

COMMON MARKET FOR EASTERN AND SOUTHERN AFRICA

JOINT DEVELOPMENT OF PROJECTS GUIDELINES

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1 Objectives of the Joint Development of Guideline

The guidelines aim to provide a general framework for a harmonized approach to planning and implementing joint development of projects amongst COMESA Member States. The guidelines are intended to outline at a high-level the issues that should be considered in joint development of projects. While the emphasis is on joint development of projects, most of the information can be useful for any project.

Due to the complexity of the political issues involved in joint development of projects in two or more countries, the guidelines are intended to highlight the critical issues involved in joint development of projects. As joining of resources challenges are mainly about political issues, the guideline is introductory.

2 Critical Issues for joint development

The critical issues in joint development and ownership roles, rights and obligations are:

i. The players – who sponsors the project?
ii. Project Phases,
iii. Establishing rights and obligations,
iv. Control of development,
v. Financing, and
vi. Governance & Decision-making.

3 The Players – Who Sponsors the Project?

Where the players are mainly utilities [i.e., often 100% government owned], jointly development is effected to achieve the following goals.

i. Ensure that the base load needs of the country are met. The power generation is located in the Member State with the lowest cost producers [e.g ., large scales hydro] and sized to meet the base load needs of the participating member states or at least the that of the lead developer.
ii. The plant is integral to the utility's system over the long term.
iii. The lead developer utility exerts considerable control.
iv. The joint development by more than one utility is often driven by the need to take advantage of economies of scale.

In cases where independent producers are responsible for the joint development, the main issues are often:

i. The lead developer requires / looks for investors or joint tenants.
ii. Serving customers under PPAs / selling into the market on a merchant basis.
iii. The lead developer wants to build or expand its generation or related core business [long-term outlook].
iv. Looking to profit from the sale of its interest [short-term outlook]; will seek broad rights to sell its interest.
v. The lead developer will want to exert control to protect its investment.

4 Projects Phases

Project have 3 distinct phases: 1) The development phase [which end at financial closure], 2) The construction phases, and 3) the operation phase [which ends at plant retirement]. During the development phase, the following is required:

i. Need for Project Development Agreement to specify Participants' roles, rights and obligations.
ii. Project Development Agreement and Asset Purchase Agreement executed during Development Phase.
iii. Participation Agreement executed either at: 1) Financial Closing, or 2) as part the Project Development Agreement.

Key issues during the development phase, include:

i. Access to project information [permits, real estate, local taxes, fuel availability, cost and transportation].
ii. Development budget.
iii. Initial construction budget.
iv. Pro forma operating budget.

5 Establishing Rights and Obligations

The lead developer or sponsor has a duty to:

i. Perform agency rights (fiduciary standards).
ii. Regularly inform all other participants in the joint development.
iii. Duty to pursue the development.
    - Permitting
    - Additional Owners
    - EPC Contract/Multiple Prime
    - O&M Contract
    - Real Estate
    - Fuel Contracts/Plan
    - Interconnection Agreement

The participant's obligations include:

- Payment of percentage costs.
- Maintain confidentiality (applicability of open records statutes).
- Support development [e.g. Permitting, political (state and local)].
- Audit Rights.
- Private Use Restriction – Preservation of tax-exemption.
- Fees (Development, Administrative, Success).

6 Control of Development

The day to day decision making should be entrusted to the lead developers. A project development committee comprising of all participants must be established to:

i. Facilitates exchange of information; feedback.
ii. Meet monthly to discuss key aspects of the project.
iii. Co-ordinate financial matters pertaining to the project – including timing of disbursements, etc.

Some decisions require super majority and may not be taken by the sponsor / lead developer at the exclusion of inputs from other participants, these include:

- The appointment of the EPC Contractor.
- Operation & Maintenance Agreement.

- Decisions that have Material Adverse Impacts.
- Purchases of Real Property.
- Other significant Binding Commitments (e.g. Fuel, Transportation).

7 Financing

Essence of joint ownership is sharing financial risk, these being mainly 1) Construction, and 2) long-term operation. The more diverse the ownership mix, the more credit information and coordination will be necessary.

Generally, each Owner is responsible for its Owner financing and does not need the consent of the other Owners. The goal is to close on a single mutually agreed date. There is always uncertainty until the last Owner is assured access to capital. It is recommended to consider 'pilot' arrangements, enterprise zone and other tax issues early. The JV participants should launch financing efforts when agreed project elements have clear definition, these are:

i. Permits,
ii. Construction costs,
iii. Real estate,
iv. Ownership percentages [Credit standing of Owners, Financing plans],
v. Fuel and Fuel Transportation Strategy,
vi. Operating strategy,
vii. Participation Agreement finalized,
viii. Asset Purchase Agreement finalized, and
ix. Weekly coordination meetings.

FINANCING OPTIONS	
IPPs - Merchant - Selling under PPAs	Project Finance - Rated - Sub-investment grade - Leasing Structure
Tax Exempts - Municipals - Joint Action Agencies	Issuing Tax-Exempt Bonds for 100% of Project Costs.
IOUs – Rate-based – Through non-regulated entities	– Corporate Debt & Equity – Commercial Bank Loan – Project Finance
– Electric Cooperatives	– Co-Bank/RUS – CFC/RUS

The partners should encourage bank / private equity financings to be arranged first. Capital Markets transactions require disclosure and cannot easily accommodate changes. Transactions where Owners well understand the financing of requirements of their co-Owners tend to have the least disruptions prior to closing.

8 Governance & Decision-making

Decision-making vested in Management Committee with representation proportional to ownership. The day-to-day decisions are delegated to the lead sponsor by the Management Committee. Extra-ordinary decisions that may delegate to a select committee or handled by the full Management Committee include:

- Project Budgets: Construction & Operations

- Project Agreements, e.g. O&M, Fuel
- Affiliate Contracts
- Restoration, Condemnation, and Retirement
- Permit Changes
- Decisions with Disproportionate Effect
- Capital Improvements

Other governance issues that must be considered by the JV partners are:

i. Operating structure for asset management / operations.
ii. Fundamental Dispatch Principles - each participant entitled to its percentage of energy, capacity and ancillary services.
iii. Joint and several liability versus several liability.
iv. Assignment – transfer of interests. Which are permitted and which require consent?
v. Expansion - Rights jointly owned or rights retained by Lead partner or Lead partner grants right of first refusal/option
vi. The collateral package - joint owners are tenants-in-common, each owning an individual undivided interest in project assets or other version?
vii. Impact of a co-tenant financing: tax-exempt financing versus project finance financing.
viii. Payment default dilemma - The essence of joint ownership is shared financial risk.

9 Benefits / Incentives of Joint Projects

The benefits of joint development of projects include:

i. It facilitates the development of large generation projects through the pooling of financial resources by the partners as well as securing large markets with long-term offtake agreements. The economies of scale results in lower unit costs of electricity.
ii. The timescale of large projects including preparation, contract building, programme execution, data treatment, and reporting takes typically several years. Therefore, joint projects are mostly useful for dealing with mid-term or long-term issues.
iii. Joint development projects provides a large capability for know-how transfer and for building expert capacity.
iv. The relationship (integration) that arise out of joint development of energy projects promotes trade beyond electricity through the working relationships that result from such projects.
v. Joint projects are likely to generate safety relevant programmes that would may not happened if the individual countries were left alone with maintaining and operating a large facility.
vi. Transmission interconnectivity is increased by a focus on joint development of projects.
vii. The inter-trade is a critical resource [electricity] developed through joint development of the project foster political co-operation.

10 Examples of Joint Development of Projects in COMESA

COUNTRIES	PROJECT
Ethiopia / Djibouti	A 232 kV transmission from interconnection line Ethiopia to Djibouti – transmits up to 50 MW.
	Plans under way to build a second transmission interconnection line.
Ethiopia / Kenya	Transmission power line from Ethiopia to Kenya.
Ethiopia / Sudan	Transmission power line from Ethiopia to Sudan.

COUNTRIES	PROJECT
Burundi / DRC / Rwanda	Rusizi I – Hydro Power plant [80 MW]
	Rusizi III – Hydro Power plant [145 MW]
	Rusizi VI – Hydro Power plant [267 MW]
Burundi / Rwanda / Tanzania	Rusumo Hydro Power plant [80 MW]
DRC / Zambia	Transmission (220 kV) line interconnecting the DRC and Zambia.
Swaziland / Mozambique / South Africa	MOTRACO – a transmission interconnection line from South Africa to Swaziland and onward to Mozambique.
Zambia / Zimbabwe / Botswana / Namibia	ZIZABONA - Transmission (330 kV) line, interconnecting Zambia, Zimbabwe, Botswana and Namibia.
Zambia / Tanzania	Transmission (220 kV) line interconnecting Zambia and Tanzania.
Zambia / Zimbabwe	Batoka Gorge Hydro Power Station – a planned 1 600 MW power station to be jointly developed by Zambia and Zimbabwe.

Some of the transmission interconnection lines sighted above are not jointly owned, while some are jointly owned and jointly operated.

APPENDIX A - Framework for a Joint Development of Projects Between Member States

1 General Matters

Parties

[Name of Lead Member State] ("_____"), and [Name of Other Member] ("Party B"), collectively with [Lead Party], the "Parties."

Project Name

[Insert description of the Project.]

Scope of Development

The development activities will include all tasks required with respect to the development, financing, construction, operation and ownership of the Project and entering into other related documents and agreements. The Development Program and the Development Budget will be prepared, agreed-to, and attached to the Joint Development Agreement (the "Agreement").

Non-Recourse Project Financing

The Parties intend to obtain non-recourse or limited recourse project financing for the Project and the Parties also recognize that the assets of the Project Company will be required as security by lending institutions pursuant to the Financing Agreements.

Term of Agreement

The Agreement shall be effective as of the date of execution thereof and remain in effect until the earliest of: (1) the effectiveness of the Shareholders Agreement, (2) the withdrawal of all but one of the Parties, (3) the mutual agreement of the Parties to terminate the Agreement, and (4) [Insert Date] (the "Drop Dead Date").

2 Management

Management Committee

A Management Committee comprised of [*number*] Representatives from each Party shall manage and oversee the overall Development Process and keep the Parties apprised of all material aspects of, and developments in connection with the Project.

If any Party withdraws from the Project or the Agreement in accordance with the terms of the Agreement, the Representative of such withdrawn Party shall be permanently removed from the Management Committee.

Management Decisions

The affirmative vote of all the Representatives shall be required for decisions of the Management Committee with respect to the approval of amendments to the Development Budget and to the Development Program, approval of Cash Calls in respect of Shortfall Amounts, and with respect to the terms and condition of the Shareholders Agreement and any material Project Document or Financing Agreement.

If the affirmative vote of all the Representatives cannot be obtained by the Management Committee with respect to any issue stated above, then the issue shall be referred within 7 days for resolution to a meeting comprised of one senior executive management representative from each of the Parties, each such representative to have all requisite authority to resolve the issue.

All other decisions in respect of the Project shall require the affirmative vote of the Representatives who represent more than 50% of the Participation Interests. The

Representatives of each Party shall cast one vote which shall be accorded the percentage weight equal to that Party's Participation Interest in the Project.

Management Meetings

Meetings of the Management Committee shall be held at least [monthly] [every two months] [every three months] unless otherwise decided by the Management Committee, and at such other times as may be determined by the Chairman of the Management Committee, upon at least 14 days' prior written notice to all Parties.

3 Development Team and Project Manager

Lead Developer

[Lead Party] will act as the lead developer and coordinate the activities of the Parties.

Project Manager

[Lead Party] shall appoint and supervise the Project Manager. The Project Manager shall be responsible for the day to day implementation of the Development Process. The Project Manager shall keep the Management Committee fully informed on all matters concerning the development of the Project and shall keep records of all material aspects of the Development Process.

Development Team

A development team drawn from representatives of the Parties shall be responsible for the development of the Project under the general supervision of the Project Manager and [Lead Party], and in accordance with the Development Program and the provisions of the Agreement. The Parties shall nominate qualified personnel to serve on the Development Team when vacancies develop or when the Project Manager has determined there is a need to replace existing members.

Development Program

The Project Manager shall produce a program of activities for the development of the Project, which shall set forth the activities to be carried out during the Development Process, the date by which, or the period of time during which, each such activity is to be carried out, and if applicable, which Parties or persons are responsible for which activities.

Development Budget

The Project Manager shall produce a budget for expenditures incurred or expected to be incurred by or on behalf of the Parties during the Development Process, which shall set forth a reasonably detailed breakdown of expected Development Costs and Deferred Costs.

4 Project Costs

Costs Generally

Each Party shall bear its own direct and indirect costs and expenses, including internal costs and expenses, incurred in connection with the Project, the Development Process, and the performance of such Party's obligations under the Agreement. No Party shall be entitled to reimbursement of any costs and expenses incurred in connection with the Project, except for

reimbursement in accordance with the terms of the Agreement for Prior Costs, Deferred Costs, and Development Costs.

Prior Costs

The Parties will establish a schedule setting forth the mutually agreed internal and third party costs and expenses related to the Project incurred prior to the date of the Agreement.

Deferred Costs

The Parties agree that the internal cost to each Party of providing a Representative to serve on the Management Committee, and other personnel working specifically on development of the Project and the travel expenses and disbursements of such personnel, will be funded by such Party during the Development Process and accrued until Financial Close. Each Party shall document such Deferred Costs and submit an accounting of these costs to the Management Committee for approval on a monthly basis.

Development Costs

Development Costs shall be the reasonable and prudent costs incurred by the Parties to the extent set forth in the Development Budget and approved by the Project Manager in connection with the development of the Project including the costs of the Project Manager and the Development Team to work specifically on the Project, out-of-pocket expenses, and third party costs incurred on behalf of the Development Team or the Parties.

Funding of Development Costs

Each Party shall pay its pro rata share of all Development Costs incurred by the Parties from and after the Effective Date. The Project Manager shall, prior to the beginning of each [quarter], determine the anticipated Development Costs for that [quarter] and notify each Party of its respective share of such Development Costs for that period (each a “Cash Call”). In determining the amount of each Cash Call, the Project Manager shall consider Development Costs projected to come due during the relevant period in accordance with the then current Development Budget, any cash remaining from prior Cash Calls and the amount of unreimbursed Development Costs each Party has expended. Each Party shall pay the amount of the Cash Call not later than 7 days after receipt of the Cash Call.

Development of Reimbursement Costs

Each Party shall send an invoice to the Project Manager monthly in respect of the Development Costs listed above. Payment will be made within 30 days of receipt of such invoices to the extent that funds are available. If a Party is in arrears in payment of a Cash Call, the Project Manager will be entitled to offset the arrears against any reimbursement of Development Costs or other amounts owed to that Party under the Agreement.
At Financial Close, to the extent that funds are available and permitted to be used for such purpose, the Project Company shall make the following payments to the Parties: (1) reimbursement of all Prior Costs accrued by each Party; (2) reimbursement of all Deferred Costs; and (3) payment of a development fee to each Party.

5 Participation of Parties

Participation Interest

The Parties’ respective initial Participation Interests are as follows: [insert information]

Project Company

On or before Financial Close, [Lead Party] will establish a Project Company to own and operate the Project. Upon formation thereof, each Party shall assign to the Project Company all contracts, permits and other rights relating to the Project. Immediately prior to Financial Close, the equity ownership of the Project Company will be adjusted such that it is held by the Parties in the same proportion as their Participation Interests.

Affiliates Roles

[Lead Party] or its Affiliates shall provide operations, maintenance, and project management services for the Project. [Party B] and its Affiliates will have the opportunity to provide the fuel supply arrangements, provided such arrangements are commercially reasonable and cost competitive.

6 Remedies

Voluntary Withdrawal

A Party may withdraw at any time by giving not less than 30 days' written notice to the other Parties of the effective date of such withdrawal. No Party shall be permitted to withdraw if such withdrawal would result in an Event of Default by or disqualification of the remaining Parties or the Project Company.

Compulsory Withdrawal

Upon the occurrence and during the continuance of an Event of Default with respect to a Party, the Management Committee may require, by written notice, such Defaulting Party to withdraw from the Agreement and the Project.

Dilution

If a Defaulting Party has not been required to withdraw from the Agreement and the Project, then immediately prior to Financial Close and upon a vote of the Party or Parties with a greater than a 50% Participation Interest, the Defaulting Party's Participation Interest and its corresponding right to subscribe for equity in the Project Company shall be reduced such that each other Party's Participation Interest corresponds to the percentage of Development Costs and Prior Costs paid by each Party in relation to the total of all Development Costs and Prior Costs expended by all the Parties.

Continuing Remedies

Withdrawal of a Defaulting Party or reduction of its Participation Interest shall not affect the non-defaulting Party's right to damages for breach of contract and other rights and remedies under the Agreement and applicable law.

7 Confidentially and Other Provisions

Confidentially

All Confidential Information shall be held by each Party in strict confidence and shall not be disclosed to any third party, except as may be reasonably required by such Party for the performance and fulfilment of its obligations under the Agreement.

In addition, no Party shall release any press statement or any other public comment about the Project, the Development Process, the terms of the Agreement or the activities under the Agreement.

General Indemnity

Each Party shall indemnify, defend and hold harmless each other Party and the Project Company with respect to any and all claims made against any of them by any person claiming any interest, entitlement, fees, or costs related to the Agreement, the Project or the Project Company by or through such Party.

Assignment

No Party may sell, assign or otherwise transfer, voluntarily or by operation of law, any part of its rights under the Agreement, or divest itself of control of an assignee of its interest, except an assignment of all such rights or a divestiture to an entity which is wholly owned by, or under common ownership with, such Party.

Governing Law

The Agreement shall be governed by and construed in accordance with the laws of [insert jurisdiction]

Dispute Resolution

In the event that any dispute, controversy or claim is unable to be resolved between the Parties within [number of days, normally 30] days after notice of such dispute, then such dispute may be referred to arbitration. All disputes hereunder shall be settled exclusively and finally by arbitration, irrespective of the magnitude thereof, the amount in dispute or whether such dispute would otherwise be considered justifiable or ripe for resolution by any court or arbitral tribunal. Each rbitration shall be governed by the arbitration rules of the International Chamber of Commerce. Each arbitration shall be held in [insert jurisdiction].

Consequential Loss

No Party or its affiliates shall have any liability to any other Party or to the Project Company for any special or consequential loss or damage.

Exclusivity

[Language to be supplied when concept agreed.]