REVIEW OF JORDAN'S PROPOSED MINERALS AND PETROLEUM LAW

Final Report

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REVIEW OF JORDAN'S PROPOSED MINERALS AND PETROLEUM LAW

FINAL REPORT

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CONTENTS

REVIEW OF JORDAN'S PROPOSED MINERALS AND PETROLEUM LAW 2

EXECUTIVE SUMMARY 3

review of jordan's proposed minerals and petroleum law 3

Article (3): This law shall seek: 3

Article 2 – Definitions 3

Article (3) – the Objectives of the Proposed Law 4

Article (4) – Scope of the Proposed Law 5

Article (8) – Competence of the Commission 5

Article (10) – Appointment of Commissioners 5

Article (21) – Prospecting Licenses 5

Article (23) – Foreign Licenses 6

Article (36) – the Downstream Petroleum General Regulation 6

Article (41) – Suspending, terminating or revising the terms of a Permit or a License 6

Article (44) – Minimum Reserve Requirements 7

Article (49) – Open Sector and Fair Competition 7

Article (50) – Market share and market concentration 7

Part Six – Transitional Provisions 7

Article (53) – Taxes and Custom Duties 8

Chapter (6) – Penalties and Individual Liability 8

Chapter (7) – Appeals and Mediation 9

REVIEW OF JORDAN'S PROPOSED MINERALS AND PETROLEUM LAW

At the request of the U.S. Embassy and USAID/Jordan, the SABEQ Program's sub-contractor Sanad Law Group conducted a review of the proposed Minerals and Petroleum Law (the "Proposed Law").

The purpose was to identify and analyze potential issues of interest that may contravene directly or indirectly with the Government direction in liberalizing the sector, or may create unnecessary confusion resulting in disturbing the supply chain upon implementation. This review was prepared by Sanad Law Group in January, 2008.

EXECUTIVE SUMMARY

REVIEW OF JORDAN'S PROPOSED MINERALS AND PETROLEUM LAW

At the outset, the Proposed Law appears to uphold the Government direction towards opening up this Sector, and states that explicitly within its objectives.

Article (3): This law shall seek:

a. *To achieve the development of the Sectors in accordance with the public interest and which will take into account the interest of the parties operating in these Sectors, and in a manner that will encourage local and foreign investments in the Sectors.*

b. *To create an adequate, efficient and transparent legal and regulatory framework for the liberalized Sectors of the Kingdom in accordance with this law.*

c. *To assure that the Petroleum supply in The Kingdom is adequate, reliable, efficient, economical and in conformity with the Jordanian standards and Technical Regulation.*

d. *To improve Petroleum sector governance by clarifying the functions of institutions responsible for Petroleum products supply affairs and to make the operation of these institutions accountable and transparent.*

e. *To ensure the protection of the consumer, of public safety and the environment in all Petroleum and petroleum products supply operations and installations and in exploration and mining operations in accordance with Jordanian Laws, Regulations and Technical Regulation.*

f. *To encourage and promote private initiative and fair competition within the Petroleum supply market, to eliminate discrimination or preferential treatment of any participant and to prevent monopolistic control of any segment of the Supply Chain except as otherwise dictated by the nature of the Downstream Petroleum Sector .*

g. *To create favorable conditions for existing operators and new participants and investors in order to improve services and to expand the infrastructure of the Supply Chain.*

h. *To strengthen the institutional capacity of the Government in order to better formulate and implement the policies of the Petroleum Supply Chain.*

However, a closer review of the Proposed Law revealed some areas of concern, which may be contributed to drafting ambiguities or more seriously represent certain grey areas resulting in legislative gaps in the Regulatory Framework governing the Sector; this memo provides a summary of the findings of such review and specifically addresses the inquiries raised in your e-mail, in the order they appear in the Proposed Law.

Article 2 – Definitions

A. The Definitions of "**Upstream Petroleum Sector**" and "**Downstream Petroleum Sector**" include similar activities that may create uncertainty regarding whether a certain

type of activity is considered within the "Upstream" or "Downstream" sector, and thus, which set of rules should apply to such activity; for example, the activities of transportation and storage are included under both definitions.

> *"**Upstream Petroleum Sector**" All activities and installations related to exploration, development and production of crude oil and natural gas, as well as the **transportation**, **storage**, **treatment** and or **any other activity** related to the same, as defined by concession, production sharing or other agreements.*

> *"**Downstream Petroleum Sector**" All installations, investments, operations and economic activities for or in connection with the import, export, landing, loading, unloading, processing, transformation, refining, **transport**, **storage**, distribution, wholesale or retail of crude oil and natural gas and petroleum products in the kingdom including asphalts and liquefied natural gas (LNG).*

B. The Definition of "**Quarry License or Prospecting License**" does not provide for a distinction between prospecting and quarrying; it is not clear whether these licenses are used interchangeably for the similar activity, while being considered prospecting concerning minerals and quarrying concerning stone materials. The Proposed Law also fails to determine the various phases in the quarrying activity, and whether it can be subject to "Mining Rights" within the meaning provided for under the Proposed Law.

Article (3) – the Objectives of the Proposed Law

As stated above, the Proposed Law appears to be in line with the Government's intention and direction in liberalizing the Sector, through providing equal opportunities to all concerned parties interested in becoming part of the Supply Chain, while introducing clear measures to guarantee consumer protection and maintaining the Government's right to step in when the need arises to exercise a certain level of control over the Sector; the Legislator added additional emphasis on that by clearly stating the objectives of the Proposed Law. However, the stated objectives raise the following concerns:

1. The Proposed Law aims at encouraging both domestic and foreign investment in the Sector; this objective should be read in conjunction with the Regulation Governing the Investment of Non-Jordanians No. (54) for the year 2000, to ensure that any limitations included under the Regulation do not impede the liberalization of the Sector and are in line with the Government general policy in this regard.

2. The Proposed Law aims at ensuring fair competition among all players, and providing equal opportunities through eliminating any favorable treatment and prohibiting monopolies only when necessarily dictated by the nature of the Downstream Petroleum Sector. While this may appear as a dangerous language, potentially defeating the objectives set by this provision, we are of the opinion that this qualification is provided for under the Proposed Law to allow the Government to respond to economic considerations that may dictate, due to the scale of the operations and the small market size, that certain activities be run only by one entity; an economic analysis may provide a better indication of the significance of this point and the likelihood that this qualification may be "abused" to allow

monopolies, where competition is feasible and should rather be encouraged by the Government.

Article (4) – Scope of the Proposed Law

A. The Legislator excludes from the Scope of the Proposed Law the activities and installation related to the import, export, transport, distribution and sale of or any other downstream activity related to natural gas that is included in the License Agreement for Gas Transmission Pipeline in Jordan signed in 2004 until the termination or the lapse of term of the License Agreement. While this provision necessarily respects the License Agreement, it creates uncertainty regarding the duration for such exclusion, as it references the term of the License Agreement, without specifying a predetermined date; the License Agreement may provide for renewals and/or extensions that may allow this License to continue for an indefinite amount of time.

B. The Legislator also excludes the Armed Forces and Security Divisions from the scope of the Proposed Law, pursuant to a regulation that should be issued for that purpose. While this exclusion is necessary for National Security considerations, keeping it general may create room for manipulating the provision to impose certain monopolies that may contravene with the declared Government liberalization policy.

Article (8) – Competence of the Commission

The Proposed Law grants the Commission the competence to determine the basis, terms and conditions to conclude agreements and grant concessions concerning petroleum and oil shale, in compliance with applicable laws. The Proposed Law leaves the matter of setting the basis for entering into agreements and granting concessions to the discretion of the Commission, which may create a state of uncertainty, as to when such concessions should be granted, and whether they should be granted on exclusive basis, and on what terms.

Article (10) – Appointment of Commissioners

To ensure the impartiality of the Commissioners and to avoid any conflict of interest, the Proposed Law provides for certain limitations on Commissioners, which extend to relatives of the Second degree of the Commissioner and/ or his spouse. The degree of the relative is determined according to the general rules of the Civil Code; according to such rules, the calculation of the degrees shall be made up to the common ancestor and then down to all descendants, while considering each descendent a degree on its own (e.g. the father is a relative of a first degree to the sun, whereas, the brother is a relative of the second degree).

While this measure is typical for such positions, the Proposed Law in our opinion, unjustly imposes an obligation on the relatives of the Commissioners to surrender or repay all amounts and benefits received for violating the provisions of the Law; i.e. penalizing the relatives for the violations committed by the Commissioner.

Article (21) – Prospecting Licenses

The Proposed Law states that the requirements for licensing and the fees are to be specified in a regulation to be issued to that effect. This approach, while it maintains a level of flexibility to respond to the requirements of the industry, it creates uncertainty regarding the licensing

mechanism, particularly when read in conjunction with Article (79) of the Proposed Law, which stipulates that "No Exploration License or Quarry License or Mining Right shall be granted in accordance with this law before the approval of the concerned authorities".

Ideally, the Licensing in the Proposed Law should be in line with the Provisional Investment Law, which provides for a clear and streamlined mechanism for issuing Sectoral Licenses. The Investment Law entrust the licensing with one entity that is the primary authority for regulating a certain sector, and provides for a clear process for obtaining approvals from all other concerned entities, maintaining that an Investor should only deal with the primary authority.

Article (23) – Foreign Licenses

The Proposed Law stipulates that exploration licenses, mining rights, and licenses for oil shale and natural gas and petroleum exploration to foreigners are to be granted through agreements with the Commission upon a decision from the Council of Ministers.

This Article clearly states that any grant of license is subject to the approval of the Council of Ministers and through special agreements with the commission; the Article does not provide for the basis for granting such rights, nor does it describe the main features of such agreements in excess of the general terms provided for under the Article. While this level of detail is typically left to regulations, it leaves room for discretion on part of the Commission and the Council of Ministers.

Article (36) – the Downstream Petroleum General Regulation

The Proposed Law references in several Articles (36 onwards) the Downstream Petroleum General Regulation, which should be enacted in implementation of this Proposed Law. The proposed Regulation should specify many details in connection with determining the qualification for those entities or person, which will make them eligible to receive a Petroleum Construction Permit or a Petroleum Operating License within the meaning of the Proposed Law.

This Regulation must be prepared and issued in a prompt manner in order to cover the legislative gap in its absence.

Article (41) – Suspending, terminating or revising the terms of a Permit or a License

The Proposed Law provides the Commission with the discretionary power to revise the terms of a Permit or a License upon the request of the Licensee, or as a result of not abiding by the terms thereof, or due to certain violations committed on part of the Licensee, or for "Public Interest" considerations.

The term of "Public Interest" is commonly and widely used by the Jordanian Legislator to leave a door open for the interference of the competent authorities in regulating a certain activity or a sector. There is no established definition in the Jordanian Law for the term "Public Interest"; the various Interpretation Decisions issued by the Legislative Bureau and the decisions of both the Court of Cassation and the Higher Court of Justice suggest that what constitutes a Public Interest is determined upon the discretion of the authority entrusted with the regulation of the activity within the respective laws.

Article (44) – Minimum Reserve Requirements

A. Sub-Article (A) of this Article specifies the Licensees, who are required to maintain a minimum reserve, and include "Industrial Consumers" as part of these Licensees. We believe that such inclusion is a drafting mistake, considering that "Industrial Consumers" are not among those entities defined within the definition of "Licensees".

B. Sub-Article (C) of this Article provides the Commission with the right to raise the minimum requirement for the reserve, provided that the decision of the Commission would take effect after 6 months from the date of its issuance. This provision may create confusion in the market, however, the fact that the Proposed Law stipulates that the Commission must carry consultation with the Sector for a period of 30 days alleviate the effects of this grant, and restricts the possibility of its manipulation by the Government. An economic assessment of this provision, may provide a better indicator of the possibility of any disturbance of the market upon the exercise of this power.

Article (49) – Open Sector and Fair Competition

Article (49) states that "any and all activities in the Supply Chain shall be open to any person, whether private or public, domestic or foreign, subject to the provisions of this Law".

The language of this Article suggests that foreign and domestic investors are provided with the same equal treatment under the Proposed Law, however and as indicated above, granting Operating Licenses or Construction Permits to foreigners is subject to the approval of the Council of Ministers and by special agreements with the Commission.

Article (50) – Market share and market concentration

Article (50) stipulates that "The domestic market share of any of the wholesale petroleum product licensee shall not exceed 40% of the total domestic market".

This provision complies with the Competition Law No. (33) for the year 2004, which stipulates in Article (9) that any economic concentration above 40% of the market share, is prohibited except upon the approval of the Minister of Industry and Trade. In fact, the Proposed Law provides for an absolute prohibition and does not allow for any grant for more than 40% even upon the permission of the Minister of Industry & Trade, particularly that Article (84) of the Proposed Law repeals any provision in any other law that contravenes with the provisions of the Proposed Law, and provides the latter with supremacy over other laws.

PART SIX – TRANSITIONAL PROVISIONS

The Proposed Law provides for a set of measures to govern the Interim Period between the effective date of the Proposed Law and up to a maximum period of five years from the date thereof.

The Proposed Law stipulates that the Commission should issue a set of regulations to govern the Transitional period within 6 months from the effective date of the Proposed Law to specify the following:

1. Persons participating in Petroleum Operations of the Supply Chain at the commencement date of this Law are obligated to upgrade or adjust their operations and facilities in order to comply with all provisions of this Law at the end of the transition period;

2. The regulations shall set the dates on which existing and new participants in each segment of the supply chain shall apply for new Petroleum Operating License and Construction Permits;
3. Until the end of the transition period or an earlier date, when the Council of Minister is satisfied with the development of a competitive market for Petroleum Products in the Kingdom, the maximum prices for of all or some products may be controlled by the Commission, based on an import parity formula to be established by regulation;
4. During the transition period while the Petroleum market, the supply system and the infrastructure are being reorganized and adjusted according to the approved plans, the storage, transport and other logistic capacities as well as Distribution and retail assets and activities may be regulated in accordance to a regulation set by the Commission which may impose tariffs, and restrictions for all or certain segments of the Supply Chain.

The Proposed Law also stipulates that "all Persons holding Petroleum Operating Licenses and Construction Permits and other authorizations in relation to the facilities, installations or operations in the Petroleum Supply Chain shall be allowed to continue their operations in accordance with those licenses, permits and other authorizations which shall remain valid until they are to be replaced by Permits or Licenses under this Law".

While the Proposed Law does not explicitly allow for the Share Production Agreements during the Interim period, it suggests that the status quo may continue until and unless the provisions of the Regulations provide otherwise. Therefore and in the absence of specific prohibitions under the regulations, the Commission may enter into Share Production Agreements during the Interim Period.

Article (53) – Taxes and Custom Duties

The Proposed Law refers the determination of Taxes and Custom Duties on each product to the provisions of the respective Laws, and places the determination thereof in the hands of the competent authorities; i.e. the Tax Department and the Customs Department under the Ministry of Finance. It is worth noting that the Fiscal Laws and Regulations in Jordan in general are compliant with the commitment of Jordan under the various international and bilateral agreements, and the determination whether such duties or taxes is in violation of any commitments is outside the scope of the review of the Proposed Law.

CHAPTER (6) – PENALTIES AND INDIVIDUAL LIABILITY

A. Article (66) specifies the list of activities that constitute violations of the provisions of the Proposed Law, including:

1. Refusal, delay or failure to produce any documents or other information relating to Petroleum Operations and installations which a Licensee may be required to produce under this Law;
2. Knowingly or without reasonable grounds for believing the same to be true furnishing documents or other information which are false or misleading whether upon demand by the Commission or otherwise.

B. Article (68) extends the liability for violations committed against the provisions of the Proposed Law to the partners in any legal entity in their personal capacity and beyond their shareholding in the partnerships.

CHAPTER (7) – APPEALS AND MEDIATION

The Proposed Law provides that the Commission must issue Instructions to regulate the process of Mediation, which is according to the Law is a voluntary dispute resolution mechanism, and stipulates that such instructions must take into considerations the prevailing customs in the Kingdom in connection with Mediation and Dispute Resolution. Jordan has adopted Mediation process in courts, which to a great extent, follows international practices. However, such standards and practices are not typically included in the Law, but rather should be reflected in the instructions that are to be issued for that purpose by the Commission.

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