rule of law and respect for contracts, substantively fair independent judicial system that is substantively fair, and lack of domestic competition in certain sectors. As such, TT's investment climate is generally open and most investment barriers have been eliminated." Similarly, their view of The Bahamas is that the country maintains a stable environment for investment with a long tradition of parliamentary democracy, respect for the rule of law, and a well-developed legal system.

by destroying functioning markets and replacing with corrupt monopoly power.  
<sup>52</sup>(See box below)

During the 1980s and 1990s, many SOEs were privatized in CARICOM as part of Structural Adjustment Programmes imposed by the IMF and World Bank as

#### **The Plummeting of Pyrethrum Exports in Kenya**

Pyrethrum is used to make an environmentally friendly pesticide, and Kenya dominated world markets since the 1930s. The Pyrethrum Board required farmers to sell their output through the Board. Corruption, mismanagement and outright theft bedeviled the pyrethrum industry from the early 1990s, according to a report in the Business Daily (3 October 2019). The industry was brought to its knees and farmers lost hope and money. Most farmers abandoned production, and Kenyan export of the product fell to 4% of world market in 2004. As a result of the efforts of the Kenyan Competition Commission a law was passed in 2013 repealing the monopoly of the Board.

Further research shows that this victory was short-lived. Despite this successful intervention by the competition commission, the state was not chastened, and proceeded to create another Regulatory Body, the Pyrethrum Processing Company of Kenya (PPCK), and the same inefficiency and plundering of the resources of the state monopoly continued. Many farmers have ceased producing pyrethrum, so that today (2019), pyrethrum export is only 2% of the world market. And, on 27 September 2019, the Managing Director of the Board was arrested on charges of economic crimes and procurement irregularities.

An addendum to this story is that the newspaper, the Business Daily, reported on October 3, 2019, that a US company, Kentreda Biotechnologies, invested in Kenya. The company has set up a seed nursery, laboratory, and processing plant, and is purchasing dried flowers from 3,000 farmers under contract. They also switched the strain of pyrethrum grown to one that flowers every two weeks, giving the farmers a steady income. This augurs well for the farmers and the growth of the industry, rescued by foreign direct investment.

conditionality for debt restructuring and access to loans. While there are still SOEs in CARICOM, these are necessary in small economies where the private sector is unwilling or unable to engage in very large investments, such as public utilities and solid waste management, and in most countries the state has to provide the following public services: water, electricity, transport infrastructure (airports and ports) housing, education, public health services. In addition to these services, state investment can be found in support of development policies, including tourism investment support services and Small Business development, and in strategically key sectors such as broadcasting and media, postal services, and agriculture (where the private sector is reluctant to invest and banks are reluctant to give financial support).

<sup>52</sup> FOX & BAKHOUM, *supra* note 1, at 9.

In Suriname, SOEs exist in the financial services sector, agribusiness, mining, travel services, and energy among others. This in itself is not dissimilar from the Anglophone Caribbean, but in Suriname, there is little transparency about the operations of these firms, with few annual reports accessible to the public, and several have been discredited because of fraud and corrupt practices. The SOEs receive advantages when competing in the domestic market, having access to government guarantees and loans that are unavailable to private enterprises, and access to land and raw materials that are not available to private entities.<sup>53</sup>

Generally, in the Anglophone Caribbean, SOEs do not compete with the private sector, but where they do, they compete on the same terms as the private sector for market access, licenses, and other business operations, as is the case in Guyana. In Jamaica, SOEs do not generally receive preferential access to government contracts and they must adhere to Government Procurement procedures. They are subjected to the same tax requirements as private firms, and transparency and accountability is generally required. And, they are held accountable with audited finances. That being said, the US Department of State evaluation found that in Trinidad and Tobago in sectors open to both public and foreign competition, SOEs are sometimes favoured for government contracts.<sup>54</sup>

## F. Corruption in Political Office

The levels of public sector corruption in many Sub-Saharan African economies and societies, as described in the study, and the impunity with which such actions are taken, are far greater than what is found in CARICOM. Statistics published by Transparency International, Corruption Perceptions Index 2019<sup>55</sup> (100 being the least corrupt) show that, bar Haiti (22) and Guyana (38), the rest of CARICOM scored much better than Sub-Saharan Africa. Trinidad and Tobago, Jamaica, and Suriname scored in the 40s, but all other countries were above 55, with Barbados and The Bahamas scoring in the 60s, similar to Botswana, deemed to be the least corrupt country in Sub-Saharan Africa. By contrast, the highest score in West Africa was Senegal at 45, and all others were in the 30s, with Guinea Bissau at 17. In East/Southern Africa, states fared better than West Africa (Botswana-60, Namibia-51,

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53 See U.S. Dep't of State, *supra* note 29.

54 See U.S. Dep't of State, *supra* note 29.

55 TRANSPARENCY INTERNATIONAL, *Corruption Perception Index* (2019), <https://www.transparency.org/cpi2019>.

and Mauritius-50)<sup>56</sup>. The rest were in the 30s and 20s. Transparency International's *Citizens' Views of Experiences of Corruption 2019* is less comforting. Over 60 % of people in Trinidad and Tobago,<sup>57</sup> The Bahamas, Jamaica, and Guyana (59%) think that corruption in government is a major issue. The report by Transparency International also highlights bribery of government officials by people as a way of getting things done. The percentage of public service users who paid bribes in the previous 12 months are as follows: Bahamas 20 %; Jamaica 17 %; Trinidad and Tobago 17 %; Guyana 27 %. In these small societies, corruption and cronyism is facilitated by the closeness between the political and economic elites.

So, yes, there is corruption, and public perception of corruption, but there are also demands for accountability by civil society and a higher level of rule of law in more of these countries than was seen in many Sub-Saharan African countries. For instance, in August 2019, in Trinidad and Tobago, a Minister of Government and her husband were arrested on corruption charges. Media reports indicated that it is in connection with misuse of State funds, stemming from the alleged siphoning off more than TT\$1 million (US\$147,650) from a government ministry to three organizations linked to the Minister's family and friends.<sup>58</sup> In the Bahamas, in October 2015, the government charged and convicted a former State Energy Company Board member under the Prevention of Bribery Act.<sup>59</sup> And, in February 2019, the government arraigned a former Urban Renewal Deputy Director on charges related to defrauding the government. The case is on-going.<sup>60</sup>

<sup>56</sup> FOX & BAKHOUM, *supra* note 1, at 270.

<sup>57</sup> Trinidad and Tobago is the home to the infamous Jack Warner, former Vice President of FIFA, who has been indicted by U.S. prosecutors for accepting bribes in exchange for Russian and Qatar World Cup votes. The money allegedly came from 10 different shell companies, including entities in Anguilla and the British Virgin Islands. Warner has been fighting extradition to the US since he was charged in 2015 with 12 offences related to racketeering, corruption and money laundering (CARIBBEAN360, Apr. 8, 2020). He was a Minister of Government in Trinidad and Tobago during this time, but there is no evidence that he defrauded the public purse in his country, and he is regarded as a "Robin Hood" to his constituents whose interests he sought. He did, however, direct that tickets, travel and accommodations to World Cup 2006 in Germany, which Trinidad and Tobago qualified for, to be procured through his son's agency in which he had an interest.

<sup>58</sup> Keino Swamber, *Update: Minister Marlene McDonald Under Arrest*, TRINIDAD AND TOBAGO NEWSDAY (Aug. 8, 2019), <https://newsday.co.tt/2019/08/08/update-minister-marlene-mcdonald-under-arrest/>.

<sup>59</sup> *2019 Investment Climate Statements: Bahamas*, U.S. DEPARTMENT OF STATE (2019), <https://www.state.gov/reports/2019-investment-climate-statements/bahamas-the/> (see Section 9 on Corruption).

<sup>60</sup> *Former Urban Renewal Deputy Director Charged with Fraud*, THE NASSAU GUARDIAN (Feb. 13, 2019), <https://thenassauguardian.com/2019/02/13/former-urban-renewal-deputy-direc->

Finally, as another example of corrupt officials held to accountability, in October 2019, a former minister of government in Jamaica is in police custody while he is being investigated into allegations of corruption, fraud and misappropriation of funds from the Ministry he served, and the Caribbean Maritime University. In another case in July 2019, the Integrity Commission of Jamaica completed its investigation of the SOE, Petrojam Ltd., and forwarded its report to the Director of Corruption Prosecution. Indications are that criminal charges are pending. The probe revealed that millions were spent on lavish parties and unapproved sponsorships, while glaring human resource breaches occurred which caused Petrojam to end up in court as sacked employees challenge their dismissal. It also found that Petrojam made questionable payments related to procurement activities, had significant project cost overruns, and overspent on donations which impaired cash flow. The revelations about the free-for-all at Petrojam has led to the resignations of then energy minister, the then chairman of its board, other board members, its General Manager and the Human Resources Manager, among others.<sup>61</sup> In sum, while there is certainly corruption, those responsible are more likely to be held accountable than in several of the Sub-Saharan countries.

So far we have demonstrated that CARICOM is made up of small open economies, mostly island states that are export-oriented, producing mostly at the lowest value-added in the product chain, dependent on imports for consumables, and therefore extremely exposed to the vagaries of the international pricing for their export earnings and imports. In order to understand the contours of CARICOM economies and societies today, it is necessary to explore its colonial past. The following section examines how colonialism shaped Caribbean societies and economies to serve the interest of the metropole, and left behind structural, societal, and economic rigidities that still inform socio-economic conditions, and keep the major sectors of the economies in the hands of a few.

### III. EXPLAINING THE CARIBBEAN TO THE WORLD: CREATION, NOT RESHAPING, OF SOCIETIES AND ECONOMIES

The West Indian (Caribbean) islands were pawns in European wars in the 17<sup>th</sup> and

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61 Arthur Hall, *Criminal Charges Looming Over Former Petrojam Managers*, JAMAICA OBSERVER (July 14, 2019), [http://www.jamaicaobserver.com/news/criminal-charges-looming-over-former-petrojam-managers\\_169886?profile=1373](http://www.jamaicaobserver.com/news/criminal-charges-looming-over-former-petrojam-managers_169886?profile=1373).

18<sup>th</sup> centuries, and many of the islands changed hands frequently. For instance, by the Treaty of Paris (1763) which ended the Seven Years War, the European powers agreed to an exchange of colonial territories. St. Lucia, which was captured by the British, reverted to French control, while Grenada (which had always been French), St. Vincent, Dominica (declared neutral territory but surreptitiously settled by the French since 1650) and Tobago (claimed by the French but never settled) became British.<sup>62</sup> Trinidad and Jamaica were originally Spanish colonies until they were captured and settled by the British. In the case of Jamaica, the island was captured in 1645, and formally ceded to the British in 1670. Trinidad was captured in the Napoleonic wars, and formally ceded in 1801. Tobago was even more of a ‘football’ in the European wars. The French captured it in 1781; the British took it back in 1793; the French regained it through the Treaty of Amiens (1802), but it was returned to the British in 1814.<sup>63</sup> Antigua, established in 1632, and Barbados, established in 1627, were the only ones that were originally British settlements in the former, and in the latter, and remained so.<sup>64</sup> Caribbean societies have been described as a microcosm of the world-society/world-economy because they both reflect and is a reflection of the evolution of capitalist world-history. The Caribbean is the oldest and most intensely penetrated part of the periphery of the World-System.<sup>65</sup> A significant difference between Sub-Saharan Africa and the *island territories* of CARICOM is that these economies and societies were totally created by capitalist expansion and imperialism. From the beginning of the plantation system (from the colonization of Barbados in 1625), the economies were created to produce commodities for export, and to import consumption needs. Labor needed for sugar plantations was satisfied through the African slave trade and slavery, and later, through Indentureship primarily from India. Here lies the links with West Africa, and the destruction of their societies, denuding their populations and forcibly transplanting them as slaves to the Caribbean.<sup>66</sup>

62 D.L. Niddrie, *Eighteenth-Century Settlement in the British Caribbean*, 40 TRANSACTIONS OF THE INSTITUTE OF BRITISH GEOGRAPHERS 67–80 (1966), [www.jstor.org/stable/621569](http://www.jstor.org/stable/621569).

63 *Trinidad and Tobago: History*, THE COMMONWEALTH, <https://thecommonwealth.org/our-member-countries/trinidad-and-tobago/history>.

64 *Antigua and Barbuda: History*, THE COMMONWEALTH, <https://thecommonwealth.org/our-member-countries/antigua-and-barbuda/history>; *1625–1627 – The Early Beginnings of English Settlement of Barbados*, TOTALLY BARBADOS, <https://www.totallybarbados.com/articles/about-barbados/history/early-beginning-settlement/#.Xxdcy3uSnIU>.

65 HERB ADDO, *APPROACHING THE PECULIARITY OF THE CARIBBEAN PLIGHT WITHIN THE PARADOX OF THE REPRESENTATIVE STATE IN THE CONTEMPORARY WORLD-SYSTEM* (U.N. University, HSDR GP 1980).

66 FOX & BAKHOUM, *supra* note 1, at 27.

### A. Transplanted Population

“By the beginning of the seventeenth century, European colonization had reduced the Caribbean Islands to a blank canvas... The people and civilizations that had flourished in the Greater Antilles before Columbus had been virtually obliterated.”<sup>67</sup> Unlike in Africa, Caribbean societies were created by immigration from Europe and transplanting of non-European peoples: the European (white) colonizers, slaves from Africa, and after slavery was abolished (1834), and the end of the Apprenticeship period (1838), indentured workers from Portuguese-Madeira, China, and India.<sup>68</sup> Trinidad, Guyana, and Suriname, with their larger land mass than the small island states, had large East Indian populations brought in as indentured laborers, needed because ex-slaves had access to vacant Crown land where they could squat and survive on subsistence farming and therefore avoided returning to work on plantations. For instance, of Trinidad’s population growth between 1841 and 1881, 72,700 persons or 74 % was net indentured [Indian] immigrants (i.e., excluding indentured immigrants known to have returned to India).<sup>69</sup> In the smaller islands, the ex-slaves had little choice but to work for wages on the plantations, and with little bargaining power for such wages. Belize was not a plantation economy in colonial times. Rather, it was a settlement that grew out of periodic visits by loggers to exploit the rich forests and export lumber to Europe. While the mainland territories still have indigenous populations, the economies and large parts of the population were also created by European expansion and imperialism.

Peoples of European descent (hereafter called Whites) were a small percentage of the population in colonial times, but held all power, and this circumstance persists today. Barbados was the first to be colonized in the British West Indies, and the plantation system was highly developed and organized in that colony with a significant plantocracy class. In 1805, for instance, the total population of Barbados was 77,130, of which slaves were 60,000, free colored were 2,130, and whites were 15,000 (19.4 %). In contrast, Trinidad had not developed a significant plantation system at that point in time, and so in 1805 whites were only 8 % of the population.<sup>70</sup> By 1946,

67 B. W. HIGMAN, *A CONCISE HISTORY OF THE CARIBBEAN* 97 (2010).

68 CARRIE GIBSON, *EMPIRE’S CROSSROADS: A HISTORY OF THE CARIBBEAN FROM COLUMBUS TO THE PRESENT DAY* 99–100 (Atlantic Monthly Press, 2014).

69 JACK HAREWOOD, *1974 WORLD POPULATION YEAR: THE POPULATION OF TRINIDAD AND TOBAGO* 5 (CICRED Series, 1975) (Table 1A).

70 *Ibid.* Note that Trinidad was a Spanish colony until it was captured by the English in 1797 during the Napoleonic Wars. The Spanish did little to develop the colony, but in 1783 by the proclamation of the Cedula of Population, French planters were allowed to settle in Trinidad provided they were



Whites consisted of 2.7 % of the population and by 1970, 1.2 % of the population of Trinidad and Tobago.<sup>71</sup> Yet, their economic power had not diminished, leading to a “Black Power Revolution” in Trinidad and Tobago in 1970, an uprising against the socio-economic strangle-hold of the Whites in Trinidad and Tobago.<sup>72</sup>

### **B. Instruments of Control and Repression**

Belief systems of white superiority over blacks justified the enslavement of Africans. Policies to ban African cultural and religious practices disempowered the slaves even further. Slaves were dispersed to different plantations so as to separate tribes and later, families.<sup>73</sup> Carl Stone observed that:

All societies that came under Western European colonization developed ethnic economic divisions of labour which were used to control and limit the role and power of the subordinate and the intermediary ethnic groups, to perpetuate the power and privilege of the dominant whites, and to entrench a rigid ethnic hierarchy that limit and regulate competition between groups. Order in colonial society was maintained by each ethnic group’s knowing its place and its limits and by social and ideological doctrines which were used to legitimize ethnic inequality. Racism was therefore an integral part of all such colonial societies. The colonial state was used to maintain this racial hierarchy.<sup>74</sup>

Slaves maintained some elements of African culture in secret, and this was more the case in Trinidad where there were fewer slaves and a less organized plantation system, and in Jamaica with the Maroons, the runaway slave community, and particularly in Haiti, where many of the slaves were still African born at the time of the Revolution. But this was minimal except for Haiti, and there was a cultural vacuum in which imitation of white culture took hold, and together with conversion to Christianity, became the only ladder to upward mobility, along with the retraining of consumption patterns that shaped demand for consumables in both the short and long term. Best

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Catholic and declared loyalty to the Spanish Crown, and they were given land. French planters from Martinique, Guadeloupe, Grenada, St. Lucia, Dominica, St. Vincent, Nevis, and Haiti (all French colonies until captured by the British in the Napoleonic wars) migrated to Trinidad with their slaves. Note that this was the time of the Haitian Revolution and so a welcomed relief to the planters to be able to re-locate.

71 *Id.* at 97 (Table 4F).

72 See *THE BLACK POWER REVOLUTION 1970: A RETROSPECTIVE* (Selwyn Ryan & Taimoon Stewart eds., 1995).

73 *Id.* at 29.

74 Carl Stone, *Race and Economic Power in Jamaica*, in *GARVEY: HIS WORK AND IMPACT* 243–64 (Rupert Lewis & Patrick Bryan eds., 1988).

and Levitt argue in their seminal research that the most important mechanism through which the processes of the system are allowed to unfold is the survival of the imprint of the original form of the plantation on the people: the shaped taste patterns, the inculcated imitative culture and the measures of status in them of the consumption norms.<sup>75</sup>

Whites still are the elites of these societies, socially and economically, and with great political influence. This is not surprising when put in the context of the barriers in these societies for upward mobility of the other races, post-slavery. Both in the 1880s and in the 1930s there were riots all over the West Indies, protesting the poverty and social conditions in which the non-White population lived. On both occasions, the British Parliament was forced to commission enquiries into the social conditions in the West Indies and the reports produced by the Royal Commissions revealed appalling health, housing, and economic conditions. The 1897 Report revealed that workers were barely able to survive on their wages, that disease caused by malnutrition was rampant, and that access to land for the workers was severely restricted to tiny garden plots.<sup>76</sup> According to Moyne Report of 1939, in parts of the Caribbean, pay had not increased above the shilling-a-day introduced after emancipation (1838). Conditions in housing, education, and health services were abysmally poor.<sup>77</sup> Indeed, this report was completed in 1939, but not published until 1945 because Britain had entered the Second World War and needed the support of the West Indian colonies, and feared that the report was too revealing of the deprivation of the masses and would be a disincentive to assisting the Empire.<sup>78</sup>

75 Lloyd Best, *Outlines of a Model of Pure Plantation Economy*, 17 SOC. & ECON. STUD. 283–326 (1968).

76 Bonham C. Richardson, *Depression Riots and the Calling of the 1897 West India Royal Commission*, 66 NWIG: NEW WEST INDIAN GUIDE / NIEUWE WEST-INDISCHE GIDS 169–91 (1992).

77 BEN BOUSQUET & COLIN DOUGLAS, *WEST INDIAN WOMEN AT WAR: BRITISH RACISM IN WORLD WAR II* 29–30 (London, Laurence & Wishart 1991).

78 The Moyne Report (cited in *Id.*). Richard Hart, a Jamaican Trade Unionist in the 1930s, gave the following account of the conditions in his writing, *Common Causes of Working Class Unrest* (Caribbean Labour Solidarity and the Socialist History Society, 2002):

The principal causes of working class unrest and dissatisfaction were the same throughout the region: low wages; high unemployment and under-employment; arrogant racist attitudes of the colonial administrators and employers in their relations with black workers; lack of adequate or in most cases any representation; and, no established structure for the resolution of industrial disputes by collective bargaining. Another factor increasing general distress and dissatisfaction regionally was the world economic crisis which had started in the USA in 1929 and by the early 1930s was having a residual effect internationally. The fact that the grievances caused by these factors existed in all these colonies explains why, despite the lack of inter-colony contacts, the labour rebellions of the 1930s were an inter-colony phenomenon, sweeping like a wave across the region.

It is clear that in these conditions, opportunities for capital accumulation and savings for investment were closed to the non-White population. To compound this, access to loans from banks were blocked except for the well-established businesses owned by Whites. The lending policies of the British banks that were established overseas in the nineteenth and early twentieth centuries were highly selective and restrictive, engaging in a certain amount of discrimination, and their assessment of risk and creditworthiness were based on assumptions about ethnicity, including that people of non-European ancestry in general lacked sufficient monetary and commercial responsibility.<sup>79</sup> Blocked from formal channels of banking, the non-White population developed an informal savings-credit arrangement by which a core group of participants make regular contributions to a fund which is given in whole or in part, to each contributor in rotation.<sup>80</sup> In 1971-72, income distribution in Trinidad and Tobago was worse than it had been in 1957/58. Rather, than effecting re-distribution, the economic strategy of the industrialization model which was pursued had instead allowed the old commercial elite to retain, spread, and deepen its control over some [the most lucrative] area of the economy.<sup>81</sup>

Most CARICOM economies and societies are very different from those of Sub-Saharan Africa, despite the commonalities in the colonial experience of economic exploitation, cultural denigration, and structural inequality that shaped their current economic and social problems. Best and Levitt's thesis is that from inception of colonization, there was no hinterland in the Caribbean of traditional residentiary sectors; production for domestic consumption was marginalized because of the imperative to allocate resources and the most fertile land to export production. With this came the enduring trap of negative terms of trade, with prices both for exports and imports being determined in the metropole, and a dependency on earnings from

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79 Kathleen Monteith, *Financing Agriculture and Trade: Barclays Bank (DCO) in the West Indies, 1926-1945*, in WEST INDIAN BUSINESS HISTORY: ENTERPRISE AND ENTREPRENEURSHIP 125 (B.W. Higman & Kathleen E. A. Monteith eds., 2010).

80 Shirley Ardener, *The Comparative Study of Rotating Credit Associations*, 94 J. ROYAL ANTHROPOLOGICAL INST. GREAT BRITAIN & IRELAND 201 (July-Dec. 1964) (quoted in Aviston Downs, *Black Economic Empowerment in Barbados, 1937-1970 The role of Non-Bank Financial Intermediaries*, in WEST INDIAN BUSINESS HISTORY: ENTERPRISE AND ENTREPRENEURSHIP 152 (B.W. Higman & Kathleen E. A. Monteith eds., 2010)).

81 JACK HAREWOOD & RALPH HENRY, *INEQUALITY IN POST-COLONIAL SOCIETY TRINIDAD AND TOBAGO 1956-1981*, 76 (1985). Recall the Black Power Revolution in Trinidad and Tobago in 1970.

commodity export to pay for consumables imported. Today, development policies still favor the export sector.<sup>82</sup>

The vulnerability of being price takers is accompanied by the international currency regime which designates currencies of the developed world as hard currencies exchangeable on the international currency markets and used for paying for goods and services procured internationally, while the currencies of developing countries are not interchangeable. Dependence on export earnings in hard currency becomes a life line for satisfying consumption needs.<sup>83</sup> It is also significant that most of these countries are small island states dependent on international shipping for imports, with the additional costs that entails.

#### IV. FOOTPRINTS OF THE COLONIAL PAST VISIBLE IN CARICOM ECONOMIES AND SOCIETIES

The imprint of the colonial experience is visible in the ethnic composition of the populations: 41 % of the population of Trinidad and Tobago and 44% of Guyana's population are of East Indian descent due to indentureship,<sup>84</sup> but the populations of the smaller islands are largely of African descent because there was no need to import labour: the ex-slaves had no option but to continue working on the plantations. The landscape of these countries bear the footprint of colonialism and the plantation economy: remnants of sugar plantations: sugar cane fields, sugar factories, sugar mills, and density of Indian population in those areas in Guyana and Trinidad. Today, the physical evidence of export orientation of these economies can also be seen in the earth scarred and degraded by bauxite, diamond, and gold mining and the large and mostly internationally owned hotels perched dangerously close to fragile beaches to allow for easy access for tourists. Transportation linkages with the outside world reflect the colonial past: it is easier to fly to Miami, Toronto, or London, than to fly Latin America, for instance, and even intra-CARICOM transport is deficient).<sup>85</sup>

82 Lloyd Best & Kari Levitt, *Externally Propelled Growth in the Caribbean: Selected Essays*, Mimeo (Dec. 1967).

83 LLOYD BEST & KARI LEVITT, *EXTERNALLY PROPELLED GROWTH IN THE CARIBBEAN: SELECTED ESSAY* (1967). These authors debunked the theories explaining Caribbean societies created by economists from the metropole, and developed an indigenous theoretical framework for understanding Caribbean societies. Now available online at [newworldjournal.org](http://newworldjournal.org).

84 *2020 World Population by Country*, WORLD POPULATION REVIEW, <https://worldpopulationreview.com/>.

85 This skewed pattern of North-South transport linking former colonies to the metropole can be seen in some parts of Africa, making it easier to fly to Paris from Francophone Africa than to neighbouring Francophone countries. See <https://allafrica.com/stories/201909130242.html>.

Similarity exists between these countries and Sub-Saharan Africa of colonial imposition of commodity production for export to the metropole and import of consumption needs. The difference is the extremes found in the Caribbean, and the paucity of the domestic sector with extreme lack of food security. Like African countries, CARICOM countries continue to depend on commodity exports for their main earnings, with the accompanying vulnerability to fluctuating international prices that are completely out of their control: petroleum (Trinidad and Tobago), bauxite (Jamaica, Guyana, and Suriname), gold and diamond mining in Guyana and Suriname, and bananas and sugar in some countries.<sup>86</sup> The Windward Islands' economies were re-shaped by Britain to the production and export of bananas to that country in the aftermath of WW2 in order to provide nutrition for its population, and this trade continued under preferential trading arrangement (LOME Convention, now expired). Bananas are still a significant export sector, but tourism has become the mainstay of most member states of CARICOM: The Bahamas, Barbados and Jamaica in particular, but also the smaller islands of St. Lucia, St. Kitts, Nevis, Antigua and Barbuda and others. According to the Minister of Tourism of Dominica in a statement at the General Assembly of the Organization of American States, the tourism industry is the key economic driver and largest provider of jobs in the Caribbean after the public sector. Caribbean tourism broke new ground in 2016, surpassing 29 million arrivals for the first time and once again growing faster than the global average.<sup>87</sup>

Negative balance of payments figures in Table 1 above give testimony to the continuity of this dependency cultivated by colonialism, with exposure to persistent vulnerability to the vagaries of fluctuating international prices for commodities and rising prices for import of consumables. Trinidad and Tobago's positive balance reflected in Table 1 is solely dependent on the price of oil, and is now wiped out by the drastic fall in the price of oil.

Structural rigidities embedded in the colonial experience and unfavorable and inequitable conditions of international trade and market access continue to crowd out attempts to diversify the economy. The private sector is risk averse, with low savings (capital flight sucks away savings) and remain largely mercantilist, engaging in import and distribution. Where there is manufacturing, it is mostly turnkey

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86 Today, tourism is the dominant sector in most of CARICOM's economies, but this diversification has not led to economic empowerment. Indeed, the industry retains many of the features of the extractive industries, as explained later in the text.

87 *Caribbean Seeks to Climate-Proof Tourism Industry*, CARICOM COMMUNITY (June 30, 2017), <https://caricom.org/caribbean-seeks-to-climate-proof-tourism-industry/>.

operations, using imported capital and intermediate goods and contributing little value added, but creating a demand for foreign exchange to pay for import of inputs to production. However, these countries need to take responsibility for their continued dependence on commodity exports and lack of diversification because of continued shortsightedness and short-term planning on the part of governments. The five year term of governments based on the Westminster model has its shortcomings. It necessarily skews the government's focus to what can be visibly achieved in the short term to ensure re-election and keeps them locked into export-driven investments.

The result of this eternally propelled development model is that island countries of CARICOM have no hinterland upon which to rely for sustenance farming, as Sub-Saharan Africa does. Most of what is consumed, including food, is imported, there is little agriculture and available land for such usage, and therefore, these countries continue to rely on earnings of hard currency through export of commodities to pay for consumables that are imported. The continental states do have domestic agriculture and Belize, for instance, is largely self-sufficient for much of its food consumption.

#### **A. Tourism is No different**

This current shift to tourism in the Caribbean in the last few decades has not taken these countries out of the lowest level of value-added in the product chain. There is high presence of multinational enterprises (MNCs) in the tourism sector that are vertically integrated, not dissimilar to the MNCs in the major export industries in this region: mining: bauxite, gold; petroleum and petroleum by products, and those in Sub-Saharan Africa. International hotels and tour operators dominate the industry, and all-inclusive packages offered at hotels extract value added through backward and forward integration: hotel supplies brought in through upstream vertical integration, and provision of services including food captured through downstream vertical integration. Local Destination Management companies are contracted by the International Tour Operators to provide local tours, and these arrangements crowd out many local restaurants through selective arrangements with a few. Inherited capital from colonial times can be found in these Destination Management Companies as for instance, in St. Lucia, where one wealthy family has made forays beyond import and distribution to take advantage of new opportunities linked to the growth of tourism<sup>88</sup>.

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88 TAIMOON STEWART, *COMPETITION ISSUES IN SELECTED CARICOM COUNTRIES: AN EMPIRICAL EXAMINATION* 115–28 (2004).

These strategies deprive the local economy of gains to be had from the industry, including sale of local agricultural products where possible. Between 2008 and 2013, food and beverage imports represented in value 18 % of total imports, and 48 % of total consumer goods imported. And, 60 % of imported agricultural produce is consumed by the tourism sector, while only 10 % of local production is traded within the tourism sector.<sup>89</sup> Tourists in all-inclusive hotels have little incentive to visit local restaurants, use taxi services (shuttles are provided by the hotels to visit the town, for example), and take advantage of locally offered tours. Instead, the hotels all-inclusive package capture the tourists and the profits; and they source their inputs from abroad. Bookings through international booking websites exercise downward pressure on hotel prices, squeezing locally owned hotels.<sup>90</sup>

A study by Brida<sup>91</sup> reveals that cruise tourism yields little monetary gain and instead, destroys fragile ecosystems, with large cruise ships plying the waters in the Caribbean Sea and allegedly illegally dumping rubbish into the sea which finds its way to the once pristine beaches, and with the small islands having to deal with increased demand for waste disposal as a result of the presence of these one-day visiting tourists [in one day, for a few hours, there could be five cruise ships docked and thousands of tourists brought on land]. Yet, Brida argues that the monetary gains from purchases of cruise ship tourists are minimal. The distribution of income from the cruise industry is not equitable. Most ports obtain small contributions from the use of the port as a cruise destination, and cruise tourism provide few real jobs and business opportunities for local residents compared to stay over tourism. The author further points out that most cruise ships are registered in a country offering a 'flag of convenience' like Bahamas, Panama, or Liberia. As foreign corporations, cruise lines avoid taxation, labor laws, environmental standards, etc. Flags of convenience also restrict the rights of workers and are used to pay low wages. According to a BBC news article,<sup>92</sup> this strategy has left the cruise industry with no friends in the COVID-19

89 Clyde Mascoll, *The Promotion of Greater Inter-Sectoral Linkages in the Tourism Sector in Barbados*, IDB (2013).

90 STEWART, *supra* note 88.

91 Juan Gabriel Brida, *Cruise Tourism: economic, socio-cultural and environmental impacts*, 1 INT. J. LEISURE & TOURISM MARKETING 205–26 (2010).

92 The cruise industry is taking a beating with the disasters occurring as a result of COVID-19, and return to normal is unlikely as people weigh the pleasure of cruising vs the danger of being in such a confined space. Also see article published by the BBC on April 13, 2020 on the impact of COVID-19 on the cruise industry which supports the view of the minimal contribution of cruise passengers to the local economy where they stop over. Jonty Bloom, *Will we ever take cruise holidays again?*, BBC NEWS (Apr. 9, 2020), <https://www.bbc.com/news/business-52182509>.

crisis: they are not welcomed at the ports in the US, got no support from the support for business package approved by Congress and the Senate in the US, and tax breaks make no difference since they were not paying taxes.

Finally, a publication by the Cruise Industry shows total economic contribution in selected Caribbean islands in the 2017-2018 year, as follows: The Bahamas: US\$406 million; Jamaica: US\$245 million; St. Kitts: \$149 million.<sup>93</sup> A calculation of percentage of total earnings from tourism in Table 1 below shows that cruise tourism's contribution is 9.3% of total tourism earnings in the Bahamas. This supports the view that earnings from cruise tourism is miniscule compared to 'stay over' visitors, and that the gains may not compensate for the environmental damage caused.

Unlike Africa, where in many countries, over 70 % of the workforce is employed in agriculture, in many of these Caribbean tourist destinations, such as The Bahamas, over 70 % of the workforce is employed in tourism or related activities, usually at low levels of service. According to the World Travel and Tourism Council Report,<sup>94</sup> The Caribbean is one of the most tourism-dependent regions in the world. Travel & Tourism is a key economic driver and foreign exchange earner. In 2018, this sector contributed 15.5 % of Caribbean GDP (the highest in the world) while in Sub-Saharan Africa, the contribution was 7.4 % of GDP. Travel and Tourism supported 13.5 % of all employment in the Caribbean in that year (the highest in the world), while in Sub-Saharan Africa, it was 6.1 %.<sup>95</sup> Overall Travel & Tourism contributes 15.2 % of the [entire] Caribbean's GDP and 13 % of employment.<sup>96</sup> In 2019, Zambia, Travel and Tourism contribute 7 % of GDP and 7.2 % of total employment. In Uganda, Travel and Tourism contribute 5.6% of GDP and 5.8 % to total employment. In Senegal, Travel and Tourism accounted for 8.8 % of GDP and 9.1 % of total employment. These statistics are in stark contrast to the contribution of Travel and Tourism to GDP in The Bahamas in 2019: 43.3 % and 52.2% of total employment. In Barbados in 2019, Travel and Tourism contribution to GDP was 30.9 %, and to total employment was 33.4 %.<sup>97</sup> Table 2 below provides figures for 2017.

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93 BREA, *Economic Contribution of Cruise Tourism to Destination Economies: A Survey Based Analysis of Passenger*, 1 CREW & CRUISE LINES SPENDING 6 (2018).

94 World Travel & Tourism Council, *Caribbean Resilience and Recovery: Minimizing the Impact of 2017 Hurricane Season on the Caribbean Tourism Sector 2* (2018) [hereinafter WTTC 2018].

95 World Travel & Tourism Council, *The Importance of Travel and Tourism in 2018* (2019).

96 WTTC 2018, *supra* note 94, at 7.

97 World Travel & Tourism Council, *2020 Annual Research: Key Highlights by Country* (2020).



Table 2: Contribution of Travel &amp; Tourism in The Bahamas &amp; Barbados, 2017

Country	*Direct Contribution to GDP US\$ millions	Total Contribution to GDP US\$ millions	Direct Employment In Tourism Sector	Total Employment in Tourism Sector	Earnings from Export of Tourism US\$ billions	Capital Investment in Tourist Infrastructure US\$ million
The Bahamas	1,726 19% of GDP	4,343 47.8% of GDP	52,400 26.2% of total jobs	111,500 55.7% of total jobs	2.7 73% of total export earnings	442.5 18.6% of total investment
Barbados	608.3 or 13% of GDP	1,907.2 or 40.6% of GDP	17,500 or 13.5% total employment	52,700 or 40.6% total employment	1.3 or 68.2% of total exports	0.2 or 22.7% total investment

World Travel and Tourism Council (WTTC) *Travel and Tourism Economic Impact 2018*. All values are in constant 2017 prices and exchange rates. In 11 of the 21 countries, tourism [direct & indirect] supports more than 25% of the country's GDP p. 12. \*Direct contribution of Travel and Tourism to GDP reflects spending within the country.

Table 3: Contribution of Tourism to Economy 2019: Selected CARICOM and Sub-Saharan African Countries

Country	Total Gdp Contribution	Total Employment Contribution	Country	Total Gdp Contribution	Total Employment Contribution
Antigua/ Barbuda	42.7%	33.8%	Botswana	12.6%	10.9%
Bahamas (The)	43.3%	52.2%	Kenya	8.2%	8.5%
Barbados	30.9%	33.4%	Mauritius	18.8%	19.1%
Dominica	36.9%	38.7%	Tanzania	10.7%	11.1%
Jamaica	31.1%	32.8%	Zambia	7.0%	7.2%
St. Kitts/Nevis	28.2%	59.1%	Guyana	4.4%	4.7%
St. Vincent/ Grenadines	28.6%	42.5%	Suriname	2.6%	2.8%
St. Lucia	40.5%	78.1%	Trinidad and Tobago	7.8%	8.5%

A sudden drop in tourism could be disastrous for employment, as happened in The Bahamas in the immediate aftermath of 9/11 when tourist arrivals from the US dropped drastically, hotel occupancy and a large part of the work force had to be sent home for the slow period.<sup>98</sup> Dependence on international forces beyond their control makes the sector extremely fragile. The current COVID-19 pandemic has tanked the tourism industry in the Caribbean according to STR's preliminary data of drop in hotel occupancy in the month of March 2020. In Barbados, hotel occupancy was over 90 % at the beginning of March 2020, and this fell to 1.5 % by March 28<sup>th</sup>. For the Caribbean as a whole, occupancy declined from 77 % on 11 March to 8.4 % on 25 March.<sup>99</sup> In most Caribbean countries, borders were closed by the last week of March and for the foreseeable future, hotels are closed, and cruise ships are banned. The prospect for recovery is dire. Tables 2 and 3 above demonstrate the extreme dependency on tourism in some of these economies and the fatal blow it has received as a result of the pandemic. Because of dependence on minerals and mining for the mainstay of their economies, Trinidad and Tobago, Guyana, and Suriname are comparable to Sub-Saharan African countries.

To compound the vulnerability caused by these exogenous factors, there are increasing frequency and ferocity of hurricanes caused by global warming and higher sea temperatures.<sup>100</sup> Hotel infrastructure is damaged or destroyed in a hurricane, airports are damaged and closed, and rising sea levels are eroding the very beaches to which tourists flock. While only Dominica in CARICOM was devastated in 2017, WTTC contends that islands not affected by the hurricane still suffered because of public perception [in the developed countries] that the whole Caribbean was impacted. The recent devastation of Abaco and Grand Bahama in The Bahamas in 2019 is a stark example of such vulnerability.<sup>101</sup>

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98 Frank Comito, *Impact of Terrorism and Crime on Tourism is Far-Reaching*, BAHAMAS B2B NEWS (Sept. 11, 2002), <http://www.bahamasb2b.com/news/wmview.php?ArtID=110> ("What did hit home hard for many of us in The Bahamas is the reality that terrorism, like any criminal act, can sap the very economic livelihood out of people, businesses, industries and our nation. It is estimated that The Bahamas lost over \$100 million in revenue as a result of September 11 and according to many business people, the U.S. recession aside, we have yet to recover fully from that dreadful act. ").

See also [http://www.guyana.org/Speeches/ishmael\\_112801.html](http://www.guyana.org/Speeches/ishmael_112801.html).

99 Smith Travel Research (STR), *Webinar on Impact of COVID-19 on Tourist Industry in Mexico and the Caribbean* (Apr. 3, 2020). For a summary of this Webinar, see <https://str.com/data-insights-blog/covid-19-webinar-summary-5-key-points-our-mexico-and-caribbean-webinar-3-april>.

100 WTTC 2018, *supra* note 94, at 6.

101 *Id.*

## B. Domestic Market Structure: Inherited Wealth Dominates

CARICOM economies have high concentration levels, and this is a feature both of small size requiring economies of scale, and concentration of capital in the hands of the historically privileged. The constraints resulting from small size is increased by the need to import most consumables from the United States, Canada, and elsewhere, to island states, requiring airfreight or shipping. Only large orders would reduce the cost by bulk buying and shipping, and this leading to reliance on large firms to import and wholesale in the islands. These economies are still dominated by families with inherited wealth from the colonial period, with descendants of the merchant class of colonizers continuing to have control of the largest sectors of the domestic economies. Importation of consumables date back to the earliest colonial times, and the import/distribution business thrived and was controlled by the White mercantile class, inevitable since the majority of the population was enslaved. These Import Houses morphed into import/wholesale/distribution firms controlled by their descendants. In all the territories of the Caribbean, the seed capital that spawned the dominant firms in control of importation of consumables can be traced to family agencies and holdings dating back to the 1880s and earlier. Today, those businesses have diversified their operations, combined to form conglomerates, and are spreading throughout CARICOM. Two examples are the Trinidadian firms, ANSA McAL and Massy.

In Appendix 1 below, the genesis of these companies in the 19<sup>th</sup> century with ownership held by the white mercantile class, and their growth and evolution to today's dominance are traced. These two companies had first mover advantage in a juncture in history when whites controlled the economy and society with structural barriers to entry by non-whites, as shown earlier, and the links between the white colonizers back to the metropole were strong. They obtained agencies for major goods that were imported, and controlled trade. The families were able to build on this advantage of connections and goodwill that developed over the years, and solidify their hold on the economy through amalgamations, consolidation, and inter-marriage within their class and ethnicity<sup>102</sup>, thus sustaining and growing their dominance over a period of a century and a half.

Today, ANSA McAL has 73 companies operating across the CARICOM region, in Trinidad and Tobago, St. Kitts/Nevis, Guyana, Grenada, Barbados, Jamaica, and its procurement and logistics provider, ANSA McAL (US) in Miami, vertically

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<sup>102</sup> It is interesting that the term "ethnicity" is used to refer to non-White groups. This creates the distinction of the Whites and the "Other".

integrated upstream by sourcing of goods and arranging importation logistics, and shipping through its subsidiary, Alstons Shipping Ltd. It operates in the following sectors: automotive, beverage (beer), construction, distribution, financial services, manufacturing, real estate, media, and retail. It employs 6000 staff, has daily customer connections of 250,000, and revenue in 2018 of US\$940 million. It is now traded on the Trinidad and Tobago Stock Exchange.<sup>103</sup>

The Massy Group spans 14 countries in the Caribbean, has 66 companies in 9 locations, including the US, 12,250 employees, and revenue of TT\$12 billion (approx. US\$1.7 billion). The Group also offers financial services: mortgages, installment credit, demand loans, lease financing, remittance service. It sells automotive and industrial equipment, energy and industrial gases, information technology and communication, and distribution and retail. The Massy Stores are the biggest supermarkets in the region, and operating in 47 different locations in five CARICOM countries: Barbados, Guyana, St. Lucia, St. Vincent, and Trinidad & Tobago.

In the OECS countries, Barbados, and The Bahamas, among others, the descendants of the colonizers still dominate in the domestic economies and this can be traced and verified historically. Market access for smaller enterprises is necessarily narrowed and many are primarily engaged in retail, purchasing supplies from the major importers. The small business sector and employment in the tourism industry are in the lower levels of value added: taxi drivers, tour operators, cleaners, waiters, and bar servers. Some have captured business in water sports, serving the tourists. But this needs capital, and in the Bahamas, for instance, the ones who provide this service are largely family-owned White Bahamian businesses.<sup>104</sup>

The dominant players in most CARICOM economies are foreign investors and local Whites, descendants of the mercantile class of colonial times with structural barriers to entry of entrepreneurs (differences are explained in the Appendix). For the most part, non-Whites are represented in small and medium enterprises. This reality

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103 Further information is found on the company's webpage.

104 This observation was gleaned by the author during interviews conducted in the Bahamas in October 2018 for a study led by Oxford Economics. The observation is completely the author's and not Oxford Economic's. The history of the Bahamas is very different from the rest of CARICOM. It was populated largely by White Planters and their slaves from the Southern US, mainly the Carolinas, in two waves of migration: the loyalists after the American Revolution, and those who were unwilling to accept the abolition of slavery after the civil war. These White Planters continued racial segregation similar to Southern states in the US until 1967 when a black government came into power for the first time. The Whites retained control of the economy, and still dominate the major sectors of the domestic economy. Bay Street is the main business street and they control this area and are referred to as "The Bay Street Boys".

poses challenges for the enforcement of competition law in CARICOM, given the small societies, the close connections between families in the business class, and the closeness of the business class to politicians.

## V. COMPARISON OF COMPETITION REGIMES IN CARICOM AND SUB-SAHARAN AFRICA

### A. The CARICOM Competition Regime

The Revised Treaty of Chaguaramas (RTC), Chapter 8, provides for competition and consumer protection policy in the Single Market, the establishment of a regional competition commission and that MS enact national competition law and set up national enforcement institutions. The CARIFORUM-EU Economic Partnership Agreement (EPA) also contains a chapter on competition which reiterates the obligations contained in the RTC, and provides for technical assistance to Signatory States to establish their competition regimes. Interestingly, the EPA chapter on competition identifies the regional competition commission as the institution with which the EU would deal, rather than national commissions, apart from the Dominican Republic and The Bahamas, which are not part of the CSME and therefore not under the jurisdiction of the regional commission.

In keeping with these obligations, the CARICOM Competition Commission (CCC) was set up in 2008 to enforce national competition laws solely in a cross border context within the CSME. The Caribbean Court of Justice (CCJ) is the final court of appeal in the CSME, and for appeals against decisions of the CCC. The CCC has a very small staff (one senior lawyer, one senior economist, an economist, a registrar, and an executive director who is also a lawyer with training and experience in the regulatory sector).<sup>105</sup>

The RTC's chapter on competition policy contains provisions on prohibitions of anticompetitive conducts, and requires that MS enact legislation to ensure that determinations of the CCC are made enforceable in their jurisdictions. It also requires MS Competition Commissions to cooperate with the CCC in investigations. Consistent with this view, is Rule 4 of the CCC's Rules of Procedure, which affords jurisdiction to investigate where there is suspicion of conduct that infringes national provisions implementing Article 177(1)(a)–(c).

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<sup>105</sup> *History*, CARICOM COMPETITION COMMISSION, <http://www.caricomcompetitioncommission.com/en/about-us/history>. Details of the composition of the current staff was acquired through communication with the Executive Director.

CARICOM's regional regime differs from the WAEMU competition regime in Francophone Africa, and also differs from COMESA's. The WAEMU Commission has far reaching powers to enforce competition law both at the national and regional levels. But there are many problems created by this extension of power to national jurisdictions, as discussed earlier. Indeed, CARICOM is currently discussing the feasibility of giving the CCC enforcement powers at the national level as a way of breaking the current stalemate in advancing enforcement in the region. However, the proposed change would allow for national jurisdictions that are already enforcing to maintain their national jurisdiction. In COMESA, the regional commission was given an explicit mandate to enforce the regional competition law, by the COMESA Competition Regulations of 2004 under Article 7 of the Regulations: Functions of the Commission 1: "*The Commission shall apply the provisions of these Regulations with regard to trade between MS and be responsible for promoting competition within the Common Market.*" The EU Commission has supranational legal authority to legislate through its Parliament and with a Commission authorized to enforce laws in the Community. In the EU, for instance, "*the direct effect enables individuals to immediately invoke a European provision before a national or European court independently of whether a national law exists.*" The direct effect is a jurisprudential creation of the CJEU in the *Van Gend en Loos* of February 5, 1963.<sup>106</sup> By contrast, the CARICOM is not a legal supranational entity. It is a Community created by Treaty with trade and cooperation modalities, and administered by a Secretariat. Chapter VIII of the RTC provide the provisions on Competition Policy for the region, but there is no additional legislation like in COMESA that clearly sets on the legal authority of the CCC. And, a direct effect provision by which there can be enforcement of the "federal" competition law even when there is no law in the Member State, as in the EU, is not included in the RTC.

## **B. National Competition Laws and Enforcement in CARICOM: Comparison with Sub-Saharan Africa**

Like Sub-Saharan Africa (except South Africa), the competition regimes in CARICOM are in their infancy. Four MS have enforcement institutions: Jamaica, Barbados, and Guyana and Trinidad and Tobago. All operate with very small competition technical staff: the Jamaica Fair Trading Commission (JFTC) has eight; the Barbados Fair

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<sup>106</sup> Personal correspondence with Professor Frederic Jenny (Feb. 2020).

Trading Commission (BFTC) has three; the Guyana Competition and Consumer Commission (GCCAC) has two, and the Trinidad and Tobago Fair Trading Commission (TTFTC) has 2 (as at April 2020). Three of these MS are enforcing the competition law while the fourth, the TTFTC was unable to enforce because the law, the Trinidad and Tobago Fair Trading Act (TTFTA) was not fully proclaimed until very recently (early February 2020). At present, the TTFTC is preparing itself to begin enforcing of the law (constrained, however, by the COVID-19 lockdown).

The other 11 MS are in the process of developing laws and institutions. Belize, Suriname, The Bahamas, and the OECS countries all have draft competition laws. The process of drafting laws and taking it to parliament in all these states has been ongoing for at least a decade in these countries and there seems to be a lack of political will to support the development of competition regimes. This may stem from distraction by more pressing social and economic issues, but also because the political directorate may lack a full understanding that enforcement of competition law can actually alleviate some of these problems. With most of these economies decimated by the fall-out from closure due to COVID-19, establishing competition regimes is unlikely to shift to the front burner for some time to come.

OECS countries have agreed to have a single competition law that will be enacted in each MS, but the institutional dimension is still under discussion. Initially, the MS intended to set up a sub-regional authority, the OECS Competition Commission, to represent all members of the sub-region, and with agencies on the ground to receive complaints and assist in investigation. However, lack of resources has stalled this process, and there is at present a sub-committee of the CSME Regional Task Force for Competition which is considering the practicality of a single competition entity within the Community.<sup>107</sup> This would resolve the stagnation of efforts to establish national regimes in the rest of CARICOM and advance the process of enforcement of competition law in the region.

CARICOM has fledging institutions, but where the law is being enforced, good progress is being made, and the institutions are independent of political interference.<sup>108</sup>

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107 FAIR TRADING COMMISSION, ANNUAL REPORT 2018, 17 (2018), [https://www.ftc.gov.bb/library/2018-ftc\\_annual\\_report.pdf](https://www.ftc.gov.bb/library/2018-ftc_annual_report.pdf).

108 According to Kovacic and Lopez-Galdos, their research suggests that it takes twenty to twenty-five years to gauge progress in competition regimes in a meaningful manner: to construct and set the system's institutional footings, to adopt and refine the initial statutory scheme, to obtain judicial interpretations of the law's substantive commands and procedural features, to build capacity within the competition agency, and to foster improvements in collateral bodies whose contributions are necessary to sustain an effective system. See William Kovacic & Marianela

But, the region is lagging in most of the countries because of the lack of political will to have laws enacted and institutions set up in the rest of CARICOM countries. It is the hope that these issues would be resolved in the near future and we can see the rest of the region meet the obligations of the RTC and CARIFORUM-EU EPA. There is currently a Sub-committee of the Task Force on Competition to consider the practicalities of a single competition entity within the Community.<sup>109</sup> This would extend the CCC's jurisdiction to cover domestic anticompetitive conducts in those territories without laws and institutions. This would at least take forward the active enforcement of competition law in the region.

### C. Institutional Design

There is a mix of institutional designs in CARICOM. The Competition Commissions in the three functioning national regimes (Jamaica, Barbados, and Guyana) are mixed administrative and prosecutorial models, and are structurally independent, similar to the commissions in East Africa. In the case of Trinidad and Tobago, the institution is prosecutorial in design, with investigative reports submitted to the Court for determination. It does not have its own decision making power. The decisions of the Courts can be appealed in the Trinidad and Tobago Appeal Court, and further appealed to the Privy Council. The CCC is an independent institution, with investigative and adjudicative arms, the power to make determinations, and the power to fine. It is therefore pure administrative in design.

Like Senegal, the Ivory Coast, and Burkina Faso, the competition authorities are structurally independent but in practice, are closely linked to the administration.<sup>110</sup> The National Commissions all report to a government Ministry to which they must submit their annual report and any specific information that the Minister may require, and to which they submit their budget for approval and onward submission for Parliamentary approval. The CCC submits its work program to the Council for Trade and Economic Development of CARICOM for approval, and to the Community Council of Ministers for approval of its annual budget.

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Lopez-Galdos, *The Lifecycles of Competition System: Observations on the Evolutionary Paths* 1–2 (King's College London Dickson Poon School of Law, Legal Studies Research Paper Series, Paper No. 2016-33, 2016).

109 BFTC 2018 ANNUAL REPORT, at 17 (2018), [https://www.ftc.gov.bb/library/2018-ftc\\_annual\\_report.pdf](https://www.ftc.gov.bb/library/2018-ftc_annual_report.pdf).

110 FOX & BAKHOUM, *supra* note 1, at 47.



All Commissions in the region consists of the investigative and adjudicative arms, with an executive director presiding over the investigative arm, staff of the commissions undertaking investigations, and a Board of Commissioners with power to determine cases. A firewall exists between the two arms, to protect against breach of natural justice (more said on this later). There is the right to appeal the decisions of the commissions in the High Court, and further appeal to the national Appeal Court. The final appeal can be made to the Privy Council in the UK for most countries (having not adopted the CCJ). For four MS, the CCJ is the final Court of Appeal.<sup>111</sup> There is no regime that follows the South African model of having a Tribunal for adjudication separate from the Commission. Constraints on funding is a major deterrent to having such a model. However, this administrative designed is partly prosecutorial in Jamaica, Barbados, and Guyana because determinations by the Commissions are *not legally binding*. Therefore, firms can refuse to comply and appeal to the Courts, and the laws in the three jurisdictions stipulate that judges in the Supreme Court *must first satisfy themselves that there is a breach of the law*, thus leaving the final legally binding determination to the Courts.<sup>112</sup> But, the Judges in these countries have the benefit of the report on the determination of the Board of Commissioners.

In the case of Trinidad and Tobago, the Commission investigates and submits the report to the Court. The Board does not have the authority to make determinations. It is therefore a prosecutorial model. This institutional design presents problems since Judges need to have substantial understanding of the methodology used in analyzing competition cases, including the economics of competition and the ability to analyse economic evidence presented to the court. But High Court Judges in Trinidad and Tobago have no training in competition law or the economics of competition, and are ill prepared to preside over competition cases and make determinations. Nor is it possible to select a few of the 25 High Court Judges and provide intensive training to them, and with the intention that there will be specialized judges presiding over competition cases. Rather, judges are assigned to cases randomly. So, all twenty-five will need to be trained in competition law and the economics of competition, rather than four or five commissioners which already include economists in any event. In Trinidad and Tobago, there is a serious back log of court cases, so that even murder

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111 As yet, most MS of the CSME have opted to keep the Privy Council as their final Court of Appeal. The only members that have adopted the CCJ as their final court of appeal are Belize, Barbados, Dominica, and Guyana. There is optimism that others will do so soon, and the CCJ is developing an impressive body of jurisprudence.

112 Gleaned in discussions with Marc Jones.

cases are not heard for years and cases are adjourned more than heard. This has serious implications for timely decisions to be made when time is of the essence for businesses.

#### **D. Goals in Respective Laws**

Despite the fact that competition law was introduced into Sub-Saharan African countries as part of Structural Adjustment Programs imposed by the International Financial institutions (except in Mauritius),<sup>113</sup> East/Southern African countries were able to design their laws with objectives that included protection of public interest and stated equity goals along with the standard goals of efficiency, consumer interest, and competitiveness. Some explicit goals include to expand economic opportunity and achieve a greater spread of ownership among historically disadvantaged persons (Namibia)<sup>114</sup>, enhancing equality, protecting against too much concentration, and facilitating the emergence of small businesses. Fox and Bakhaum pointed out that while the goals combine efficiency and equity provisions, it is left to the court to decide on the tensions between them.<sup>115</sup>

By contrast, in CARICOM, only Jamaica introduced its competition law as a part of Structural Adjustment requirements. All other CARICOM countries adopted or are in the process of adopting competition laws in response to internal dynamics: that is, fulfilling the obligations undertaken in the Revised Treaty of Chaguaramas. Moreover, it is generally accepted that enactment and enforcement of competition law is a necessary accompaniment to market liberalization. Yet, the goals expressed in these laws are based on efficiency and consumer welfare imperatives, and do not contain equity clauses, except for one provision in the Barbados Fair Competition Act (BFCA): “An Act ... (c) to ensure that all enterprises, irrespective of size, have the opportunity to participate equitably in the market place ....” The Jamaica Fair Competition Act (JFCA) (currently being revised) and TTFTA do not state goals,<sup>116</sup> and the goals in the Guyana Competition and Fair Trading Act (GCFTA) are limited to promotion of competition, prevention of anticompetitive conducts, and protection of consumer welfare. The goals expressed in the RTC Chapter 8, are very much based on EU law with efficiency and consumer welfare objectives, and the protection of the free flow of goods and services in the single market as the imperative. All laws in the

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113 FOX & BAKHOUM, *supra* note 1, at 64.

114 FOX & BAKHOUM, *supra* note 1, at 72.

115 FOX & BAKHOUM, *supra* note 1, at 71–72.

116 These are laws promulgated by Parliament, and not regulations, and yet, they are silent on goals.

CARICOM region mandate that the Commissions monitor the economies, undertake market studies, and engage in advocacy.<sup>117</sup> Unlike the laws in East/Southern Africa that require competition authorities to deal with all mergers that are notified and all complaints made to them,<sup>118</sup> the Commissions in CARICOM have discretionary power to prioritize investigations and choose the most important ones for follow up action.<sup>119</sup> JFCA Section 11(1) states: “At any stage of an investigation or inquiry under this Act, if the Commission is of the opinion that the matter is being investigated or subject to an inquiry does not justify further investigation or inquiry the Commission may discontinue the investigation or inquiry.”

### E. Exemptions from Competition Law

In West Africa, some national laws have exemptions or special rules for SOEs and give non-transparent protection to politically –connected businesses.<sup>120</sup> Exemptions from competition law are the standard ones in most CARICOM countries: those agreements that are for protection of employees; or collective bargaining on behalf of employers and employees; conducts undertaken for the protection of Intellectual Property Rights (IPRs); where conducts are authorized by the Commissioner; activities of professional associations designed to develop or enforce professional standards. SOEs are caught by the laws in CARICOM. Similar to Kenya’s law, Trade Associations are caught by the laws in CARICOM. And, like E/S African, the competition laws of Barbados, Jamaica, and Guyana provide for authorizations: “[A] business may apply for authorization to enter into or carry out an agreement, or to engage in a business practice that, in the person’s opinion, is an agreement or practice affected or prohibited thy this Act” (BFCA Section 29.1.; JFCA Section 29.1; GCFTA Section 35.1). The RTC Article 180 provides for Negative Clearance Rulings under which member states may apply to the Commission to clarify whether a business conduct is prohibited by paragraph 1 of Article 177. The TTFTA does not include authorization of conducts.

The TTFTA differs in that it includes complete exemption from the competition law of the financial sector (Securities Industry Act 1995 applies), and the telecommunications

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117 RTC, Article 173.2; GCFTA, Section 6(1)–(2); JFCA, Section 5(1)–(2); BFCA, Section 5 (1)–(2); TTFTA, Sections 5 (1)–(2).

118 FOX & BAKHOUM, *supra* note 1, at 114.

119 Similar provision is found in BFCA, Section 9 (1); TTFTA, Section 8 (5) and GCFTA, Section 17 (1). Interviews by the author of Agency heads revealed that the staff would evaluate complaints submitted and decide which are worthy of investigation and prioritize cases and which to dismiss.

120 FOX & BAKHOUM, *supra* note 1, at 54–55.

sector (Telecommunications Authority Act 2001 applies), and while regulated industries are caught by the competition law, the Regulated Industries Commission (RIC) is given full jurisdiction to enforce the competition law, but is required to consult the Competition Commission where a merger or anticompetitive agreements falls within the purview of the Commission; but no mention is made of abuse of dominance. There are many pitfalls to these exemptions, not the least of which is that provisions in the Securities Industries Act and the Telecommunications Authority Act do not capture anticompetitive conducts fully as they are defined in competition law. And, there is also a problem with giving enforcement of the TTFTA to the RIC against firms in that sector because the staff may not have the specialized skills needed to apply the specialized methodologies used in investigating breaches of competition law and will need to be trained. This demand for training professionals in competition law is exacerbated by the need to also train twenty-five High Court Judges who have been assigned by the TTFTA with adjudicative power.

## **F. Prohibitions in Laws**

Jamaica, Barbados, and Guyana included enforcement of consumer protection law under their competition commissions. At present, the JFTC is being reorganized to incorporate into the Commission other government agencies which enforced consumer protection law, thus unifying and rationalizing enforcement. Guyana and Barbados adopted this procedure from the beginning. The TTFTA does not include consumer protection provisions, but there is a separate consumer protection law enforced by the Consumer Affairs Ministry.

### ***i. Prohibition of Anticompetitive Agreements***

There are some differences between CARICOM's regimes and Francophone Africa where there is prohibition of abuse of economic dependence, that is, unfair use of bargaining power.<sup>121</sup> CARICOM laws do not contain such a provision, and would not consider this to be a competition issue. Another major difference between CARICOM's laws and that of Sub-Saharan West Africa is that price regulation is standard in these Francophone countries, and the competition laws allow for intervention to control prices where there are excessive prices in special circumstances such as calamity or

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121 FOX & BAKHOUM, *supra* note 1, at 45.

crisis or in clearly abnormal market in a given sectors.<sup>122</sup> There are no price control provisions in CARICOM's laws. While some price controls remain in the OECS countries, there are no competition laws in these countries at present. The draft OECS competition bill has no price control provisions, and clearly a rationalization between government policies and the law will have to be done once the law is enacted.

West African and East/South African laws contain prohibition of anticompetitive agreements which prevent, restrict, or distort competition, as do the laws in CARICOM, but Tanzania's law adds, only if the acting person intentionally or negligently acts in violation of the section<sup>123</sup> Generally, Trade Associations are caught in East/South Africa as is the case in CARICOM.

Hard core cartels are generally treated as per se illegal in E/S Africa as are resale price fixing agreements.<sup>124</sup> CARICOM's laws, like Kenya's, Namibia's, and Botswana's, also have two categories of anticompetitive agreements: hard core cartels, and other horizontal agreements and are also patterned after EU Law. Similarly, hard core cartels and resale price fixing are treated as per se illegal in CARICOM laws, except for the provision in the TTFTA which states:

17(1) An Agreement which –

(a) fixes prices directly or indirectly *other than in circumstances where the agreement is reasonably necessary to protect the interests of the parties concerned and not detrimental to the interests of the public*; [emphasis mine].

Whereas it is accepted internationally that the most egregious of business crimes is price fixing, and per se illegality is applied as there is no reasonable defense for such conduct,<sup>125</sup> the TTFTA contains a proviso that allows firms to defend price fixing. This provision lays open a defense of price fixing that can put the TTFTC back on its heels, and give a field-day to lawyers defending firms.

122 FOX & BAKHOUM, *supra* note 1, at 36–40.

123 FOX & BAKHOUM, *supra* note 1, at 79.

124 FOX & BAKHOUM, *supra* note 1, at 65.

125 For instance, the US "...Supreme Court has accurately labeled cartels 'the supreme evil of antitrust.' *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004). The fixing of prices, bids, output, and markets by cartels has no plausible efficiency justification; therefore, antitrust authorities properly regard cartel behavior as per se illegal and a 'hard core' violation of the competition laws." Address by Thomas O. Barnett, Assistant Attorney General, Antitrust Division, U.S. Department of Justice, Fordham Competition Law Institute's Annual Conference on International Antitrust Law and Policy New York, New York, (Sept. 2006), <https://www.justice.gov/att/speech/criminal-enforcement-antitrust-laws-us-model>.

## *ii. Prohibition of Abuse of Dominance*

Provisions prohibiting Abuse of Dominance are taken largely from EU law, both in Sub-Saharan Africa and CARICOM. SOEs are caught by the laws in CARICOM, as they are in Zambia, Tanzania, and Mauritius but are not caught in some laws in Sub-Saharan Africa, particularly in West Africa.<sup>126</sup>

Thresholds for establishing dominance of relevant markets are different in the various countries: Kenya's: 50%<sup>127</sup>; South Africa and Namibia have tiered thresholds: 45% of market, or 35% unless firms can prove that they have no market power; or less than 35 % if the Commission proves that they have market power. Mauritius has a 30%, or 70% when not more than three firms are involved while Zambia's threshold is also two tiered, but specifies 60% or more for three firms.<sup>128</sup>

In CARICOM, the RTC Chapter 8, the BFCA and the JFCA do not provide thresholds, but rely on the definition of dominance in the respective laws. JFTC Section 19 states:

For the purposes of this Act, an enterprise holds a dominant position in a market if by itself or together with an interconnected company it occupies such a position of economic strength as will enable it to operate in the market without effective constraints from its competitors or potential competitors.

The RTC specifies that an enterprise and its affiliates are treated as one enterprise. Similar definitions are found in other laws in CARICOM. The Guyana law specifies a 40 % threshold for initiation of an investigation. The TTFTA specifies 40 % or more of the market *or such percentage as the Minister may by Order prescribe*. This clause leaves open the possibility of regulatory capture, as there is no fallback scrutiny to this clause.

The TTFTA is different from the other laws in CARICOM in that it refers to a dominant position as a Monopoly, patterned after US Antitrust Law, and the efficiency defense for breach of the provisions refers only to goods and not services (most likely an error). However, the detailed provisions on dominance are similar to those in the rest of CARICOM and the EU law. All CARICOM laws, like Sub-Saharan laws, prohibit unfair purchase or selling prices or other anticompetitive practices, and Barbados' law goes further to state in Section 16(3)(d) "... prices that are excessive,

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126 FOX & BAKHOUM, *supra* note 1, at 54–55.

127 FOX & BAKHOUM, *supra* note 1, at 69.

128 FOX & BAKHOUM, *supra* note 1, at 77.

unreasonable, discriminatory or predatory.” This follows the EU approach and not the US where there is no provision against excessive pricing.

The provisions allowing efficiency defense in CARICOM laws differ from that in E/S Africa in that the latter also allows public interest consideration to be taken into account, particularly effects on employment and small businesses benefits.<sup>129</sup> While the Barbados law has in its chapeau a provision to ensure that all enterprises, regardless of size, have the opportunity to participate equitably in the market place, this is not fleshed out in the defense provisions. There is a provision in Tanzania that places a proviso on conducts caught: that is, *only if the acting person intentionally or negligently acts in violation of this section*.<sup>130</sup> There is no such provision in CARICOM's laws.

Another interesting point is that the efficiency defense of anticompetitive agreements in all the regional laws, while based on TFEU 101(3), has a single word difference that profoundly changes the interpretation. In the linking of the three sub-paragraphs that itemizes conditions that allow for exemption, the regional laws use “or” instead of the EU’s “and” which removes the cumulative requirement of the EU (all three conditions must be present). For example,

BFCA Section 16. 4 - An enterprise shall not be treated as abusing a dominant position

- (b) if it is shown that its behavior was exclusively directed to improving the production or distribution of goods or to promoting technical or economic progress and consumers were allowed a fair share of the resulting benefit;
- (c) the effect or likely effect of its behavior in the market is the result of the superior competitive performance; or
- (d) by reason only that the enterprise enforces or seeks to enforce any right under or existing by virtue any copyright, patent, registered design or trademark except where the Commission is satisfied that the exercise of those right
  - (i) has the effect of lessening competition substantially in a market; and
  - (ii) impedes the transfer and dissemination of technology

This means that any one defense will suffice thus lowering the standard of proof. There is also a difference in that East African laws include industrial policy in its efficiency defense: if the conduct leads to the promotion of exports. In regard to (c)

129 FOX & BAKHOUM, *supra* note 1, at 65.

130 FOX & BAKHOUM, *supra* note 1, at 79.

above, the BFCA and the GCFTA are the only laws in CARICOM which have an explicit prohibition of *abuse* of intellectual property monopoly rights. Other laws simply exclude enforcement of IPR from actions caught under abuse of dominance provisions.

### *iii. Merger Control Regulation (MCR)*

The laws in Francophone Africa do not contain MCR. While similarly, the laws of Jamaica, Guyana, and the regional provisions in the RTC do not contain MCR, in all three there are draft laws under consideration that include MCR. There is now recognition in this region of the relevance of MCR for these economies, despite small size. All the laws of East/South Sub-Saharan Africa contain MCR, and merger review that meets the threshold is mandatory.<sup>131</sup> Fox and Bakhoun pointed out all but Malawi and Mauritius require pre-merger notification.<sup>132</sup> The laws of E/S Africa weaves public interest provisions into its MCR, with specific provisions to protect employment and market access for small businesses of the black disadvantaged communities. For instance, Kenya's MCR takes into account whether the merger is likely to affect a particular industrial sector or region, employment, small firms ability to gain market access or be competitive, the ability of national industries to compete in international markets, along with the standard efficiency provisions.<sup>133</sup>

Barbados' law has MCR, with the definition of a merger including amalgamation and joint ventures resulting in two or more enterprises ceasing to be distinct entities. Notification is mandatory once the threshold for notification is met: if the enterprise or those with whom it intends to merge have no less than 40 % of the market. There are no explicit public interest provisions in the section on merger control comparable to those in the laws of Sub-Saharan West Africa, and those expressed in the chapeau of the BFCA (to ensure that all enterprises, irrespective of size, have the opportunity to participate equitably in the market place) are not woven into the fabric of the specific provisions on merger analysis, though taken into account in investigative procedures. The provisions covers all sectors and economic actors including SOEs.

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131 FOX & BAKHOUM, *supra* note 1, at 116.

132 FOX & BAKHOUM, *supra* note 1, at 65. The CFTA of Malawi does not provide thresholds for merger notification and hence all mergers are notifiable, despite the fact that some may be of little or no significance. See Charlotte Wezi Mesikano-Malonda, *Malawi: Competition and Fair Trading Commission*, GLOBAL COMPETITION REV. (Dec. 18, 2015), <https://globalcompetitionreview.com/insight/the-african-and-middle-eastern-antitrust-review-2016/1066973/malawi-competition-and-fair-trading-commission>.

133 FOX & BAKHOUM, *supra* note 1, at 71.



TTFTA contains MCR, with a definition of merger as the cessation of two or more enterprises from being distinct whether by purchase or lease of shares or assets, amalgamation, combinations, joint venture or any other means through which influence over the policy of another enterprise is acquire. TTFTA provides a monetary threshold: assets exceed TT\$50 million (US\$7.4 million approximately) and at least one of the enterprises carries on or intends to carry on business in Trinidad and Tobago. The danger of having a monetary value threshold is that it could prove to be too low as firms grows or if the value of the TT dollar falls due to government devaluing the currency. Note that the telecommunications and financial sector are exempt from MCR merger review under the TTFTA:

Section 3. (1): This Act shall not apply to –

- (g) companies which fall within the purview of the Telecommunications Authority Act, 2001;
- (h) banks and non-bank financial institutions which fall within the purview of the Securities Industry Act, 1995;

While mergers in these sectors are reviewed by the relevant regulatory authority, the specific methodology on assessing effects on competition contained in competition law may not be present in the laws regulating the sectors.

## VI. ENFORCEMENT OF LAWS IN CARICOM

There has been some success in enforcement of national laws in CARICOM, more on par with E/S Africa rather than Francophone where national commissions were stripped of the authority to enforce national laws. There are three national commissions enforcing national laws: JFTC, BFTC, and GCCAC, of which the Guyanese Commission is the youngest. TTFTC is still in the process of organizing itself to begin enforcement, having just fully proclaimed the law. The national commissions have the discretion to choose cases, but the CCC is constrained, and this is addressed later. The CCC enforces against cross border anticompetitive conducts.

### A. Jamaica

The website of the JFTC<sup>134</sup> shows that it was established in 1993 and cases and enquiries listed on that website<sup>135</sup> indicate that in its first decade, the Commission dealt with

<sup>134</sup> FAIR TRADING COMMISSION, <https://jftc.gov.jm/>.

<sup>135</sup> *Judgments*, FAIR TRADING COMMISSION, <https://jftc.gov.jm/enforcement/judgments/>.

consumer protection issues much more than competition issues, largely because of the complaints that were registered. As in the case with new regimes, consumers did not sufficiently understand competition law issues. As such, of 12 cases taken to Court, all cases except three, discussed below, were brought under Section 37 of the JFCA which prohibits unfair competition and involved misleading advertisement.

Similarly, of the twenty-one Consent Agreements between the JFTC and firms, all but two were unfair trade and mostly false advertising cases.<sup>136</sup> Details available on the JFTC website shows that in the first competition investigation in 1994 the Commission succeeded in getting Cable and Wireless (the monopoly telecommunication company) to unbundle telephone equipment and installation from their service. The second was an amalgamation in 2016 between a radio station and newspaper company which the JFTC investigated of its own initiative. The staff concluded that the amalgamation agreement did not have as its purpose the substantial lessening of competition, but that the increased market power could in the future lead to abuse. However, it decided that the possible anticompetitive effects were outweighed by the public interest benefits, similar to East African enforcement. Because of this overemphasis on fair competition cases rather than antitrust, the Commission launched a targeted public education program, engaged in market studies, and this effort resulted in the receipt of more competition, rather than consumer complaints.

Of the twelve court cases,<sup>137</sup> the first two judgements (summarized here) were competition cases and judgements went against the JFTC. It's very first court case in 1995 was to challenge the Jamaica Law Association's practice to set legal fees. The Law Association went to court and secured a judgement that exempt them from the Fair Competition Act. The JFTC, in my view, tackled the organization most equipped to defend itself as its first case, rather than choosing a bread and butter issue that the populace could relate to, and that could be easily won. And, the second case was even more damaging. The JFTC sought to intervene in a conduct engaged in by the Jamaica Stock Exchange, but was immediately brought before the High Court by the Securities Commission, requesting a declaration that the Jamaica Stock Exchange is governed by the provisions of the Securities Act, and not the Fair Competition Act, and that the JFTC had acted *ultra vires*, and a further declaration that the JFTC was in breach of natural justice since there was no clear firewall between its investigative and adjudicative arms (though, *de facto*, the Commission operated with a firewall).

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136 *Id.*

137 *Id.*

The High Court ruled in favor of the JFTC, but the ruling was appealed by the Jamaica Stock Exchange. The Appeal Court came back with a ruling in favor of the Jamaica Securities Commission, and directed the JFTC to address the issue of breach of natural justice by revising its law and reforming its institutional structure.<sup>138</sup> This was to have a crippling effect on the JFTC's work, but the Commission continued its work by using Consent Agreements and the Courts where necessary to tackle anticompetitive conducts.<sup>139</sup>

There was one major legal success obtained by the JFTC: a court ruling that allowed it to apply its provisions prohibiting anticompetitive agreements to investigate mergers. The case dates back to the 2011 acquisition by Digicel Jamaica Limited (Digicel) of Oceanic Digital Jamaica Limited (Claro) through a stock purchase agreement and transfer of Claro's license to Digicel. The Telecommunications Authority approved the merger. Note that the Minister responsible was the Prime Minister, and so approval came from him. The JFTC objected, stating that this acquisition could substantially reduce competition in the market, and asserted its right to investigate the merger for anticompetitive effects, citing the provision in its law prohibiting anticompetitive agreements. (Section 17 (1)) This section applies to agreements which contain provisions that have as their purpose the substantial lessening of competition, or have or are likely to have the effect of substantially lessening competition in a market.

Digicel and Claro took the case to the High Court questioning the JFTC's jurisdiction to examine and rule on this acquisition. The High Court ruled in favour of the Commission, but the two firms appealed the decision. The Jamaican Court of Appeal, in 2014, held that while the JFTC has jurisdiction in the telecommunications industry, it did not have jurisdiction over the acquisition by Digicel of Claro, which was approved by the relevant Minister under the Telecommunications Act. Not to be stopped, the JFTC took the case to the highest court of appeal for this jurisdiction, the Privy Council in the UK. And, in a major victory for the JFTC, in August 2017, the Privy Council agreed with the High Court's decision, stating that:

- even **without a merger control regulation** (MCR) provision as part of its law, and
- notwithstanding the **regulator's decision** (Telecommunication Authority) regarding the merger

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138 *Id.*

139 Interview of the Executive Director of the JFTC by the author.

- the Competition Commission *has the authority of oversee any sector or issue that can negatively impact competition in the relevant market* and
- that the **provisions on anticompetitive agreements in the law can be applied** to acquisition agreements even in sectors overseen by a Regulator.

The JFCA has been revised and is with the Attorney General's office. Until it is passed in Parliament, the JFTC will have to continue enforcement through the Courts and through Consent Agreements with firms.<sup>140</sup>

## **B. Barbados**

The Barbados Public Utilities Board, in existence since 1955, was responsible for regulating Utilities and Telecommunications. In 2001, a new Commission, The Barbados Fair Trading Commission (BFTC) was set up incorporating the Utilities Board, and creating two new arms, the Competition Division and the Consumer Protection Division. This Commission therefore has responsibility for regulation, competition and consumer protection, and they work in tandem, support each other, and have excellent relations. This is an example of good cooperation between regulatory authorities and competition authorities, often problematic in so many jurisdictions. The BFTC has been gradually and steadily building its expertise and experience. Total number of technical staff at the Commission is fourteen of which three are in the competition division. Despite this, it has been able to investigate and make decisions on several cases. Since its inception, it has investigated conducts and delivered reports to the offending firms, and in several cases, succeeded in making the offenders change their behavior. What is clear is that in the first years after the competition regime came into force, firms did not understand the implications of their conducts and were willing to change once they became aware that they were breaking the law. This augurs well for the regime, as it demonstrates a relatively good respect for the rule of law. And, similar to the leniency approach adopted by Kenya in the early years, the BFTC used a persuasive approach to enforcement to enable a culture of competition to take root.

An example of the success of this softer approach is, for instance, in 2007, the Barbados Bankers Association agreed to stop limiting their loan clients to a selected list of valuers, and accepting that clients can use other valuers that are approved by

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140 *Id.*

the professional association which maintain high standards. Similarly, in 2008, Awarak Cement Ltd. agreed to stop price discrimination as between manufacturers and distributors and agreed to apply the same discount to both based on quantity purchased. And, both Pinnacle Feed Company and Archer Daniel Midlands (ADM), of the infamous Lysine Cartel, were investigated for excessive pricing, and both conceded to changing their pricing methodology and practice. In the ADM case, fluctuations of prices of inputs at the international level were not properly reflected in their final prices; rather they maintained their higher prices even when international prices fell. In 2011, Shipping Agents agreed that they had engaged in price fixing, confessed that they had no idea of the gravity of their action, and put in place individual pricing. Or when, also in 2011, Caribbean Broadcasting Corporation agreed to change its policy of not carrying advertisements of rivals, based on the findings of the BFTC that being the only terrestrial broadcaster in Barbados, its refusal distorts competition.<sup>141</sup>

The BFCA includes merger control regulation, and the BFTC has reviewed 20 mergers, of which 15 were allowed, 4 required remedies and one was disallowed, the reports of which are available on the BFTC website.<sup>142</sup> Summaries of some of those cases are provided here. One case, the proposed acquisition by Sol St. Lucia Ltd. of Barbados National Terminal Ltd. (BNTLC), was approved only with remedies to remove restrictive clauses from the agreement that would prevent new licenses from being issued and the construction of any new terminal for 15 years. In December 2017, Sol filed an appeal against the Commission's decision and the matter is still before the Court.<sup>143</sup> Two other mergers were reviewed in 2017 and 2018, one between a bottling company and a distribution company, and the other between two general insurance companies that had jumped the gun and merged without notifying the Commission as required under the merger regulations where the combined threshold is 40 % of the relevant market. The former was approved with remedies that were accepted. The latter was the Acquisition of Harmony General Insurance by Sagicor Ltd.<sup>144</sup> The merger was approved after a full investigation that showed that there

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141 *Allegation: Refusal to Supply by Caribbean Broadcasting Corporation*, FAIR TRADING COMMISSION, BARBADOS (Case opened Jan. 2010; Case closed Feb. 2011), [https://www.ftc.gov.bb/index2.php?option=com\\_content&do\\_pdf=1&id=225](https://www.ftc.gov.bb/index2.php?option=com_content&do_pdf=1&id=225).

142 *Merger Determination*, FAIR TRADING COMMISSION, [https://www.ftc.gov.bb/index.php?option=com\\_content&task=view&id=375&Itemid=119](https://www.ftc.gov.bb/index.php?option=com_content&task=view&id=375&Itemid=119).

143 Press Release: BNTCL Merger Application Decision, FAIR TRADING COMMISSION (Nov. 28, 2017), [https://www.ftc.gov.bb/index.php?option=com\\_content&task=view&id=336](https://www.ftc.gov.bb/index.php?option=com_content&task=view&id=336).

144 *Fair Trading Commission Merger Determinations*, FAIR TRADING COMMISSION, (Dec. 9, 2019) [https://www.ftc.gov.bb/index.php?option=com\\_content&task=view&id=373](https://www.ftc.gov.bb/index.php?option=com_content&task=view&id=373).

were no significant change in competition in the relevant market, and that there were sufficient firms operation in the relevant market to make it competitive. In any case, after full analysis, the combined market share did not meet the threshold of 40 % requiring notification. This experience calls into question the viability of using a market share threshold, since there are circumstances where there is no certainty that the proposed merger in question qualify for notification until after the rule of reason procedure is applied in an investigation. Of note, also, is that the BFTC did not apply the fine for jumping the gun, and this may have been because the firms complied once receiving a letter of objection from the BFTC, and cooperated in the investigation.

### C. Guyana

The Guyana Competition and Consumer Affairs Commission (GCCAC)<sup>145</sup> is much younger than the JFTC and BFTC. It was established in 2011 and began enforcing the law. The staff of the Commission is extremely small, 15 members, of which 8 are consumer protection officer, 2 are in competition enforcement, and the others are support staff.<sup>146</sup> They have managed to successfully investigate one competition case, a cartel among five terminal operators fixing the haulage price for 20 foot and 40 foot containers. In January 2019, the terminal operators were ordered to terminate with immediate effect the agreement and the companies were ordered to pay G\$3,843,000 (US\$18,364) within six weeks of the date of the order. The Commission acknowledged that the Shipping Association was acting under orders of the terminal operators and had no independent interest, income or benefit, and so it was not fined. The Commission's decision was appealed by the terminal operators and is still in court. Six other cases were investigated, but they were all consumer protection cases.<sup>147</sup>

### D. Regional Enforcement

The CCC has not had an investigation that has resulted in a decision, and this is largely because the CCC is constrained in its power: it was not given the power to investigate of its own accord, but must rely on MS or the Council for Trade and Economic Development of CARICOM (COTED) to request an investigation. No MS has requested an investigation since its inception. Article 176 authorizes

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145 *Consumer & Competition Laws of Guyana*, COMPETITION AND CONSUMER AFFAIRS COMMISSION, <https://ccac.gov.gy/consumer-competiton-laws/>.

146 Interview by author with Director of Competition Division of the CCAC.

147 Complaint by JD Transport Services (Jan. 31, 2019), <https://ccac.gov.gy/wp-content/uploads/2019/04/Draft-Decision-Complaint-by-JD-Transportation-Services-against-the-SAG-31-Jan-2019.pdf>.

the CCC to request a national competition authority to undertake a preliminary examination of the business conduct of an enterprise whose conduct it believes to have cross regional anticompetitive effects. The national commission shall examine the matter and report back to the Commission. And where the Commission is not satisfied, it can undertake its own preliminary examination. But, to advance further with an investigation, jurisdiction between the MS and the CCC has to be agreed, and where no such agreement can be reached between the MS and CCC, COTED has to decide. To this point (April 2020) this provision has not been tested. It is convoluted, and has tied the hands of the Commission to investigate cross border anticompetitive conducts. The Commission is further hampered by the fact that the Treaty states that the Commission shall request a National Competition Authority to undertake a preliminary examination. At present, there are only four national competition authorities, so should the conduct involve the other MS, there are no competition authorities to which the request can be made. This is the reverse of the problem faced in Francophone Africa where the national commissions were powerless and the regional commission given all the power.<sup>148</sup>

There was one case investigated by the CCC at the request of COTED and this was abuse of dominance of the regional cement company, Trinidad Cement Ltd. (TCL). It was its first case, and it was at the preliminary stage of determining jurisdiction and whether an investigation was justified. It did not inform TCL that it was being investigated until an Enquiry was launched, and the company was asked to appear before the CCC. TCL immediately appealed the CCC's action in the CCJ, the Appellant body for decisions of the CCC, with the complaint that, among others, it had not been informed that it was being investigated whereas Article 175 of the Treaty states that: (5) Where the Commission decided to conduct the investigation, the Commission shall (a) notify the interested parties and COTED within 30 days.

The CCJ determined that 'interested parties' in the Treaty refers to signatories to the Treaty, and therefore MS, and not enterprises being investigated were to be notified. But, the CCC was required by the Court to revise its rules of procedure which "... did not deal expressly with the preliminary assessment which express the first juncture at which interested parties enjoy the procedural right to be consulted, to ensure compliance with the Treaty."<sup>149</sup> This case was never adjudicated because

<sup>148</sup> FOX & BAKHOUM, *supra* note 1, at 46.

<sup>149</sup> *CCJ Dismisses TCL's Claim Against Competition Commission*, THE CARIBBEAN COURT OF JUSTICE (Nov. 13, 2012), <https://www.ccj.org/ccj-dismisses-tcls-claim-against-competition-commission/>.

of delays in appointment of new commissioners. While the CCC has a draft revised Rules of Procedure, it is still to be formalized.<sup>150</sup>

Interestingly, empowered by the Privy Council decision in the Digicel/Claro merger case that was appealed by the JFTC, the CCC flexed its muscles and sought to intervene in an acquisition involving two of the largest banks in the region: by Republic Bank Financial Holdings (a local Trinidad and Tobago bank) of Scotiabank (Canadian) operations in nine Caribbean countries. The CCC expressed competition concerns in three CARICOM countries, St. Lucia, Grenada, and Guyana. Note that the commercial banking sector in CARICOM is highly concentrated, and that several of the largest banks are foreign owned. This is the first time that the CCC has exercised power to review mergers in the region, and the jurisdictional claim must have been based on the decision by the Privy Council that provisions prohibiting anticompetitive agreements that have an effect or are likely to have an effect on competition can be applied to merger agreements. The Revised Treaty of Chaguaramas, Chapter 8, articulating CARICOM's competition regime, does not include merger control regulation in its provisions. The CCC has done a review of the acquisitions and published a summary of its findings which confirmed its concerns for restriction of competition as a result of the acquisition. However, it did not undertake an investigation because it depends on member state governments or COTED to request an investigation, or to request national commissions to undertake a preliminary enquiry. St. Lucia and Grenada do not have national competition law or enforcement institutions, hence there was no applicable legal standard in those MS for evaluating the transaction.<sup>151</sup> The CCC did request of Guyana a preliminary investigation. However, the GCFTA does not include merger control regulation, and the Privy Council decision has not yet been adopted by Guyana's courts [given that the Privy Council is no longer the final Court of Appeal for Guyana]. If that ruling had been adopted, the transaction would have been substantively evaluated under Guyana's Competition and Fair Trading Act.<sup>152</sup>

Meanwhile, the acquisitions in 7 of the 9 territories have been finalized, including two of the countries in which the CCC expressed concerns, St. Lucia and Grenada.

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150 Interview by author with Executive Director of the CCC.

151 Upon the review of the legal framework regarding its powers to monitor and investigate potentially anti-competitive conduct, the Commission concludes that while the acquisition fell within its cross-border jurisdiction, it is not in a position to investigate the transaction because of inadequate legislative and institutional frameworks in the Member States affected. *PRESS RELEASE: CARICOM Competition Commission (CCC) Establishes Steering Committee to Monitor Regional Action Plan for Competition and Consumer Agencies in CARICOM to Mitigate Effects of COVID-19*, <http://www.caricomcompetitioncommission.com/en/news>.

152 Interview with Senior Legal Counsel of the CCC by this author.



There was no competition concern in Antigua/Barbuda, but the government blocked the acquisition allowing a local bank to acquire Scotiabank's operations in that country. The Central Bank of the OECS approved the acquisitions in OECS countries. The acquisition in Guyana was disallowed by the Central Bank of Guyana, which found that it will increase Republic Bank's existing 35.4 % of the banking systems assets and 36.8 % of deposits to 51 % after the acquisition, leading to too much concentration.<sup>153</sup> Central Bank of Guyana did not publish the methodology or findings which provided the basis for their conclusion that the acquisition would lead to too much concentration. It would be very interesting to compare the methodology used by the Central Bank of Guyana to evaluate the effects of the acquisition, versus that used by competition commissions, and whether outcomes differ.

The CCC has undertaken several market studies in the past few years: The Impact of Competition in the Mobile Sector in Suriname; Economic Report on Beer Consumption in CARICOM (March 2017); Defining the Relevant Product Market: An Application of Price Tests to the Beer Market in Barbados; and, Competition in the Commercial Banking Sector in Guyana and Suriname (May 2019). The CCC is mandated to assist national authorities in developing their competition regimes (RTC Article 173.2 (c) & (d)). As such, the CCC has been undertaking workshops to improve the public's understanding of competition law, provide technical training to staff of commissions and senior public officials in countries without commissions, and moderates a regional network for competition commissions, patterned after the European Competition Network.

### **E. Fines Specified in the Laws**

The study of Sub-Saharan Africa explored the fines that are specified in the various laws. Namibia, Zambia, Botswana, Mauritius, and Tanzania all provide a percentage of annual turnover, with varying time limits to the calculation (Botswana: a maximum of 3 years; Mauritius: no more than 5 years). Zimbabwe and Kenya both quantified fines in monetary terms (Kenya: not exceeding US\$100,000; Zimbabwe: not exceeding \$5,000). Some laws include imprisonment (Zambia, Zimbabwe), but this remedy has never been imposed.<sup>154</sup> Interestingly, in Mauritius, Botswana, and Tanzania, the laws allows fine only if the act was intentional or negligent.<sup>155</sup>

153 *Guyana Central Bank blanks sale of Scotia to Republic Bank*, TRINIDAD GUARDIAN NEWSPAPER (Nov. 4, 2019), <http://www.guardian.co.tt/news/guyana-central-bank-blanks-sale-of-scotia-bank-to-republic-bank-6.2.945099.b0bef3cb4b>

154 Compiled from information in FOX & BAKHOUM, *supra* note 1, at 67–85.

155 FOX & BAKHOUM, *supra* note 1, at 84.

In CARICOM laws, fines vary. The RTC does not specify amounts of fines applicable, though the CCC has the power to impose fines for breaches of the rules of competition. Guidelines for setting fines have been published, and the CCC will take into account the duration, seriousness, and effect of the conduct and impose fines not exceeding 10 % global revenue of the enterprise for the last financial year. Jamaica's law allows the Court to fine not exceeding one million Jamaican dollars (US\$7,128). The law was enacted in 1993, and is been updated, and so one assumes that there is an upward adjustment to fines in the draft law. Barbados' law imposes liability of B\$150,000 (US\$75,000) or 6 months in prison or both for an individual and for a corporate entity, B\$500,000 (US\$250,000) or 6 months in prison or both or to 10 % of turnover of the enterprise for the financial year preceding the date of the commission of the offence, whichever is greater. The Guyanese law provides for fine of G\$50 million (approximately US\$240,000) and to one year in prison for failure to terminate an anticompetitive agreement or an abusive conduct. TT's law provides for fines up to up to TT\$100,000 (US\$14,700) for engaging in anticompetitive agreements, and failure to obey the Court's instruction to terminate the agreement. Interestingly, for abuse of monopoly power, an enterprise is given six months within which to cease the abusive practice and must submit to the Commission measures it will take and the timetable for giving effect to measures to remove the monopoly power it has on the market.<sup>156</sup> One can see a great disparity between the fines that can be imposed in Barbados and Guyana as opposed to Trinidad and Tobago. Yet, the largest firms in the region are in Trinidad and Tobago. No CARICOM country has imposed prison sentences so far.

The forgoing illustrates that much is still to be done to advance the competition regimes in the region, not the least of which is to harmonize laws, since this is the requirement of the RTC Article 173.2 (c), but at the moment, the four national laws in existence have differences that can hamper regional enforcement.

## VII. ANALYTICAL FRAMEWORK ARTICULATED IN SUB-SAHARAN STUDY<sup>157</sup>

Fox and Bakhoun concluded their study on Sub Saharan Africa by proposing changes

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<sup>156</sup> This may be a drafting error since it seemingly requires a structural change in all instances of abuse.

<sup>157</sup> FOX & BAKHOUM, *supra* note 1, at Chapter VII.

that can be made in the countries. They framed the discussion by asking: what are the conditions necessary for a market system to function smoothly.

These authors categorized countries as (a) least developed, (b) more developed, (c) Brazil, Russia, India, China, South Africa, the so-called BRICS countries, and (d) developed countries, with the least developed experiencing serious corruption in government, poverty, inequality, unemployment, lack of socio-economic mobility, triumphs of vested interests, and dysfunction in democracy. The other three categories are measured by the extent they are able to counter these problems, with their ranking based on the level to which they could successfully remove the problematic factors. It is instructive to note that all these problems are present in all countries in the world, but the extent to which they could counter the problems and minimize them equals their level of development.<sup>158</sup>

Hence, while in the least developed, courts are dysfunctional and judges can be bribed, in the more developed, courts function better and judges are independent and honest and cannot be bribed, while in the developed countries, the judiciary is strong, well trained, honest and there is a high level of rule of law and transparency. Similarly, in the least developed, markets have to be created, while in the more developed, there is a fair level of functioning markets present, and in the BRICS, more sophisticated markets (but with a poor and disadvantaged population in South Africa that has to be raised out of poverty and provided with economic opportunities), and in the developed countries markets are healthy with deep incentives to innovate and strong pro-consumer and anti-corruption activism. In the least developed, the competition agenda is dominated by price control, while in the more developed, there is enforcement of competition law, but constrained by lack of human and financial resources, while in the developed countries, there is a deep human resource pool, and sufficient resources, and robust enforcement of competition law.

The research on Sub-Saharan Africa shows that, of the countries chosen for study by Fox and Bakhoun, several fall into the least developed category (as does Haiti in CARICOM). Findings are that governments in several of the countries studied are controlled by corrupt politicians that siphon off the wealth of the country and pursue policies that allow MNCs to continue to exploit the countries' resources. The authors, using the democracy index, identified five of the sixteen countries in Sub Saharan Africa that were chosen for study as authoritarian; seven as hybrid democracies and three as flawed democracies, that is, democracy functions but with problems (Senegal,

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158 FOX & BAKHOUM, *supra* note 1, at 206.

Botswana and Namibia). In all of Sub Saharan African countries studied, only Mauritius was deemed to have full democracy, while non in CARICOM is raised to that rank. It is interesting to note that the level of enabling environment present in these countries can be correlated to their level of functioning democracy.<sup>159</sup>

Fox and Bakhoun asked, what a [developing] nation wants from its market system and posited that countries want efficiency and development: inclusive growth.<sup>160</sup> They identified market restraints within the nation that inhibit such inclusive growth to include those generated by the State, including poor delivery of infrastructure, education, health services and opportunities for mobility, among others, and also, the concentration of economic power in the hands of a few families. MNCs operate in the economy with huge concessions granted by the governments, thereby depriving the local economies of surplus retention. These market restraints are compounded by scarce financial resources, a small pool of talent, cronyism, slow, inefficient courts with judges untrained in market and economic concepts, and sometimes corrupt, and the absence of rule of law.<sup>161</sup>

In this trajectory, CARICOM countries fall in the second category of more developed with all except Haiti qualifying as flawed democracies. Fox and Bakhoun observed the following characteristics in this category of countries: competition culture taking root, people appreciate how freeing up markets can help them, the competition agenda is not dominated by price control, there is more sophisticated competition law and policy observable and officers are gleaning lessons from more mature commissions and the international community. In this category, the regional body provides training, competition commissions submit to peer review at UNCTAD, and competition officers are more confident to interact with colleagues from international commissions. All of these conditions are observable in CARICOM countries, and the Commissions, both national and regional, interact frequently with the staff of the US FTC, in particular, and seek advice and guidance from them. There is a strong parallel between CARICOM countries and some of the more developed countries in East Africa. And, while they experience all the restraints of the least developed countries, they are more likely to challenge them.

Fox and Bakhoun also pointed to external sources that distort the functioning of markets, that is, the impact on these countries of MNCs cross border anticompetitive conducts, and the lack of ability of developing countries to discipline these companies

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159 FOX & BAKHOUM, *supra* note 1, at 34 & 56.

160 FOX & BAKHOUM, *supra* note 1, at 208.

161 FOX & BAKHOUM, *supra* note 1, at 208.

once they are outside their jurisdiction. International cartels are the most harmful of these conducts, and MNCs exploit the vacuum created by lack of competition laws or feeble enforcement, to operate with impunity in these countries while avoiding jurisdictions where there is strong enforcement. Unequal trading conditions further disadvantage the local economies.<sup>162</sup> These issues were addressed in the earlier description of CARICOM's economic profile, with the accompanying increased exposure to the harmful effects of anticompetitive cross border conducts by MNCs. And, finally, they critiqued the assumption upon which the efficiency and consumer welfare goals based on achieving aggregate efficiency, and without interrogating who benefits and who loses in such a methodology. The aggregation of surplus-gains masks the unequal flow both within national economies and in the world economy towards those who are better off.

The exogenous factors leading to dysfunctional markets and outward flow of capital in these countries are systemic rather than episodic, in that they are deeply embedded in the nature and level of incorporation of developing economies into the world-economy. The persistent unequal distribution of roles in the international division of labor (IDL) in the capitalist world-economy ensure that higher value added production of goods and services are reserved largely to the North, and sustained by their leadership in technology change, thereby reinforcing the direction of flow of surplus value. The form of leading productive enterprise is constantly evolving, so that higher value added products and services are constantly changing. For instance, manufacturing migrated to the developing world in the last few decades, and it seemed that at last, there was 'development' occurring. Alas, higher value added had shifted to services to support manufacturing (software, engineering design, and IT support in general), and to the service industry as a whole.<sup>163</sup> It is always a catch up game that developing countries are engaged in, thinking that they have found the key to a leap forward, only to find that that the landing place had shifted and that they are at the same level in the value-chain. The evidence from CARICOM economies presented in this paper showed the low level of value added at which these countries are integrated into the world-economy.

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<sup>162</sup> FOX & BAKHOUM, *supra* note 1, at 213.

<sup>163</sup> There could be a change and reversal of globalization of production as a result of the severe disruption of the supply chain for component parts caused by the closures in response to COVID-19.

I draw on contributions to a debate on the relationship between equity and growth. Contributors drew on the points offered by Acemoglu and Robinson<sup>164</sup> that an essential ingredient for a well-functioning market system is a strong democracy which normally presupposes a large middle class which in turn relies on a fair amount of equity in distribution. Further, a market economy would only achieve equity-inclusive outcomes if they are introduced in an enabling environment: opportunity to everyone to do business, social benefit payment to those unable to work, or who suffer unemployment, until they find jobs, adequate education and training of people in order to prepare them for jobs, a proper health care system, a proper functioning administrative and judicial system, good infrastructure, and other public goods which are accessible for everyone, irrespective of their wealth. Most important is a well-functioning taxation system, which provides progressive taxation so that those who benefit most from the market will contribute most to government's budget: "social justice" should complement "market competition" and not replace it. And, delivery of social justice depends on a well-functioning government that creates this enabling environment in the interest of all sectors of a society.<sup>165</sup> This provides a good grid against which to measure countries' advancement towards inclusive growth.

The four categories offered by Fox and Bakhoun clearly demonstrate the shortcomings that are found in the least developed and more developed societies but these cannot be explained outside of the conditions created by the colonial experience, and resolutions of the problems have to take into account the continuing structures and processes of the IDL by which these economies are incorporated into the world-economy.

But there is much more to be explained in the pitiful state of some countries in Sub-Saharan Africa and of Haiti. One can draw more deeply on Acemoglu and Robinsons whose work traces the evolution of institutions through time and space to show that countries that evolved from extractive political and economic institutions to inclusive ones were able to achieve the equity-inclusive outcomes for the society as a whole with well-functioning market system and good democracy.

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164 DARON ACEMOGLU & JAMES A. ROBINSON, *WHY NATIONS FAIL: THE ORIGINS OF POWER, PROSPERITY AND POVERTY* (2012).

165 Taimoon Stewart, *Should Growth Policy be Blind to Equity? Should Competition Law and Policy be Blind to Equity? The Debate* (CUTS Int'l, rev. 2013), available at [https://www.academia.edu/35904296/Should\\_Growth\\_Policy\\_be\\_Blind\\_to\\_Equity\\_Should\\_Competition\\_Law\\_Policy\\_be\\_Blind\\_to\\_Equity\\_The\\_Debate](https://www.academia.edu/35904296/Should_Growth_Policy_be_Blind_to_Equity_Should_Competition_Law_Policy_be_Blind_to_Equity_The_Debate).

Extractive political institutions concentrate power in the hands of a narrow elite and place few constraints on the exercise of this power. Economic institutions are then often structured by this elite to extract resources from the rest of society”. Each depends on the other in this synergistic relationship. “Inclusive political institutions, vesting power broadly, would tend to uproot economic institutions that expropriate the resources of the many, erect entry barriers, and suppress the functioning of markets so that only a few benefit.”<sup>166</sup>

Acemoglu and Robinson posit that “Understanding how history and critical junctures shape the path of economic and political institutions enables us to have a more complete theory of the origins of difference in poverty and prosperity. In addition, it enables us to account for the lay of the land today and why, some nations make the transition to inclusive economic and political institutions while others do not.”<sup>167</sup>

These authors trace the transformation of the institutions in Sub-Saharan West Africa to cater to the Atlantic slave trade, changing occasional tribal wars and secondary outcomes of domestic slavery to commodification of human beings that required wars to specifically capture people to be sold as slaves as the primary intent. This caused institutional change as societies organized around the slave industry and warfare waged with western arms and ammunition. With the abolition of the slave trade in 1807, and the simultaneously growing interest of Europe in African commodities, the slave trade with Europe was replaced by commodity trade in palm oil and kernels, peanuts, ivory, rubber and gum Arabic. The institutional power structure created by the slave trade was sustained by now redirecting slaves to work on plantations and mines in Sub-Saharan Africa. Approximately 30 per cent of the populations of Senegal, Mali, Burkina Faso, Niger, and Chad were enslaved in 1900. In Sierra Leone, slavery was abolished in 1928. In Liberia, it is estimated that 25 percent of the labour force were coerced, living and working in conditions close to slavery in 1960.<sup>168</sup>

These exploitative and extractive conditions persisted into the 20th century and can explain the poor performance of these countries by the indicators provided in the study by Fox and Bakhoun in which all the western Sub-Saharan countries have a low human development index, authoritarian or hybrid democracies, and extremely extractive political and economic institutions, benefiting the elite of the society.

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166 DARON ACEMOGLU & JAMES A. ROBINSON, *WHY NATIONS FAIL: THE ORIGINS OF POWER, PROSPERITY AND POVERTY* 81 (2012).

167 *Id.* at 101.

168 *Id.* at 256–57.

According to Acemoglu and Robinson, “In most cases in sub-Saharan Africa ... the post-independence governments simply ... repeated and intensified the abuses of their predecessors, often severely narrowing the distribution of political power, dismantling constraints, and undermining the already meager incentives that economic institutions provide for investment and economic progress.”<sup>169</sup>

Acemoglu and Robinson showed that East Sub-Saharan Africa was not affected to any great extent by the Atlantic slave trade, but was a source of supply of slaves to the Middle East for centuries. Yet, their political institutions were not organized solely to satisfy the slave trade as it was in western Sub-Saharan Africa.<sup>170</sup> This, plus the difference in the colonial experience with British rule and the introduction of British institutions, helps to explain the better performance of east Sub-Saharan Africa. However, Botswana’s history provides an enlightening contrast to the rest of Sub-Saharan Africa. In this area of Africa, originally Bechuanaland, a nascent set of pluralistic institutions had developed by the 19th century which included political centralization and collective decision making procedures which encouraged political participation and constrained chiefs. Moreover, it is the only African country that did not engage in slave trading nor experience slavery. And, through a clever diplomatic approach to the British Government in 1895, the three leading Tswana chiefs travelled to London to meet with Chamberlain to request that Cecil Rhodes be prohibited from expanding into Bechuanaland. They succeeded, conceding only a track of land through which a railway could transit, with no stops in Bechuanaland. And, so, this country stayed insulated from the extractive political and economic institutions of colonialism, and was able to retained and developed inclusive institutions, and to transition to a successful parliamentary democracy at independence. What saved it was its poverty and apparent lack of mineral wealth, and so the British paid little attention to it. Diamonds was discovered just prior to independence and kept secret until the country was safely out of the clutches of Britain. This explains the success of Botswana in contrast to the rest of Sub-Saharan Africa.<sup>171</sup>

## VIII. RECOMMENDATIONS AND APPLICABILITY TO CARICOM

Fox and Bakhoun make very specific recommendations for drafting and enforcing competition laws for Sub Saharan countries, most of which are very relevant for

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169 *Id.* at 112.

170 *Id.* at 251.

171 *Id.* at 404–09.



CARICOM countries. To address the problems raised in the study, the authors recommended identifying what blocks the most productive channels for economic opportunity and targeting reform to remove those blockages. They advised including prohibition of state restraints in those countries that do not have this provision in their competition laws. Provisions in all competition laws in CARICOM apply to SOEs. They recommend that intra-regional border restraints should be removed. Unlike Sub-Saharan Africa, there are no land borders between the countries in this Community except Guyana and Suriname. In regard to intra-regional trade, that is being addressed through the creation of the Single Market and progress is being made in its implementation.

A major limitation to competition authorities successfully challenging restraints is the distrust people have for markets, and the need to allay this distrust through litigation and advocacy for policy reform with successes well publicized, and strong, honest and determined leadership as the face of the Commission. To this point, CARICOM's Commissions are engaging in robust public education and training of technocrats, and leadership at the Commissions have been strong. Competition authorities in CARICOM have been undertaking market studies and so have been unmasking the blocks to economic opportunity, but much more targeted research can be done. In that regard, studies are needed that interrogate market structure with a historical perspective, to reveal the barriers to entry for the vast majority of the populations, and to examine to what extent do such barriers still exist. For instance, what are the barriers to credit for the middle and lower income peoples? How do SMEs get their capital? As Fox and Bakhom asked, "What market restraints and abuses hurt the nation and its peoples the most?"<sup>172</sup> These Commissions can also benefit from the recommendation offered by the authors that commissions undertake advocacy based on groundwork, facts, analysis, and a sense of what is politically possible, and should involve scrutiny of regulations, SOEs, and national trade laws. Jamaica has had both successes and failures in litigation, but the Commission is well respected in the society. Barbados and Guyana are in their infancy with regard to litigation, but they are building strength incrementally.

Fox and Bakhom proposed that competition regimes should remove exemption of the financial sector, as banks are notorious for crowding out the underprivileged by denying access to loans, and engaging in conducts that may be collusive.<sup>173</sup> The

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<sup>172</sup> *Id.* at 207.

<sup>173</sup> *Id.* at 238–40.

only country that has such an exemption is Trinidad and Tobago, and concerns were raised in this paper since this country has the largest banks in the region which are expanding throughout the region, but the exemption poses problems for cross border investigations since the CCC needs cooperation with the TTFTC that itself has no jurisdiction over the banking sector, and the Financial Regulator has no legal basis to cooperate with the CCC. The prospects of this exemption being removed in the near future are unlikely.

Antitrust exemptions for firms in the regulated sector, according to Fox and Bakhoun, was unacceptable because this removes the best watchdog and increases the risk that regulated firms will capture the regulator.<sup>174</sup> We saw the success of the JFTC in getting the ruling from the Privy Council that the competition commission has the authority to oversee any sector or issue that can negatively impact on competition in the relevant market, including the regulated sectors. Barbados has shown the example of a very good working relationship between sector regulators and competition commission, and the competition law applies to the regulated sectors. The exemption of the regulated sectors (financial and telecommunications) in the TT law is problematic and needs to be addressed. So is the relegation of enforcement authority to the Utilities Regulator.

Similarly, Fox and Bakhoun advised against full exemption for IP monopoly holders conducts, and pointed to the robust enforcement against abuse of IP monopoly in the US and EU. For instance, the EU courts have adopted a rule of presumptive illegality for 'pay for delay' agreements which is sympathetic towards generic entry.<sup>175</sup> But, for developing countries, the more pervasive types of IP monopoly abuse can be found in licensing agreements such as tying clauses, or royalties charged beyond the life of the patent.<sup>176</sup> This issue was raised earlier in regard to CARICOM, and of the need to revise the RTC, Chapter 8, and the laws of Jamaica and TT to prohibit abuse of IP monopoly power.

There are some concrete proposals offered for drafting of legal provisions and for enforcement choices. They cautioned against use of technical and complex rules and regulations, opting rather for simple rules and standards fit for the capabilities of the commissions and the context of the markets. Fox and Bakhoun suggest specific legal provisions that are suited to the challenges faced by developing countries. For instance,

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174 *Id.* at 238.

175 *Id.* at 238–39.

176 There is literature dating back to Edith Penrose's work in 1951, *The Economics of the International Patent System*, 12 J. ECON. HIS. 289-290 (1951), and others, documenting the abuse of IP power in developing countries. See a review of this literature in Taimoon Stewart, *The Functioning of Patent Monopoly Rights in Developing Economies*, 49 SOC. & ECON. STUDIES (2000).

resale price maintenance should be presumptively illegal and hard core cartels should be per se illegal or at least presumptively illegal.<sup>177</sup> These are already in CARICOM's laws, except for the TTFTA which provides a defense for price fixing, and which needs to be changed. They advised that countries should consider adopting standards that will open markets while giving due regard to dominant firm's actions that bring new or better products to market. Fox and Bakhoun advised that developing countries should not adopt complexity-creating statutory language, as this exposes reversal of decisions of the competition authorities by judges, as was the case against Mittal in South Africa, in which the court's interpreted the statutory language as requiring a more complex enquiry (proving effects).<sup>178</sup> Given the limited technical staff in the Commission in CARICOM, it would be wise for Commissions to review their laws and simplify where language may be interpreted to require complex enquiries.

There is a general recommendation by Fox and Bakhoun that countries use a simple approach to enforcement, rather than adopt the complex standards of proof in the US or EU, particularly proving effects, which makes a great demand on the resources and expertise of these small commissions. Instead, the Commissions could take the approach that some conducts are bad enough without having to prove harm. They also cautioned against adopting the "as efficient as" standard of proof which can be quite demanding on these small commissions in Sub-Saharan Africa and CARICOM. Fox and Bakhoun cautioned that in markets with entrenched monopolies [an enduring feature of CARICOM economies], capital markets work poorly and are not likely to correct itself, and challengers to monopolists may not be equally efficient. Instead, dominant firms could be required to justify their conduct by business needs or prove that the prohibition of the conduct would make consumers worse off. Commissions should target leveraging, foreclosure, and access violations to ensure more market access to those without power to compete on the merits, rather than more freedom for firms with power.

Market definition should lean towards pro-poor outcomes, as the South African Tribunal did. There is the danger that market definition may be applied too economic and mechanistically without taking into account public interest in where the chips fall. While it may be argued that this is dangerous as it removes objectivity, and rightly so in the generality, Fox and Bakhoun argued that seeking fairness can be included in the analysis. CARICOM's enforcers may benefit by exploring outcomes from such

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<sup>177</sup> FOX & BAKHOUM, *supra* note 1, at 242.

<sup>178</sup> FOX & BAKHOUM, *supra* note 1, at 246.

an approach, given severe scarcity of human resources, and markets controlled by entrenched monopolies.

Another recommendation is to promote collective action as a way for the poor to get access to the justice system. However, given the serious backlog of cases in the courts in CARICOM, it is questionable whether the poor would have the incentive to use collective action strategies, given how disillusioned the populace is with the length of time it takes for court hearings and action. Efficiently functioning courts are needed for this recommendation to work.

It is a global problem, the fact that Judges may not be versed in competition law, but this is more in the exception that the rule in the US, the EU and other mature jurisdictions. In developing countries, and certainly in CARICOM, there is great danger in having well-reasoned recommendations based on rigorous methodology required by competition law investigations overturned or dismissed in courts simply because the judge had little understanding or ability to assess the methodology through which the Commission arrived at its conclusion. This is a big problem for CARICOM national commissions, given that all final determinations rests with Judges, and only designating dedicated judges who are properly trained could resolve the issue. And, it's a bigger problem for the TTFTC because of reliance on courts to make all determinations, not just ones challenged in Court.

In regard to international restraints, Fox and Bakhoun's recommendations for solutions are laudable but it is questionable whether some can be realistically adoptable by the international community because of the blatant self-interest embedded in competition laws and procedures in developed countries' regimes. Firms that engaged in international anticompetitive conducts that harm developing countries are from the developed countries, and mostly from the US and EU, but their laws limit their Competition Commissions to only investigating conducts that affect the domestic market and consumers, and prohibit sharing of confidential information or evidence gathered in the course of an investigation. Fox and Bakhoun suggest that the "wise international regime would at least require nations to prohibit from doing to foreigners what they would not do to themselves": to prohibit hard core cartel activity that would harm anyone in the world, including export cartels, and offending countries should aid in discovery of evidence in their jurisdictions. This would require amending their laws to provide jurisdiction for the discovery of documents and testimony from suspects and others privy to the facts of the outbound cartels and provide for subpoena power. While this is a profound solution that would go a long way to helping developing countries counter harm to their economies caused by foreign

firms, it is highly unlikely to happen. Developed countries have so far not given an inch to developing countries in terms of taking responsibility for the actions of their firms that harm anyone but their own consumers and own economy. And, they are unmoved by the challenges faced by developing countries in investigating the firms from developed economies. As the authors themselves stated, developing countries want development, and developed countries want competitiveness in the world and global economic hegemony.<sup>179</sup>

Fox and Bakhoun recommended that developing countries have extraterritorial jurisdiction in their laws. The laws in CARICOM do not explicitly authorize extraterritoriality. Rather, the foreign firms have to have a presence in the domestic economy. But, this is an impotent power. The authors did recognize that loss of access to the large markets of the US and EU is persuasive for foreign firms to subject themselves to these jurisdiction. By contrast, the markets in Sub Saharan Africa and CARICOM are miniscule, and power asymmetry limits these competition authorities to exercise extraterritoriality in any case. This power asymmetry even impacts on their ability to investigate powerful MNCs operating within the economies, given the importance of the sectors in which they operate for generating export earnings and the reluctance on the part of the government to challenge these firms. Power asymmetry is clearly visible from the fact that the annual income of these MNCs far exceed the annual GDP of these countries.

Finally, Fox and Bakhoun advised competition authorities in developing countries to question western standards and to consider sympathetically standards that will open markets while giving due regard to dominant firms' acts that bring new or better products to markets. But, the "good work" being done by the ICN and OECD in bringing greater convergence to laws across all countries contradicts this effort. A survey done by the ICN in 2009 showed that 71 % of competition authorities in developing countries are actively working towards applying ICN recommended practices, and 96 % of commissions use ICN work products and materials. It is well known that western standards and practices overwhelmingly influence the work in the ICN. Therefore, the ICN, is, by subtle means, achieving convergence based on developed countries' standards. There are trade-offs. There is much merit from learning from the work of the ICN. But, there is the danger that developing countries commissions may not interrogate the materials sufficiently in the context of their own circumstances and tailor them to their specific needs.

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<sup>179</sup> FOX & BAKHOUM, *supra* note 1, at 208.

This concern is supported by Fox and Bakhoum's own caution that MNCs would generally profit from common world rules and standards, and that developed countries are seeking convergence because divergence harm their firms by increasing cost of doing business. By contrast, developing countries have little to gain from a single approach to competition law and enforcement. It is the *modus operandi* of developed countries to strategize to have their laws universalized. This is evident in the WTO agreements of 1994, for instance, in the TRIPS agreement, Customs and Trade Facilitation, TRIMS, while all the while resisting changes in areas where it does not suit their interests: agricultural subsidies, anti-dumping rules. Where they cannot achieve their objectives in the WTO, they introduce WTO plus provisions in trade agreements, and through technical assistance that serve to universalize their legal standards.

There is one issue that could be fleshed out more and which is now raised. The study linked the current problems in the Sub-Saharan countries to colonial exploitation of mineral resources at the expense of domestic production, destruction of local governing systems and social institutions, and cultural invalidation, particularly in Francophone Africa. In defining the *problematique* today and proposed solutions to make markets work, however, Fox and Bakhoum do not sufficiently weave the threads back to the origins of *problematique* created by destruction of indigenous political, economic, and social systems. The current extractive political and economic systems are deeply grounded in the colonial experience, and unless there is a very targeted program to engender transformation towards inclusive institutions in pluralistic societies, then efforts at making markets work will be just tinkering with the system and will continue to fail. In the case of the societies that were transformed to create an industry of slave capture and trade, it is not going to be possible to find a way back to inclusiveness because for centuries, they were functioning as brutal extractive societies. Ways have to be found to start a process of transformation.

But there is another factor to take into account. It is the norms, mores, practices and beliefs of a people that forge social identity and upon which institutions, political structure, and governance are built. The European system of government and their institutions emerged out of Eurocentric epistemologies and experiences, and the theories and derived policies and instruments, including institutions, are organically linked to European culture and belief systems. They make sense in that context. However, non-Eurocentric belief systems were destroyed or invalidated in the colonies and a system of government and institutions disconnected from the visions, images, and values which these societies consider to be a true picture, or meaning of the preferred future

(development) were imposed. Social beliefs of non-European peoples survive, but are not given legitimacy; rather, they are dismissed as not of the “real world” meaning, the dominating knowledge.<sup>180</sup> This invalidation of culture, beliefs, and institutions has been internalized amongst the colonized and becomes self-reinforcing of internal sources of imperialism. The result is hybrid institutions and social systems; it is no wonder that they struggle to find stability in Sub Saharan Africa (and elsewhere in the former colonized world).<sup>181</sup> Addo argued that these images and visions, as they are interwoven by values, tend to be historically-culturally specific; and they provide the rationalizing sources from which are drawn legitimacies of epistemologies of social beliefs, and from which, in turn, are derived the conferred aura of validities that methodologies claim to have, as they relate to extracted goals, deduced theories, and applied policies, established structures and semiotic indicators to construct models of different development processes.<sup>182</sup>

Culture is what defines a people, and what holds them together. This is why developed countries celebrate their heroes, teach children a history that engenders pride and identity, and value social identity and cohesion.<sup>183</sup> By destroying identity and replacing organically grown institutions and ways of governing with alien ones, the colonial powers made it much more difficult for these countries to emerge from the destruction they experienced in colonial times. There are deep cultural retentions in Africa, and social movements aimed at renewal and regeneration of indigenous culture. There still exist functional tribal community leadership. Could an examination of the beliefs and cultural norms underlying community respect for such leadership, and where such leadership is exercised in the interest of the people, rather than in power and wealth grab, be a basis for engendering the needed change in dysfunctional political leadership? The Caribbean peoples face a more difficult problem, with cultures of ancestors destroyed, and Eurocentric values and culture dominating. But, there

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180 James Gathii reinforces this point by interrogating the Eurocentric dominating knowledge from which international law was spawned and imposed upon developing countries, and the continuation of control by the legal fraternity of the developed world, with only marginal involvement of developing countries lawyers, even though expertise exist. Further, case law used in the developing world are largely from Eurocentric courts. Yet, there is a growing volume of case law in the developing world that can be drawn upon. James Thuo Gathii, *The Promise of International Law: A Third World View*, GROTIUS LECTURE PRESENTED AT THE 2020 VIRTUAL ANNUAL MEETING OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW ON JUNE 25, 2020, at 3–5 (July 2020).

181 HERB ADDO, *EUROCENTRICITY: A CRITICAL METHODOLOGICAL TREATISE ON DEVELOPMENTALISM* (St. Augustine: Institute of International Relations, UWI, 1989).

182 *Id.*

183 And, peoples in the colonies learned the stories of heroes from the mother country.

is also the unique opportunity of a new organic form emerging from the blending of cultures and beliefs. An opportunity, yes, but will it be allowed to take seed? The region faces too many challenges and can hardly come up for air before being hit by another disaster.



## APPENDIX 1

*Capital Investment Rooted in Privilege and Power  
in Colonial Times: The Making of Two of the Biggest  
Conglomerates in CARICOM*

Where did the seed capital come from that built the empire of ANSA McAL and the Massy Group? According to Gerald Besson, historian, there were different categories of Whites in Trinidad in colonial times: the British administrative class; the French Creole, descendants of the French planters who migrated from Martinique and Guadeloupe to Trinidad at the time of the French Revolution; the English Planters; and the merchant class. He describes the last as dependent on brains energy and capital and were shrewd, upright and honest. He provides several family names of that mercantile white class whose descendants are easily recognizable in Trinidad today, among them Alston, Bryden, and McEneaney.<sup>184</sup>

The original company was Alston, set up in 1881 to buy and export cocoa. It expanded into saw mill and lumber department. Its shipping business originates in 1914, when it expanded its business to ship chandlery, cargo handling and being an agent for shipping lines. By 1921, the company imported English, French, American, and Indian food stuffs (to cater to the large East Indian population brought as Indentured labourers). It exported cocoa, sugar, coffee, coconuts and all kinds of local and Venezuelan produce. In 1936 it invested in Trinidad Clay Products limited, which produced mainly bricks for construction and is today a multimillion dollar enterprise. In 1959 it expanded to Barbados. And, in 1963, a year after Trinidad and Tobago's independence, it expanded into insurance to become one of the biggest insurance providers in the country. And, in 1969, it merged with Charles McEneaney and Co. Ltd., started in 1922, dealer in motor vehicles, also with subsidiary in Barbados, and consolidating with Stokes and Bynoe, founded in 1898 in Barbados. A further consolidation by purchase of A S Bryden and Sons Ltd, another colonial import and distribution firm, which is now a self-proclaimed major force in the distribution industry offering over 450 brands, according to its website. Meanwhile, Alstons set up the Caribbean Development Co. Ltd. in 1950 and started producing beer. Note that

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184 Gerard A. Besson, THE CARIBBEAN HISTORY ARCHIVES (By Paria Publishing Co. Ltd), <http://caribbeanhistoryarchives.blogspot.com/>.

all this development took place prior to independence and all seed capital came from the white mercantile class in Trinidad and Tobago. Much more can be traced, but the point is made. McEneaney and Alstons merged in 1975, forming McEneaney Alstons Ltd. and rapidly expanded in other sectors, spurred on by the oil boom and wealth liquidity in Trinidad and Tobago.

The drastic fall in the price of oil in the early 1980s led to severe economic contraction in Trinidad and Tobago that brought the merged company to its knees with share prices dropping drastically. Interestingly, this opened a window for the entry of a player who was a self-made entrepreneur, Anthony Sabga, with no seed capital rooted in colonial power and wealth, a Christian Syrian immigrant whose family fled Syria in the 1920s to escape religious persecution. Sabga started in business as a boy in 1946 and through sheer will power, perseverance, determination to succeed, built an import and retail business from nothing, to become the major retailer of appliances in the country, and who expanded into cars, printing presses, and even began local production of appliances with license from manufacturers when the government blocked imports in order to stimulate import substitution production. When McEneaney Alstons was in deep trouble in 1986, Sabga stepped in and bought the company for TT\$40 million in cash. We see here both the story of inherited wealth and first mover advantage of powerful companies in the region. But, we also see a rare case of entrepreneurial development through taking advantage of opportunities created by gaps left by the big firms: they did not cater sufficiently to the middle to lower income groups, and Sabga offered clever deals, and credit, advertising to target this group.

A similar exercise can be done by tracing the Massy Group's origin and expansion. Originating in the 1920s, the amalgamation of two firms in 1932, Neal Engineering and Massy Ltd., it specialized in machinery (tractors, cranes, compressors) and engineering services, including electrical. In the 1970s, the company expanded into IT and communications, setting up Complete Computer Systems. Firms were set up or acquired in Guyana, Jamaica, Antigua, Grenada, and Barbados over the years, and product range expanded to food processing, Supermarkets, copying services, office services, pharmaceuticals, consumer goods for wholesale and retail. In 1990, it acquired The Geddes Grant Group, which was originally established in 1901, and became the largest agents for manufactured goods, distributing to general merchants in the CARICOM region, with subsidiaries in Guyana, Barbados, Grenada, and St. Vincent and the Grenadines, and supplying supermarkets, groceries, pharmacies, hospitals, variety stores, wholesale and hardware stores, agricultural shops, hotels,

restaurants, and duty free outlets. In 2008, it acquired Barbados Shipping and Trading Company, completing upstream vertically integration. The company has 130 years of experience in General Insurance offered in 14 territories.

There are examples of break-out entrepreneurial successes by non-Whites. Syrians, Portuguese-Madeirans relied on their cultural knowledge and values to carve out spaces for themselves. These individuals took advantage of gaps in the supply chain established by the major import/distribution firms. Anthony Sabga is an example. Lower income groups did not have the savings to purchase non-essential goods such as furniture and appliances, and textiles for drapery and clothing. The Syrians filled that gap, by offering credit. They went from door to door in the early days selling cloth. Their cultural knowledge of textiles date back to the 2<sup>nd</sup>. Century BC from being part of trade on the Silk Route. These peddlers offered credit to the poor, unheard of before. And the poor used their pooled resources referred to earlier, to purchase such goods. Syrians now dominate the textile import and retail trade in CARICOM. Note that they were not part of the enslaved or indentured population, having arrived in Trinidad in the 1920's fleeing religious persecution in Syria and Lebanon.

But there are also successes among descendants of indentured laborers. The Portuguese-Madeirans produced wine for sale, again, skills deeply embedded in cultural knowledge. Some of these entrepreneurs were able to build large businesses, for instance, S. M. Jaleel, the largest soft drink producer in CARICOM. This endeavor started out as a cottage industry, with an individual Indo-Trinidadian making the drink in his house and peddling bottles in his neighborhood on his bicycle. It is interesting to note that windows of opportunities for entrepreneurial entry emerge in specific conditions at a particular time and place, and dependent on structure of market and barriers to economic and social mobility. The ability to use those opportunities depend on cultural values of saving and willingness to delay gratification, and drawing upon cultural knowledge.<sup>185</sup>

Interestingly, some wealth changed hands in Jamaica when wealthy whites and Chinese fled the island in the face of the threat of socialism posed by the Manley government in the 1970s and black families were able to make inroads into the business sector, either by buying them out cheaply, or filling the vacuum left by their migration. A similar flight of capitalists took place in Trinidad and Tobago, scared by the Black Power Revolution in 1970. The Chinese elites in particular fled to Canada

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185 See *ENTREPRENEURSHIP IN THE CARIBBEAN: CULTURE, STRUCTURE, CONJUNCTURE* (Selwyn Ryan & Taimoon Stewart eds., 1994).

and whites to Florida and Barbados. But, the economic boom that followed just two years later with the rise in the price of oil stemmed the outflow and business boomed for another decade.