

MEMORANDUM OF DETERMINATIONS

Expropriation Claim of Joseph Companies Incorporated of Minneapolis Jamaica - Contract of Insurance No. E197

I. CLAIM

By letter dated July 17, 1996 (Annex 1), supplemented by letters dated October 16, 1996 (Annex 2), January 30, 1997 (Annex 3), and February 13, 1997 (Annex 4), Joseph Companies Incorporated of Minneapolis ("Josco" or the "Investor") filed an application under OPIC Insurance Contract No. E197 (the "OPIC Contract"), a Form 234 KGT 12-85 (Second Revised) NS equity contract, as amended (Annex 5), for compensation in the amount of U.S.\$1,494,000. The OPIC Contract covered an equity investment in the expansion of a vegetable oil processing facility in Jamaica (the "Project") owned and operated by Jamaica Soya Products Industries Limited ("JSPI"). The claim is for the expropriation of the Investor's equity interest in the Project.

In February 1996, Josco (through its legal counsel Richard Berryman) contacted OPIC regarding the occurrence of the events described in Section III below. An informal exchange of information and correspondence was maintained until July 17, 1996, when Josco filed a formal application for compensation for the expropriation of the Project. OPIC requested additional information, and, on the basis of these requests, subsequent amendments to the initial application were filed by Josco on October 16, 1996, January 30, 1997, and February 13, 1997. OPIC also conducted independent research of the facts underlying the claim through various sources, including formal and informal communications with officials of the Government of Jamaica and the U.S. Embassy in Kingston, Jamaica. In response to a formal request for information dated February 7, 1997, OPIC received written responses and comments from the Jamaican Ministry of Industry, Investment and Commerce dated May 15, 1997 and September 24, 1997, and the Jamaican Ministry of Finance dated July 10, 1997.

OPIC issued a proposed Memorandum of Determinations (the "Proposed MOD") on October 24, 1997. Josco responded to the Proposed MOD by letters, a summary response memorandum and a paragraph by paragraph analysis all dated January 21, 1998 (Annex 6). Thereafter, additional factual research was conducted, including interviews with present and former GOJ officials, and management of JSPI. OPIC received a Statutory Declaration of Lascelles A. Chin, Managing Director of JSPI, dated April 16, 1998. OPIC also received a memorandum of the Solicitor General of Jamaica dated October 8, 1998.

Based on all the information provided and certifications made by Josco (together, the "Application"), OPIC finds that the claim is valid.

II. THE INSURANCE CONTRACT

In March 1993, Josco filed a registration with OPIC for coverage of the Project. OPIC received Josco's application for insurance for the Project on October 24, 1994. On June 23, 1995, OPIC executed the OPIC Contract, which provided coverage against the risks of inconvertibility, expropriation, and political violence. The OPIC Contract covered Josco's equity in the Project, contributed in the form of reinvested retained earnings.¹

III. FACTUAL SUMMARY

In 1974, Josco (then the I.S. Joseph Company, Incorporated) entered into a joint venture agreement (the "Heads of Agreement") with Jamaican Nutrition Holdings Limited ("JNH"), a corporation wholly owned by the Government of Jamaica (the "GOJ"), to build an oilseed crushing plant and related primary oilseed refinery. Pursuant to the Heads of Agreement, JNH acquired sixty percent (60%) of the equity of the foreign enterprise, JSPI, and Josco acquired forty percent (40%) of JSPI's equity.² JSPI was created under the Heads of Agreement as a small oilseed crushing facility intended to serve principally the domestic market for soya bean meal and soya bean oil.³ The Heads of Agreement set forth the parameters of a protected environment in which JSPI could operate productively for the benefit of the Jamaican people and without being swamped by offshore competitors.

Pursuant to the Heads of Agreement, JNH, and later the Jamaica Commodity Trading Corporation Limited, the successor in interest to JNH under the Heads of Agreement ("JCTC"), tried to maintain a policy of producing all of the country's meal requirements through JSPI. It was the responsibility of JCTC to purchase sufficient quantities of soybeans for crushing by JSPI to satisfy local meal requirements. JSPI crushed the soybeans and sold the meal back to JCTC at prices and with margins based on a formula that was specified in the Heads of Agreement.⁴ JCTC then resold the product to privately-owned Jamaican animal feed manufacturers. The crude and once-refined soybean oil produced by JSPI was a byproduct of the bean crushing operations and was sold to SEPROD Limited (a Jamaican oil refinery and the principal consumer of the soya bean oil sold by JSPI) through JCTC for final refining. The animal feed manufacturers and SEPROD had no alternative but to purchase soya bean meal and oil from JSPI, as imports were monopolized by the GOJ through JCTC, and import duties were set at

¹ Although \$1,660,000 represents the contribution amount, the insured investment amount is \$1,494,000, reflecting the 10% statutory risk retention requirement.

² OPIC also provided coverage for Josco's initial investment in JSPI, which coverage has expired.

³ See Annex 2 (October letter, p. 5.) "[T]he company from its inception was designed and built as a strictly Jamaican market entity and not as an international competitor...JSPI's 300 ton per day plant was no match for the 3,000 tons per day and greater processing capacities of competitors in North and South America..."

⁴ The original formula was subsequently adjusted to reflect such factors as increased inflation and devaluation in another Heads of Agreement dated May 25, 1977 (the "Second Heads of Agreement"), a marketing agreement dated November 25, 1982 (the "Marketing Agreement"), and later, by periodic exchange of letters between the two companies.

prohibitive levels to protect local production.⁵ Section 27 of the Heads of Agreement provides that its terms shall continue in full force and effect "...so long as Josco shall maintain a capital financial interest in [J]SPI."

As part of the inducement for Josco to make its original investment (which is no longer insured by OPIC), and as a condition subsequent to the Heads of Agreement,⁶ then Minister of Industry, Commerce and Tourism, the Honorable P.J. Patterson, who is now Prime Minister of Jamaica, provided a formal letter of assurances to Josco, dated as of July 24, 1974 (the "Letter of Assurances").⁷ Although the Letter of Assurances contains no specific undertakings from the GOJ, it substantiates the intent of the parties in undertaking the venture in a manner that would ensure that JSPI would operate in a protected environment.⁸

During most of the period in which the GOJ maintained an ownership interest in JSPI (from 1974 to 1993), the combination of the GOJ import monopoly and high tariffs preserved a favorable environment for JSPI and protected the gross margins on JSPI's products. The GOJ also offered other forms of support to JSPI during the period from 1974 to 1993, including the guaranty of bank lines of credit for JSPI. JSPI remained profitable, and Josco believed that it was able to work together with the GOJ amicably to resolve problems that threatened JSPI's profitability.⁹

The process of trade liberalization in Jamaica, which had begun in 1987, was accelerated during the early 1990s. Consequently, as of December 31, 1991, all monopoly rights of JCTC were relinquished as the GOJ began plans to divest itself of numerous parastatal companies including JSPI. The privatization of JSPI was ultimately accomplished in March 1993 when the GOJ sold its majority equity interest in JSPI to Lasco Processors Limited (the "Purchaser" or "Lasco"), owned by a group of Jamaican private investors including the former chairman and other GOJ appointees on the JSPI Board of Directors. The principal terms of the sale of the GOJ's interest in JSPI were set forth in the Agreement for Sale of Shares, dated March 24, 1993, between the GOJ and Lasco (the "Share Sale Agreement"), which required that:

⁵ In 1974, the Jamaican agricultural markets were highly protected, as the GOJ maintained import monopolies and high tariffs on imports of competing products. Without this protection, JSPI would not have been able to compete with imports enjoying the benefits of significant economies of scale.

⁶ Heads of Agreement, Section 24(i), PMD, Annex 1, Tab 2.

⁷ The Letter of Assurances provides in pertinent part that "the Government of Jamaica will use its best endeavors to ensure that all facilities necessary for the viability and profitability of the venture are made available to [JSPI] on normal commercial terms in so far as they are obtainable within the capacity of the Government of Jamaica, as determined by its policies from time to time."

⁸ See Annex 2 (October letter, page 3) ("Out of an abundance of caution, Josco requested that the profit assurance mechanism and other points of agreement reached in negotiations with intermediate level Government personnel be endorsed by more senior political level officials. This was provided in the form of a letter of assurance from a senior Minister, the Honorable P.J. Patterson, then Minister of Industry, Commerce and Tourism, now Prime Minister of Jamaica.")

⁹ The adverse effects on JSPI's business from factors such as increased inflation and devaluation were addressed by the GOJ to Josco's satisfaction through adjustments of the prices on JSPI's products. A more substantial problem of alleged bribery of customs officials, which resulted in soya bean oil entering Jamaica duty free, was remedied by replacement of the management of the customs organization in Jamaica following protests by Josco to the GOJ.

[provided] the economic conditions prevailing at the time of the Agreement continue or improve throughout the ensuing four (4) year period, [Lasco] will undertake to upgrade and expand the Plant at an estimated cost of THREE MILLION EIGHT HUNDRED THOUSAND UNITED STATES DOLLARS (US\$3.8M)....¹⁰

The proposed expansion would enable JSPI to (i) produce fully refined soya bean oil, (ii) reduce its reliance on a single major oil producer customer (SEPROD), (iii) refocus the company's orientation away from meal to the more profitable oil production, and (iv) produce the higher grade (48% protein) soya bean meal demanded by certain significant customers for JSPI's soya bean meal.¹¹ Although Josco, which was not a party to the Share Sale Agreement, had no contractual obligation to invest in the Project, it nevertheless contributed its pro rata portion of the Project costs, or approximately U.S.\$1,660,000, in the form of reinvested retained earnings. This is the investment that was insured under the OPIC Contract.

In an effort to ensure the continuation of the margin and other protections provided to JSPI under the Heads of Agreement, Lasco negotiated Section 4(i) of the Share Sale Agreement, which provides that the terms and conditions of the Heads of Agreement are incorporated therein by reference. With the relinquishment of the import monopoly, and an anticipated termination of JCTC's marketing functions, it was assumed by Lasco and Josco that the GOJ would perform its obligations under the Heads of Agreement by providing support in the form of tariff protection or some other protective device. Lasco represents that its decision to acquire the shares was based on its contractual assurance of the continued effectiveness of the GOJ obligations under the Heads of Agreement, and the absence of any statement of intent made by any of the negotiating parties acting on behalf of the GOJ to change the prevailing economic environment, i.e., the existing tariff regime, to the detriment of JSPI.¹²

As part of its due diligence in committing the additional equity investment to the Project, Josco sought and claims to have received specific oral assurances from various GOJ officials regarding the continued tariff protection that JSPI's products would enjoy following privatization. According to Josco, such express assurances were provided at a meeting on August 31, 1992 with officials of the National Investment Bank of Jamaica (the "NIBJ"), a corporation wholly owned by the GOJ, which acted as the GOJ's agent in selling the Government owned shares in JSPI. Josco also represents that an official of the Ministry of Industry and Commerce (currently the Permanent Secretary in the Office of the Prime Minister), provided oral assurances to both Josco and Lasco regarding continued tariff protection. Josco represents that at no time did any representative of the GOJ disclose or indicate that there would be any impending changes in the tariff rates applicable to imported soya bean meal and soya bean oil.

¹⁰ The actual cost of construction was approximately U.S.\$4,150,067.

¹¹ The production of oil, though more profitable, was a secondary activity at JSPI where the focus was on producing soya bean meal for the animal feed industry until the new oil refinery was completed.

¹² The prospectus issued by the NIBJ to potential investors in JSPI on behalf of the GOJ did not mention a prospective liberalization of the tariff regime for soya bean products.

Full implementation of the privatization of JCTC caused drastic changes to the operations and financial condition of JSPI. As of October 1993, JCTC was no longer responsible for soya bean, soya meal or soya oil imports, having turned over all remaining commercial purchasing activities to the private sector. All purchases of beans, meal and oil were thereafter made by JSPI, the feed manufacturers, SEPROD or anyone else interested in so doing. Thus, JSPI's customers were no longer obligated to purchase from JSPI and could freely import soya bean products.¹³

Josco initially alleged that, after the privatization, the GOJ radically altered the tariff regime applicable to soya bean meal and soya bean oil imports that competed with JSPI's products. With respect to soya bean meal, competing imports were permitted to enter Jamaica under the classification "soya bean residue" with no tariff, instead of the previously used classification "soya bean meal," which carried a 35% duty.¹⁴ It may be more accurate to say that this duty-free classification apparently existed in the Jamaican tariff rates well before the privatization, but was somehow discovered and utilized by JSPI's customers after JCTC relinquished its import monopoly functions. With respect to soya bean oil, the Prime Minister exercised his discretion to reduce the duty applicable to imports of soya oil for further processing, allowing such oil to enter Jamaica with a 5% duty, or in some cases, a zero duty.

The financial condition of JSPI began to deteriorate as JSPI's sales of soya bean meal and soya bean oil both declined due to the increasing imports from producers in the United States, Trinidad and Tobago and elsewhere that were entering Jamaica with zero or low tariffs and displacing JSPI's production.¹⁵ These producers enjoyed significant economies of scale and therefore sold their products at lower prices than those JSPI could offer. These conditions ultimately forced the closure of JSPI's soya bean crushing operations in November 1995.¹⁶ JSPI continued construction of the Project through completion in January 1996, and operated the new refinery for less than a year before running out of raw materials.¹⁷ Josco has indicated that project completion was necessary because, by the time the tariff reductions were identified, contractual commitments for the Project had been made. Apparently the sale of oil from the refinery did not go as well as expected, as consumers were slow in accepting the new concept of tetra-packed (long life) oil used by JSPI.¹⁸ The refinery operations are now closed.

¹³ By mutual agreement, after privatization, the GOJ and JSPI also discontinued the marketing arrangement and various other forms of GOJ support to JSPI, such as the guaranteed lines of credit. JSPI began to market its product to its customers directly and through its majority shareholder, Lasco. Josco has not asserted that the withdrawal of this form of support by the GOJ was wrongful.

¹⁴ A report by the USDA states, "In practical effect the two commodities are interchangeable". USDA/FAS at p. 9 (1996).

¹⁵ JSPI's financial statements indicate losses as of March 1995 of JS\$9.1 million, and as of February 1996 of JS\$64 million. In contrast, the financial statements indicate profits for the prior three years as follows: year ending March 31, 1992 - JS\$21.5 million; year ending March 31, 1993 - JS\$31.9 million; and year ending March 31, 1994 - JS\$62.8 million.

¹⁶ Josco further contends that the investment it made in the Project out of JSPI's retained earnings stripped the company of working capital that could have been used once profitable operations ceased.

¹⁷ USDA/FAS at p. 6 (1997). The principal raw materials used in the refinery operations were the crude and once-refined soybean oil produced as a byproduct of the bean crushing operations, which ceased in November 1995.

¹⁸ *Id.* at p.1.

After Josco became aware of the erosion of its sales by imports entering with reduced tariffs, Josco initiated a dialogue with the GOJ beginning in August 1995, seeking the GOJ's acknowledgment of obligations with respect to JSPI.¹⁹ After an exchange of correspondence and a series of meetings, on May 21, 1996, the Prime Minister's Office wrote to JSPI informing the company of its decision to deny damages for any losses allegedly caused by its actions or inactions.²⁰ Josco asserts that this denial of responsibility for the injury caused to Josco by the tariff liberalization constituted expropriation. For this reason, Josco has identified May 21, 1996, as the date on which the expropriatory effect commenced for purposes of the OPIC Contract.

Although the GOJ has denied responsibility for the injury that Josco has allegedly suffered through the financial decline of JSPI, the GOJ believes it has attempted to address Josco's concerns. First, an Inter-Ministerial Committee was established by the Office of the Prime Minister to examine the charges of JSPI. With respect to the soya residue issue discussed below, research and testing were conducted, and, due to the marginal differences between products classified as soya meal and soya residue, approval was obtained from the Caribbean Common Market ("CARICOM") Council for Jamaica to impose a duty on soya residue.²¹ To date, no tariff has been imposed, as producers of animal/poultry feeds have objected to the adverse impact such a tariff will have on their production costs and ultimately, consumer prices for meat. In addition, in view of the loss of sales and financial difficulties experienced by JSPI, the Inter-Ministerial Committee briefed two public lending institutions in Jamaica, the NIBJ and the Export-Import Bank, to discuss possible solutions for JSPI. The GOJ has represented that the Export-Import Bank failed to approve JSPI's loan request, and an NIBJ debt-restructuring program has not been finalized. In additional discussions with the GOJ led by Lasco, JSPI's local investor, who has threatened to file suit against the GOJ for breach of contract, JSPI proposed that the GOJ finance two shipments of soya beans valued at US \$3.5 million and make an equity infusion of US \$1 million into JSPI. The GOJ did not accept either proposal. Thus, all efforts at reaching some form of settlement have been unsuccessful.

IV. DETERMINATIONS UNDER THE CONTRACT

A. *The actions taken by the Government of Jamaica with respect to Josco's insured investment in JSPI constitute total expropriation within the meaning of Section 4.01 of the Contract of Insurance.*

Four issues are presented by Section 4.01 of the Contract of Insurance, which sets forth the requirements for total expropriation coverage: (1) whether the acts were attributable to a foreign governing authority in de facto control of Old Harbour, Jamaica; (2) whether the acts constituted a violation of international law or a material breach of local law; (3) whether Josco was deprived of fundamental rights in the insured investment, and if so, whether the stated acts

¹⁹ See correspondence dating from August 1995 through present, at Annex 1, Tabs 6 to 16.

²⁰ See Annex 1, Tab 14.

²¹ However, the GOJ did obtain confirmation from the World Congress Tariff Organization that its classification of soya residue was appropriate. According to the GOJ, Jamaica would be the only CARICOM partner that imposed a tariff on soya residue.

directly caused such loss; and (4) whether the expropriatory effect has continued for the requisite six-month period.

1. The acts are attributable to a foreign governing authority, which is in de facto control of the part of the country in which the project is located.

The identity of the foreign governing authority in control of Old Harbour, Jamaica, is not in question in this case. Instead, the issue in the present case is whether the acts that are the basis of the claim were attributable to such foreign governing authority.

OPIC has determined that the expropriatory acts were attributable to the GOJ, the foreign governing authority in control of Old Harbour, Jamaica. The expropriatory action consists of a change in tariff treatment following the privatization of JSPI in violation of the GOJ's continuing contractual obligation to preserve pricing margins, coupled with the failure of the GOJ to implement alternative relief measures.²² First, the changes in the tariff treatment were authorized and implemented by the GOJ. Second, JCTC (previously JNH), a corporation wholly owned by the GOJ, was party to the Heads of Agreement and the Share Sale Agreement, and the GOJ in its sovereign capacity provided Josco with the Letter of Assurances as a condition subsequent to the Heads of Agreement. Lastly, the letter denying responsibility for any losses or damages to JSPI arising from the failure to apply, enforce or reinstate tariffs or to substitute alternative relief came from the Permanent Secretary in the Office of the Prime Minister.

2. The acts are violations of international law (without regard to the availability of local remedies) or material breaches of local law.

According to the Restatement (Third) of the Foreign Relations Law of the United States (the "Restatement of the Foreign Relations Law"), a state is responsible under international law for injury resulting from: "... (2) a repudiation or breach by the state of a contract with a national of another state (a) where the repudiation or breach is (i) discriminatory, or (ii) motivated by noncommercial considerations, and compensatory damages are not paid, . . . or (3) other arbitrary or discriminatory acts or omissions by the state that impair property or other economic interests of a national of another state".²³

(A) The GOJ violated a contractual agreement with Josco, giving rise to an obligation to compensate Josco under international law or local law.

The Heads of Agreement was entered into in 1974 between Josco and the predecessor of JCTC (JNH), a corporation wholly owned by the GOJ, and contains various obligations and undertakings of the GOJ. Although the GOJ was not a party to the Heads of Agreement, the October 9, 1998 memorandum submitted to OPIC by the Solicitor General of Jamaica acknowledges that the GOJ granted certain incentives under the Heads of Agreement that were

²² OPIC reiterates that the tariff modifications implemented by the GOJ were actions within the sphere of the GOJ's regulatory authority and, therefore, such actions alone did not constitute expropriation.

²³ Restatement (Third) of the Foreign Relations Law of the United States §712 (1987).

within its power to grant and fulfill.²⁴ The Letter of Assurances provides further support for the acknowledgement of the GOJ's express undertakings under the Heads of Agreement. Therefore, we conclude that the Heads of Agreement, together with the Letter of Assurances, creates obligations of the GOJ to Josco.

It was well understood by the parties that the 300 metric ton per day capacity soya processing plant desired by the GOJ to serve local requirements would not provide a sufficient economic base to compete in the world market. Consequently, pursuant to the Heads of Agreement, a protective environment was created for the formation and operations of JSPI. A critical component for ensuring the maintenance of this protected environment was Section 20 of the Heads of Agreement, which provided that JSPI would sell crude oil and meal in Jamaica at a price (subject to the laws of Jamaica) in accordance with a basic formula for determining pricing margins set forth in an exhibit attached thereto. The express terms of the Heads of Agreement provide that the benefits therein would continue for as long as Josco maintained its interest in JSPI.

Delivery of the Letter of Assurances was a condition subsequent under the Heads of Agreement, and, being executed by a higher government official, served as further evidence of the GOJ's awareness of, and general support for, the joint venture and the obligations incurred by the GOJ. In the Letter of Assurances, the GOJ undertook to use its best efforts to ensure that "all the facilities necessary for the viability and profitability of the venture [were] made available to [Josco] on normal commercial terms in so far as they [were] obtainable within the capacity of the [GOJ]".

For almost twenty years after the execution of the Heads of Agreement, the gross bean crushing and refining margins provided by this formula were maintained by the GOJ with numerous adjustments for fluctuations in the rate of exchange, inflation or other conditions prevailing in the market place. The pricing margins were implemented by JCTC in the ordinary course through the combination of the import monopoly, purchasing of beans for JSPI, then marketing and selling the JSPI's soya products to Jamaican consumers. Although protective tariffs were in place on soya meal and soya oil during this period, the Jamaican consumers were not free to import soya products. After the GOJ's relinquishment of the import monopoly, it was generally understood by all concerned that tariff protection would remain as the principal mechanism for ensuring protection of the margins necessary for JSPI's survival.

No document executed by Josco and the GOJ during the course of the privatization expressly or implicitly terminates the Heads of Agreement and all GOJ obligations thereunder. Outside of JCTC's marketing functions, which were terminated by mutual agreement after the privatization, the GOJ's principal obligation to preserve margin protection was never terminated. In fact, the Share Sale Agreement incorporates the terms of the Heads of Agreement by reference. In addition, Josco sought and received oral confirmation that the protections provided by the Heads of Agreement would be continued following the GOJ's divestiture of JSPI. In the

²⁴ The GOJ argues, however, that the inclusion of express provisions regarding incentives under an investment law, and the absence of provisions relating to tariff protection, leads to the conclusion that the Heads of Agreement did not contemplate undertakings with respect to tariff protections.

absence of any evidence to the contrary, the fundamental obligation of the GOJ to maintain pricing margins survived the privatization.

The obligation under the Heads of Agreement to maintain pricing margins did not specify the particular mechanism to be used by the GOJ. OPIC recognizes that, absent an explicit contractual undertaking, it would be unreasonable to require a sovereign entity to maintain a particular regulatory regime to serve the economic interests of one enterprise, particularly in the context of the global trend toward trade liberalization benefiting a broad array of consumers. Therefore, the GOJ's breach of the Heads of Agreement does not rest on the GOJ failure to alter the tariff regime, but on the failure to provide continuing support to JSPI by tariff or equivalent protections, such as subsidies, import quotas or negotiated purchase prices.

OPIC further finds that the GOJ's breach of the Heads of Agreement was motivated by noncommercial considerations. All relevant events leading up to the GOJ's breach of the Heads of Agreement, i.e., the relinquishment of the import monopoly, the privatization, and the termination of purchasing and marketing functions, were all prompted by the GOJ's trade liberalization policy and not commercial considerations. Additionally, after the privatization, the GOJ no longer maintained a commercial relationship with JSPI, and the continuing contractual obligation to provide support to JSPI under the Head of Agreement was in the GOJ's capacity as a sovereign government and not as a supplier or shareholder of JSPI.

Contrary to its undertakings, the GOJ, virtually simultaneous with its sale of shares, undertook action that undercut entirely its obligation of continuing support. While the contractual obligation could not compel the government to change its sovereign acts, it could require that the government answer in damages for its conduct. Therefore, OPIC has determined that the GOJ had a continuing contractual obligation under the Heads of Agreement to maintain a protective environment for the operations of JSPI through protective tariffs or some other mechanism. Failure to maintain such protection constituted a breach of contract and gave rise to a right to compensation. The GOJ's decision not to compensate Josco thereby constitutes a violation of international law.

B) The GOJ's misleading assurances with respect to the continuation of the existing tariff regime, or its failure to make explicit its inability to provide any assurances of continued support in response to direct inquiries by Josco before the privatization and before Josco made an additional equity investment in JSPI, constitutes a violation of international law.

According to the Restatement of the Foreign Relations Law, a government may also be liable under international law for other arbitrary or discriminatory acts or omissions by the state that impair property or other economic interests of a national of another state.²⁵ "Arbitrary economic injury" for these purposes refers to an act that is unfair and unreasonable, and inflicts serious injury to established rights of foreign nationals, though falling short of an act that would meet the more traditional standard of expropriation set forth in subsection (1) of Section 712 of

²⁵ See Restatement (Third) of Foreign Relations Law of the United States §712(3)(1987).

the Restatement of Foreign Relations Law.²⁶ The Restatement Second of Contracts further states the general contract law principle on reliance that "a promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise."²⁷

The central issue presented is whether the alleged change in tariff treatment after Josco made an additional equity investment constituted such unfair and unreasonable treatment that the exercise of the GOJ's legitimate state action, together with its failure to take remedial action, constituted a violation of international law. Josco's argument is that the GOJ failed to disclose critical information regarding prospective tariff changes or its inability to provide continuing support for JSPI through some alternative mechanisms that would have been material to Josco's decision to invest additional monies in the Project. OPIC finds this argument persuasive.

Under Section 9 of the Heads of Agreement, Josco, as the holder of the Class B shares of JSPI, had veto power over certain significant actions of the Board of Directors and shareholders of JSPI, including the non-distribution of profits and acquisition of substantial assets, if such acquisition required further investment on the part of Josco. Josco thereby contends that it had the power to block the privatization, since the Project was a condition to the GOJ's sale of shares to Lasco under the Share Sale Agreement, and Josco's willingness to apply retained earnings to the Project was critical to Lasco's purchase decision. Josco further contends that it had the power to block the privatization, since no private investor would purchase the GOJ shares in a company with a dissenting minority shareholder.

As noted above, both Josco and Lasco (whose shareholders previously served as the GOJ's appointees on the JSPI board of directors) fully understood that JSPI could not compete in the international marketplace, and would not survive, without the continuing protections of the GOJ pursuant to the Heads of Agreement. At the time of the privatization, JCTC had already relinquished its import monopoly, and the obvious mechanism to be used to maintain the protected economic environment would be the protective tariffs, which were already in place. Faced with public knowledge of the broader trade liberalization plans being implemented by the GOJ, and the potential for decreasing tariffs, on several occasions Josco and Lasco sought and received explicit oral assurances from various officials of the GOJ that the existing tariff regime would be maintained. Josco asserts that the clarifications and assurances it received from the GOJ representatives were, at best, misleading and that it reasonably relied, to its detriment, on this materially misleading information in not exercising its veto power to block the privatization.

OPIC has determined that Josco's reliance on the GOJ assurances was reasonable. Josco has represented that oral assurances were provided by the President of the NIBJ, the entity charged with selling the GOJ's shares in JSPI, and by an official of the Ministry of Industry and Commerce. In the context of its positive history in resolving disputes with the

²⁶ See *Id.* at §712, *Reporters' Note 8*; See also, *Id.* At §712, *Comment i* ("An alien enterprise that has been lawfully established is protected by international law against changes in the rules governing its operations that are discriminatory... or are so completely without basis as to be arbitrary in the international sense, i.e., unfair.")

²⁷ See Restatement (Second) of the Law of Contracts 2d §90 (1981).

GOJ and its positive overall investment history in Jamaica. Josco was comfortable in relying on the oral assurances given by the governmental entities, which had been its partners for nearly twenty years. Josco was not a new investor in Jamaica and had established a basis for relying on oral assurances provided to it. A basic unfairness was worked on Josco by the GOJ's misleading assurances with respect to the continuation of the existing tariff regime.

OPIC acknowledges that, according to some reports, trade liberalization had been occurring in Jamaica since the 1980s, and significant changes in the tariff regime as applied to the vegetable oil market could be seen by 1991. OPIC further acknowledges the greater social good effected by the GOJ in not implementing tariffs on soya residue, as higher tariffs would affect the price of poultry feed and would likely ultimately be reflected in higher priced poultry being sold to the Jamaican consumer. Thus, the merits of the specific GOJ policy and related actions or inaction that caused injury to Josco are not in question. Rather it was the misleading failure of the GOJ in response to direct questions by Josco to disclose the prospective tariff changes to Josco, or at least to make explicit the GOJ's inability to provide any assurances of continued support, that constituted unfair and unreasonable governmental action. Josco reasonably relied on this governmental action to its detriment in not exercising rights it had to block the privatization.

(C) Summary.

OPIC finds that the GOJ breached a contractual obligation to maintain margin protection support through the existing tariff regime or some alternative mechanism, and the failure to provide adequate compensation for such breach constitutes a violation of international law. OPIC further finds that the GOJ's misleading assurances with respect to continuation of the existing tariff regime, or the GOJ's failure to at least make explicit its inability to provide any assurances of continued support in response to direct inquiries by Josco before the privatization and before Josco made an additional equity investment in JSPI, was fundamentally unfair action that constituted an independent violation of international law.

3. The acts deprived the Investor of fundamental rights in the insured investment.

A determination under Section 4.01(c) of the OPIC Contract raises two issues: (1) the issue of causation; and (2) whether Josco was substantially deprived of fundamental rights in the Project.

(A) The GOJ's failure to disclose prospective changes in the tariff treatment was the cause of Josco's loss.

To establish direct causation, Josco must demonstrate that the loss was not the result of exogenous factors, such as the failure to derive benefits from the marketplace. Relevant questions in establishing causation are (i) whether JSPI was financially sound prior to the government action, and (ii) whether the loss would have occurred even in the absence of the government action.

The financial statements of JSPI indicate that the company was financially sound prior to the privatization and through March 31, 1994.²⁸ Although Josco does not have direct access to precise market information during the period of the GOJ's ownership of JSPI, during which all of JSPI's product was purchased by JCTC for resale, it appears that sales of both soya bean meal and soya bean oil by JSPI were steady for most years prior to the privatization. In the period of 1995-1996, sales began to decline, leading ultimately to plant closure in November 1995.

There are indications that during the later years of GOJ ownership in JSPI some of JSPI's major customers expressed dissatisfaction with the pricing, reliability and quality of its products and threatened to use imports exclusively.²⁹ However, it was only with the removal of import restrictions, the use of the soya residue tariff classification, lower tariffs on soya oil and the increased availability of foreign exchange, that these customers increasingly found it feasible to import soya bean products.³⁰ There is no evidence that these customer dissatisfaction issues would have caused the closure of the plant. Moreover, OPIC must focus on the insured investment in this case, i.e., the expansion of the JSPI plant.

Josco has represented that it would not have undertaken the additional equity investment in the Project without the express oral assurances provided by the GOJ. Thus, not only would the loss not have occurred if the GOJ assurances had been realized, but the investment would not have been made in the absence of the GOJ assurances. It is the misleading nature of these assurances that makes the GOJ action unfair. OPIC therefore determines that the GOJ's failure to maintain protective tariffs or some alternative mechanism to protect JSPI after making alleged oral assurances to the contrary was the direct cause of the loss of the insured investment.

(B) Josco was deprived of fundamental rights in the insured investment.

Not all of the investor's rights with respect to the insured investment need be affected for an Investor to be fundamentally deprived of the benefits of its investment. In determining whether total expropriation has occurred, OPIC will examine the significance of the rights in question in the context of the overall investment arrangement.

In the present case, shortly after completing construction of the plant expansion, the entire plant closed due to lack of working capital. The principal reason for this working capital shortage was a significant decline in revenues following the influx of imports eroding JSPI's customer base, entering Jamaica at low or zero duties.

Josco (together with its equity partner, Lasco) retains full control of the assets of the plant, including the assets constructed as part of the Project. These assets remain dormant because, without protective tariffs or equivalent protections, such as subsidies, import quotas or negotiated purchase prices, JSPI's products are not competitive. In addition, the destructive effects of import competition have totally depleted JSPI's sources of working capital necessary for operation. Based on a balance sheet prepared for JSPI as of March 31, 1996, the value of

²⁸ Annex 2, Tab 7.

²⁹ See e.g., USDA/FAS at p. 7 (1996).

³⁰ *Id.* at p. 4.

Josco's total investment in JSPI was J\$139 million (approx. US\$3.4 million).³¹ JSPI estimates that it would need at least J\$325 million (approx. US\$8.45 million) during the first 24 months of a start up of its operations.³² Moreover, JSPI is currently in debt to the National Commercial Bank and other creditors in the amount of J\$558 million (approx. US\$14.5 million). Although Josco has continually sought remedial action from the GOJ over the past several years, no relief has been granted to date.

For these reasons, OPIC has determined that Josco has been deprived of fundamental rights in the insured investment.

4. The violations of law are not remedied and the expropriatory effect continues for six months.

Although Josco and JSPI have maintained a dialogue with the GOJ since May 21, 1996, the date on which Josco maintains the alleged expropriatory action commenced, the GOJ has not taken any action that would provide relief or compensation. During this time, Josco has not obtained any compensation from other sources. Therefore, OPIC finds that the alleged violations of law have not been remedied and the alleged expropriatory effect has continued for the requisite six-month period.

B. Section 4.03 Exclusions.

The OPIC Contract exclusions do not apply to this claim. However, the Section 4.03(b) "Government Action" exclusion is worthy of a brief discussion.

Section 4.03 Exclusions. *No compensation for expropriation shall be payable if:*
(b) Government Action *The action is taken by the foreign governing authority in its capacity or through its powers as a purchaser, supplier, creditor, shareholder, director or manager of the foreign enterprise.*

There is no question that the changes in Jamaica's tariff regime were undertaken by the GOJ acting in its sovereign capacity. However, the expropriatory action determined to have been taken is not the change in tariffs, but the breach by the GOJ of its continuing contractual obligation to protect JSPI from external competition and to ensure the maintenance of certain pricing margins through tariffs or some other mechanism. In this context, the issue is whether this contractual undertaking was an obligation of the GOJ in its capacity as shareholder of the foreign enterprise or in its capacity as a sovereign government.

The GOJ's obligation to maintain pricing margins is pursuant to the Heads of Agreement, which was executed by JNH in its capacity as a shareholder of JSPI, and established other purchasing, marketing and other relationships that the GOJ would have with JSPI. The GOJ's acknowledgement of its obligations was evidenced through the Letter of

³¹ Counsel to Josco has informed OPIC that due to the declining financial condition of JSPI, no financial statements were prepared for any period after March 31, 1996.

³² Even if JSPI received this amount for working capital, JSPI could not return to commercial viability without some mechanism to protect it from import competition.

Assurances which was provided as a condition subsequent under the Heads of Agreement. The Heads of Agreement expressly provides that the GOJ's obligations thereunder will continue as long as Josco has an interest in JSPI. After the privatization, the GOJ was no longer a shareholder of JSPI, and due to import liberalization and pursuant to agreement with JSPI, the GOJ's responsibilities as a supplier of beans and marketer of JSPI's products were also terminated. Therefore, any continuing obligations that the GOJ was required to fulfill under the Heads of Agreement were in its capacity as a sovereign government, and this exclusion is not applicable.

C. Procedural Issues

There are no procedural issues that require discussion in connection with this claim determination

D. Investor's Duties. *Except for Section 9.01.4 that is hereby waived, the Investor has complied with its duties under the OPIC Contract.*

1. Ownership and Eligibility (Section 9.01.2). Section 9.01.2 requires the Investor to remain at all times the beneficial owner of the insured investment. Although the Investor has assigned its ownership interest in JSPI to the Joseph Family 1994 Irrevocable Trust as an estate planning matter, the Joseph Family 1994 Irrevocable Trust is owned beneficially by the same U.S. citizen beneficial owners of the Investor. Therefore, OPIC has determined that the Investor has complied with the requirements of Section 9.01.2.

2. Self-Insurance (Section 9.01.3). The Investor has continued to bear the risk of loss of at least 10% of its interest in the foreign enterprise.

3. Assignment (Section 9.01.4). Section 9.01.4 prohibits any assignments of the OPIC Contract without the prior written consent of OPIC. The Investor transferred its interest in the OPIC Contract to the Joseph Family 1994 Irrevocable Trust without seeking OPIC's prior written consent. Because the same individual owners of the Investor beneficially own such trust, OPIC has determined that it will waive the requirements of Section 9.01.4.

4. Accounting Records (Section 9.01.6). Section 9.01.6 requires the Investor to maintain in the United States certain accounting records for the foreign enterprise necessary to compute and substantiate compensation, as well as to prepare financial statements in United States dollars in accordance with principles of accounting generally accepted in the United States (including principles of currency conversion). Although OPIC has identified certain deficiencies in the accounting records and financial statements submitted by Josco, Josco has undertaken that it will correct such deficiencies as necessary for OPIC to compute and substantiate compensation.

5. Reports and Access to Information (Section 9.01.7). Section 9.01.7 requires the Investor to furnish OPIC with such information related to the Project as OPIC may reasonably request. The Investor has satisfactorily complied with the requirements of Section 9.01.7.

6. Compulsory Notice (Section 9.01.8). Josco initially notified OPIC of events potentially constituting expropriation in February 1996, three months after the closure of the plant in November 1995. Since this initial contact, OPIC has been kept well informed of developments regarding JSPI and discussions with Josco.

Arguably, in not providing notice of the deterioration of JSPI's financial condition until three months after the plant's closure, Josco failed to provide OPIC with prompt notice of events potentially constituting expropriation. However, Josco has stated that it did not receive notice of the tariff changes for a significant period of time, and discovered the changes only as a result of investigating the causes of JSPI's declining sales.

OPIC notes that there is correspondence among JSPI, Josco and the GOJ dating from early 1995, in which JSPI and Josco complained of imports entering duty free. Nevertheless, Josco assumed that this was a temporary problem, like others such as smuggling and inflation that would be corrected promptly by the GOJ upon request from Josco. It was only after its entreaties for assistance failed to produce any response that Josco determined that action had occurred that might constitute expropriation under the OPIC Contract. OPIC determines that the delay in Josco's notice to OPIC was reasonable and that Josco provided prompt notice within the meaning of the OPIC Contract.

7. Preservation, Transfer and Continuing Cooperation (Section 9.01.9). Section 9.01.9 requires the Investor, in consultation with OPIC, to take all reasonable measures to preserve property, to pursue available administrative and judicial remedies, and to negotiate in good faith with the GOJ. In consultation with OPIC, Josco has pursued negotiations with the GOJ and has taken all other reasonable measures to preserve property. Josco will assign rights as required by Section 8.02 prior to payment of compensation and will take all actions that may be reasonably requested by OPIC in preserving such rights.

8. Other Agreements (Section 9.01.10). The Investor has not entered into any agreement with a foreign governing authority with respect to compensation for any acts within the scope of coverage.

9. Worker Rights (Section 9.01.11). The Investor has not taken any actions in violation of the worker rights requirements of the OPIC Contract.

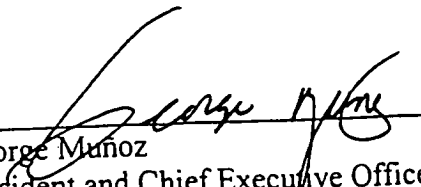
10. Maintenance of Retained Earnings (Section 10.03). Because Josco's equity investment in the Project consisted of reinvested retained earnings that were not represented by additional shares of stock issued to Josco, OPIC required Josco to represent and warrant in Section 10.03 that it would cause JSPI to maintain an amount of retained earnings of which Josco's share was at least equal to the amount of the equity investment for each period during the OPIC Contract. Section 10.03 further provided that any reduction in the level of reinvested retained earnings maintained by the Investor below the amount of the investment would constitute a return of capital.

Josco's compliance with these requirements will be discussed in a later determination covering the compensation amount for this claim.

V. CONCLUSION

For the foregoing reasons, OPIC concludes that the claim of the Investor is valid. The amount of compensation for the claim will be covered in a separate determination document.

OVERSEAS PRIVATE INVESTMENT CORPORATION

By: 
George Muñoz
President and Chief Executive Officer

Date: