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ANTITRUST LAW IN JAMAICA: THE FAIR COMPETITION ACT OF 1993

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I. INTRODUCTION

Jamaica's Fair Competition Act of 1993 ("the Act") is arguably the most important of Jamaica's commercial law reforms in the last twenty years.[1] No other legislation is as likely to significantly affect how business is conducted in Jamaica.[2] The Act's impact is most notable because, in addition to introducing a new regulatory agency called the Fair Trading Commission,[3] the Act has made fundamental changes in antitrust and consumer protection laws.[4] The Act is not merely commercial law reform—it is commercial law revolution.

Because Jamaica has a long tradition of a state-controlled economy, the Act's antitrust reforms are considered radical. The Act introduces Jamaica to antitrust concepts that evolved in the United

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1. Other important changes in Jamaica's commercial law are taking place. These changes primarily introduce *de novo* regulation of banking, finance and securities.

2. No item of post-World War II commercial legislation, except perhaps Jamaica's Rent Restriction Act, will have the same economic impact. There are some who will argue, of course, that rent restriction legislation in general, and Jamaica's in particular, has had a negative influence on economic development. None can argue, however, whether for good or evil, that its impact has not been significant.

3. *See infra* part III.B.

4. This discussion will focus only on antitrust regulation with some passing reference to market regulation. The legal reforms in consumer protection, although radical, are not considered controversial. Furthermore, although the Fair Trading Commission's structure and function will be controversial, the Act's antitrust law will take center stage in the political debate.

States over the last 100 years. The antitrust concepts that are radically changing Jamaica's business patterns are very familiar to United States businesses. This discussion will review and compare aspects of United States antitrust law and show how they have been replicated in the Act.[5]

II. THE EVOLUTION OF JAMAICA'S FAIR COMPETITION ACT OF 1993

A. Historical Origins

Jamaica's earliest public policy toward competition promoted competition as an essential part of a modern, market-driven economy. The *Green Paper*[6] on competition reform expressed the importance of a market-driven economy:

> The Government of Jamaica had several times in the past and recently in various fora, articulated its policy objectives to foster, create and enhance an institutional framework which seeks to transform the country to a market driven export-led economy. . . . Competition legislation is central to those policy initiatives and in the promotion of competition policies.[7]

This passage illustrates that Jamaica's competition policy had in the past received nothing more than rhetorical support. Except for advocating antitrust legislation that resembles the United States' approach, Jamaica had not legislatively enacted any antitrust laws.[8]

In the early 1990s, the Jamaican government prepared the *Green Paper* to begin a public discussion of the proposed changes the government wished to see codified in a new fair competition law. The *Green Paper*'s antitrust philosophy reflected a strong United States influence because it was prepared with the assistance of an American consultant. Therefore, Jamaica's newest antitrust laws contain antitrust concepts analogous to laws developed and refined in the United States.[9]

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5. When comparing the Act's antitrust provisions to United States law, this Article refers only to federal antitrust law.

6. GOVERNMENT OF JAMAICA, GREEN PAPER ON THE PROPOSALS FOR A "COMPETITION ACT," (April 9, 1991) (published in Parliament).

7. *Id.*

8. The *Green Paper* included "a basic outline of the legislation." This outline, however, was merely a body of proposals designed to promote discussion and comment. *See generally* DERRICK MCKOY ET AL., THE PROPOSED COMPETITION ACT: AN ANALYSIS OF THE GREEN PAPER & APPENDIX (1991) (summarizing and appraising the need for legislation).

9. Although United States law and policy were the Act's foundation, the Act is not a mirror image of United States law. In fact, the Act is a hybrid of Canadian, English and New Zealand legislation. *See generally id.*

Critics alleged that a new fair competition law was unnecessary because Jamaica had not experienced the fair competition problems that antitrust laws aim to rectify. Admittedly, Jamaica's business experience did not contribute to the Act's antitrust provisions in the same way that United States antitrust law is a product of the American business experience and economy. In fact, the very term "antitrust" is a unique product of United States history. A legal fiction called a "trust" was used by Americans in the latter part of the nineteenth century to gain monopolist control of several industries and, according to the Sherman Act of 1890,[10] restrain trade. Even though the problem of the "trust" was unique to American history, Jamaica's legislature nevertheless passed legislation in 1993 to create an antitrust law. The law was titled the Fair Competition Act of 1993 ("the Act").[11]

Although the Act's provisions are not reflective of Jamaica's economic history, the Act illustrates a desire to make a radical break from the past and to make Jamaica's economy competitive in the twenty-first century marketplace. Therefore, the Act is a deliberate attempt to engineer Jamaica's passage into a market driven economy rather than to ameliorate deficiencies in Jamaican law.

The Act's purpose, like the Sherman Act, is to encourage competition. Traditional economic theory states that competition keeps private markets working in socially desirable ways. A competitive system allows easy entry and withdrawal from the marketplace, encourages the efficient allocation of resources, and stimulates product innovation. Therefore, the Act describes its purpose as providing "for the maintenance and encouragement of competition in the conduct of trade, business and in the supply of services in Jamaica with a view to providing consumers with competitive prices and product choices."[12]

This purpose reflects the influence of the Sherman Act as interpreted by United States Courts. For example, in *Northern Pacific Railway Company v. United States*,[13] Justice Hugo Black said:

> The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, highest

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10. Sherman Antitrust Act, ch. 647, §§ 1-8, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1-7 (1988)).

11. JAMAICA ACTS, Fair Competition Act (Act 9 of 1993) [hereinafter Fair Competition Act].

12. *Id.* preamb.

13. 356 U.S. 1 (1958).

> quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic, political and social institutions.[14]

Because the Act is modeled after United States law, the similarity between the Act's self-declared purpose and the court-declared purpose of the Sherman Act is understandable.

B. Legislative Origins

Conceptualizing and articulating an antitrust policy is one thing, but reducing it to legislation can be something else. The regular legislative process in the Commonwealth Caribbean, and certainly in Jamaica, can be characterized as a black box. One knows what goes in, but one is never sure about what will come out.

In the Commonwealth Caribbean, new legislation is often inspired by successful legislation from abroad. The Commonwealth Caribbean has developed a tradition of using expert translators, but does not have a tradition of electing expert, or even capable, legislators. The expert translators' ignorance of the legislative process and tendency to import provisions from other statutes often produces strange results.

The Act is no exception. When Jamaica's legislature imported foreign antitrust statutes into the Act, the legislature inadvertently codified some inarticulate language that had lost much of its substantive meaning in the translation.

For example, the Act states that no person shall conspire, combine or agree with another person to *unduly* limit the facilities for transportation, production or manufacture of goods or services.[15] The Act further states that no person shall *unduly* prevent, limit or lessen the manufacture of any goods, *unduly* lessen competition in the production, manufacture or supply of any goods, or *unduly* restrain or injure competition.[16] The question then becomes what "unduly" means in this context. Unfortunately, neither the legislation nor the legislative history offers a definition. It seems that "unduly" is derived from the Canadian legislation imported into the Act, but it is unclear to Jamaicans what the Canadians meant. "Unduly" probably was a compromise appeasing some special interest in Canada, yet it nevertheless comforted someone in the Office of the Parliamentary Counsel of Jamaica to copy it. The point is that literal

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14. *Id.* at 4.
15. Fair Competition Act, *supra* note 11, § 35(a).
16. *Id.* §§ 35(b)-(d).

translation of foreign legislation has compromised the effectiveness of the Act.

Translation problems are not the only difficulties faced when importing statutes. Another problem is the applicability of a foreign solution to a local problem. For example, the Act codifies a threshold requirement for justiciability which functions somewhat like the United States Commerce Clause. In the United States, federal legislation regulating business activity must affect interstate commerce in order to satisfy the Commerce Clause.[17] If the activity does not affect interstate commerce, then the activity cannot be regulated by Congress. Jamaica has no Commerce Clause but must satisfy another criterion. Under the Act, anticompetitive activities can be regulated if they "affect competition in a market." The debate, therefore, focuses on a definition of "market" that is largely influenced by New Zealand law.[18] Whether Jamaica will benefit from New Zealand's idea of a market, or from the United States' idea that only certain anticompetitive activities should be regulated, is uncertain.

III. COMPARING JAMAICA'S FAIR COMPETITION ACT TO UNITED STATES ANTITRUST LAW

Although there are many similarities between United States law and the Act, the Act differs by focusing on behavior rather than structure. The Act, like the Clayton Act of 1914,[19] prohibits price discrimination, exclusive dealing, tying contracts, and other business structures that limit competition. Unlike the Clayton Act, the Act does not prohibit the creation of monopolies if the monopolies have not actually injured competition. Thus, although the Act generally follows United States antitrust law that prohibits anticompetitive pricing, the Act focuses on behavior rather than structure by differing from United States law in three fundamental ways. First, the

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17. For example, *Perez v. United States*, 402 U.S. 336 (1971), illustrates the United States courts' broad interpretation of the Commerce Clause. In *Perez* the defendant was convicted of violating the "loan sharking" provisions of the Federal Consumer Credit Protection Act. It had been proven that the defendant had used extortion to collect illegal rates of interest but he challenged the constitutionality of he stature on the ground that Congress has no power to control intrastate loan sharking. The court held that extortionate credit transactions, though purely intrastate, may affect interstate commerce.

18. Following the New Zealand Commerce Act, the Fair Competition Act defines a market as follows:

> Every reference in this Act to the term "market" is a reference to a market in Jamaica for goods or services as well as other goods or services that, as a matter of fact and commercial common sense, are substitutable for them.

Fair Competition Act, *supra* note 11, § 2(3).

19. Clayton Antitrust Act, 18 U.S.C. §§ 12-27 (1988 & Supp. V 1993); *see also* United States v. Penn-Olin Chem. Co., 378 U.S. 158 (1964).

Act only regulates monopolies that abuse their market strength. Second, the Act does not prohibit mergers that can potentially establish a monopoly. Third, the Act does not address interlocking directorates that can potentially lead to monopolistic collusion. These three differences were not part of Jamaica's initial proposal but found their way into the final version of the Act because Jamaica's legislature modified foreign laws to meet local circumstances. Therefore, the question remains whether omitting the regulation of mergers and interlocking directorates was a wise decision.

The value of regulating mergers and interlocking directorates is a function of a nation's economy. Because Jamaica has a small economy, regulations necessary for a large economy may be unnecessary. Regulating mergers and interlocking directorates is a cardinal example of burdensome and unnecessary regulation in a small economy. Current academic discussions on the question of interlocking directorates in Jamaica[20] still rely on data that is almost two decades old[21] and focus on the concentration of wealth in an underdeveloped economy, rather than the use of legal structures to restrain and stifle competition.[22]

A. Comparing the Treatment of Monopolies

The Act is similar to United States antitrust laws in that the Act specifically prohibits trade restraints such as price fixing,[23] bid-rigging,[24] and conspiracies to limit production or reduce competition.[25] However, the Act and United States antitrust law differ significantly in their treatment of monopolies.

Section 2 of the Sherman Act restricts competitors from deliberately excluding competition or deliberately obtaining market power to control prices. Once competitor exclusion or price control is evidenced, the Sherman Act further requires proof of intent to destroy or limit competition to gain monopoly pricing power. The Sherman Act also prohibits an attempt or a conspiracy to monopolistically

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20. *E.g.*, Darren Skinner, *Unlocking the Interlocks: Common Law Fiduciary Duties and the Phenomenon of Interlocking Corporate Directorates in the Commonwealth Caribbean*, 3 J. TRANSNAT'L L. & POL'Y 53 (1994).

21. *E.g.*, Stanley Reid, *An Introductory Approach to the Concentration of Power in the Jamaican Corporate Economy*, in ESSAYS ON POWER AND CHANGE 15 (1977).

22. True competition, however, is not an abstraction. As Jamaica's economy redefines its niche markets, those markets will impose and promote competition in Jamaica. It is possible that opening Jamaica's markets to international trade, rather than regulating mergers, may provide the impetus for assuring competition.

23. Fair Competition Act, *supra* note 11, § 34.

24. *Id.* § 36.

25. *Id.* § 35.

price any part of interstate or foreign commerce. Therefore, the Sherman Act seeks to prohibit monopolistic *pricing* rather than the mere possession of monopoly market-power.

Unlike the Sherman Act, Jamaica's Fair Competition Act does not prohibit attempting or conspiring to monopolistically price commercial goods. The Act is only concerned with the use or abuse of market power that restrains competition and actually results in a monopolistic pricing scheme.[26] The Act prohibits companies from taking the dominant position in the market, which it defines as "such a position of economic strength as will enable [the enterprise] to operate in the market without effective constraints from its competitors or potential competitors."[27] Although the Act does not prohibit attempting or conspiring to set monopolistic prices, the Act does prohibit actual monopolistic prices. Therefore, it is likely that many monopolistic pricing abuses under the Sherman Act are also abuses of a dominant position under Jamaican law.[28]

B. Comparing Enforcement Mechanisms

United States antitrust laws are enforced by individuals, state governments and the federal government. The Federal Trade Commission and the Department of Justice enforce the federal antitrust laws. Following this example, Jamaica's Fair Competition Act can be enforced by individuals as well as the state through Jamaica's Fair Trading Commission (Commission). The Commission is the administrative agency responsible for regulating enterprises that violate the Act by abusing a dominant position in the market.[29] Upon finding a violation of the Act, the Commission may take necessary and reasonable steps to overcome the effects of the market abuse.[30] If the business enterprise fails to respond to the Commission's directions, the Commission may apply to the court for a pecuniary penalty to enforce the directions.[31] The Commission has significant investigative

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26. *See id.* § 20.

27. *Id.* § 19.

28. For examples of cases that would perhaps be actionable in Jamaica as abuses of dominant positions, see Aspen Skiing Co. v. Aspen Highland Skiing Corp., 472 U.S. 585 (1985), and Lorain Journal v. United States, 342 U.S. 143 (1951). In *Lorain*, the publisher of the Lorain Journal newspaper, in an effort to destroy a competing small radio station, refused to sell advertising to persons that patronized the radio station. The publisher's pattern of conduct was described as "bold, relentless and predatory" and a deliberate effort to discourage customers from doing business with its smaller rival.

29. Fair Competition Act, *supra* note 11, § 5(1)(d).

30. *Id.* § 21(1)(b).

31. For a discussion of the role of Jamaica's courts in interpreting antitrust laws, see *infra* part III.D.

power, including the power to subpoena information and discover documents.

In the United States, the Department of Justice can bring criminal proceedings. In Jamaica, criminal law is not used to enforce the Act but is used to protect the Commission's enforcement authority by making it a criminal offense to impede or obstruct the Commission's investigations. The Director of Public Prosecutions (Director) has the constitutional responsibility for determining whether to prosecute a case, but anyone may make a complaint before a Magistrate or Justice of the Peace.

The Jamaican government was adamant about including provisions in the Act to give individuals the right to bring a private cause of action similar to United States antitrust law. Such a policy allows an industrious applicant that has standing to initiate an action without suffering from the backlog of an overburdened or unmotivated administrative agency. The past performance of other administrative agencies in Jamaica suggests that such a right would contribute significantly to the Act's credibility. However, it is questionable whether the Act gives standing to private parties.[32]

The Jamaican government and the Commission maintain that the Act provides such standing. Admittedly, the Act contains provisions for private enforcement but the new private cause of action is vastly inferior to that enjoyed under United States antitrust law. For example, anyone who has suffered loss as a consequence of someone breaching the Act may recover the actual damages suffered. However, actual damages are not as significant a deterrent as the triple damages that may be imposed under the Sherman Act. Therefore, although the Act has created new private causes of action, the Act is not as aggressive as United States antitrust laws.

C. Comparing Damages Available for Antitrust Violations

United States antitrust laws recognize four separate types of legal sanctions: criminal fines and imprisonment,[33] injunctions, treble damages, and even forfeiture.[34] Similarly, the Act provides for

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32. The Director may initiate any criminal prosecution and estop any prosecution, civil or criminal, initiated by anyone else. It is difficult to conceive, however, that anyone not connected to the Commission would seek to use the criminal legal process to enforce the powers of the Commission.

33. Crimes under the Sherman Act are now felonies and individuals can be fined up to $350,000 and corporations can be fined up to $10,000,000 for each offense. Individuals can also be imprisoned for up to three years.

34. Any property owned in violation of Section 1 of the Sherman Act, which is being transported from one state to another, is subject to seizure and forfeiture to the United States. It is understood that this remedy is rarely used.

enforcement via pecuniary, injunctive, and compensatory damages.[35] The Act does not permit criminal fines or imprisonment to enforce the consumer-protection and antitrust laws, except to ensure the efficient operation of the Commission itself.[36]

A pecuniary penalty is new to Jamaican law. The pecuniary penalty is not a criminal fine and, thus, failure to pay the penalty does not result in a criminal record. Rather, the pecuniary penalty is a civil fine invoked by courts sitting in civil proceedings. The concept of a civil pecuniary penalty to enforce public law was unknown to Jamaican law before the Act.[37]

Precedent for the civil pecuniary penalty may be found in other Commonwealth Countries. The pecuniary penalty is a part of New Zealand's Commerce Act.[38] New Zealand's pecuniary penalty was based on Australia's Trade Practices Act that was passed in 1974.[39]

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35. Fair Competition Act, *supra* note 11, §§ 46-50.

36. The Act supports the Fair Trading Commission's activities with two degrees of punishment. The most severe punishment may involve, on conviction before the Supreme Court, imprisonment for up to five years, or a fine, or both. The less severe punishment may involve, on conviction before a Resident Magistrate, imprisonment for up to two years, or a fine, or both. The more severe penalty is reserved for those who impede, obstruct or mislead the Commission or its authorized officers. The less severe penalty is applied to those who fail to comply with a requirement or to appear before the Commission when summoned to do so. *Id.* Jamaican law does not permit the plea of *nolo contendere* to a criminal charge, a device often used to achieve criminal convictions in antitrust matters without acknowledging liability for subsequent civil actions. Therefore, a guilty plea in Jamaica may be used in some cases as proof of liability in subsequent civil actions arising out of the same set of circumstances. Conversely, an unsuccessful "not guilty" plea will not relieve a plaintiff's burden of proof in subsequent civil proceedings arising out of the same circumstances. The allocation of the burden of proof in civil proceedings that *follow* an unsuccessful antecedent criminal defense is the same for an unsuccessful antecedent *civil* defense.

37. The closest concept to a civil pecuniary penalty is in a *criminal* provision that allows the presiding magistrate to impose a fine, upon request from the Commissioner of Customs, for certain breaches of Jamaica's Customs Act.

38. The New Zealand Act provides:

> If the Court is satisfied on the application of the Commission that a person . . . has contravened . . . this Act . . . [t]he Court may order the person to pay to the Crown such pecuniary penalty as the Court determines to be appropriate, not exceeding $500,000 in the case of a person not being a body corporate, or $5,000,000 in the case of a body corporate, in respect of each act or omission . . . . In determining an appropriate penalty . . . , the Court shall have regard to all relevant matters, including . . .
>
> (a) The nature and extent of the act or omission;
>
> (b) The nature and extent of any loss or damage suffered by any person as a result of the act or omission;
>
> (c) The circumstances in which the act or omission took place;
>
> (d) Whether or not the person has previously been found by the Court in proceedings under this Part of this Act to have engaged in any similar conduct.

Commerce Act 1986 of New Zealand § 80(1)-(2).

39. The Australian Act provides:

> If the Court is satisfied that a person—

Thus, even the most cursory review of the Act's enforcement provisions clearly lacks a connection to Jamaica's history. Section 46 of the Act provides that if the court is satisfied by a Commission application stating that any person has violated the Act or has failed to comply with any directions of the Commission,[40] the Court may exercise any of the Section 47 powers. These powers are strikingly similar to the provisions incorporated from New Zealand and Australian laws.[41]

Unlike New Zealand, Australia does not restrict its Trade Practices Commission to simply imposing a pecuniary penalty for violating antitrust laws. Jamaica has followed the New Zealand example of restricting the Commission's authority to imposing a mere pecuniary penalty for violating the Act. Some critics claim that by following New Zealand, rather than Australia, Jamaica has missed a unique opportunity to introduce more aggressive private enforcement into its antitrust laws.

Although the damages available under the Act are clearly influenced by Australian and New Zealand law, the actual implementation of the Act has made some illogical departures. In Jamaica, the pecuniary penalty can be applied only if provisions of the Act are actually contravened or if one fails to comply with a direction of the Commission. Jamaica's pecuniary penalty is not available as a remedy in cases involving attempts to contravene, or aiding, abetting,

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> (a) has contravened a provision of Part IV; . . . [t]he Court may order the person to pay to the Commonwealth such pecuniary penalty (not exceeding $50,000 in the case of a person not being a body corporate, or $250,000 in the case of a body corporate, in respect of each act or omission by the person to which this section applies) as the Court determines to be appropriate having regard to all relevant matters, including the nature and extent of the act or omission and of any loss or damage suffered as a result of the act or omission, the circumstances in which the act or omission took place and whether the person has previously been found by the Court in proceedings under this part to have engaged in a similar conduct.

Trade Practices Act 1974 of Australia § 76(1).

40. The most important of which would be the regulatory power the Commission may exercise under Section 21 when it finds that an enterprise has abused its dominance. *See* Fair Competition Act, *supra* note 11, § 21.

41. The Act provides that:

> the Court may . . . order the person to pay to the Crown such pecuniary penalty not exceeding 1 million dollars in the case of an individual and not exceeding 5 million dollars in the case of a person not an individual . . . [or] grant an injunction restraining the offending person form engaging in [prohibited] conduct . . . . In exercising its powers under this section, the Court shall have regard to . . .
>
> (a) The nature and extent of the default;
>
> (b) The nature and extent of any loss suffered by any person as a result of the default;
>
> (c) The circumstances of the default;
>
> (d) any previous determinations against the offending person.

Fair Competition Act, *supra* note 11, § 47(1)-(2).

counseling or procuring to contravene the Act. Oddly enough, one may recover damages for loss caused by contravention of provisions of the Act or by attempting to contravene, or aiding, abetting, counseling, or procuring to contravene the Act.[42] There is no good reason why the Act should depart from the approach taken by Australia and New Zealand of imposing a pecuniary penalty, rather than damages, for making attempts to contravene, or the aiding, abetting, counseling or procuring the contravention of the Act. However, the broad formulation of the circumstances under which one may apply for damages under the Act may have the unintended effect of producing a further departure from United States antitrust law.

Under the *Illinois Brick*[43] doctrine developed in the United States, the courts generally restrict the recovery of damages to direct, versus indirect, purchasers. However, an *Illinois Brick* doctrine cannot develop in Jamaica because of the broad formulation of the circumstances under which one may claim damages for breach of the Act.

The standard of proof for recovering the pecuniary penalty and any other damages under the Act is the standard used in civil proceedings.[44] Apparently, there is no time limitation on the Commission to apply to Jamaica's Supreme Court for the right to impose a pecuniary penalty for violating the Act. However, civil causes of action for damages under the Act must commence within three years.[45]

D. Comparing the Role of the Courts

Although the Commission can assess a pecuniary penalty, only Jamaica's courts can enforce the penalty. The Commission's initial attempts to enforce a pecuniary penalty were conducted by a motion to Jamaica's Supreme Court,[46] so one can conclude that the Supreme Court is the proper tribunal to enforce pecuniary penalties. The Act does not refer to any procedural requirements for an application to the court. Therefore, under Jamaican law, any appropriate method may be used to approach the court.[47]

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42. *Id.* § 48(1).

43. Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977).

44. Fair Competition Act, *supra* note 11, § 47 (3).

45. *Id.* § 48 (2). The words used in this subsection are not words of limitation but rather words of ennoblement: "An action . . . may be commenced at any time within three years." However, since the first subsection already gives the right of action, it would seem that the draftsman intended the second subsection to limit the right already conferred.

46. Fair Trading Comm'n v. Broadway Import/Export Co. Ltd., Suit M85 (Jamaica 1994); Fair Trading Comm'n v. C. O. Jacks and Assoc. Ltd., Suit M86 (Jamaica 1994); and Fair Trading Comm'n v. Mores Trans. Svcs. Ltd., Suit M91 (Jamaica 1994).

47. *In re* Meister, Lucius and Brunning Ltd., 31 L.T.R. 1, 59 Sol. J. 25 (Jamaica 1914), *cited with approval by* Pierre v. Mbanefo, 7 W.I.R. 433 (Jamaica 1964).

The Act does not give courts the specific power to declare that an individual or business enterprise has violated the Act. This is important, because under past legislation the power to declare a violation rested exclusively with administrative agencies. However, the courts are understood to have a common law supervisory power to ensure that all judicial, quasi-judicial and administrative agencies behave properly and act within the jurisdiction conferred. Thus, the power to declare the law is part of the inherent equitable powers of the court. Indeed, the Commission's first three applications to the Supreme Court have sought, *inter alia*, declarations that the respondents have broken the law.[48]

Like laws everywhere, Jamaica's laws must respond and adjust to changing circumstances. However, the Act is more specific than the antitrust laws that affect the United States legal system, and this rigidity restricts the Jamaican courts from defining and developing antitrust law. For example, the Sherman Act is deliberately vague. The Congress expected that the courts would draw the line between legal and illegal business conduct. The United States courts have therefore developed the principles of the test of reasonableness and *per se* illegality.[49] The test of reasonableness determines whether the challenged contracts or behavior unreasonably restrict competitive conditions. There is not much room to try to incorporate a test of reason under the Act. Jamaican businesses participate in many agreements and practices that are illegal *per se* because they blatantly lack redeeming value. Therefore, the Act would condemn these agreements and practices without further examination as to the precise harm caused or business rationale that might exist.[50] Examples of practices that are illegal *per se* include price fixing and bid rigging.[51]

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48. Fair Trading Comm'n v. Broadway Import/Export Co. Ltd., Suit M85 (Jamaica 1994); Fair Trading Comm'n v. C. O. Jacks and Assoc. Ltd., Suit M86 (Jamaica 1994); and Fair Trading Comm'n v. Mores Trans. Svcs. Ltd., Suit M91 (Jamaica 1994).

49. The rule of reason was announced in Standard Oil Co. v. United States, 221 U.S. 1 (1911). Contracts or conspiracies in restraint of trade were illegal only if they constituted *undue* or *unreasonable* restraints of trade and that only *unreasonable* attempts to monopolize were covered by the Sherman Act.

50. Fair Competition Act, *supra* note 11, §§ 17, 18, 22, 23, 27 and 28.

51. The concept of *per se illegality* simplifies proof. If an activity is illegal *per se*, authorities must demonstrate only the existence of the activity to establish proof of the violation. There is no further need to examine or establish the effects of the activity. Other agreements or practices that do not fit this predefined list of *per se illegality* in the Act are proscribed only if they have, or are likely to have, the effect of substantially decreasing competition in a market. These concepts articulated in the Act have been derived from principles first articulated by United States antitrust statutes and refined by the United States courts. In the United States, noncompete agreements or activities are illegal only if they impose an unreasonable restraint on competition, but in Jamaica noncompete agreements are illegal only if they have or are

E. Comparing Exemptions from Antitrust Regulation

United States antitrust laws recognize three major exemptions: exemptions under the *Noerr-Pennington*[52] doctrine, state action exemptions,[53] and statutory exemptions. The *Noerr-Pennington* doctrine, unique to United States law, recognizes a constitutional exception for lobbying government officials.[54] Jamaica's constitution does not provide such a right and therefore no exemption exists for lobbying.

Jamaica also does not recognize state action exemptions because Jamaica is not a federation of states but rather a "Monarchy and the Crown".[55] This formulation is unique and thus, destroys any immunity the state could enjoy except where that immunity is authorized by statute. By comparison, Australia's and New Zealand's provisions are not so extensive. The antitrust statutes in Australia[56] and New Zealand[57] bind the states provided the state is engaged in trade. Conversely, when the state is not engaged in trade the state is exempted under New Zealand and Australian law.[58] In Jamaica, the state is bound regardless of whether it is engaged in trade. This should affect many Jamaican government agencies, such as the statutory commodity boards, which not only participate in trade but also regulate the market in which they are engaged. Because the Act binds the Crown subject to contrary statutory provisions, the issue therefore becomes whether the statutes that created the government agencies are so incompatible with competition that they intend for the Crown, or the Crown's agents, to be exempt from the Act.

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likely to have the effect of substantially decreasing competition in a market. It seems that the result is the same.

52. The *Noerr-Pennington* doctrine protects legitimate efforts to influence governmental action. The doctrine derives from the United States Supreme Court's interpretation of the First Amendment to the United States Constitution. *See* Eastern R.R. President's Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961); United Mine Workers of Am. v. Pennington, 381 U.S. 657 (1965).

53. State action exemptions are also known as the *Parker v. Brown* doctrine. *See* Parker v. Brown, 317 U.S. 341 (1943). State action exemptions are still undergoing development in the United States. However, the Sherman Act seems to exempt state governments from its antitrust provisions, according to decisions like *Parker v. Brown*.

54. *See supra* note 52.

55. Fair Competition Act, *supra* note 11, § 54.

56. Trade Practices Act (Australia) § 2A.

57. Commerce Act (New Zealand) § 5.

58. *See* Thompson Publications Pty. Ltd. v. Trade Practices Comm'n, 40 F.L.R. 257 (Australia 1976):

> The plain inference to be drawn from the provisions of [section] 2A is that the prohibitions . . . do not bind the instrumentalities of agents of the Crown in the right of the Commonwealth except in so far as they carry on a business.

Jamaica does, however, recognize statutory exemptions. Similar to United States antitrust law, the Act creates statutory exemptions for combinations or activities of employees, for labor collective bargaining arrangements, for agreements relating to the use of copyright, patents and trade marks, and for international treaty obligations. However, unlike the United States, the insurance industry is not exempt.

Both the Commission and the government trade official have the authority to approve a given business activity as statutorily exempt from antitrust regulation. The Commission may authorize a non-compete agreement or permit a collusive business practice if it is satisfied that the agreement or practice is likely to promote the public welfare.[59] In addition to the Commission's exemption authority, the government trade official may also exempt any business or activity. The official's decision is subject to an affirmative resolution in Parliament, but the Act contains no similar review for the decisions of the Commission.

IV. COMMENTARY AND CONCLUSION

Antitrust law is new to Jamaica and has presented new administrative and policy challenges. Some issues are easily resolved and require only investigation, analysis, and enforcement. For example, proving whether a baker's two-pound loaf of bread sells for the same price in every shop on the island is not difficult. Likewise, proving whether a housing developer who has advertised that houses will be completed within a certain time at a certain price knew that this could not be done and was guilty of misleading advertising should not be difficult. Nevertheless, these are new problems for the Jamaican government.

Other issues are more difficult to resolve, regardless of the time or the legal and economic environment. The question of the coffee industry presents one such difficulty. Jamaican Blue Mountain coffee is considered a superior product, but its price likely reflects both its quality and its regulation by the Coffee Industry Board. Does the contribution of this industry to the national economy justify an "authorization" under the Act to enable the restrictive practices of the Coffee Industry Board to continue? What about Jamaica's national telecommunications monopoly? The abuse of dominance is clear when a value-added service provider is prevented from connecting to the national telecommunication grid, but is the abuse just as clear when the value-added provider is connected to the national

59. Fair Competition Act, *supra* note 11, § 29.

telecommunication grid at a higher fee? Does the National Water Commission abuse its monopoly power by charging a higher price to its regular customers to compensate for what it calls "social water" provided to depressed areas at no charge? All these questions, and many other questions of equal national importance, are still unanswerable due to the uncertain meaning of Jamaica's antitrust laws.

Ultimately, there are important differences between United States and Jamaican antitrust laws. However, Americans doing business in Jamaica will now experience antitrust laws similar to those in the United States. Even though there are important differences between the competition laws of the United States and Jamaica, American lawyers and people doing business in Jamaica will now experience a competition regime similar to the competition regime of the United States. There may even be circumstances where the new rules may provide an additional advantage to the American visitor: his local colleagues are likely to be no more certain of the meaning of Jamaica's Fair Competition Act than he is.