

1970/139

**THE INCOME TAX (NON-RESIDENT COMPANIES SPECIAL
DEVELOPMENT PROJECT) ORDER 1970**

RICHARD WILD, Administrator of the Government

ORDER IN COUNCIL

At the Government House at Wellington this 6th day of July 1970

Present:

HIS EXCELLENCY THE ADMINISTRATOR OF THE GOVERNMENT IN COUNCIL

PURSUANT to the Land and Income Tax Act 1954, His Excellency the Administrator of the Government, acting by and with the advice and consent of the Executive Council, hereby makes the following order.

O R D E R

1. Title—This order may be cited as the Income Tax (Non-Resident Companies Special Development Project) Order 1970.

2. Interpretation—(1) In this order—

“The industry agreement” means the agreement a copy of which is set out in the Schedule to this order:

“The smelter” means the initial aluminium smelter on Tiwai Peninsula near Bluff in New Zealand and expansions thereof from time to time:

“Taxable income” does not include income in the form of dividends, interest, rents, royalties, payments of any kind for the supply of scientific, technical, industrial, or commercial knowledge, information, or assistance, or any payments of a similar nature:

“Ton” means a ton of 2,240 pounds avoirdupois, and a specified number of tons mentioned in connection with the production capacity of the smelter means that number of tons of aluminium in cast form:

The expressions “aluminium”, “force majeure”, “participant”, “participants”, “the period of force majeure”, “the prescribed capacity”, “rated production capacity”, and “the smelter company” have the same meanings as in the industry agreement:

The expressions “accounting year” and “branch” have the same meanings as in section 78F of the Land and Income Tax Act 1954:

Other expressions defined in the Land and Income Tax Act 1954 have the meanings so defined.

(2) The Acts Interpretation Act 1924 shall apply with respect to this order as if this order were an Act of the General Assembly.

3. Special development project declared—The industrial undertaking, as specified in paragraph (i) of subclause (c) of clause 10 of the industry agreement, being an undertaking which is to be carried on by Comalco Industries Pty. Limited (a duly incorporated company having its registered office at 95 Collins Street, Melbourne, Australia, and hereinafter in this order referred to as the company) through a branch, situated in New Zealand, of the company, is hereby declared to be a special development project for the purposes of section 78F of the Land and Income Tax Act 1954 with respect to the taxable income derived by the company from that industrial undertaking during such accounting years of the company as are hereunder specified as comprising, in relation to this order, the first specified period and the second specified period as defined in subsection (1) of the said section 78F, namely—

(a) The first specified period shall comprise the accounting year of the company in which that industrial undertaking commences; and

(i) The 14 accounting years of the company next succeeding its accounting year in which that industrial undertaking commences if the date during that last-mentioned year on which that industrial undertaking commences is not later than 6 months after the commencement of that last-mentioned year; or

(ii) The 15 accounting years of the company next succeeding its accounting year in which that industrial undertaking commences if the date during that last-mentioned year on which that industrial undertaking commences is later than 6 months after the commencement of that last-mentioned year:

(b) The second specified period shall comprise the 10 accounting years of the company next succeeding its last accounting year comprised in the first specified period in relation to this order:

Provided that the requirement in the preceding provisions of this clause that that industrial undertaking is to be carried on through a branch, situated in New Zealand, of the company shall not extend to any activities comprised in that industrial undertaking, being activities which are carried on outside New Zealand and which relate directly to the purchase of alumina, or to the supply of alumina (not being supply activities relating to the ordering and importing into New Zealand of alumina in accordance with the requirements of the smelter for the time being, or to the delivery in New Zealand of those imports to the smelter), or to the marketing outside New Zealand or the disposal outside New Zealand of aluminium.

4. Terms and conditions—This order shall be subject to the following terms and conditions:

(a) That if the smelter has not been expanded to the prescribed capacity by the end of the first specified period, this order shall not apply with respect to the taxable income derived by the

company from its said industrial undertaking on or after the commencement of the second specified period:

Provided that if the failure to so expand the smelter was due to any force majeure, the foregoing provisions of this paragraph shall not operate so as to preclude this order from applying with respect to—

- (i) The taxable income derived by the company from that industrial undertaking during so much of the period of force majeure as falls within the second specified period; or
- (ii) Where the period of force majeure terminates before the end of the second specified period and the smelter has been expanded to the prescribed capacity by the end of the period of force majeure, the taxable income derived by the company from that industrial undertaking during so much of the second specified period as remains after the end of the period of force majeure; or
- (iii) Where the period of force majeure terminates before the end of the second specified period and after the commencement but before the end of an accounting year of the company within the second specified period and subparagraph (ii) of this paragraph does not apply, the taxable income derived by the company from that industrial undertaking during so much of that accounting year as remains after the end of the period of force majeure:

Provided also that nothing in this paragraph shall be construed as applying this order with respect to any taxable income with respect to which this order does not apply by virtue of the operation of paragraph (b) or paragraph (c) of this clause:

- (b) That if at any time during the first specified period or the second specified period—

- (i) The company fails to comply with any of the provisions of clause 8 of the industry agreement (whether through the exercise of its rights under clause 11 of that agreement or otherwise), or fails to abide by the provisions of paragraph (b) of clause 9 of that agreement; or

- (ii) The company fails to abide by the provisions of paragraph (c) of clause 9 of the industry agreement so long as the Commissioner and the taxation authority of Australia have agreed in terms of that paragraph,—

this order shall not apply with respect to the taxable income derived by the company from its said industrial undertaking on or after the commencement of its accounting year in respect of which that failure took place:

Provided that the Governor-General may, if he thinks fit, upon application made in that behalf by the company to him through the Minister of Finance, declare, upon such terms and conditions as the Governor-General may impose, that this

order shall apply with respect to the taxable income derived by the company from that industrial undertaking from such date as the Governor-General determines; but no such decision of the Governor-General shall have effect to extend the first specified period or the second specified period beyond the date on which it would have determined had there been no such failure by the company:

Provided also that nothing in this paragraph shall be construed as applying this order with respect to any taxable income with respect to which it does not apply by virtue of the operation of paragraph (a) or paragraph (c) of this clause:

- (c) That if the company fails in each of any two consecutive calendar years, within the first specified period or within the second specified period or partly within the one and partly within the other, to take from the smelter at least 80 percent of that quantity of aluminium which is equal to the company's committed proportion for that year (in terms of paragraph (i) of subclause (a) of clause 7 of the industry agreement) of the quantity of aluminium which is the rated production capacity of the smelter for that year, this order shall not apply with respect to the taxable income derived by the company from its said industrial undertaking—

(i) On or after the commencement of its accounting year next commencing after the end of the said two consecutive calendar years; or

(ii) After the end of the second specified period—
whichever is the sooner:

Provided that if in any calendar year the smelter fails to produce a quantity of aluminium at least equal to its rated production capacity for that year because of circumstances beyond the control of the participants (other than refusal by any country or territory other than New Zealand to permit imports of aluminium), then, for the purposes of the foregoing provisions of this paragraph, the rated production capacity of the smelter for that year shall be deemed to be the quantity of aluminium which the smelter is able to produce in that year:

Provided also that if, pursuant to an arrangement between one of the participants and another or others of the participants, the other participant or participants take all or part of the first-mentioned participant's said committed proportion for any calendar year, then, for the purposes of the foregoing provisions of this paragraph, the first-mentioned participant shall be deemed to have taken, and the other participant or participants shall be deemed not to have taken, in that year the quantity in question:

Provided also that nothing in this paragraph shall be construed as applying this order with respect to any taxable income with respect to which it does not apply by virtue of the operation of paragraph (a) or paragraph (b) of this clause.

SCHEDULE

INDUSTRY AGREEMENT FOR ESTABLISHMENT AND OPERATION OF
ALUMINIUM SMELTER NEAR BLUFF

AN AGREEMENT made the 5th day of September 1969 BETWEEN HER MAJESTY THE QUEEN in respect of the Government of New Zealand acting by and through the Minister of Industries and Commerce (hereinafter referred to as "the Crown") of the first part COMALCO INDUSTRIES PTY. LIMITED a duly incorporated company having its registered office at 95 Collins Street, Melbourne, Australia (hereinafter referred to as "Comalco") of the second part SHOWA DENKO K.K. a duly incorporated company having its registered office at 34 Shiba Miyamoto-Cho, Minato-Ku, Tokyo, Japan (hereinafter referred to as "Showa Denko") of the third part SUMITOMO CHEMICAL COMPANY LIMITED a duly incorporated company having its registered office at 15 5-Chome, Kitahama, Higashi-Ku, Osaka, Japan (hereinafter referred to as "Sumitomo") of the fourth part and NEW ZEALAND ALUMINIUM SMELTERS LIMITED a duly incorporated company having its registered office at 20 Brandon Street, Wellington, New Zealand (hereinafter referred to as "the smelter company") of the fifth part (the parties of the second part, the third part and the fourth part being hereinafter referred to individually as "participant" and collectively as "participants")

WHEREAS the Crown and Consolidated Zinc Proprietary Limited, a company associated with Comalco, are parties to an agreement dated the 15th day of August 1963 and validated by the Manapouri - Te Anau Development Act 1963 (hereinafter referred to as "the 1963 Power Agreement") as varied by two agreements both dated the 15th day of November 1966 the one being approved by Order in Council published in 1967 New Zealand Gazette at page 409 (hereinafter referred to as "the 1966 Notices Agreement") and the other being notified in 1967 New Zealand Gazette at page 414 (hereinafter referred to as "the 1966 Pricing Agreement")

AND WHEREAS the 1963 Power Agreement as varied by the 1966 Notices Agreement provides for the development by the Crown of the water resources of Lakes Manapouri and Te Anau and certain rivers for the generation of electrical power and sets out the respective rights of the parties thereto to specified quantities of the electrical power which will become available, and the Schedule to the 1963 Power Agreement as varied by the 1966 Pricing Agreement provides for the calculation of the price for the electrical power made available by the Crown to Consolidated Zinc Proprietary Limited or its permitted assigns

AND WHEREAS Comalco in order to achieve its announced objective of making the best use of the electrical power available to it through Consolidated Zinc Proprietary Limited or its permitted assigns under the 1963 Power Agreement varied as aforesaid has joined with Showa Denko and Sumitomo to establish an aluminium smelter near Bluff to produce aluminium principally for export

AND WHEREAS the participants have discussed and agreed with the Crown the terms and conditions upon which they will establish, operate and expand the said smelter

AND WHEREAS the Crown with a view to encouraging the establishment and expansion of the said smelter by the participants has agreed

to make certain special arrangements in regard to taxation and other matters in reliance upon which the participants have agreed to establish and operate the smelter

AND WHEREAS the basis upon which the said discussions were conducted, the matters upon which agreement was reached, and the terms, conditions, and special arrangements agreed to as aforesaid have been recorded in Heads of Agreement between the Crown and the participants dated the 8th day of July 1968 and subsequently confirmed by the Crown and each of the participants

AND WHEREAS the Land and Income Tax Amendment Act (No. 2) 1968 enacted by the New Zealand Parliament enables provision to be made for certain of the special arrangements in regard to taxation set out in the said Heads of Agreement

AND WHEREAS Showa Denko and Sumitomo have sought and obtained the approval of the Japanese Government to their participation in the smelter project and to their investment and expenditure of funds in relation to the initial stage of the smelter in the manner provided for in this agreement

AND WHEREAS the rights of Consolidated Zinc Proprietary Limited under the 1963 Power Agreement as varied by the 1966 Notices Agreement have (except as to certain clauses thereof) been transferred with the written consent of the Minister of Electricity pursuant to clause 23 thereof to Comalco Power (N.Z.) Limited a duly incorporated company being a subsidiary of Comalco and having its registered office at 20 Brandon Street, Wellington, New Zealand, and Comalco Power (N.Z.) Limited has given to the Crown a notice dated the 23rd day of December 1968 under paragraph (c) of clause 5 of the 1963 Power Agreement as varied by the 1966 Notices Agreement requiring the supply of 100 megawatts of electrical power from Manapouri on and from the 30th day of June 1971

AND WHEREAS as a result of the transfer hereinbefore referred to certain consequential variations are contemporaneously with these presents being made by the Crown and Comalco Power (N.Z.) Limited to the 1963 Power Agreement as varied by the 1966 Notices Agreement

AND WHEREAS the Crown and Comalco Power (N.Z.) Limited are also contemporaneously with these presents executing an agreement further varying the 1963 Power Agreement as varied by the 1966 Pricing Agreement in order to give effect to the agreement as to the price of electrical power from Manapouri contained in subclause (a) of clause 20 of the said Heads of Agreement

AND WHEREAS the parties to the said Heads of Agreement thereby agreed that they would as soon as practicable enter into an Industry Agreement which would embody in greater detail the provisions of the Heads of Agreement (excepting clause 20 thereof which would be dealt with in accordance with paragraph (e) of that clause) and that upon the Industry Agreement and any agreement necessary under the said clause 20 being concluded the Heads of Agreement would lapse

NOW THEREFORE IT IS HEREBY AGREED by and between the parties hereto as follows:

1. (a) In this agreement—
“accounting year”, in relation to a participant, means a year ending

with the date of the annual balance of that participant's accounts:

“aluminium” means primary aluminium and primary aluminium alloys:

“branch”, in relation to a participant, means a branch of that participant that—

(i) is a fixed place of business of that participant; and

(ii) so long as there is, in relation to that participant, a Double Taxation Agreement for the time being in force, is a permanent establishment of that participant within the meaning of that Double Taxation Agreement:

“the Commissioner” means the Commissioner of Inland Revenue of New Zealand:

“the Minister” means the Minister of Industries and Commerce, provided that in clauses 15 and 16 of this agreement “the Minister” means the Minister of Customs:

“smelter” means the initial aluminium smelter on Tiwai Peninsula near Bluff and expansions thereof from time to time:

“ton” means a ton of 2,240 pounds avoirdupois, and a specified number of tons mentioned in connection with the production capacity of the smelter means that number of tons of aluminium in cast form.

(b) For the purposes of this agreement—

(i) the shareholding in the smelter company of a nominee of a participant, being a nominee approved by the Minister and for the time being complying with such conditions as the Minister may have imposed in that approval, shall be deemed to be part of the shareholding of that participant, and where reference is made in this agreement to the proportion of the share capital of the smelter company held by a participant the share capital of the smelter company held by any such nominee of that participant shall be deemed to be held by that participant:

Provided that, in the application of this paragraph to paragraph (i) of subclause (a) of clause 7 of this agreement, a failure to comply with any of the said conditions shall not reduce a participant's obligations in terms of that last-mentioned paragraph below what such obligations would have been if there had been no such failure:

(ii) the references in paragraph (c) of clause 9, subclause (a) of clause 11, clause 12 and clause 14 of this agreement to the Land and Income Tax Act 1954 shall, in each case, be deemed to include a reference to any subsequent enactment that may be passed in amendment of that Act or in substitution therefor or in amendment of or substitution for any such subsequent enactment and so on:

(iii) the expression “Double Taxation Agreement”, in relation to a participant, means an agreement or convention made between the Government of New Zealand and the Government of the country of which that participant is a resident or, as the case may be, in which that participant is resident, with a view to affording relief from double taxation in relation to

tax (being tax to which that agreement or convention applies) imposed by the laws of New Zealand and to tax (being tax to which that agreement or convention applies) imposed by the laws of that country.

2. This agreement relates only to the rights and obligations of the participants and the smelter company in connection with the establishment and operation of the smelter and the production and disposal of aluminium, but the production and disposal overseas (or, with the consent of the Minister, in New Zealand) of any carbon products from the smelter's carbon plant which are surplus to the requirements of the smelter for the time being and of any by-products of the smelter which are approved by the Minister shall be deemed to be within its provisions.

3. (a) THE smelter company has been formed to establish, own, and operate the smelter.

(b) The share capital of the smelter company is held in the following proportions:

Comalco	50 percent
Showa Denko	25 percent
Sumitomo	25 percent

No change in this shareholding either as to proportion of shares or identity of shareholder shall at any time be made without the consent of the Minister.

(c) In the case of an application for consent to a change which affects only the proportions of the share capital held by the participants the Minister shall have regard to the respective rights of the participants with respect to the expansion of the smelter as set out in agreements between them the terms of which have been notified to the Minister, and to the requirement that the smelter be expanded to a designed annual production capacity of at least 210,000 tons by the end of the first specified period referred to in clause 10 of this agreement before the participants will become entitled to the benefit of the tax provisions set out in that clause and in section 78F of the Land and Income Tax Act 1954 relating to the second specified period referred to in that clause.

(d) In the case of an application for consent to any such change after the expiration of eleven years from the commencement of commercial operation of the initial stage of the smelter, the Minister's consent shall not be unreasonably withheld.

4. THE smelter company shall acquire the necessary land at Tiwai Peninsula near Bluff upon which to construct an aluminium smelter in accordance with clause 5 of this agreement.

5. (a) IT is the intention of the participants through the smelter company to construct in two stages an aluminium smelter having a designed annual production capacity of not less than 105,000 tons and designed so that it may be readily expanded to at least 210,000 tons annual production capacity.

(b) The smelter company after finalising the necessary financial arrangements shall without delay embark upon construction of the initial stage of the smelter, designed for not less than 70,000 tons annual production capacity, generally in accordance with the schedule with which Comalco has provided the Minister setting out the dates by which

it is intended to achieve completion of the major stages of construction and to commence operation of the initial stage of the smelter.

(c) It is the firm intention of the participants that as soon as the initial stage is complete they will through the smelter company add at least a further 35,000 tons annual production capacity making a total of not less than 105,000 tons. It is also the firm intention of the participants through the smelter company to expand the smelter to at least 210,000 tons annual production capacity as soon as is practicable.

(d) It is recognised by the parties hereto that commencement of major construction work for the smelter depends upon the date of completion of the road and bridge which will provide access to the smelter site and which road and bridge were originally scheduled by the Southland County Council in consultation with Comalco for completion by the 1st day of October 1969, but which in terms of the contract awarded by the said Council are now required to be completed by the 26th day of January 1970.

6. THE last estimate by the participants of the total cost of establishing the smelter to the stage of a designed annual production capacity of about 105,000 tons is of the order of NZ\$80-90 million. The moneys required to meet the said cost will be made available to the smelter company (subject to the obtaining of the requisite exchange control and any other necessary approvals from countries from which the moneys originate) as to part by the participants and their approved nominees in the form of subscribed share capital, as to part by loans by the participants, and as to the balance by other borrowing, which for the purposes of this clause shall be deemed to include deferred payments for plant and equipment, if available.

7. (a) THE participants and the smelter company have entered into contracts having initial terms in excess of twenty-five years whereby, among other things, the participants in effect have agreed:

- (i) to take in the same proportion between them as they hold shares in the smelter company the whole of the output of the smelter to the limit of its rated annual capacity for the time being, provided that any one or more of them may undertake in whole or in part the obligation of another to take its share of the output, and provided further that in the event of any participant failing to take or to arrange for another participant on its behalf to take its committed share of the output then it will pay to the smelter company a stand-by charge of an amount equal to the charge referred to in paragraph (iii) of this subclause less any savings which the smelter company may make in not producing the relevant quantity of aluminium;
- (ii) each to supply the smelter with sufficient alumina to produce the quantity of aluminium it is obliged to take from the smelter; and
- (iii) to pay a charge for converting the alumina to aluminium which charge is designed to cover processing costs, depreciation, interest on loans, and other expenditure of a non-capital nature, less the proceeds of the sale of carbon products surplus to the requirements of the smelter and of any by-products of the smelter.

(b) The participants and the smelter company shall make such arrangements with departments and instrumentalities of the Crown and with local authorities as may be requisite to enable the prompt establishment of the initial stage of the smelter and the later establishment of expansions thereof in accordance with recognised engineering and aluminium smelting practices.

(c) The participants and the smelter company shall arrange, in consultation with the appropriate agency of the Crown or local authority, that the smelter will be so designed, constructed and operated that it will conform to all relevant statutory provisions, regulations, by-laws and lawful requisitions from time to time in force relating to public health and the prevention of nuisances and in particular relating to the emission of gases and effluents.

8. EACH of the participants shall as from a date not later than the commencement of the commercial operation of the initial stage of the smelter—

(a) establish and maintain in New Zealand a branch of that participant;

(b) conduct its affairs in such a way that it will in fact be engaged in or carry on business in New Zealand through that branch in respect of its industrial undertaking, as specified in subclause (c) of clause 10 of this agreement, except in so far as that undertaking comprises activities which are carried on outside New Zealand and which relate directly to the purchase of alumina, or to the supply of alumina (not being supply activities relating to the ordering and importing into New Zealand of alumina in accordance with the requirements of the smelter for the time being, or to the delivery in New Zealand of those imports to the smelter), or to the marketing outside New Zealand or the disposal outside New Zealand of aluminium; and

(c) consult with the Commissioner, at such times as he considers necessary, as to the effective implementation by it of the provisions of paragraphs (a) and (b) of this clause and take such steps as may be necessary for such effective implementation.

9. It is agreed that—

(a) the overall profits derived by each of the participants in any of its accounting years from its industrial undertaking, as specified in subclause (c) of clause 10 of this agreement, shall be calculated in accordance with New Zealand law and with the principles of arm's length dealing;

(b) on the basis of the provisions of clause 8 of this agreement, the proportion to be attributed to sources within New Zealand in accordance with paragraph (c) of this clause of the said overall profits, calculated in accordance with paragraph (a) of this clause, derived by each of the participants in any of its accounting years—

(i) shall be properly attributable to its said branch in New Zealand; and

(ii) so long as there is, in relation to that participant, a Double Taxation Agreement for the time being in force, shall be properly attributable under that Double Taxation Agreement to that branch;

(c) the proportion to be attributed to sources within New Zealand of the said overall profits, calculated as aforesaid, derived by each of the participants in any of its accounting years shall be as agreed from time

to time in that behalf between the Commissioner and the taxation authority of Australia or, as the case may be, of Japan, or if in respect of any accounting year there be no such agreement then as determined by the Commissioner, subject, if objection is made by the participant to any assessment made pursuant to the Commissioner's determination, to such rights as the participant may have in respect of the objection under the Land and Income Tax Act 1954 or otherwise under the law of New Zealand;

(d) the principles stated in the preceding paragraphs of this clause shall apply with respect to any loss incurred by a participant in any of its accounting years from its said industrial undertaking; and

(e) for the purposes of this clause, the expression "overall profits" does not include income in the form of dividends, interest, rents, royalties, payments of any kind for the supply of scientific, technical, industrial, or commercial knowledge, information, or assistance, or any payments of a similar nature; and the expression "loss" does not include in the calculation of such loss income in any form which is excluded from the expression "overall profits" in accordance with the foregoing provisions of this paragraph:

Provided however that nothing in the foregoing provisions of this paragraph or in any other provision of this agreement shall be construed as in any way affecting the liability for tax in New Zealand of any income in any form which is excluded from the expression "overall profits" and the expression "loss" in accordance with the foregoing provisions of this paragraph.

10. (a) THE Crown shall, in the case of each of the participants, take the necessary action to have the industrial undertaking (as specified in subclause (c) of this clause) of that participant, being an undertaking which is to be carried on by that participant through its said branch in New Zealand, declared, by Order in Council, to be a special development project for the purposes of section 78F of the Land and Income Tax Act 1954 with respect to the taxable income derived by that participant from that industrial undertaking during the maximum number of accounting years of that participant permitted in the first specified period and in the second specified period as defined in subsection (1) of the said section 78F to the end that that participant shall be enabled to obtain the rebates of income tax applicable to it under that section:

Provided that the requirement in the preceding provisions of this subclause that that industrial undertaking is to be carried on through a branch, situated in New Zealand, of that participant shall not extend to any activities comprised in that industrial undertaking, being activities which are carried on outside New Zealand and which relate directly to the purchase of alumina, or to the supply of alumina (not being supply activities relating to the ordering and importing into New Zealand of alumina in accordance with the requirements of the smelter for the time being, or to the delivery in New Zealand of those imports to the smelter), or to the marketing outside New Zealand or the disposal outside New Zealand of aluminium.

(b) The said Order in Council shall be subject to the following terms and conditions:

(i) that if the smelter has not been expanded to the prescribed capacity by the end of the first specified period, the said

Order in Council shall not apply with respect to the taxable income derived from its said industrial undertaking on or after the commencement of the second specified period by the participant to which the said Order in Council relates:

Provided that if the failure to so expand the smelter was due to any force majeure, the foregoing provisions of this paragraph (i) shall not operate so as to preclude the said Order in Council from applying with respect to—

- A. the taxable income derived by that participant from that industrial undertaking during so much of the period of force majeure as falls within the second specified period; or
- B. where the period of force majeure terminates before the end of the second specified period and the smelter has been expanded to the prescribed capacity by the end of the period of force majeure, the taxable income derived by that participant from that industrial undertaking during so much of the second specified period as remains after the end of the period of force majeure; or
- C. where the period of force majeure terminates before the end of the second specified period and after the commencement but before the end of an accounting year of that participant within the second specified period and paragraph B of this proviso does not apply, the taxable income derived by that participant from that industrial undertaking during so much of that accounting year as remains after the end of the period of force majeure:

Provided also that nothing in this paragraph (i) shall be construed as applying the said Order in Council with respect to any taxable income with respect to which the said Order in Council does not apply by virtue of the operation of paragraph (ii) or paragraph (iii) of this subclause:

- (ii) that if at any time during the first specified period or the second specified period—

- A. the participant to which the said Order in Council relates fails to comply with any of the provisions of clause 8 of this agreement (whether through the exercise of its rights under clause 11 of this agreement or otherwise), or fails to abide by the provisions of paragraph (b) of clause 9 of this agreement; or
- B. that participant fails to abide by the provisions of paragraph (c) of clause 9 of this agreement so long as the Commissioner and the taxation authority of Australia or, as the case may be of Japan have agreed in terms of that paragraph,—

the said Order in Council shall not apply with respect to the taxable income derived by that participant from its said industrial undertaking on or after the commencement of its accounting year in respect of which that failure took place:

Provided that the Governor-General may, if he thinks fit, upon application made in that behalf by that participant to

him through the Minister of Finance, declare, upon such terms and conditions as the Governor-General may impose, that the said Order in Council shall apply with respect to the taxable income derived by that participant from that industrial undertaking from such date as the Governor-General determines; but no such decision of the Governor-General shall have effect to extend the first specified period or the second specified period beyond the date on which it would have determined had there been no such failure by that participant:

Provided also that nothing in this paragraph (ii) shall be construed as applying the said Order in Council with respect to any taxable income with respect to which it does not apply by virtue of the operation of paragraph (i) or paragraph (iii) of this subclause:

- (iii) that if the participant to which the said Order in Council relates fails in each of any two consecutive calendar years, within the first specified period or within the second specified period or partly within the one and partly within the other, to take from the smelter at least 80 percent of that quantity of aluminium which is equal to that participant's committed proportion for that year (in terms of paragraph (i) of subclause (a) of clause 7 of this agreement) of the quantity of aluminium which is the rated production capacity of the smelter for that year, the said Order in Council shall not apply with respect to the taxable income derived by that participant from its said industrial undertaking—

A. on or after the commencement of its accounting year next commencing after the end of the said two consecutive calendar years; or

B. after the end of the second specified period—whichever is the sooner:

Provided that—

(1) if in any calendar year the smelter fails to produce a quantity of aluminium at least equal to its rated production capacity for that year because of circumstances beyond the control of the participants (other than refusal by any country or territory other than New Zealand to permit imports of aluminium), then, for the purposes of the foregoing provisions of this paragraph (iii), the rated production capacity of the smelter for that year shall be deemed to be the quantity of aluminium which the smelter is able to produce in that year: and

(2) if, pursuant to an arrangement between one of the participants and another or others of the participants, the other participant or participants take all or part of the first-mentioned participant's said committed proportion for any calendar year, then, for the purposes of the foregoing provisions of this paragraph (iii), the first-mentioned participant shall be deemed to have taken, and the other participant or participants shall be

deemed not to have taken, in that year the quantity in question:

Provided also that nothing in this paragraph (iii) shall be construed as applying the said Order in Council with respect to any taxable income with respect to which it does not apply by virtue of the operation of paragraph (i) or paragraph (ii) of this subclause.

(c) The industrial undertaking referred to in subclauses (a) and (b) of this clause is—

(i) In the case of Comalco, the industrial undertaking of that participant which comprises the supply by it of alumina to the smelter (or the purchase by it of alumina and the supply by it of that alumina to the smelter), the processing on behalf of that participant by the smelter company at the smelter of that alumina to aluminium, and the marketing and disposal by that participant of that aluminium:

(ii) In the case of each of Showa Denko and Sumitomo, the industrial undertaking of that participant which comprises the purchase by it of alumina and the supply by it of that alumina to the smelter (or, where that participant does not purchase alumina, the supply by it of alumina to the smelter), the processing on behalf of that participant by the smelter company at the smelter of that alumina to aluminium, and the marketing and disposal by that participant of that aluminium.

(d) For the purposes of this clause—

“force majeure” means:

(i) war or act of public enemies;

(ii) act of God;

(iii) strike or lockout or stoppage or restraint of labour;

(iv) riot or civil commotion; or

(v) any other cause beyond the control of the participants and of the smelter company, other than restrictions imposed by the Government of Australia or the Government of Japan: “the period of force majeure”, in relation to a participant to which an Order in Council made under subsection (4) of section 78F of the Land and Income Tax Act 1954 relates, means the period comprising—

(i) the period during which the force majeure (being the force majeure to which the failure to expand the smelter to the prescribed capacity by the end of the first specified period was due) continues; and

(ii) such further period (which further period is hereinafter in this definition referred to as “the additional period”), immediately following the cessation of the said force majeure, as the Minister determines, after consultation with the participants, to be reasonably sufficient to enable the smelter to be expanded to the prescribed capacity, and any extension or extensions to the additional period which may, by reason of any further force majeure arising before the end of the additional period be approved by the Minister:

Provided that the Minister shall not determine any period or extension to a period under this paragraph (ii) unless he is satisfied that the participants or any one or more of them have the firm intention and ability to have the smelter expanded to the prescribed capacity within a period being a period which immediately follows the cessation of the force majeure referred to in paragraph (i) of this definition and which, in the opinion of the Minister formed after consultation with the participants, is reasonably sufficient to enable the smelter to be expanded to the prescribed capacity:

Provided also that, where the Minister has made a determination under this paragraph (ii), then, if at any time during the additional period, or, as the case may be, the additional period as so extended, the Minister is satisfied, after consultation with the participants, that the smelter will not, for reasons other than further force majeure, be expanded to the prescribed capacity within the additional period or, as the case may be, the additional period as so extended, the Minister, by notice to the participants and the smelter company, may terminate the additional period (or, as the case may be, the additional period as so extended) on the last day of the accounting year of the participant first referred to in this definition during which the notice is given:

“the prescribed capacity” means a designed annual production capacity of at least 210,000 tons:

“rated production capacity”, in relation to the smelter and to a calendar year means—

(i) the sum of the number of tons per year which is the rated production capacity of the initial stage of the smelter and the number of tons per year which is the rated production capacity of each expansion (if any) of the smelter which is ready for operation during that calendar year, and for this purpose—

A. the rated production capacity of the initial stage of the smelter shall be deemed to be 73,800 tons per year, and

B. the rated production capacity of each expansion of the smelter shall be deemed to be the number of tons per year equal to the designed annual production capacity of that expansion as notified by the participants or the smelter company to the Minister prior to completion thereof: or

(ii) any greater or lesser number of tons per year than that determined under paragraph (i) of this definition which has at any time been agreed upon by the participants and notified by the participants or the smelter company to the Minister and which in the case of any number of tons per year less than the number of tons per year last determined under the said paragraph (i) or under this paragraph, has been approved by the Minister:

Provided that where the initial stage of the smelter or, as the case may be, any expansion of the smelter is not ready for full scale operation at the commencement of that calendar

year, the said initial stage or, as the case may be, that expansion shall be taken into account in respect of that calendar year only for the period in which, and to the extent to which, it is ready for operation during that calendar year;

Provided also that where the rated production capacity of the smelter is determined under paragraph (ii) of this definition after the commencement of the calendar year that determination shall be taken into account in respect of only such portion of that calendar year as remains after the date on which the determination took effect:

“taxable income” does not include income in any form which is excluded from the expression “overall profits” and the expression “loss” in accordance with the provisions of paragraph (e) of clause 9 of this agreement, and the proviso to that paragraph shall apply accordingly.

(e) The participants or the smelter company shall forthwith notify the Minister whenever the participants have agreed upon any greater or lesser number of tons per year under paragraph (ii) of the definition of “rated production capacity” in subclause (d) of this clause.

11. (a) NOTWITHSTANDING the provisions of clause 8 of this agreement, a participant may at any time conduct and continue to conduct its affairs in New Zealand, in relation to its industrial undertaking, as specified in subclause (c) of clause 10 of this agreement, through a subsidiary company of that participant (being a subsidiary company which is incorporated in New Zealand and is resident in New Zealand within the meaning of the Land and Income Tax Act 1954 and being a subsidiary company which, so long as there is, in relation to that participant, a Double Taxation Agreement for the time being in force, is a New Zealand resident or, as the case may be, a resident of New Zealand within the meaning of that Double Taxation Agreement) instead of through its said branch in New Zealand if and so long as the Commissioner is satisfied, after such consultations, including consultation with the taxation authority of Australia or, as the case may be, of Japan, as he considers necessary, that the amount of profits arising from that industrial undertaking which is attributable to sources in New Zealand and which is assessable for New Zealand income tax is not and will not be thereby reduced. In such event the principles of clause 9 of this agreement shall apply as if the references in that clause to the participant’s said branch in New Zealand were references to that subsidiary company and as if the reference in that clause to clause 8 of this agreement were a reference to clause 11 of this agreement.

(b) For the purposes of this clause the expression “profits” does not include income in any form which is excluded from the expression “overall profits” and the expression “losses” in accordance with the provisions of paragraph (e) of clause 9 of this agreement, and the proviso to that paragraph shall apply accordingly.

12. (a) NOTHING in this agreement shall be construed as in any way derogating from or limiting the powers, duties, functions, or discretions of the Commissioner under the Land and Income Tax Act 1954, or under any Double Taxation Agreement which, in relation to any participant, is for the time being in force, or otherwise under the law of New Zealand.

(b) Except as is otherwise specifically provided in this agreement, this agreement shall not be construed as in any way derogating from or limiting the rights of a participant or of the smelter company under the Land and Income Tax Act 1954, or under any Double Taxation Agreement which, in relation to that participant, is for the time being in force, or otherwise under the law of New Zealand.

13. THE Crown shall take the necessary action to have the undertaking, scheme, or work of the smelter company, being its undertaking, scheme, or work comprising the establishment and operation of the smelter for the purposes of this agreement as set out in clause 2 of this agreement, declared by Order in Council to be a development project for the purposes of section 2A of the Land and Income Tax Act 1954.

14. THE smelter company shall not, until after the rated production capacity (as defined in subclause (d) of clause 10 of this agreement) of the smelter exceeds 105,000 tons per year, claim more than one-half of the deductions by way of special depreciation allowable under the Land and Income Tax Act 1954.

15. (a) SUCH licences as may from time to time be required for the importation, for the purpose of production of aluminium in the smelter, of alumina, cryolite, fluorspar, aluminium fluoride, petroleum coke, pitch, sodium carbonate and such other materials of whatsoever kind (including electrode materials) as may be approved by the Minister shall be freely granted.

(b) Such licences as may from time to time be required for the importation of plant, equipment, machinery, raw materials and other goods for the construction or operation of the smelter shall be granted by the Crown provided that (except in the case of the materials referred to in subclause (a) of this clause)—

- (i) the Minister is satisfied that suitable similar goods cannot reasonably be produced, manufactured or procured in New Zealand within a reasonable time; and
- (ii) the imported goods are paid for either with overseas funds of the participants or the smelter company or with the proceeds of their export transactions. It is accepted that such overseas funds need not be employed for replacement parts or minor improvements.

16. (a) FOR the purpose of production of aluminium in the smelter, the participants and the smelter company shall have the right to import free of sales tax and free of all duties including primage duty (save that where such freedom from all duties would conflict with New Zealand's international obligations existing on the 19th day of January 1960 the minimum duties consistent with those obligations shall apply if and so far as those obligations shall exist under any existing or substituted arrangement) alumina, cryolite, fluorspar, aluminium fluoride, petroleum coke, pitch, sodium carbonate and such other materials of whatsoever kind (including electrode materials) as may be approved by the Minister. The participants and the smelter company shall also have the right to export free of all duties and sales tax aluminium, products of aluminium, and such other products as may be approved by the Minister. It is further agreed that subject to any requirements of defence or national security such licences as may from time to time be required for the export of any of the foregoing products will be freely granted.

(b) Where plant, equipment, machinery and other goods are required for incorporation in the smelter which the Minister is satisfied cannot reasonably be produced, manufactured or procured in New Zealand within a reasonable time, the Crown shall reduce the customs duties in respect of them to the minimum amount consistent with its international treaty obligations.

17. (a) THE Crown has reaffirmed that its current policy on capital repatriation, the remittance of dividends and profits and debt servicing is in accordance with the statement made by the then Minister of Finance on the 27th day of November 1962 and published in Reserve Bank of New Zealand Bulletin, November 1962. The Crown affirms that it has no present intention of modifying this policy.

(b) The participants have discussed and corresponded with the Reserve Bank of New Zealand concerning the requisite consents and approvals pursuant to the Exchange Control Regulations 1965 which may be necessary in connection with the establishment and financing of the smelter. The Reserve Bank acting in accordance with the powers delegated to it by the Minister of Finance under the said regulations has indicated that:

- (i) all funds entering New Zealand must be remitted through the banking system;
- (ii) it will give its consent, as and when necessary, to the borrowing of money overseas by the smelter company provided the smelter company has obtained consent as required by the Capital Issues (Overseas) Regulations 1965; and subject to this condition, it will also give consent to the issue of shares in the smelter company to foreign companies and to the export of the relative share certificates;
- (iii) it will normally approve applications by the smelter company for permission to enter into agreements (including technical assistance agreements) necessary for the establishment or operation of the smelter, which oblige the smelter company or its shareholders to make payments overseas, provided such payments are acceptable to the relevant authorities;
- (iv) it will normally give consent to guarantees by New Zealand trading banks of credit granted by vendors of equipment to the smelter company subject to such conditions as the Reserve Bank may require;
- (v) it will agree to payments reasonably required for the establishment (including financing) and operation of the smelter from funds raised overseas by the smelter company or its shareholders without the need for the funds entering New Zealand, provided that adequate information concerning such transactions is given to the Reserve Bank, and that if transfers of funds from one country to another outside New Zealand are required (particularly from a country in the sterling area to a country outside the sterling area) the prior consent of the Reserve Bank, which will normally be given, is obtained;
- (vi) it agrees that generally payments from New Zealand with funds originating overseas will be permitted for all reasonable purposes required for the financing, establishment and operation of the smelter.

(c) It is recognised by the parties to this agreement that at this stage no special concessions are involved and that no specific consents or approvals have been given. The Reserve Bank has the right to apply its normal policies to any proposed transaction by the smelter company or its shareholders that comes within its jurisdiction.

18. THE participants and the smelter company shall make the fullest use practicable in the construction, establishment, and operation of the smelter of the resources of manufacturing capacity, capital equipment, materials, and services available in New Zealand. This clause shall not derogate from their right to obtain freely overseas the materials referred to in subclause (a) of clause 15 of this agreement, but the participants and the smelter company shall endeavour to obtain suitable similar materials in New Zealand where prices and terms of delivery are competitive with those obtainable overseas.

19. THE participants and the smelter company shall maximise as far as practicable the use of New Zealand labour in the construction, establishment, and operation of the smelter. The Crown recognises that during construction and reasonable periods thereafter it will be necessary to obtain the services of key skilled personnel from overseas and it shall approve the entry into New Zealand of acceptable personnel for this purpose.

20. THE parties to this agreement recognise that the smelter will require to be operated twenty-four hours a day, seven days a week, under normal circumstances. In so operating the smelter, the smelter company shall conform to the laws of New Zealand governing employment, and particularly the night employment of females and juniors, and shall provide good working conditions and welfare arrangements for employees.

21. THE Crown shall use its good offices to facilitate:—
provision of housing for those employed in the smelter;
roading and access to the smelter;
construction of a wharf at Tiwai Point;
supply of power for construction;
provision of water supply; and
telecommunications.

22. THIS agreement shall be governed by New Zealand law.

23. ALL differences and disputes between the parties to this agreement or any of such parties touching or concerning the rights, duties, or obligations of the respective parties or any act or thing done suffered or omitted in pursuance of this agreement or of or touching the construction thereof shall be referred to arbitration in accordance with the provisions of the Arbitration Act 1908 or any amendments thereto or re-enactment thereof for the time being in force; provided that except for any difference or dispute arising out of paragraph (c) of clause 8 of this agreement as to the effective implementation of the provisions of paragraph (b) of that clause nothing in this clause shall apply to any difference or dispute arising out of any matter dealt with in clauses 8 to 14 inclusive of this agreement.

THE said Heads of Agreement are hereby cancelled.

WITNESS WHEREOF this agreement has been executed the day and year first hereinbefore written.

SIGNED for and on behalf of HER MAJESTY
THE QUEEN in respect of the Government of
New Zealand. }
JOHN ROSS MARSHALL the Minister of } J. R. MARSHALL.
Industries and Commerce in the presence of }
M. J. MORIARTY. }

COMALCO INDUSTRIES PTY. LIMITED

By D. J. HIBBERD,

Executed by being signed and delivered by its duly appointed
attorney Donald James Hibberd.

SHOWA DENKO K. K.

By MASAO ANZAI,

Representative Director.

SUMITOMO CHEMICAL COMPANY LIMITED

By N. HASEGAWA,

Representative Director.

The Common Seal of NEW ZEALAND ALUMINIUM SMELTERS LIMITED
was hereto affixed in the presence of:

D. J. HIBBERD,
Director.

I. F. BORRIE,

A person duly appointed by the Board.

Dated 5 September 1969.

Parties:

HER MAJESTY THE QUEEN

COMALCO INDUSTRIES PTY. LIMITED

SHOWA DENKO K.K.

SUMITOMO CHEMICAL Co. LIMITED

NEW ZEALAND ALUMINIUM SMELTERS LIMITED

INDUSTRY AGREEMENT RELATING TO
ALUMINIUM SMELTER NEAR BLUFF

Crown Law Office,
Wellington.

P. J. BROOKS,
Clerk of the Executive Council.

Issued under the authority of the Regulations Act 1936.

Date of notification in *Gazette*: 9 July 1970.

This order is administered in the Inland Revenue Department.