

Part Three

Noranda Bauxite Limited's Expired Letter of Credit

Executive Summary

The Ministry of Finance and the Public Service (MoFPS) has overall responsibility for developing the Government's fiscal and economic policy framework; collecting and allocating public revenues and playing an important role in the socio-economic development of the country in creating a society in which each citizen has every prospect of a better quality of life. The objectives of the Ministry include the creation of an environment that will promote sustainable economic growth, and to effectively manage the national budget and administer policies for the sound financial management of public funds.

In accordance with a request from the Opposition Spokesman on Finance, we conducted a special audit to determine whether the circumstances surrounding the issuance of a letter of credit (LOC) by Noranda Bauxite Limited to the Government of Jamaica were consistent with best practices. The key findings of the audit are summarized below.

Key Findings

1. Arising from a dispute between the Government of Jamaica (GoJ) and Noranda Bauxite Limited (NBL), an Interim Agreement was signed on June 9, 2015, to allow NBL to continue exporting bauxite pending the completion of arbitration proceedings. The Agreement required the payment of US\$3.75 per metric tonne in cash and US\$1.25 per metric tonne in irrevocable LOCs' issued to the GoJ and payable on the termination of this Agreement. On December 18, 2015, the Arbitration Tribunal ruled in favour of the GoJ, and awarded the sum of US\$12.6 million representing bauxite levy to be paid by NBL.
2. **The Ministry of Finance and the Public Service (MoFPS) did not make a timely and compliant request on NBL's irrevocable letter of credit, leading to its expiration and delay in recovery of US\$5.06 million²⁸.** On January 25, 2016, four days prior to the expiration of the LOC, the MoFPS made a drawdown request to an overseas bank. However, the bank did not honour the request due to the Ministry's failure to submit the required sight draft and the beneficiary statement. This was communicated in a letter from the overseas bank dated January 28, 2016, but stamped as received by the Office of the Financial Secretary on February 01, 2016, after the LOC expiry date of January 29, 2016.

²⁸ Exchange rate of \$121.37 as at January 29, 2016, translates to JA\$614,081,952.82

3. Subsequently, on February 8, 2016, Noranda Aluminium Holding Corporation (parent company) filed for Chapter 11 Bankruptcy in the USA and the GoJ submitted the claim to the Court for an amount of US\$23.5 million, which included levy payable, interest of US\$1.2 million, and other outstanding taxes and awards.
4. The MoFPS informed us that the new owners of NBL agreed to repay the \$5.06 million as a part of a larger debt repayment over an eight-year period.

Recommendation

The MoFPS should design and implement procedures to govern the monitoring of Letters of Credit issued to the Government of Jamaica (GoJ). These procedures should include clear lines of responsibility over these Letters and should also provide for sanctions to minimise the recurrence of these incidence of negligence.

The Ministry subsequently indicated that it has implemented mechanisms to monitor the arrangements under which letters of credit received by the Ministry are processed and actioned.

Interim Agreement

- 3.1** On September 30, 2004, the Government of Jamaica (GoJ) and Saint Ann Bauxite Limited²⁹ signed an Establishment Agreement, which outlined the terms under which bauxite will be produced by the company and the minimum Levy rate of US\$5. Section 6.01 (c) (ii) of the Establishment Agreement states that:

The minimum production levy per metric tonne is determined at the LMEP³⁰ of US\$1,325 per metric tonne and shall escalate from US\$5 per metric tonne in direct proportion to increases in LMEP.

Source: Establishment Agreement between GoJ and St. Ann Bauxite Ltd. dated September 30, 2004.

- 3.2** On August 31, 2009, Noranda Bauxite Limited (NBL)³¹ acquired beneficial interest in Saint Ann Bauxite Company from Century Aluminium Company. As a consequence of the purchase, GoJ and the NBL signed an Amendment to the Establishment Agreement³² on June 24, 2010. The Amendment provided for an adjustment to the Bauxite Levy rate covering the period September 2009 to December 2014.

Period	Amended Production Levy Rate	LMEP
2012 – 2014	US\$3.50	US\$2,500 or above
	US\$3.00	US\$2,100 but under US\$2,500
	US\$2.50	under US\$2,100
2009 – 2011	US\$2.50	-

- 3.3** In January 2015, Jamaica Bauxite Institute (JBI), acting on behalf of the GoJ, resumed calculation of bauxite levy payable in accordance with the Establishment Agreement (September 2004). By way of correspondence dated January 6, 2015, NBL informed JBI that correspondence under the signature of the Honourable Minister of Science, Technology, Energy and Mining (MSTEM) extended the levy arrangements beyond December 31, 2014.

Acting on the advice of the JBI and pursuant to Section 47 of the Mining Act, I hereby amend Special Mining Lease 165 to accommodate your above application on condition that:

- 1 800,000 Dry Metric Tonnes (DMT) are made available to Glencore International AG annually within the period 2014 to 2017; and

²⁹ As at September 2004, the company was 50 per cent beneficially owned by Century Aluminum Company and Noranda Aluminum Incorporated

³⁰ London Metal Exchange price – average of the three months' seller price for 99.7 per cent purity aluminum in US dollars per metric ton quoted by the London Metal Exchange

³¹ Pursuant to a securities purchase agreement with the investors dated August 3, 2009

³² GoJ, acting through the Minister of Finance and Planning and the Minister of Mining and Energy and Saint Ann Bauxite Limited, known as Noranda Bauxite Limited (NBL)

2 The Establishment Agreement dated September 1, 2009 be amended to reflect that clauses 6.02 (a) (Capital Investment Programme), 6.02(c) (Application Levy) and 7.01 (Royalty) are extended beyond December 31, 2014.

Source: Letter from Ministry of Science, Technology, Energy and Mining to NBL dated December 13, 2013.

3.4 JBI determined the levy rate to be US\$6.34 for calendar year 2015, based on the minimum bauxite levy rate of US\$5 in accordance with the Establishment Agreement. This resulted in a dispute between the Government of Jamaica (GoJ) and Noranda Bauxite Limited (NBL), and on June 9, 2015, an Interim Agreement was signed to allow NBL to continue exporting bauxite pending the completion of arbitration proceedings. The Agreement required the payment of US\$3.75 per metric tonne in cash and US\$1.25 per metric tonne in irrevocable letters of credit (LOC) issued to the GoJ and payable on the termination of this Agreement³³.

Letters of Credit

3.5 On June 24, 2015, an overseas financial institution issued to the MoFPS an irrevocable Standby Letter of Credit (LOC) for an amount not exceeding US\$2.5 million. The LOC document indicated an expiry date of January 29, 2016 and indicated that '*partial drawings were permitted*'.

3.6 Over the period July 2015 to December 2015, the overseas financial institution submitted six amendments to the initial LOC addressed to the Ministry of Finance for the attention of the Financial Secretary. Review of the LOC documents showed that the Office of the Financial Secretary acknowledged receipt of Amendment 5 and Amendment 6 and directed these to the Legal Services Unit (LSU) for necessary action. As at December 9, 2015, the guaranteed amount totalled \$5.06 million (**Figure 10**).

Figure 10 – Noranda Bauxite Limited Letter of Credit and its amendments

Agreement	LOC Date	Guaranteed Amount (US\$)	Received by OFS - MoFPS (as per affixed stamp)
Letter of Credit	June 24,2015	2,547,953.75	Not provided
Amendment 1	July 14,2015	2,945,625.00	July 16,2015
Amendment 2	August 10,2015	3,350,368.75	Not provided
Amendment 3	September 8,2015	3,906,265.00	Sept 10, 2015
Amendment 4	October 7,2015	4,434,298.75	Not provided
Amendment 5	November 9,2015	4,818,392.50	Nov 11, 2015
Amendment 6	December 9,2015	5,059,586.25	Dec 14, 2015

Source: AuGD's compilation of Information from the Letters of Credit

³³ Section 3 of the Interim Agreement (Levy Payments on Account)

- 3.7 On December 18, 2015, the Arbitration Tribunal ruled in favour of the GoJ, and awarded the sum of US\$12.6 million to be paid by NBL (**Figure 11**). NBL was also required to pay \$163.4 million, which represents two-thirds of the Tribunal costs of \$245.1 million. The Tribunal also concluded that the regime for 2015 and beyond had not been contractually determined, but remained to be negotiated.

Figure 11 – Tribunal Award

	US\$	US\$
Levy Payable 2015		27,795,180
Levy Paid		
• Cash	16,837,760	
• Letters of Credit	5,059,586	(21,897,346)
Levy Outstanding – 2015		5,897,834
Letters of Credit	5,059,586	
Levy Owning – 2014	1,653,617	6,713,203
Tribunal Award		12,611,037

Source: AuGD's compilation of the Jamaica Bauxite Institute Accounting Information & Tribunal Award

- 3.8 On January 15, 2016, MoFPS sent a demand letter to NBL requesting a payment of US\$14.8 million, which included US\$12.6 million owed in bauxite levy based on the Tribunal award. The submission of the demand letter was in accordance with the terms of the irrevocable letter of credit, which required the MoFPS to request payment from NBL at least five days, before drawing down on the LOC.

GoJ has made written demand delivered to NBL for payment of such unpaid amount represented by the drawing requested herewith at least five days prior to GoJ making this drawing, and NBL has failed to pay such amount to GoJ.

Source: *Letter of Credit dated June 24, 2015.*

- 3.9 On January 25, 2016, four days before to the expiration of the LOC, MoFPS made a drawdown request to the overseas financial institution, indicating that the GoJ has made written demand for unpaid amounts represented by the letter of credit and its amendments, which was not honoured by NBL. The letter stated that MoFPS had:

Enclosed original LOC and amendments, save and except the amendment for August 2015, which we will send shortly and wish to draw down on the full sum represented by the LOC and amendments.

Source: *Letter of Overseas Financial Institution dated January 25, 2016.*

- 3.10** We reviewed the letter from the overseas financial institution dated January 28, 2016, stamped as received by the Financial Secretary on February 01, 2016. The letter stated that MoFPS did not include the sight draft and the beneficiary statement. The LOC document stated:

The letter of credit is available by your draft(s) at sight drawn on an overseas financial institution³⁴, accompanied by the following documents:

1. The original letter of credit and all amendments, if any thereto.
2. Beneficiary's dated statement signed by an authorised officer of the Government of Jamaica on letterhead.

Source: Letter of Credit dated June 24, 2015.

- 3.11** Based on the non-submission of the documents, the overseas financial institution did not honour the request. The Ministry has subsequently indicated that it has implemented mechanisms to monitor the arrangements under which letters of credit received by the Ministry are processed and actioned.

Subsequent Events

- 3.12** On February 8, 2016, Noranda Aluminium Holding Corporation filed for Chapter 11 Bankruptcy in the USA and the GoJ had until August 30, 2016, to file a claim in the Bankruptcy court. The GoJ submitted the claim within the stipulated time frame. Outlined in the claim to the Court is an amount of US\$23.5 million, which included levy payable, interest of US\$1.2 million, and other outstanding taxes and awards as outlined in the Proof of Claim to a US Bankruptcy Court. Correspondence from the Attorney General's Chambers in January 2017 indicated that:

The Missouri Bankruptcy Court approved the sale of the Debtors' (Noranda Aluminium, Inc. and its affiliated companies) upstream business including Noranda Bauxite Limited (NBL) and the Gramercy Refinery on 21 October 2016.

As a result of the Auction, NBL and the new purchaser entered into an Amended and Restated Asset Purchase Agreement providing for a secured note with a principal amount equal to US\$24,430,000, representing US\$2,930,000 more than the consideration initially offered by the Purchaser under the Stalking Horse Agreement.

The new owner's binding Letter of Intent with the GoJ requires them to pay the outstanding debt of US\$12.6 million for levy owed for 2014 and 2015 to the extent that this is not paid to the GoJ by the trust fund.

Source: Email from Attorney General's Department to AuGD dated January 16, 2017.

³⁴ Bank address and other details redacted

- 3.13** Our review of the binding letter of intent presented by the MoFPS outlining partnership terms between the new owner and the Government of Jamaica accepted and agreed as of October 24, 2016, highlighted an initial 25 year term subject to renewal. The agreement also states:

Section 1.1 - This may require the issue of a new Special Mining Lease as the existing Special Mining Lease held by NBL which is to be transferred to **new owner** and/or the new JV partnership has less than the period remaining.

Section 3.1 – Net of any recovery in the Noranda Bankruptcy, the **new owner** will repay the US\$12.6 million in overdue levy in phases with an initial up-front payment of US\$1.0 million annually for the first 4 years, followed by annual payments of US\$2.15 million without interest thereon for a further 4 years until the sum is repaid. In the event of a sale of **the business** prior to repayment in full of this amount, the **new owner** will pay the unpaid amount upon such sale.

Source: Letter of Intent dated October 24, 2016.