

Chapter 363B.

Mining (Ok Tedi Second Supplemental Agreement) Act 1981.

Certified on: / /20 .

INDEPENDENT STATE OF PAPUA NEW GUINEA.



Chapter 363B.

Mining (Ok Tedi Second Supplemental Agreement) Act 1981.

ARRANGEMENT OF SECTIONS.

1. Interpretation.
 “the commencement date”
 “the Second Supplemental Agreement”
2. Approval of Agreement.
3. Effect in relation to laws of Papua New Guinea.
4. Ancillary powers of Minister.

SCHEDULE 1

INDEPENDENT STATE OF PAPUA NEW GUINEA.



AN ACT

entitled

Mining (Ok Tedi Second Supplemental Agreement) Act 1981,

Being an Act to provide for the approval and implementation of a Second Supplemental Agreement relating to the development of certain mineral deposits in the Ok Tedi region of the Western Province.

1. INTERPRETATION.

In this Act—

“**the commencement date**” means 11 September 1981, being the date on which the *Mining (Ok Tedi Second Supplemental Agreement) Act 1981* came into force.

“**the Second Supplemental Agreement**” means the second Supplemental agreement a copy of which is set out in Schedule 1.

2. APPROVAL OF AGREEMENT.

The Second Supplemental Agreement is approved and has effect according to its tenor.

3. EFFECT IN RELATION TO LAWS OF PAPUA NEW GUINEA.

¹The Second Supplemental Agreement has the force of law for the full term provided for therein as if contained in this Act and shall apply notwithstanding anything to the contrary in any other law in force in the country.

4. ANCILLARY POWERS OF MINISTER.

Notwithstanding anything in any other law in force in the country at any time (whether before or after the commencement date), the Minister has power, on behalf of the State, to make all grants, issues, renewals and extensions required by or under the Second Supplemental Agreement to be made by the State, and is not bound in that regard by any provisions of any such

¹ Section 3 repealed and replaced by the *Mining (OK Tedi Agreements) (Amendment) Act 1986* (No. 26 of 1986), s 5. .

s. 4.

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law requiring or permitting any authority, consent, approval, report, recommendation, appeal, procedure or formality, or by any similar provision.

SCHEDULE 1

SECOND SUPPLEMENTAL AGREEMENT

THIS SECOND SUPPLEMENTAL AGREEMENT is made the 26th day of February 1981.

AMONG—

- (1) *THE INDEPENDENT STATE OF PAPUA NEW GUINEA* (hereinafter called "the State");
- (2) *BHP MINERALS HOLDINGS PROPRIETARY LIMITED*, a wholly owned subsidiary of The Broken Hill Proprietary Company Limited (hereinafter called "BHP Minerals");
- (3) *METALLGESELLSCHAFT AG* (hereinafter called "Metallgesellschaft");
- (4) *DEGUSSA AG* (hereinafter, called "Degussa");
- (5) *DEUTSCHE GESELLSCHAFT FUER WIRTSCHAFTLICHE ZUSAMMENARBEIT (ENTWICKLUNGSGESELLSCHAFT) mbH* (hereinafter called "DEG"); and
- (6) *OK TEDI MINING LIMITED* (hereinafter called "the Company").

WHEREAS—

- A. By an agreement dated 22 March 1976 (hereinafter called "the Principal Agreement") between the State and Danpiet Mining Company Limited (hereinafter called "Danco") the State granted to Danco certain rights, set out in detail in the Principal Agreement, including rights to carry out investigations and studies in relation to, and undertake a Project involving the exploitation of, the Ok Tedi Deposits in Papua New Guinea.
- B. By an agreement dated 25 October 1976 between Danco, Mt. Fubilan Development Co. Pty. Ltd, and Kupferexplorationsgesellschaft (hereinafter called "the Consortium Agreement"), the Parties formed a consortium (hereinafter called "the Consortium") to carry out the investigations and studies and upon completion thereof to consider the possible development and operation of the Project.
- C. By a further agreement dated 25 October 1976 between the State, Danco, Mt. Fubilan Development Co. Pty. Ltd. and Kupferexplorationsgesellschaft Danco assigned and transferred to the Consortium as tenants in common in accordance with the percentage shares set out in the Consortium Agreement all rights granted to Danco by the State under the Principal Agreement, the members of the Consortium severally agreed with the State to perform and observe all the obligations undertaken by Danco under the Principal Agreement in accordance with its terms and the State recited its approval of the assignment.
- D. In November 1979, the Consortium completed the investigations and studies and submitted a feasibility study (hereinafter called the "Feasibility Study") on the Project and a Development Proposals Supplement to the State, which Study and Supplement together contained proposals by the Consortium under Clause 8 of the Principal Agreement to carry out the Project.

- E. By an instrument dated 29 February 1980, the State approved the Consortium's proposals (hereinafter called "the Approved Proposals") in accordance with Clause 9.1 of the Principal Agreement but subject to certain conditions subsequent set out in Schedule A to the instrument. The approval instrument also incorporated the State's responses set out in Schedule B to the instrument to twenty-one issues raised by the Consortium in the Development Proposals Supplement.
- F. By a supplemental agreement (hereinafter called "the Supplemental Agreement") made the 26th day of June 1980 between the State, Damco, Mt. Fubilan Development Co. Pty. Ltd. and Kupferbergbau AG the Principal Agreement was altered, modified and added to.
- G. By instrument dated the 20th day February 1981 Kupferbergbau AG assigned all its rights under the Principal Agreement, the Consortium Agreement and the Supplemental Agreement to Metallgesellschaft, Degussa and DEG to the intent that such rights should be held by them as tenants in common in the percentages of 37.5 per centum of such rights to Metallgesellschaft, 37.5 per centum of such rights to Degussa and 25 per centum of such rights to DEG.
- H. By instrument dated the 26th day of February 1981 Damco assigned all its rights under the Consortium Agreement to BHP Minerals to the intent that such rights should be held by BHP Minerals absolutely.
- I. By instrument dated the 26th day of February 1981 Mt. Fubilan Development Co. Pty. Ltd. assigned to Amoco Minerals Company (hereinafter referred to as "Amoco") all its rights under the Consortium Agreement to the intent that such rights should be held by Amoco absolutely.
- J. BHP Minerals, Amoco, Metallgesellschaft, Degussa and DEG have nominated the Company pursuant to Clause 10.1 of the Principal Agreement as the Company to be bound by the terms thereof to undertake, construct, develop and operate the Project in accordance with the Approved Proposals.
- K. The Parties intend by this Second Supplemental Agreement to resolve certain issues that arose at the time of submission of the general financing strategy pursuant to Clause 5.1 of the Supplemental Agreement, and to make provision for other matters of mutual interest to the Parties by amendment of and addition to the Principal Agreement.

NOW THIS AGREEMENT WITNESSES AND IT IS AGREED AND DECLARED as follows:

1. DEFINITIONS AND INTERPRETATION

- 1.1 This Agreement is supplemental to the Principal Agreement and accordingly, unless otherwise defined herein, words and expressions which are given a certain meaning in the Principal Agreement are used herein with the same meanings. In addition, unless the context otherwise requires—
 - "Agreement" means this Second Supplemental Agreement;
 - "US \$" means United States dollars;
 - "Completion of Stage I" means the Commencement of Commercial Production;

"Completion of Stage II" means the last day of the first month during which the Company achieves an average rate of copper concentrate production for shipment from the Project in excess of 70% of the average monthly copper concentrate production for the first year of copper concentrate production under the Approved Proposals, or the last day of the month in which aggregate shipments of copper concentrate exceed one and a half times the average monthly copper concentrate production for the first year of copper concentrate production under the Approved Proposals, whichever be the earlier;

"Parties" means the parties to this Agreement excepting Amoco;

"Principal Agreement" means the agreement referred to in the first recital hereto, as amended by the Supplemental Agreement and as otherwise varied from time to time;

- 1.2 The rules of interpretation set out in Clause 2 of the Principal Agreement shall, unless the context otherwise requires, apply in this Agreement. References to Recitals, Clauses or Schedules are, unless otherwise specified, references to the recitals, clauses and schedules of this Agreement.

2. EFFECT ON AND OF OTHER LAWS

- 2.1 This Agreement is to have the force of law and apply notwithstanding anything to the contrary in any other law in force in Papua New Guinea and no law at any time in Papua New Guinea made after the commencement of this Agreement shall affect this Agreement—

- (a) unless the contrary intention appears either expressly or by implication, in that law; or
- (b) except as provided by this Agreement.

3. CONDITIONS PRECEDENT

- 3.1 The Parties declare that this Agreement constitutes a material or substantial alteration of the Principal Agreement and accordingly pursuant to Clause 4.2.2 of the Principal Agreement the State shall as soon as is reasonably practicable introduce and sponsor in the National Parliament a Bill for an Act to approve this Agreement, which Bill shall be in a form agreed upon between the Parties.
- 3.2 This Agreement other than this Clause 3 shall not operate unless and until the Bill referred to in Clause 3.1 is passed as an Act and comes into force.

4. EQUITY PARTICIPATION

Clause 11.3 of the Principal Agreement is amended—

- (a) by adding the following words to Clause 11.3(a)—

"the timing of the issue of such shares shall be so arranged that the State maintains its specified percentage of the total issued share capital";

- (b) by adding the words "prior to Completion of Stage I" after "for cash" in the first line of Clause 11.3(b);
- (c) by deleting all words after "Company" in the ninth line of paragraph (c);
- (d) by renumbering paragraph (d) as paragraph (f);
- (e) by adding the following two paragraphs after paragraph (c)—

"(d) the State undertakes that it will when offered the same by the Company subscribe for its proportionate share in the share capital of the Company as follows—

- (i) prior to the Completion of Stage I, amounts aggregating not less than U.S.\$45 million; such amount to be inclusive of shares allotted to the State pursuant to Clause 11.3(a); and
- (ii) prior to the Completion of Stage II for the purpose of financing capital expenditure on Stage II, amounts which when added to any shares issued to the State as paid up upon the capitalisation of Retained Earnings shall aggregate not less than U.S.\$26 million.

For the purposes of this Agreement, "Retained Earnings" shall comprise the unappropriated balance of Profit and Loss Account and amounts held in General Reserve appropriated from Profit and Loss Account.

- (e) the Company may offer from time to time further share issues to all shareholders in proportion to their shareholdings. Such issues shall be at par. The State may decline or fail to subscribe for its proportionate entitlement to such shares in which case its subsequent rights and obligations shall be reduced so as to accord with the new proportion that its shareholding bears to the new total number of shares in issue"; and
- (f) by adding the following paragraph at the end of the new paragraph (f)—
 "(v) all shares shall be issued fully paid."

5. GUARANTEES

Clause 5 of the Supplemental Agreement is amended by deleting all sub-clauses after sub-clause 5.2 and substituting the following sub-clauses—

"5.3 The Consortium and the Company may arrange loans and commitments for the financing of the Project provided that, except as the State may otherwise agree—

- (a) the loans and commitments conform with the agreed general financing strategy which was accepted by the State;
- (b) authorities under the Foreign Exchange Regulations are obtained from the Bank of Papua New Guinea in respect of the loans and commitments; and
- (c) the equity funds in the form of ordinary shares and Retained Earnings shall be not less than 25% of the total loan and share capital including Retained Earnings but loans raised by the Company in the circumstances described in Clause 5.6 and 5.9 shall be excluded from the calculation of total loan and share capital for the purposes of this Clause provided that if the State exercises the election provided in Clause 5.6(b) or the election in Clause 5.9 to provide or procure its proportion of Guarantees then in the case of any additional loans that would cause the said equity funds to fall below 25% of the sum of share capital and total loans (including such additional loans), interest on such additional loans shall not be deducted in calculating taxable income under the *Income Tax Act 1959*.

- 5.4 Clause 10.3 of the Principal Agreement is amended by deleting paragraphs (a) and (b).
- 5.5 If Guarantees are required to enable the Company to borrow amounts which (together with share capital) will be sufficient to provide finance for the Project to achieve Commencement of Commercial Production (hereinafter called "the Initially Committed Finance"), the following shall apply:—
- (a) where the Company's Guaranteed Loans are not more than US\$280 million the shareholders of the Company other than the State shall furnish Guarantees and the State shall not participate in them or be responsible or liable under them either directly or indirectly;
 - (b) where the Company's Guaranteed Loans are more than US\$280 million, the shareholders of the Company (other than the State) shall furnish Guarantees and the State shall participate in them or (if the lenders will not accept the State's participation) indemnify such shareholders or guarantors to the extent of—
 - (i) the proportion equivalent to the State's shareholding (directly or indirectly) in the Company of the amount by which the Company's total Guaranteed Loans exceed US\$280 million; or
 - (ii) US\$42 million, whichever is the less; and
 - (c) the amount of the Initially Committed Finance for the purposes of this Supplemental Agreement shall be US\$650 million.
- 5.6 If the Company in accordance with a decision made pursuant to a shareholders agreement (provided it shall be negotiated and agreed by 28th February, 1981) is to incur overruns in cost from whatever cause so that the Initially Committed Finance is not sufficient for the Company to achieve Commencement of Commercial Production and Guarantees are required to enable the Company to borrow additional loans, then subject to the provisions of the above-mentioned shareholders agreement, either—
- (a) the shareholders of the Company (other than the State) shall furnish the Guarantees required, for which the Company shall pay them a fee (which shall be treated as an operating expense) of 5% per annum on the outstanding balance of the loans so guaranteed from the time the Guarantees are given until they are discharged; or
 - (b) the shareholders of the Company, including the State shall furnish the Guarantees required in proportion to their respective shareholdings (directly or indirectly) in the Company.

The Company shall give notice to its shareholders when Guarantees are required for any such additional loans and within one month of such notice, after consulting with the other shareholders, the State shall in its discretion choose which of paragraphs (a) and (b) will apply in respect of such loans or any part thereof and shall notify the Company and other shareholders accordingly. The additional Guaranteed Loans shall, if the company can so arrange with other lenders rank equally as a debt of the Company with the State's unsecured debt payable pursuant to the Infrastructure Offer referred to in Clause 7.1 and the fee under paragraph (a) if payable shall rank the same.

5.7 Any shareholder, including the State, may in the circumstances of Clause 5.6 elect to provide an equivalent shareholder's loan to the Company in place of a Guarantee of the whole or any part of the additional loans. If a shareholder provides a shareholder's loan in the circumstances of Clause 5.6

(a) the rate of interest on the shareholder's loan shall be the then average rate of interest for existing syndicated commercial borrowings by the Company plus 5% per annum and the loan and interest thereon will rank equally with the State's user charge referred to above.

5.8 (a) If the Company raises Guaranteed Loans for capital expenditure for Stages II and III as described in the Approved Proposals or, after the Commencement of Commercial Production, for any purpose, the State shall provide its proportionate share of the Guarantees related thereto.

(b) Notwithstanding paragraph (a), prior to the Completion of Stage II in addition to any Guarantees furnished by the State under the provisions of Clause 5.5 and 5.6, and excluding any Guarantees for Stage III, the State shall not be required to provide Guarantees in excess of its proportionate share, having regard to its shareholding at the time the Guarantees are required, of US\$370 million. References herein to Stage III mean Stage III as described in the Approved Proposals.

5.9 If prior to the Completion of Stage II, Guarantees are required by the Company to be furnished by the shareholders of the Company beyond the limit specified in Clause 5.8, the State may elect not to participate beyond that limit in the furnishing of such Guarantees.

If the State so elects, the other shareholders of the Company shall subject to the provisions of any shareholders agreement referred to in Clause 5.6, furnish the Guarantees required, for which the Company shall pay them a fee, (which shall be treated as an operating expense), of 2½% per annum on the outstanding balance of the loans so guaranteed from the time the Guarantees are given until they are discharged. The Company shall give notice to its shareholders when Guarantees are required for such additional loans and within one month after such notice, after consulting with the other shareholders, the State shall in its discretion elect whether to participate and shall notify the Company and the other shareholders accordingly. The additional Guaranteed Loans shall, if the Company can so arrange with other lenders, rank equally as a debt of the Company with the State's user charge payable pursuant to the Infrastructure offer referred to in Clause 7.1 and the fee if payable shall rank the same.

5.10 Any shareholder, including the State, may in the circumstances of Clauses 5.8 and 5.9 elect to provide an equivalent shareholder's loan to the Company in place of a Guarantee of the whole or any part of the additional loans. If a shareholder provides a shareholder's loan in lieu of furnishing a Guarantee in circumstances where the State has elected under the provisions of Clause 5.9 not to furnish Guarantees the rate of interest on such a shareholder's loan shall be the then average rate of interest for existing syndicated commercial borrowings by the Company plus 2½% per annum. The shareholder loans shall, if the Company can so arrange with other lenders, rank equally as a debt of the Company with the State's user charge payable pursuant to the Infrastructure Offer referred to in Clause 7.1 and the fee if payable shall rank the same.

- 5.11 Guarantees to be furnished by the State shall be negotiated and agreed between the Company and the department of the State responsible from time to time for financial matters. Such Guarantees—
- (a) shall not contain terms which are more onerous than; and
 - (b) shall be of the same nature and quality as those required of other shareholders.
- 5.12 For the purposes of this Clause—
- (a) Guarantees means guarantees, completion undertakings, cash deficiency undertakings and other loan support; and
 - (b) Guaranteed Loans means all loans to the Company or credits obtained by the Company in respect of which Guarantees have been given or shareholder loans in lieu thereof provided in accordance with Clause 5."
- 8. MISCELLANEOUS**
- 6.1 Clause 14.1 of the Supplemental Agreement is amended by deleting the number "9.3" and substituting "13.1(a)".
- 6.2 Clause 40.3(a) of the Principal Agreement is amended by deleting all words after "to secure" in the third line and by substituting in their stead the words—
- "any obligations or liabilities of the Company (whether absolute or contingent) with respect to moneys raised or borrowed, or indebtedness incurred, for the purpose of financing the Project, including, without limiting the generality of the foregoing, obligations or liabilities of the company to repay, and to pay interest and other fees, costs and expenses related to, loans raised or borrowed for such purposes; and"
- 6.3 If the Principal Agreement and all amending agreements (whether made before or after this Agreement) are consolidated by the State into one agreement, and the Company notifies the State that it is satisfied that the consolidation is accurate (notwithstanding any renumbering of provisions of the amending agreements necessary to effect such a consolidation), then the State may cause notice of such consolidation to be published in the Gazette, and thereupon such consolidation shall have the same force and effect as the equivalent provisions of the Principal Agreement and all amending agreements.
- 6.4 This Agreement may be executed in any number of counterparts, each of which when executed shall be deemed to be an original, and such counterparts shall together constitute one agreement.

IN WITNESS whereof this Agreement has been duly executed by the Parties, the day and year first hereinbefore written.

SIGNED for and on behalf of *THE INDEPENDENT*)
STATE OF PAPUA NEW GUINEA)
 by TORE LOKOLOKO, G.C.M.G., O.B.E., K. St. J.,)
 Governor General, acting with and in accordance) TORE LOKOLOKO
 with the advice of the National Executive Council,)
 in the presence of:)

R. ROBERTSON

SIGNED for and on behalf of) H. RIEGER
METALLGESELLSCHAFT AG by its duly) H. GOETZ
 constituted Attorney in the presence of:)

FRIEDRICH

SIGNED for and on behalf of *BHP MINERALS*)
HOLDINGS PROPRIETARY LIMITED by its duly) R.J. FYNMORE
 constituted Attorney in the presence of:)

B.W. MORGAN

SIGNED for and on behalf of *OK TEDI MINING*)
LIMITED in the presence of:) D.S. ADAM

B.W. MORGAN

SIGNED for and on behalf of *DEGUSSA AG* by its) H. HARTMAN
 duly constituted Attorney in the presence of:) JUNGBAEK

ROOS

SIGNED for and on behalf of *DEUTSCHE*)
GESELLSCHAFT FUER WIRTSCHAFTLICHE)
ZUSAMMENARBEIT (ENTWICKLUNGS-) F. PAETZOLT
GESELLSCHAFT) mbH by its duly constituted) E. PETZKE.
 Attorney in the presence of:)

PETERS

AMOCO MINERALS COMPANY as assignee of the rights of the Company under the Consortium Agreement, hereby consents to the provisions of this Agreement:

SIGNED for and on behalf of *AMOCO MINERALS*) GORDON FURTH
COMPANY by its duly appointed attorney in the)
 presence of)

GRANT. J. PACE

Office of Legislative Counsel, PNG