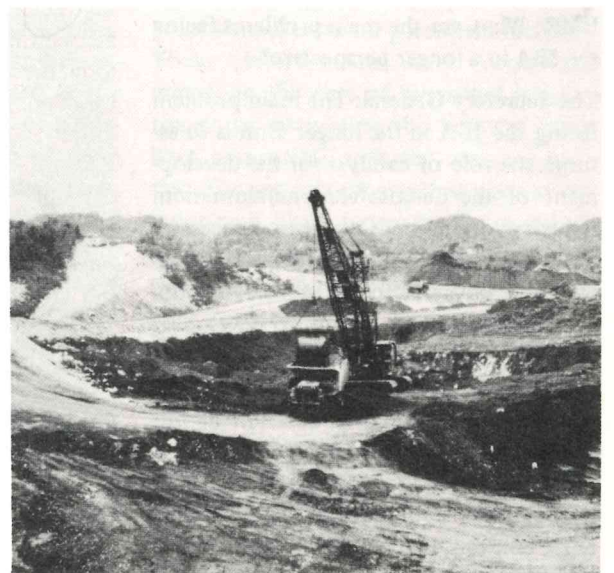
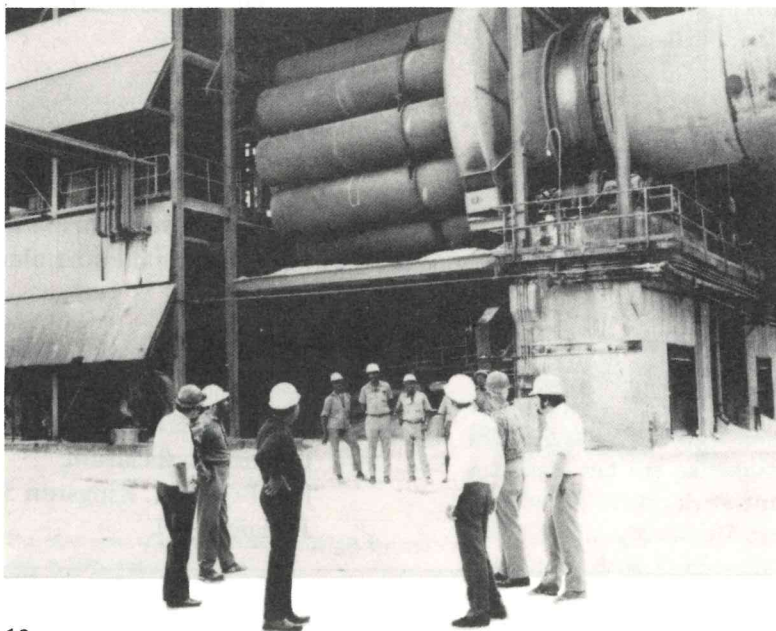
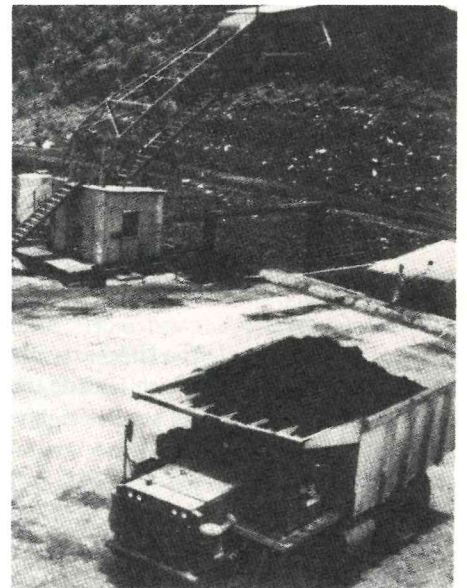
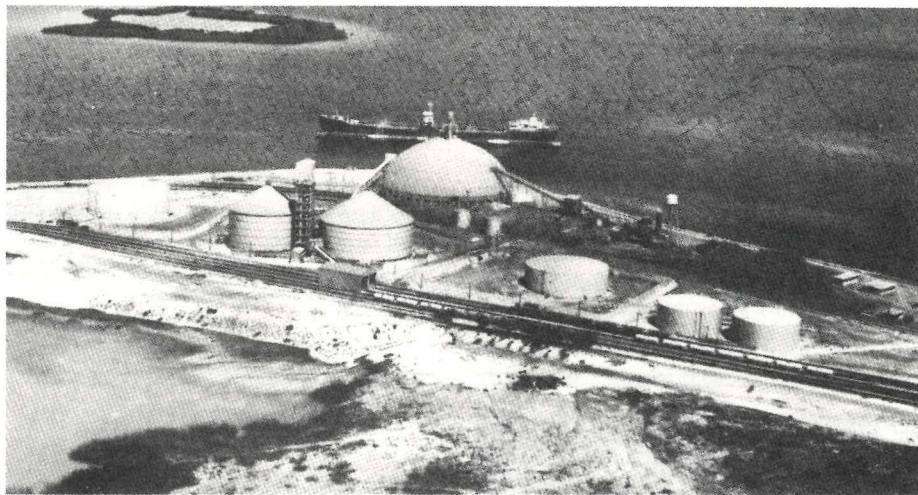




The signing of the Jamaica-Alcoa contract of 1976 (top), bauxite mining and refining in Jamaica (below).





SPECIAL REPORT

The Jamaican -Alcoa contract of 1976

By Thomas W Wälde

The 1976 bauxite agreements between the Government of Jamaica and the North American bauxite companies is one of the most interesting cases of interaction between a developing country and transnational mining companies.

In this article Thomas W Wälde gives a background to the agreements, analyses their basic structure and main objectives, and evaluates the results achieved in a larger historical perspective.

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Background and historical development of government company relationships

Bauxite is a mineral frequently encountered in the earth's crust. It is mainly used for further processing into alumina and then into aluminium, which is an important metal used in modern industry. The bauxite/alumina/aluminium industry has had considerable growth rates in the past and is expected to continue to play a major role in the future. It is capital-intensive, technology-intensive and, particularly at the stage of the transformation of alumina into aluminium, very energy-intensive.

The industry is heavily concentrated, particularly when it comes to the crucial stage of processing into aluminium; here an electrolytic process requires the intensive use of electrical power. The major transnational companies in the industry, ALCOA, ALCAN, ALUSUISSE, Kaiser, Pechiney and Reynolds, recently controlled 39%, 61% and 59% respectively of the world's bauxite, alumina and aluminium capacity (excluding the centrally planned economies). Most recently, ALUMAX is emerging as a new major bauxite company.¹ These companies are vertically integrated, i.e. they control bauxite mining, shipping, alumina production and aluminium smelting. Most of the value is added during the transformation from alumina into aluminium. The cost of bauxite mining is a relatively small component of the total costs required for the production of aluminium. These facts are essential in understanding the long, and at times tortuous, history of bauxite agreements in the Caribbean, the most prominent of which have been those in Jamaica, the Caribbean's major bauxite producer. Others are Guyana, Suriname, Haiti and the Dominican Republic.

The legal framework of 1947 and 1950

In 1943 the US Government had an ac-

tive interest in having bauxite developed close to the US; exploration in Jamaica, as elsewhere in the Caribbean, resulted in the discovery of large bauxite reserves suitable for processing into alumina/aluminium in the US. In 1947, initial mining legislation (The Minerals Vesting Law and the Mining Law – chapters 38 and 41 – of 1947) was passed by the colonial administration of Jamaica. Fiscally, the 1947 legislation relied mainly on royalties from bauxite extraction, at a rate of 20.2 US cts. per ton of bauxite mined, a comparatively high royalty rate at that time. Jamaica required the bauxite companies to purchase private lands, to obtain mining rights and required agricultural production to be maintained on those lands as well as the restoration of these areas after the mining. In 1950 three companies – Reynolds Metal Company, Aluminium Ltd of Canada and Kaiser Aluminium and Chemical Corporation – held rights to approximately 60 000 acres of land in Jamaica. By 1972, the bauxite companies operating in Jamaica owned over 200 000 acres of land, representing one-twelfth of the surface area of Jamaica.² In 1950 the *Bauxite and Alumina Industries Encouragement Law* was passed. Reynolds, ALCAN and Kaiser began bauxite mining operations in 1952/53. Under the 1950 enacted legal regime (it is unclear if there was, in addition to the 1950 Law, also a formal agreement with the Government in 1949 or only an exchange of letters), Jamaica imposed, in addition to a fixed sum royalty per ton of bauxite imported, income tax under a formula whereby a specified profit was assumed to be generated out of each ton of bauxite. The idea behind this deemed profit income tax scheme – which has been maintained in Jamaica up to now – is that the bauxite/alumina/aluminium conversion process takes place within vertically integrated companies, so that there is no at-arm's-length free market price for bauxite or alumina to rely upon to determine royalties or income. As the commentator understands, the assumed

profit was then determined to amount to 60 US cts.; given the then tax rate of 40 per cent, 24 US cts. were then payable as assumed income tax per ton.

The 1957 agreement

Subsequent to the start-up of operations, the Government of Jamaica commissioned two economists to make recommendations to modify the 1950 arrangements so as to enable the Government of Jamaica to make the most efficient use of its sources of revenue. Negotiations in 1957 resulted in a new agreement which increased the royalty and the income tax on assumed profit from exported bauxite to about five times the previous payments per ton of bauxite. The 1957 agreement was to run for 25 years. Royalties were increased, but a sliding scale was geared to production levels. The assumed income tax contained a fixed amount and a component which was indexed to the price of aluminium in the US. The assumed profit under the 1957 agreement was USD 3.85 (1.925 USD fixed and 1.925 USD linked to aluminium pig). The Government agreed that the totality of Government levies should not exceed 45 per cent of profits, as calculated under the agreement.

Legal modifications in 1967, 1969 and 1971

In 1967, the previous arrangements were modified through an amendment to the Bauxite and Alumina Industries Encouragement law. Some customs exemptions were removed; the Government was entitled to make special income tax arrangements with companies producing alumina (the 1957 agreements had only concerned bauxite production) and the Government was entitled to assess the fair value of alumina production. During 1967, US companies operating in Jamaica (by now Reynolds, Kaiser and Anaconda) announced plans to form a consortium to produce alumina in Jamaica (ALPART); also, Re-

vere Brass and Copper concluded an agreement with Jamaica to construct a new alumina plant. During 1969 and 1971, the bauxite tax agreements were modified so as to allow the US companies operating in Jamaica to claim tax credits for taxes paid to Jamaica against their tax bill in the US. This issue is a recurrent one: producer country governments and producing companies have a common interest in letting the company obtain maximum tax credit in its home country on income from mining abroad. As the US Internal Revenue Service has, through varying rules, in general only recognized foreign taxes on profits (i.e. not on royalties) for tax credit purposes, the Jamaican bauxite tax arrangements since 1967 have been heavily influenced by attempts to formulate a tax regime that allows the companies to successfully claim US tax credit. The result of the revised tax agreements in 1969 was to increase the assumed profit to USD 5.00 (1.925 USD indexed and 3.075 USD fixed). This came largely about because of an important sideletter obtained from the companies by the then Chief Minister, the Hon. Norman Manley.³

In the late 1960s and early 1970s bauxite operations in the Caribbean, especially in Jamaica, by transnational bauxite companies came under heavy criticism, which has probably had some influence on the evaluation of foreign-controlled bauxite operations in Jamaica by Jamaicans and, thus, on the subsequent conflictual developments. The wider intellectual concept of these criticisms is the dependencia-theory, prevalent among third world academics and some politicians in the last two decades. The dependencia-theory, developed primarily in Latin America and by Latin Americans, claims that the operations of transnational companies (TNC) in developing countries tends to restrain economic development, extract economic surplus and rent from natural resources exploitation and transfer it from the "periphery" to the "metropolitan" devel-

oped countries. TNC's also exercised total control over investment in developing countries, to the detriment of the producer countries and to the advantage of the consumer countries. Hence, the logical choice is nationalization of transnational investment, particularly in natural resources, and the establishment of state enterprises and co-operation among the developing countries. This concept has been articulated in a critique of TNC-investment in Jamaica's bauxite.⁴ It is contended that TNC-investment in Jamaica's bauxite resulted on one hand in a cumulative process of development and enrichment for the aluminium companies, on the other hand in a cumulative process of underdevelopment and dependency for the producer countries. While the bauxite industry was considered to be highly qualified to assume the potential role of the leading sector in Jamaica's development, this potential was said to be virtually unexploited, because the bulk of the substantial value added and external economies had been exported to North America. As an alternative, nationalization and regional integration and co-operation were advocated as a solution. The future Prime Minister, the Hon. Michael Manley, articulated his objectives with respect to the Jamaican bauxite industry in his book "Politics and Change".

Bauxite and the New International Economic Order

The growing hostility towards transnational investment and the high expectations from increased national participation in, and control over, minerals investment are reflected in a number of developments which have played a major role in bringing about the 1974 Jamaican bauxite levy and the 1976/1977 renegotiations. From 1971 to 1973 OPEC demonstrated to other minerals producing countries the potential inherent in the concerted action of producers, by raising petroleum prices unilaterally by govern-

ment fiat several times and by participating in, and later nationalizing, most foreign-held petroleum operations. In 1974, the International Bauxite Association (IBA) was established grouping together most of the market economies' major bauxite producing countries. In the United Nations General Assembly, 1974 was the year of the resolutions on the New International Economic Order (in particular resolutions 3201 and 3202 - S VI) which strongly supported the principle of permanent sovereignty over natural resources, then widely understood as the host state's right to nationalize foreign operations even contrary to previous contractual undertakings. Also, in 1971 and 1974, Guyana, another major Caribbean bauxite producer, nationalized foreign-held bauxite operations (held by ALCAN and Reynolds) and established a state bauxite company (Guyabau and Guyamine, held by BIDCO). These actions probably exercised an illustrative effect, however, due to the special character of Guyanese bauxite, which is not used for aluminium production and, hence, is less dependent on vertically integrated company operations, it was considered not possible for Jamaica to follow the route of Guyana.⁵

The bauxite levy of 1974 and the 1976/77 renegotiations

In 1972, under the new government of Prime Minister Michael Manley, a national bauxite commission was established to undertake an intensive examination of the aluminium industry. Its terms of reference were, inter alia,

"to review the conditions of Jamaica's bauxite/alumina industry and of Jamaica's bauxite reserves and to advise and make recommendations to the Minister from time to time with a view to ensuring that the exploitation of such bauxite resources makes the maximum contribution to the long term development of the country."⁶

In 1974, the Government requested renegotiation of previous arrangements with a sweeping new programme, based on the recommendations cited above. The author was informed that during these negotiations the bauxite companies claimed that economic activity moved in cycles and that Jamaica's actions in instituting the levy would drive production elsewhere. On the Jamaican side the view was reportedly propounded that aluminium, like oil, would stay in lasting shortage.

When the negotiations failed to produce an immediate agreement, Jamaica unilaterally enacted the *Bauxite Production Levy Act* of 1974 and an Amendment to the Mining Act. Through these laws, the Government in effect imposed the bauxite levy as a new bauxite tax, i.e. a tax on bauxite production amounting to about 8 per cent of the value of aluminium contained in bauxite extracted. The approach of using the final aluminium metal price as a gauge for the value of bauxite ore extracted is certainly novel in the taxation of mining industry; it was justified by reference to the fact that given the vertically integrated nature of the industry, there is no reliable world market reference price for bauxite ore and that bauxite pricing therefore as determined solely by the companies was open to manipulation to the detriment of the producing country.

One has to add that the method of using an "assumed profit" on bauxite mining, partly composed of an element linked to final aluminium prices as employed since 1957, was a precursor to the approach underlying the bauxite levy (Cf. supra). Reportedly, the Jamaicans in establishing the tax structure relied on price information set forth in the 10-K form submissions filed by the aluminium companies with the US Security and Exchange Commission. The Government was also entitled to prescribe minimum amounts of minerals to be extracted by holders of mining or special mining leases.

The role of the IBA

It is apparently somewhat controversial if the Jamaican actions received effective support from the newly established International Bauxite Association, which issued recommendations for minimum prices for bauxite. Based on communications received by the commentator, it seems that the Jamaicans themselves viewed the International Bauxite Association as little supportive, as evidenced in particular by the retreat Jamaica was subsequently forced to accept in 1979 and 1984. However, it seems that at least from 1974 to 1978 the bauxite companies perceived the IBA as more effective in coordinating effectively producer countries and such perception, even if not based on facts, is likely to have strengthened Jamaican bargaining power at that time. Jamaica also supported other bauxite producers (notably Haiti and the Dominican Republic) in their policies to also raise their income from bauxite production.

At that time, the bargaining position of Jamaica was very strong. The companies operated refineries in North America geared to the processing of Jamaican bauxite. It would have been commercially unfeasible at that time to seriously consider alternative sources of bauxite. The Jamaican Government also gave assurances to the US and Canadian Governments that the measures taken were not meant to equal expropriation and were dictated by internal political and economic circumstances.⁷ In effect, the Government obtained a sevenfold increase of its income from bauxite (i.e. from about 25 million USD in 1972 to about 175 million USD after the imposition of the levy. This additional income proved to be an important contribution to government income and to the Jamaican balance of payments situation which, in 1973, showed an overall deficit of 26.3 million USD.⁸ In fact, the increased levy helped Jamaica to offset to some extent the higher petroleum import bill faced after 1973.

The previous Governments had given an undertaking not to increase tax payments during the course of the 15-year agreement without the consent of the company; however, it seems that in a declaration made in 1957 by Norman Manley, then Chief Minister, the government had made it clear that it was constitutionally refrained from binding future governments to act in the matter of bauxite taxation. Claiming breach of contract, the bauxite companies in 1974 started legal action against the imposition of the bauxite levy. In the *Revere Copper and Brass Suit* (Suit No C L 1976 R004), the Supreme Court of Jamaica confirmed the constitutionality of the Bauxite Levy Act on the principle that a government could not bind its successors by way of agreement with a private company and on the principle of permanent sovereignty over natural resources.⁹ *Revere Copper and Brass* later instituted arbitral proceedings against the US Overseas Private Investors Insurance Corporation (OPIC) claiming, successfully, that Jamaica's imposition of the bauxite levy against its previous contractual undertaking constituted a case of "creeping expropriation" under the terms of its OPIC insurance contract and thus warranted compensation. (AAA Case 16 10 0137 76). The bauxite companies, relying on submission to the World Bank's International Centre for the Settlement of Investment Disputes (ICSID) by Jamaica in its previous agreement with the companies, requested arbitration before an ICSID-arbitral tribunal. Jamaica attempted to withdraw from its ICSID-arbitration obligations in 1974, by a notice to ICSID in which it withdrew mining and natural resources disputes from ICSID jurisdiction and by amending its 1966 International Disputes Award (Enforcement) Act so as to make ICSID-awards unenforceable in Jamaica. In a preliminary judgement, however, the ICSID tribunal affirmed its jurisdiction.¹⁰

The agreements of 1976/1977 between Jamaica and the bauxite companies pro-

vided for termination of the ICSID-proceedings by the companies.

By the end of 1974, Jamaica and the companies had resumed negotiations and signed a document named "Heads of Agreement" which constituted a kind of framework agreement on basic principles to be worked out in detail subsequently – in the 1976/1977 agreements between Jamaica on one side, and Kaiser, ALCAN, ALCOA and Reynolds on the other side. The ALCOA Agreement was signed on October 6, 1976, Kaiser on February 2, 1977, Reynolds on March 31, 1977, and ALCAN on September 25, 1978. The following analysis will focus on the first agreement concluded between Jamaica and ALCOA on October 6, 1976 (the other agreements will be summarized *infra*).

THE 1976 JAMAICA/ALCOA AGREEMENT

Basic structure and main objectives

The main, shared objective of both partners was to have a mutually acceptable agreement to replace the unsatisfactory situation of the unilaterally imposed production levy resented by the companies. On the Government's side, the maintenance of the main elements of the production levy, the transfer of the massive, unused landholdings of the companies (which had come about originally at the insistence of the then Government) back to the Government, maximum development of bauxite and alumina industries in Jamaica, and national participation in all aspects of the bauxite and alumina industries were probably the major concerns. On the companies' side, renewed and confirmed stability of conditions, long-term security of supply of bauxite and alumina to its smelting plants in the US and a structure of the tax system which would allow the companies to maximize its tax credits back home (i.e. in the US and in Canada) were the major objectives.

This agreement, with its highly complex tax structure, its emphasis on re-acquisition of land by the Government and re-transfer again of such lands as are necessary for long-term bauxite operations, its (in fact very mitigated) joint venture arrangements, and its maintenance of rather comprehensive company management prerogatives reflects how the companies and the Government had come to terms. In addition, the 1976 agreement reflects the long and conflictual history of the government/company relationship, as many contractual provisions illustrate the concern of both company and government to prevent the reoccurrence of situations resented in the past.

If the 1974 conflict between companies and governments appeared as a reflection of the new and powerful tensions between transnational corporations and developing countries, the 1976 agreement appeared to build more upon previous experiences, concerns and solutions than to generate any radically new solutions. For example, the bauxite levy itself, with its attempt to solve the intractable issue that in a vertically integrated bauxite/aluminium industry there is no clear criterion to ascertain the value of bauxite ore, builds upon previous agreements which attempted to determine a value of bauxite by working backwards from the market value of aluminium. Also, the companies' attempts to achieve a fiscal regime to obtain maximum tax credit in the US is reflected well before the 1976 agreement. Lastly, the agreement clearly attempts to strike a compromise between the concern of the government to obtain company investment in bauxite processing into alumina and the company's interest to retain full management powers and a secured long-term of bauxite. In effect, the Government did not take the road taken for example in Guyana, and propagated by others, to fully nationalize and then go for independent bauxite development and regional co-operation, but it basically attempted to strengthen its

role as financial beneficiary and junior partner of the bauxite companies.

The issue of company land

The issue of the vast company holdings of land is settled basically (Cf Art 2) by a transfer of all company lands to the Government, against compensation based on book value and paid in annual, interest-bearing installments (Cf Part III and IV of the agreement). To assure a continuous supply of bauxite needed for bauxite mining, the Government undertakes to grant mining leases which are sufficient to feed ALCOA's alumina smelting operations for the whole term of the contract. Should ALCOA decide to expand its bauxite mining and alumina refining operations – which the Government would clearly welcome – the Government will grant new special mining leases (Art 3.02) to provide sufficient bauxite reserves. In granting leases on mining land, the Government will grant 5-years leases (Art 3.07-c) so as to ensure that only the land necessary for bauxite mining is actually granted to ALCOA under a mining lease.

ALCOA will pay the Government a fee for using land for mining. The Government, in turn, will issue promissory notes to ALCOA which will be payable, if the mining land is either fully restored or if it is returned without mining use. This device is to ensure ALCOA's compliance with the restoration and land return obligation by providing a financial incentive (Art 3.08). ALCOA's obligations with respect to restoration of agricultural and pastoral use of mining lands shall be, for the term of the contract, the obligations determined in the 1969 Alumina Industry Order (Cf Art 3.10); in effect, ALCOA is, by this stabilization clause, protected from the Government imposing more restrictive or onerous terms by way of subsequent legislation.

Fiscal regime

The fiscal regime, at first sight compli-

cated, is characterized by the Government's successful maintenance of the production levy, somewhat balanced by an income tax mechanism which is to allow the companies to obtain US tax credit for income taxes paid in Jamaica, without having to pay more than the production levy. This objective is engineered by a two-tier system of income tax and production levy, with the total amount of income taxes actually paid by ALCOA credited against total amount of bauxite levy payable (Art 8.03-d).

General income tax is payable by ALCOA under Jamaica's income tax law (Cf Art 8.02). Given the US tax creditability of Jamaican income tax (being a levy on income and not, as royalties and production levy, on production values), ALCOA will have an interest to arrive at relatively high income tax payments (as long as they do not exceed the production levy payments) and given the vertically integrated nature of the bauxite industry, ALCOA and the government of Jamaica have an interest to arrive at relatively high taxable profits in Jamaica by increasing the export price of Jamaican bauxite and alumina sold by the Jamaican ALCOA operation to ALCOA's US operations.

However, given the scrutiny by the US Internal Revenue Department of transfer prices before allowing tax creditability for taxes paid on assumed profits in Jamaica, attempts by the government of Jamaica to get higher transfer prices for alumina recognized by the US IRS were unsuccessful.

The *bauxite levy* will be maintained (Art 8.03) at a rate of 7.5 per cent of the value of aluminium. It is assumed that the conversion ratio, i.e. the number of long tons of bauxite to produce one short ton of aluminium, is equal to 4.3 (Cf Art 8.03-a).

Because of Jamaica's dependency on bauxite income, a *minimum tonnage* is established (Art 8.03-f). This means that ALCOA would have to pay a production

levy on the basis of the minimum tonnage, even if it produces less. The minimum production requirement is waived in two situations: in case of "force majeure" or if market conditions require a worldwide or regional reduction in the production of alumina by ALCOA. However, in the latter case, both parties will "begin discussions concerning the minimum tonnage" with the view of maintaining Jamaica's proportionate share in the total supply of alumina to the ALCOA corporate system (Art 8.03-f, 2). Should price controls be established in the US on aluminium, a review of the production levy imposition will have to take place, the reason being that the production levy is based on US price quotations for aluminium metal and Jamaica, as well as ALCOA, have an interest in being protected from the fiscal repercussions (by way of the production levy) of artificially high or low prices of aluminium in the US (Art 8.03-g). Both parties "agree in principle" to adjust the production levy for different grades and qualities of bauxites, i.e. they agree on the principle that the operation of the bauxite levy should not discriminate against lower-quality bauxite, but have a neutral effect on bauxite mining practices.

In addition to the bauxite levy and income taxes, there will be a comparatively small *royalty* (Art 8.04). The considerable role played by company concerns for stability – and for an avoidance of the 1974 unilateral imposition of the bauxite levy – are reflected in a number of stabilization clauses:

- no withholding tax shall be imposed on dividends or other forms of profit remittance (Art 8.02-b).
- the amount of property tax payable on land is kept at a reduced level (Art 8.06-a and b)
- import duties are excluded or stabilized (Art 8.05) and, ultimately
- the Government is obliged to nullify the effect of any additional taxes by indemnifying ALCOA for the effect of such

additional tax or other Government levies (Art 8.07).

In effect, this is a stabilization clause which may seem to recognize the power of government to enact new levies and taxes (often reaffirmed by governments, courts and lawyers in Jamaica), but in fact nullifies the financial effect of such subsequent enactments by a government obligation to compensate the financial impact on ALCOA. In other words, this very modern and subtle stabilization clause recognizes the legislative power of government to enact new taxes affecting the operations, subject to the condition that the government has to compensate the company for any new taxes imposed.

While the tax regime is characterized by the manifold expressions of ALCOA's concern not to experience a repetition of the 1974 bauxite levy, a number of adaptation mechanisms attempt to make the fiscal regime more flexible: not only are both parties required to discuss an adjustment of the minimum production requirement, but they are also obliged to review the production levy in case of US price controls and to make the production levy equitable in case of varying grades and qualities of bauxite (cf supra). In particular, the fiscal regime agreed upon is opened up again for renegotiation in 1984 (Art 8.08). If, and as long as the parties reach no agreement on a revised fiscal regime, the "Levy Act and those other laws covering the other fiscal matters dealt with in this Art VIII in force and *as may be amended from time to time* shall apply to ALCOA . . . until the parties shall have reached agreement . . .". The latter clause is a most interesting sanction for the inability of the parties to agree during a contractual renegotiation – and a most ambiguous one. On one hand, it seems that the present regime, determined primarily by the contract maintaining, but conditioning the bauxite levy will continue to apply in the case of non-agreement, which would seem to strengthen ALCOA's position. On the

other hand, the reference to the Levy Act and to "as may be amended from time to time" can be read to imply that a version of the Levy Act, as amended unilaterally by Jamaica, will apply; this would mean that the hand of the Government is considerably stronger. It would be interesting to know if this ambiguity is a conscious attempt to find a compromise in ambiguity or if it was a simple drafting and negotiating omission by company negotiators. It is in fact reported to the commentator that the 1984 settlement (cf infra) was reached despite strong reservations on the companies' side because they had to choose between paying a levy based on the 1974 regime or the new one under consideration.

Rather extensive foreign exchange privileges (Art 9), in particular the right to retain the proceeds of export transactions outside Jamaica, (which can be an important asset in case of another dispute between companies and Jamaica), complement the financial provisions of the agreement.

Joint venture, management and control

The principle of government participation (Cf AMt 4.0) is that Jamaica Bauxite Mining Ltd, a state enterprise, will acquire an undivided 6 per cent ownership interest in the mining and refining assets of ALCOA in Jamaica. Jamaica will pay for this share according to the sale of assets agreement attached (Part VIII of the agreement). A Joint Venture Agreement will govern co-operation of the parties (Part IX). According to the Joint Venture Agreement, ALCOA and JBM become associated in business, without the formation of a partnership or a joint stock corporation. (Art 3.01 of Joint Venture Agreement, JVA). As transpires from the Joint Venture Agreement, ALCOA has a very strong, if not predominant, role (different from the Reynolds and Kaiser agreements concluded later). Only a few major decisions require unanimity (Art

4.06 JVA). JBM appoints two members of the Executive Committee, ALCOA five members. Decisions of the Executive Committee will be by majority (Art 5.12). JBM's role is thereby limited to participation in consultations which may, due to vertical integration of the Jamaican operations in ALCOA's integrated corporate network, play a relatively minor role in corporate decision-making. The reason for this relatively advantageous treatment of ALCOA has probably been the much more reduced dependence of ALCOA on Jamaican bauxite supplies when compared to Reynolds and Kaiser.

Nevertheless, one has to take into account that even with a minor equity share Jamaica has quite some leverage to obtain information if it insists energetically, in particular using linkages with other government prerogatives. Also, Jamaica, despite the small equity participation, has been able to obtain 33 kt of alumina from ALCOA for direct marketing.

Management is in the hands of ALCOA (Art 6 JVA). In particular, ALCOA, as manager, is not liable, except in case of fraud or gross negligence (Art 6.06 JVA). ALCOA will receive full reimbursement of management costs, including costs incurred outside Jamaica. Salary compensation will be doubled (Art 6.09–f) to cover general overhead. These management powers have to be seen in combination with the management prerogatives recognized by the main agreement, where full and effective control and management is guaranteed for all relevant activities (Art 10.01) and to where ALCOA's judgement as to the qualification of Jamaican nationals is declared conclusive (Art 13.01–b-2).

JBM's rights, based on its 6 per cent share, are basically related to production-sharing according to its participation (Art 8). It may also (Art 9.01/9.02) request an expansion of alumina refining capacity, if it provides sufficient financing. In that case, ALCOA and JBM will negotiate an engineering/construction contract (Art

9.02); a model agreement is attached to guide these negotiations. In that case, ALCOA will also grant a technology license (Cf First Schedule to JVA).

Economic development provisions

The agreement provides several provisions encouraging the employment of Jamaican nationals (Art 13) and favouring the procurement by ALCOA of Jamaican goods and services (Art 15.01), those to include goods and services from other CARICOM (Caribbean Common Market) countries, thus providing a gesture of good will by Jamaica in favour of its CARICOM partners (Art 15.01). However, most of these obligations are rather vaguely worded and ALCOA's judgement on quality and suitability is considered conclusive. Of interest is another provision (Art 15.01-c) which obliges ALCOA to ship half of the bulky shipments of bauxite/alumina in ships registered in Jamaica, provided, however, that ships suitable and acceptable in terms of their competitiveness are available.

Legal status

The tortuous and conflictual history of Jamaica's dealing with the companies, in particular its withdrawal from ICSID and its refusal to accept ICSID jurisdiction, are again reflected in the settlement of dispute mechanism (Art 17). Jamaican sovereignty is paid heed to by referral of disputes, in principle, to Jamaican courts. The crucial disputes, however, i.e. the question of the validity of the agreement, the major undertakings of the parties and the tax and foreign exchange issues, are to be settled by arbitration. As Jamaica had just withdrawn from ICSID, the parties had to construct a mutually acceptable *ad-hoc* arbitral mechanism. Arbitration is to be held in Hamilton, Bermuda. If the two arbitrators appointed by each party cannot agree the chairman of the tribunal, the President of the Law Society of England and Wales, will act as appointing authority (Art 17.02). The law applicable

shall include international law. Jamaica waives "irrevocably" any privilege or immunity from jurisdiction or enforcement of an arbitral award (Art 17.02-j). Presumably, in case of a renewed arbitration procedure, Jamaica will not claim — as she tried, albeit without success, in the ICSID proceedings — that the arbitral tribunal has no jurisdiction and that she, as a sovereign government, is entitled to revoke submission to arbitration in an agreement with foreign investors.

While "force majeure" is recognized as an exonerating event, the Government may not invoke an act of its governmental authority if such act has as one of its main purposes the frustration of any right or obligation under the agreement (Art 18.02-c). In other words, the Government is enjoined of using its legislative authority to escape from the obligations imposed by the agreement. ALCOA is obliged to withdraw from the ICSID-arbitral proceedings (Art 18.05). The term of the agreement is conditioned upon the expiry of the last special mining lease to be granted. The Government "shall use its best endeavors to secure the enactment . . . of legislation as may be necessary". It is not made clear what the consequences would be if the Government would fail, (as may have been possible), to win parliamentary consent to the agreement and its consequences. Presumably, failure to obtain enabling legislation would make the agreement void.

Evaluation of the Agreement

The 1976 agreement, concluded after three years of very difficult negotiations and subsequent to creation of a "fait accompli" by the Government's unilateral imposition of the production levy, reflects a complex, difficult and somewhat uneasy accommodation between the major concerns of government and company. Mistrust and concern created by previous conflicts — on the company side the concern over unilateral government action and unwillingness of government to

stick to the terms of an arrangement worked out, and on the Government side the concern about the company's strategy to withdraw from Jamaica or use it as a mining source of last resort — is vividly present in most provisions of the contract. While the Government was successful in asserting the production levy and thus scored financial gains, the company was, by and large, successful in maintaining its full control over the operations, mitigated by a relatively minor accommodation of government participation. The agreement demonstrates that both sides were wary of each other, but still in sufficient need of each other's contribution to come to terms, albeit rather difficult and complicated ones. The fact that the Government's success was ultimately a primarily financial one demonstrates that, in spite of larger objectives of national control and regional co-operation voiced in Jamaica, they were in fact relegated to a secondary position, and revenues, as the Government's most short-term and tangible goal, was in the end decisive. It may be that this policy is reflective of the Manley Government's social welfare policies which seemed, in the end, to have been geared primarily at spending more on welfare services than on strengthening Jamaica's economy by investment.

Subsequent developments

Subsequent to the agreement with ALCOA, similar agreements were signed with ALCAN, Kaiser and Reynolds.¹¹ While formally the four agreements are very similar, the ALCOA and ALCAN contracts differed substantially from the Reynolds and Kaiser pattern. The difference can be explained by the fact that Kaiser and Reynolds were heavily dependent on bauxite supplies from Jamaica to their US plants (about 75 per cent), while ALCOA produced alumina in Jamaica and obtained only about 8 per cent of its raw materials supply from Jamaica. Kaiser, therefore, was forced already in

1974 to break the ranks of the companies and start negotiating with Jamaica.

In the ALCAN agreement, as in the ALCOA contract, the Government is to acquire all of ALCAN's mineral lands and a 7 per cent interest in ALCAN's integrated Jamaican mining and refining operations. Both interests will be contributed to a joint venture (JAMALCAN), with ALCAN as managing partner. For ALCAN, the production levy is more burdensome than to ALCOA (and other US companies) as it cannot obtain the same tax credit for income tax paid to Jamaica in Canada, its home country.

The agreement with Kaiser provides for a sale of 51 per cent of Kaiser's mining assets to Jamaica — (note: there were no Kaiser alumina operations in Jamaica) and it will receive a 40-year supply for its US aluminium processing plants. Kaiser's fiscal regime is, as in the ALCOA arrangement, structured so that there is a nominal profit per long dry ton of bauxite, which is indexed to world aluminium prices, in order to allow Kaiser to obtain a US tax credit. A partnership is to be established between JBM and Kaiser to conduct mining operations on behalf of Kaiser Bauxite. Both partners are equally represented on the board, with Kaiser Bauxite as managing partner. The agreement with Reynolds is similar to the agreement with Kaiser. The formal implementation of the joint ventures and partnerships was carried out by partnership agreements concluded with ALCAN, ALCOA, Kaiser and Reynolds in 1979/1980.¹²

The decline of government bargaining power

While the production levy act of 1974, successfully maintained in the 1976/1977 agreements, represented a high point in government bargaining power, subsequent developments all indicate a continuous decline. While government income from bauxite mining had increased sevenfold

after 1974, production steadily declined. In 1974, 15 Mt of bauxite were mined, in 1980, 12 Mt and in 1983, 7 Mt. Alumina production, on which the Government had pinned great hopes, and which was one of the major objectives of the formation of government/company joint ventures, declined from 2.8 Mt in 1974 to 2.4 Mt in 1980.

A number of causes can be cited:

- there was industrial unrest in Jamaica in 1975/1976
- Jamaica severely lacks indigenous sources of energy which are essential for bauxite conversion while its competitors, namely Australia and Brazil (in the future also Guinea), can rely on indigenous hydroelectricity
- other bauxite producers did not follow Jamaica's high levy policies and the mining companies diversified away from Jamaica, partly because of the increasingly more competitive situation of the new bauxite producing countries but also as a result of having their heavy dependence on Jamaican bauxite and, thereby, the Government's fiscal policies, exposed by the bauxite levy.

In fact, one of the company negotiators mentioned in a meeting attended by the commentator already in October of 1976 that the companies were going to "create a surplus into the system and diversify away from Jamaica". The Revere Copper and Brass plant in Jamaica was closed in 1975, ALPART was producing below its rates capacity, ALCAN was operating only 3 out of 4 units; Reynolds cut back its production from 3.7 to 2.5 Mt and Kaiser was purchasing 500 kt from another country.¹³ The companies insisted on a reduction of the bauxite levy which was agreed upon effective July 1, 1979.

The 1979 levy is based on a production incentive formula: the reduction is gradual and new minimum production requirements are set and must be met before the lower levy rates become effective.

Levy rebates are given as incentives for production exceeding the minimum quantities specified. A review is to be carried out when the price for aluminium exceeds a specified price and in January 1984.

The Jamaican bauxite industry was heavily affected by the world economic recession, with slackening demand and decreasing prices for aluminium. The position of the Caribbean as a major producer of bauxite diminished considerably, mainly in favour of Guinea, Australia and Brazil. The yield of the production levy (at about 209 million USD in 1980) had been reduced by about 40 million USD in 1981 and all companies operating in Jamaica were cutting back on production of bauxite and alumina.

The Government had hoped to set up regional co-operation ventures with Guyana, Trinidad, Mexico and Venezuela. Originally, these ventures were the answer of the dependencia theory to domination of national economies by transnational corporations (Cf *supra*). However, in 1977 the Government of Trinidad and Tobago decided to undertake an aluminium smelter project on its own, and in 1978 the Government of Mexico withdrew from a joint Jamaica/Mexico aluminium smelter project. Venezuela purchased some of Jamaica's bauxite production.

There were also plans to reduce the dependence of Jamaica on company smelters located in the US by long-term sales contracts, principally with Algeria, the USSR and Hungary. However, as far as the commentator has been informed, none of the various long-term agreements for the sale of alumina are at present being implemented.¹⁴

In 1984, new negotiations were being held to revise the bauxite levy downwards again. These negotiations were influenced by closures of bauxite operations by Reynolds in Haiti and, unexpectedly, in 1984 in Jamaica. Reynolds plans to supply this plant with bauxite from alternative sources in Australia, Brazil and Gui-

nea. At the same time the closure was announced. Reynolds purchased a 6 per cent interest in the Guinean Halco operations.¹⁵ Bauxite operations were also shut down in the Dominican Republic. The Government emphasized that "with hindsight it was clear that the levy was originally set too high"¹⁶ and it tried to enhance the role of an "incentive formula" whereby higher production would be subject to a lower levy and lower production to a higher levy. By February 1984, the levy was reduced to 6 per cent of the average realized price of primary aluminium for a 5-year period.¹⁷

Conclusions

The 1976 bauxite agreements between the Government of Jamaica and the North American bauxite companies is one of the most interesting cases of interaction between a developing country and transnational mining companies. Most factors and concepts of the debate on the New International Economic Order of the 1970s are present:

- transnational companies, apparently heavily dependent on raw materials supply from developing countries
- a government which has the political will and technical skill to break away from longtime dependence and enforce a new deal for itself
- co-operation of minerals producers following the lead of OPEC and
- the clash of sanctity of contract versus permanent sovereignty over natural resources.

The survey of 40 years of bauxite development in Jamaica allows us now to view the developments in a larger historical perspective. The development of the bauxite industry by the North American companies, the growing dependence of the Jamaican Government on the bauxite industry (Jamaica's prime earner of foreign exchange and Government revenues), the politicization of foreign-controlled Ja-

maican bauxite in domestic politics and the continuous renegotiations (in 1957, 1967, 1972, 1974–1977, 1979/1980, 1984) in which, at first, the leverage of the Government is exploited and in which later the companies re-assert successfully their bargaining power. It is debatable if such reassertion of the companies bargaining power is due to the decline of Jamaican bauxite and its competitiveness in the international markets or due to a conscious strategy of the companies to diversify away from Jamaica and thus to reduce their exposure to leverage exercised by Jamaica.

For a lawyer, the evolution of the contractual arrangements is most interesting as we witness the clash of a contractual undertaking with national legislation, the withdrawal and refusal to accept previously agreed international arbitration and, subsequent to the conflict, contractual documents of great complexity reflecting mutual mistrust, tempered by the need on both sides to find accommodation. The legal talent present on both sides is evident, even if the product is often over-complicated and far from being clear on essential questions. The impact of national politics on the relationship between the parties is reflected in the history of the agreements, as is the harsh reality of a world market, where industries rise and decline. In a way, the actors — both government and transnational corporations — seem more objects than independent actors in this play.

From a more economic perspective, it is noteworthy that, in spite of development-oriented rhetoric, reflected vaguely in the agreements, the prime emphasis of the government is financial. The various Jamaican governments, as most governments, can be seen as hard-pressed for revenues, to finance their own needs and to supply costly social consumption in an attempt to maintain their power; the foreign investor hence plays the role of financing the consumptive and legitimizing needs of the state class in developing

countries.¹⁸ Few of the substantial revenues derived from the sevenfold increase of the bauxite levy (ca 2 billion USD) seem to have gone into investment (notably for funding of the Jamaica National Investment Co, the Jamaica Bauxite Institute, for paying up the equity Jamaica holds in the bauxite and alumina joint venture and into the Jamaica cement company), particularly into industrial investment diversifying Jamaica's economy. Substantial amounts went into paying for Jamaica's increased oil import bill and into alleviating the considerable and politically explosive unemployment problem.¹⁹ One questions if Jamaica would not have been better off in the end if the financially rewarding development of its bauxite reserves had not occurred at all.

Explanations on underdevelopment or of the relationship of transnational companies vis-a-vis developing countries seem often rather mechanistic applications of theoretical concepts. One wonders if the rather reduced development contribution of the rather substantive bauxite revenues generated in Jamaica through very admirable and generally recognized negotiating skills may not be somewhat linked to the psychology of colonialism left as an intellectual heritage to the developing countries in the Caribbean: Could it not be that colonialism left basically reactive and intellectual skills, e.g. legal skills, negotiating ability, analysis but not practical emphasis critical on creating structures of active economic activity, i.e. all skills reacting to the companies' activities, while the skills and the spirit necessary for creating and managing economic activity was not part of the psychology of colonialism inherited by these developing countries. The art of negotiating for governments in the 1970s, well practised in Jamaica, is focused on extracting a maximum from foreign companies — with some reference to national efforts and regional co-operation on the side — but it would now seem might have been better to focus attention and skills on the use of these revenues.²⁰

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Notes:

- ¹ UNCTC, *Transnational Corporations in the Bauxite Industry*, 1981.
- ² Cf C Davis, *Jamaica in the World Aluminium industry*, JBI Journal, Vol 1, No 1, November 1980, p 4. In 1950 *the Bauxite and Alumina Industries Encouragement Law was passed*.
- ³ Cf C Davis, *Jamaica in the World Aluminium Industry: Taxation and Royalty Regimes 1953–1957*.
- ⁴ Cf N Girvan, *Foreign Capital and Economic Underdevelopment in Jamaica*, 1972; *idem Making the Rules of the Game: Company–Country Agreements in the Bauxite Industry*, 1971.
- ⁵ Cf Gerald Meier, *Problems of Cooperation for Development*, 1974, p 181 and *passim*; Duke Pollard, *Kaiser Jamaica Bauxite Company: A Case Study*, UNCTC Workshop in Accra, Ghana, 1981.
- ⁶ Cf C Davis, *Jamaica in the World Aluminium Industry: The Discovery and Commercialization of Aluminium*, JBI Journal, Vol 1, No 1.
- ⁷ Cf D Pollard, 1981, *supra*.
- ⁸ Cf Government of Jamaica, Press Release of 1974-06-26.
- ⁹ Cf K O Rattray, *Juridical Aspects of the New International Economic Order*, The Jamaican Experience in the Case of Bauxite, Jamaican Bauxite Symposium, 1980, p 137, as cited by Pollard, 1981.
- ¹⁰ Cf John Schmidt, *Arbitration under the Auspices of the ICSID Implications of the Decision in ALCOA v Government of Jamaica*, Harvard International Law Journal, No 17, 1976, p 90.
- ¹¹ Cf UN/ECLA, *Policies and Negotiations with Transnational Corporations in the Bauxite Industry of Jamaica*, E/CEPAL/R 326, of 1982-07-28.
- ¹² Cf N Webb-Brown, *Developments in the Bauxite-Alumina Industry of Jamaica 1976–1980*, in: UN/DSE, Legal and Institutional Arrangements in Minerals Development, 1982, p 216.
- ¹³ Government of Jamaica: Ministry Papers No 46 of 1979.
- ¹⁴ Cf UN/ECLA, 1982, p 37 f.
- ¹⁵ Cf 1984 Annual Report under Section 13 of the Securities and Exchange Act, submitted by Reynolds to the US Securities and Exchange Commission, p 2/3.
- ¹⁶ Cf Metal Bulletin, 1983-12-30.
- ¹⁷ Commodities Report, 1984-05-11.
- ¹⁸ Cf Hartmut Elsenhans, *Abhängiger Kapitalismus oder bürokratische Entwicklungsgesellschaft*, Frankfurt 1981; N Girvan, *Corporate Imperialism*, 1976.
- ¹⁹ Cf C Davis, *Energy and the Jamaican Bauxite/Alumina Industry*, JBI Journal Vol 2, No 1.
- ²⁰ Cf P N Giraud, *Geopolitique des Ressources Minières*, 1983, p 666.

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