

## GUIDANCE NOTES TO AIPN 2012 MODEL JOINT OPERATING AGREEMENT

### Guidance Note on Model Forms:

The following model forms, some of which are referenced in this Model JOA, are available from AIPN:

Accounting Procedure (2004)	Joint Operating Agreement (JOA) - 2002
Confidentiality Agreement (2007)	Joint Operating Agreement 2002 - Australian version (Guidance Notes) (2008)
Consultant Agreement for Business Development in a Host Country (2008)	Lifting Agreement (2001)
Data Exchange Agreement	LNG Master Sales Agreement (SPA) - 2009
Farmout Agreement (2004)	Secondment Agreement (2002)
Gas Sales Agreement (2006)	Service Contracts (2002)
Gas Transportation Agreement (2009)	Study and Bid Group Agreement (2006)
International Dispute Resolution Agreement (2004)	Unitization and Unit Operating Agreement (2006)

### Guidance Notes on use of Model JOA with a Concession or License:

The following list sets out basic instructions for modifying the model JOA for use with concessions or licenses instead of production sharing contracts. Given the wide variety of types of Contracts existing, the following list may not necessarily be an exhaustive one of modifications needed to adapt this model JOA for a concession or license. Terms and conditions of the actual Contract should be thoroughly evaluated in this regard and the model JOA reconciled with the Contract.

First Recital, second paragraph, page 1 = Modify as appropriate to reflect the underlying Government concession, license, lease or instrument and retain the defined term "Contract", for example:

Alternative Provision, Choose one

Alternative # 1

WHEREAS, the Parties have entered into \_\_\_\_\_ (identify by name and date) \_\_\_\_\_, (the "Contract")

Alternative # 2

WHEREAS, the Parties hold licenses granted by \_\_\_\_\_ (identify by name and date) \_\_\_\_\_, (the "Contract") covering certain areas located in the

\_\_\_\_\_, referred to as the “Contract Area”, and more particularly described in Exhibit B to this Agreement; and

Article 1– “Cost Hydrocarbons” definition = Delete.

Article 1 “Profit Hydrocarbons” definition = Delete.

Article 7.5.D = Delete the two first sentences of this Article.

Article 9.2 (ALTERNATIVE #3) - “Cost Hydrocarbons and Profit Hydrocarbons” = Change to “the production”.

Article 9.3.A (ALTERNATIVE #1) - Delete Paragraph 8.

Article 9.3(B) (ALTERNATIVE #1) - Delete Paragraph 10.

Article 13.2.B (ALTERNATIVE #1) - “Cost Hydrocarbons and Profit Hydrocarbons” = Change to “the production”.

Article 15.2.A.8 - “with Article 20.3” = change to “with Article 19.3”.

Article 19 - ALLOCATION OF COST / PROFIT HYDROCARBONS = Delete entire Article and remove from Table of Contents.

Article 20 - Re-number as Article 19 (and also in the Table of Contents).

#### **Guidance Note on Civil Law:**

The Model JOA is written for use in a wide variety of types of jurisdictions. However, some of the legal concepts and mechanisms are taken from the common law and may need to be adapted for use in jurisdictions other than those based on a common law tradition. These Guidance Notes aim at providing the users of the Model JOA some information regarding the main issues and concerns which may require particular attention when the Operating Agreement adopts or contemplates adopting the laws of a Civil Law jurisdiction, instead of a Common Law jurisdiction, as governing law. These Guidance Notes do not purport to address issues or concerns of a commercial or technical nature which would exist wherever the Model JOA is used.

In this Guidance Note:

“Civil Law” means, for the sole purpose of simplicity and clarity, the “Civil Law” (or Roman derived law) system of law and any other Law from a jurisdiction that is not Common Law, but the variety of legal systems worldwide is vastly more complex.

“Common Law” means the legal systems throughout the world deriving from English law.

So, the terms “Civil Law jurisdiction” and “Common Law jurisdiction” mean any country whose system of law belongs to either the Civil Law (or other) tradition, or to the Common Law tradition respectively. Other capitalized terms used in this Guidance Note have the meaning assigned to them in the Model JOA, and references to Articles and Sections are to those of the Model JOA.

The nuances between the legal systems are even relevant during the negotiations of a JOA. For instance, under Civil Law all parties to an agreement have the obligation to act/negotiate in good faith to come to an agreement, and the concept of ‘reasonableness’ is set out in Civil

Codes or in case law. There is no such symmetrical obligation under many Common Law jurisdictions, and therefore any obligation to act in good faith or ‘reasonably’ should be expressly set out in the contract.

In addition, even where the governing law of an Operating Agreement is the law of a Common Law jurisdiction, these Guidance Notes may still provide useful information if the host Government contract is governed by other applicable law. Indeed, from a legal and practical point of view, the Model JOA is generally subject to the host government contract and the enforceability of many provisions of the Model JOA are closely dependent on the legal context in the country where the petroleum operations are to be performed. As an example, the assignment of a Party’s Participating Interest (including as a result of the operation of the forfeiture or withdrawal provisions) will take place in relation to the host government contract, and the JOA and therefore will be subject to the provisions of both agreements and, in addition, to the regulations of the host country.

While all Civil Law jurisdictions share notable similarities, due to the hybrid solutions that are found in different countries, the differences that exist among Civil Law jurisdictions in the treatment of issues such as those referred to in these Guidance Notes do not permit a universal solution via standard form provisions or articles. This is the main reason for addressing the issues and concerns described below in the form of Guidance Notes rather in the form of Optional and/or Alternative provisions to be directly incorporated in the Model JOA.

These Guidance Notes are intended only to provide focus points to be considered and further analyzed by users of the Model JOA in Civil Law jurisdictions, depending on their own circumstances and needs, and therefore do not contain specific recommendations in the particular context of any individual JOA. Given the wide variety of types of Contracts existing, the following list may not necessarily be an exhaustive one of modifications needed to adapt this model JOA to the applicable contract and law. Terms and conditions of the applicable contract and law should be thoroughly evaluated in this regard and the model JOA reconciled with them.

#### Article 4.2.B.18 Rights and Duties of Operator - Provisions to be included in contracts with independent contractors

In most Civil Law jurisdictions, the Operator usually acts both on its behalf (to the extent of its Participating Interest) and as agent on behalf of the Non-Operators. It is therefore necessary to assess to what extent the provision under paragraph (a) (establishing that contractor can only enforce the contract against Operator) is lawful and enforceable in such context. This point should be checked mainly in light of the governing law of each relevant contract executed by the Operator with the contractors.

For example, in some but not all Civil Law jurisdictions, where the Operator acts as an “agent without authority to represent” (i.e. acts de facto in the interest of the Non-Operators but without explicit or implied authority to represent them) the Non-Operators are not directly bound by the contracts executed with independent contractors and these contractors may not enforce their contracts against such Non-Operators. On the other hand, in other Civil Law jurisdictions, the enforcement of such contracts against the Non-Operators may not be avoided (or, alternatively, a full exclusion of liabilities of the Non-Operators towards such independent contractors may not be obtained). In such cases where the Operator acts as an agent on behalf of the Non-Operators under contracts executed with independent contractors, special

Also available as part of the eCourse

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2013 The Law, Science and Finance of International Energy Projects session  
"Co-Venture Formation and Agreements"