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TRADE AND INVESTMENT DEVELOPMENT PROJECT

Final Report

**JAMAICA: Economic Analysis
Support for the Fair Trading
Commission**

SUBMITTED TO
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Office of Private Enterprise
Kingston, Jamaica

SUBMITTED BY
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1.0 BACKGROUND & SCOPE OF WORK

The services described herein were rendered by Nathan Associates, Inc. to USAID/Jamaica as part of the Latin American/Caribbean Trade and Investment Development Project (the "LAC/TIDP") under contract to the United States Agency for International Development ("USAID") under Contract No. LAG-0797-C-00-2046-00 and Technical Services Order No. 022, in response to a request from the USAID Mission in Kingston, Jamaica.

The overall goal of the LAC/TIDP is to support macroeconomic reforms in the LAC region with particular emphasis on trade and investment-related legal/regulatory regimes to move such regimes toward international standards through USAID-assisted programs. The Project staff and affiliated technical consultants provide expertise and assistance to USAID/Washington and USAID missions in the LAC region and, through them, to governments and institutions of the region.

The Jamaican Fair Trading Commission began operations in 1993 to enforce the Fair Competition Act (the "Act"), which was enacted into law in March of that year. The purpose of the Act is to enhance Jamaica's competitive environment and protect consumers in conditions of a free market economy in which State-owned enterprises have been transferred to private enterprise and the regulatory environment is in formation. The Jamaican Fair Trading Commission ("JFTC") has three commissioners who serve as a quasi-judicial body to rule on infringements of the law. The commissioners are supported by a professional staff that includes lawyers and economists. The role of the staff economists is to assist the Commission through research, collection, and interpretation of data relevant to the economic environment and to undertake quantitative sectoral analyses of specific industries of special concern to the JFTC.

USAID/Jamaica requested assistance of the LAC/TIDP for the strengthening of the capacity of the JFTC's economists to support the JFTC, particularly in the area of economic analysis. The purpose of The Project's Technical Service Order No. 022 was to provide the services of a trained economist to work with the economics staff of the JFTC to strengthen their procedures and to provide guidelines for future research and analysis.

2.0 REPORT OF ACTIVITIES

Dr. Thomas Timberg of Nathan Associates, Inc. arrived in Jamaica on September 10, 1995 and began work at the JFTC on Monday, September 11, 1995. Sessions, generally lasting about an hour, were conducted with all professional staff members of the JFTC. Several longer sessions were conducted with the two economists, Andy Sadler and Patrick Williams. The JFTC's draft economic analysis guidelines were reviewed as well as the files of a number of specific cases under review. Dr. Timberg was asked to meet with the Commission itself on one ongoing case. Sessions with staff members normally included requests for assistance in specific cases in process, as well as general discussion of the issues presented in such cases or similar cases.

Specific recommendations were made and information provided on the specific cases. But, more importantly, general procedural changes were proposed that would strengthen the operation of the JFTC. Specifically, a format for industry memoranda was suggested that would permit tracking of issues from their formulation in the memorandum's statement of purpose, through presentation of data and findings of fact, and, finally, indicating for each conclusion or recommendation the findings of fact relied upon therefor, and the question or issue addressed thereby. A suggestion for reorganization of the economic analysis guidelines was advanced to tie them more directly to the specific purpose and audience for which they were designed. General suggestions were made for systematic access for the economists to the kinds of data they and the JFTC lawyers need, particularly through use of the Internet. Six written memoranda were prepared on issues raised for use of the JFTC staff.

Several articles were identified on the two key issues facing the JFTC, with arrangements made to forward them and other materials from Washington upon Dr. Timberg's return. These two issues are: (a) implicit collusion in price fixing and (b) implications of direct statements utilized in advertising. Information was also provided on specific industry sectors, drawing upon Nathan Associates' information resources. Three documents were supplied by the Nathan librarian by fax with others to be forwarded later. Specific responses to questions involving financial institutions, international trade, and forensic economic issues were made available from Nathan's resources.

Explorations of alternative uses of the Internet and discussion of needed supplementary materials and assistance for the JFTC resulted in some of the recommendations set forth below. Despite some software problems, two demonstration sessions were conducted for JFTC economists on use of the Internet, with additional material thereon to be forwarded later.

The substantive and procedural issues raised by the cases include both issues standard in United States law and issues posed by the European origins of the Fair Competition Act under which the JFTC operates, particularly, questions relating to abuse of dominant position for purposes other than to inhibit competition, an issue with which European courts continue to have difficulty. There were also issues, not primarily economic, raised by the breadth of some of the exceptions in the Act. As to these, the JFTC itself and Jamaican jurisprudence in general will have to find their way through the particular maze these issues create for the Act. Material on the European experience with such abuses will be forwarded to the JFTC.

Both a separate interim and a joint final debriefing on the consultant's activities were conducted with USAID/Jamaica and the JFTC. These briefings anticipated the subject matter and enlarged upon the text and recommendations of this Final Report.

3.0 SPECIFIC TASKS OF THE TECHNICAL SERVICES ORDER

Technical Service Order No. 022 provided for the consultant hereunder to perform six major tasks: (1) Assisting JFTC economists to develop systematized approaches and an informational framework for use in investigation of suspected violations of the Fair Competition Act; (2) Assisting in the development of improved methods of data collection and storage; (3) Assisting in the preparation of standard operating procedures for work of JFTC economists; (4) Providing guidance to JFTC economists through selection of hypothetical situations requiring economic analysis and advising them

on appropriate methodology and procedures; (5) Advising JFTC economists on the requirements and procedures for trial preparation, including active training sessions simulating a trial situation; and (6) submission of a Final Report to USAID/Jamaica describing briefly the activities carried out and detailing the recommendations made to the JFTC with respect to procedures, guidelines, and operations. The following briefly describes activities under each of these tasks.

1. Assisting JFTC economists to develop systematized approaches and an informational framework for use in investigations of suspected violations of the Act

The consultant suggested that this was best accomplished by elaboration of economic analysis guidelines that specify the nature of offenses under the Act, including, where possible, guidelines defining such offenses and listing the type of evidence likely to establish such violations. The consultant also suggested that the guidelines should be accompanied by memoranda from the JFTC economists reflecting a standardized, predictable format indicating the thinking, findings, and conclusions of Commission economists with respect to:

- industry investigations
- investigations of alleged abuses
- investigations to establish material facts for alleged abuses
- response to statements of alleged violators about alleged abuses
- recommendations for remedies for alleged abuses.

The JFTC economists themselves suggested that the guidelines should also specify the procedures for initiating and terminating investigations, the approvals needed at each stage thereof, and the procedures for reference to different divisions of the JFTC. Dr. Timberg worked with Mr. Sadler on one such proposed memorandum and made specific recommendations for improvement of the guidelines, both general, and specifically as relates to abuse of dominant position and price fixing. He also provided general advice on preparation of the guidelines and development of an operations manual for the JFTC economists.

2. Assisting in the development of improved methods of data collection and storage

The work on proposed sources of information and uses of the Internet covered in the recommendations below respond to this aspect of the TSO activity.

3. Assisting in the preparation of standard operating procedures for the work of JFTC economists.

Covered under task no. 1.

4. Providing guidance to JFTC economists through selection of hypothetical situations requiring economic analysis and then advising them on appropriate methodology and procedures

This was done, not only for hypothetical cases, but for a number of difficult actual cases currently before the JFTC. But, as with most case-oriented teaching, the guidance in such situations moved from the actual cases to counterfactual hypothetical to explain the theory and cases, as well as bringing in clinical examples of parallel cases from other countries. It was felt that the pressures of work schedule and the relevance of many of the actual cases made them more appropriate for training than purely hypothetical constructs.

5. Advising JFTC economists on the requirements and procedures for trial preparation, including active training sessions simulating a trial situation

To some extent this was implicit in the activities responding to task no. 1. Moreover, the consultant's discussion of recommendations related to the requirements of trial preparation under Jamaican law, with particular emphasis on Jamaican rules of evidence and their background in the United Kingdom-influenced Common Law.

6. Submission of a report to USAID/Jamaica describing briefly the activities carried out and detailing recommendations to the JFTC with respect to procedures, guidelines, and operations

This task is accomplished by submission of this Final Report.

4.0 RECOMMENDATIONS

Based on the interaction of the consultant with the members and staff of the JFTC and his research and development of documentary materials related to the activity under this Technical Service Order, the consultant advances the following recommendations:

1. The economic analysis guidelines and a related operations manual be elaborated on the basis of the models provided by the consultant

Both this and the following recommendation should help systematize the economists' work and activities and secure better convergence between their support and the forensic needs of the JFTC.

2. Standardized formats be developed similar to those presently proposed for economists' reports to the Commission setting forth the findings and recommendations of the Commission's economists on cases brought before it.

There should be developed a standardized, predictable format for JFTC economists to present to the Commission that contains their thinking, findings, conclusions, and recommendations with regard to cases brought before the Commission.

3. The JFTC should be provided with appropriate access to the Internet

There are several Internet access alternatives that need to be considered by the JFTC, including direct access through the University of the West Indies or commercial access through the Infochannel. It may be appropriate to obtain paid access through services like Dialogue or Nexus/Lexis. The Nathan Associates librarian suggest that Nexus/Lexis is particularly appropriate because it is likely to be cheaper and all relevant economic databases may be found on it (specifically, ABI, PROMT, and the Trade Information Index). Nathan frequently uses MAID, a British-based source, but the cost is considerably higher than for Nexus/Lexis. The consultant will forward information indicating where relevant material is available on Internet and from what sources. The cost of this access will probably be in excess of US\$ 1,000 - but in no case more than US\$ 4,000. This and the following recommendations should enable access for the JFTC staff, especially economists, to needed data sources and information in the United States, as well as permit them to enjoy ongoing professional dialogue with other forensic and industrial sector/organization specialists.

4. Budget provision be continued and utilized for long-distance calls to the United States and, perhaps, even fees for occasional use of other data bases by JFTC staff

This could be made available through a variety of private and perhaps public sources. Nathan Associates would be willing to provide these services - though the charge Nathan Associates makes is normally only the marginal cost of the services involved and does not reflect its fixed costs.

5. The Commission should subscribe to the major journals and purchase some of the standard texts on Antimonopoly matters to which it does not now have access

Some recommendations on these matters have been made by previous consultants that seem appropriate. This item can again be fitted into a budget line but should not entail more than US\$ 1,000. The consultant, as a first priority, suggests that the **Antitrust Bulletin** (published by Federal Law Publishers, Inc.) be received, as well as the Journal of the American Economic Association. The consultant also recommends F.M. Sherer's, Competition Policies for an Integrated World Economy, Brookings Institution, Washington, D.C., 1994. The JFTC library lacks textbooks on international trade economics and law as well as one on marketing, both of which would be useful to Commission activities. The consultant suggests two books on international economics - International Economics: A Policy Approach by Lindert & Kindleberger, Richard D. Irwin, Inc. and International Economics by Mordechai Kreinin, Harcourt Brace Jovanovich as well as The World Trading System: The Law and Policy of International Economic Relations by John Jackson, The MIT Press.

6. Some practical experience in antimonopoly theory and enforcement and consumer protection litigation and forensic economics be arranged for JFTC economists

Despite the fact that the JFTC economists have had a brief study tour to the United States, it would be desirable for them to obtain actual work experience with the kind of documents necessary to support a particular enforcement action. While the United States Federal Trade Commission and the Antitrust Division of the U.S. Department of Justice may be reluctant to provide such on-site experience because of confidentiality concerns, it may be that such training could be facilitated through a private firm like Nathan Associates, Inc. The firm would be ready to host one or both economists for a two week internship, though sufficient notice should be given so that preparations can be made for them.

7. Contacts with U.S. professionals, including visits to Jamaica and participation in seminars and other training events should be continued

The JFTC staff feels that further U.S. consultant visits would be useful since such visits, even on an occasional basis, facilitate interchange. The consultant concurs with their opinion. But it would be desirable to continue to budget funds for telephone, fax, or e-mail contacts with U.S. experts on a regular basis. Any considerable use of private consultants' time would occasion some additional cost, though that might be handled on a budget-limited time and materials basis. Perhaps the U.S. Federal Trade Commission might consider some regular consultancy as a preface to a formal arrangement for cooperation - as it has with other countries. These two sources of consultancy are not mutually exclusive since the FTC collaboration would respond to its own priorities and, except in unusual circumstances, involve entirely U.S. law and experience. It is possible some U.S. academic collaboration could also be obtained. In discussions with JFTC staff, the importance of continuity of consulting relationship was particularly emphasized.

8. Jamaican judges should be given training in economics and its relationship to the law

Specific interest was expressed by JFTC management in securing training for Jamaican judges in courses run by several U.S. institutions, such as those for U.S. federal judges, in the relationships between economics and the law and the appropriate understanding and application of economic theory to legal cases and procedures, particularly in such economics-intensive areas as antimonopoly and competition law.. The consultant knows of some possibilities in this regard, such as the training possibilities available in law and economics at George Mason University in Virginia. While U.S. institutions may be able to bear part of the cost of such training, it is more likely they would be interested in obtaining USAID funding for training activities. George Mason University indicated that there might be room for a Jamaican judge though the cost would be \$8000 for a two week course and they can make no commitments until the Spring when they see what enrollment is like.

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