

GUIDANCE NOTES
AIPN Model Form Confidentiality Agreement
(2007)

PREAMBLE

"Effective Date" was added as a defined term to specifically define when the term of the contract begins.

ARTICLE 1
DISCLOSURE OF CONFIDENTIAL INFORMATION

Exhibit A was changed to refer to a map as a way of defining the "Area". In some cases, drafters will instead refer to a specific contract or contract area under a production sharing contract or concession held by the Disclosing Party.

The exhibit to list Confidential Information disclosed is now Exhibit "B". While it is common to strike the reference to Exhibit "B", having an inventory of Confidential Information identifies what the Disclosing Party wants to protect and helps Receiving Party identify what to return or destroy as required by Article 8.

The reference to disclosure on a non-exclusive basis was moved to a new Paragraph 13.

ARTICLE 2
UNDERTAKING NOT TO DISCLOSE

This is a restatement of paragraph 2 of the 1999 model form which contains one of the two core obligations undertaken by the Receiving Party. (The other is the use restriction in Article 6.) Excess language was removed for emphasis and clarity.

In certain situations, the drafter may want to ensure that the Receiving Party does not disclose the existence of this Agreement to any other person. If this type of provision is desired, the following may be considered:

Likewise, Receiving Party shall not disclose the fact that it has entered into this Agreement with Disclosing Party to anyone without the prior written consent of Disclosing Party, except as provided in Article 5 of this Agreement.

ARTICLE 3
CERTAIN INFORMATION NOT CONFIDENTIAL

This is a revision of paragraph 3 in the 1999 model form which described certain Confidential Information which could be disclosed. The new Article 3 takes that same

information such as information that is or becomes available to the public and provides that it is not confidential. Unless the information is specified as being not confidential, it would be subject to the use restriction of Article 6 and the provision requiring return of the information in Article 8, something the parties probably do not intend.

ARTICLE 4 PERMITTED DISCLOSURE BY RECEIVING PARTY

The new Article 4 consolidates permitted disclosures of Confidential Information previously dealt with in paragraphs 4 and 5 of the 1999 model form.

One significant change is the removal of the requirement for consultants, agents, banks and financial institutions to execute a confidentiality agreement enforceable by both the Disclosing Party and the Receiving Party. The reason is that Article 5 now provides that the Receiving Party is responsible for compliance by consultants, agents and banks. There may be circumstances where the drafter may want to reinsert this obligation. For example, a separate confidentiality agreement may be required in order to comply with the underlying PSC, host government contract or applicable laws. The new form includes an optional provision to cover those cases.

ARTICLE 5 OBLIGATION OF RECEIVING PARTY FOR PERMITTED DISCLOSURES

Article 5 is new. It consolidates the obligations of Receiving Party (previously contained in Articles 5 and 7 of the 1999 model form) when making permitted disclosures of Confidential Information. Under this article, the Receiving Party is responsible to Disclosing Party for any breach by the persons receiving the information from Receiving Party.

ARTICLE 6 RESTRICTION ON USE OF CONFIDENTIAL INFORMATION

Article 6 deals with the restricted use of Confidential Information. The proviso in paragraph 6 of the 1999 model form that allowed a Receiving Party to use its “own analysis” of Confidential Information for evaluation of properties outside the Area has been replaced with language in the new Article 6.2 that recognizes that when persons view Confidential Information they may form mental impressions that are not written down or otherwise reduced to a record and expressly provides for no restriction on the use of such mental impressions. As a practical matter, there is no effective way to restrict a person from forming and using mental impressions. This revision is one part of a revision of the 1999 model form carrying forward the concept of the Receiving Party’s “own analyses.” The other is contained in a new paragraph 9 that addresses Evaluation Material, a new concept in the model form.

ARTICLE 7 DAMAGES

The new Article 7 retains the concept from Article 7 of the 1999 model form that neither party is liable to the other for certain special, indirect, or consequential damages. The new article makes a positive statement of what damages are available, i.e., direct damages, and also provides that those direct damages shall be the sole and exclusive remedy. In considering the enforceability of limitations on liability, the drafter should carefully consider this clause in conjunction with the governing law and dispute resolution provisions in Article 12 of the new model form.

ARTICLE 8 RETURN OF CONFIDENTIAL INFORMATION

The 1999 model form version of Article 8 has been split into Articles 8.1 and 8.2 in the new form with only minor editing revisions. New provisions are contained in Article 8.3 of the new form that have exceptions to the return and destruction requirements of Article 8.2. The new provisions deal with computer backup systems and record retention requirements and reflect what is becoming widespread industry practice.

ARTICLE 9 EVALUATION MATERIAL

This article is new and deals with Evaluation Material derived from a Receiving Party using its “own analyses” of Confidential Information referred to in paragraph 6 of the 1999 model form. One part of the Receiving Party’s “own analyses” is the mental impressions already provided for in Article 6 of the new form. Another is the Evaluation Material that is specifically defined in Article 9.1. Article 9.2 provides that Evaluation Material cannot be disclosed other than to the persons described in Article 4 of the new form. Evaluation Material was not characterized as Confidential Information to avoid other restrictions on Confidential Information such as return of data and restrictions on use which are not applicable to the Receiving Party’s “own analyses” referred to above.

ARTICLE 10 TERM

Alternative Provision 1 is new and allows the parties to specify a date when the agreement terminates. Alternative Provision 2 is substantially similar to the language in the second sentence of Paragraph 9 in the 1999 model form. That Paragraph 9 also provided for termination upon the Parties entering into a subsequent agreement that supersedes the existing agreement. That provision, however, is not included in the new

model from. If a future agreement specifically supersedes an prior agreement, that will happen regardless of what the prior agreement says.

ARTICLE 11 REPRESENTATIONS AND WARRANTIES

This article is substantially the same as Article 10 of the 1999 model form except that the bold face capital letters have been removed. In many jurisdictions it is not a legal requirement to state such a disclaimer in bold face capital letters. The drafter should be satisfied that such a requirement does not exist under the law chosen to be the governing law applicable to the Agreement.

ARTICLE 12 GOVERNING LAW AND DISPUTE RESOLUTION

This article is a revision of the arbitration provisions of paragraph 11 of the 1999 model form to make them similar to arbitration provisions contained in other AIPN model forms except that the article now includes a waiver of damages other than those provided for in Article 7.

ARTICLE 13 NONEXCLUSIVE DISCLOSURE OF CONFIDENTIAL INFORMATION

Paragraph 1 of the 1999 model form mentions in passing that the disclosure of Confidential Information to the Receiving Party is nonexclusive. Since this is an important concept it is now stated in a separate article for emphasis. If the disclosure is to be exclusive, this article needs to be revised.

ARTICLE 14 NO RIGHTS IN THE AREA

This is a restatement of paragraph 12 in the 1999 model form.

ARTICLE 15 GENERAL PROVISIONS

This article is new and contains general interpretive provisions that are taken from other AIPN model forms. Note that Article 15.6 is intended to restrict the application of legislative provisions that confer rights under a contract to persons that are not a party to the contract. Users should verify that as stated, the language is sufficient to accomplish the intended purpose under the law governing the agreement.

ARTICLE 16
NOTICES

The notice provision is new and is taken from other AIPN model forms.

ARTICLE 17
ASSIGNMENT OF THIS AGREEMENT

This article is an expansion of what was contained in paragraph 15 of the 1999 model form. The article now allows the Receiving Party to assign its interest to a person or entity that is not an Affiliated Company but only with the prior written approval of Disclosing Party. Assignment to third parties was not allowed under the 1999 model form.