The Implications of Trade Agreements on Benefits Planning for Offshore Oil and Gas Development in British Columbia

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Executive Summary

Within the context of British Columbia’s energy policy, the BC Offshore Oil and Gas Team (the Team) will contribute to the province’s economic strategy through a number of objectives. These include obligations to First Nations and coastal communities, as well as the support of a strong and healthy business climate. The Team will evaluate a variety of policy tools to ensure that “development provides benefits to First Nations and communities”.

One policy option is the use of an Impact Benefit Agreement (IBA) or “Benefits Agreement”. This form of agreement is negotiated between the company, various levels of government and the community to enhance the local benefits from a project. Such benefits often include employment considerations, economic development and business opportunities and social, cultural and community support.

As demonstrated by the experiences of the two Atlantic provinces, these agreements may not be enough to ensure all benefits are shared and must be used in conjunction with a proper and enforceable legal and regulatory framework. Existing trade agreements such as the North American Free Trade Agreement (NAFTA, 1994) and Agreement on Internal Trade (AIT, 1995) may interfere with future decision-making and “tie our hands” by limiting the policy tools that are available. Performance requirements forbid parties from imposing or enforcing preferential treatment for goods and services provided by local suppliers or the pursuit of a given level or percentage of domestic content.

One avenue that the province could explore is the use of qualifications within the trade agreements that provide means for British Columbia to pursue benefits planning as part of its long-term economic objectives. Sector-specific reservations made by Canada under the NAFTA cover new initiatives that allow for discriminatory practices as long as the initiatives are within the public policy and legal framework described by the reservation. Under the AIT, certain limitations and exceptions pertaining to preferential treatment are qualified if a province is pursuing regional economic objectives.
Introduction
Moratoria on offshore oil and gas development are not new phenomena to British Columbia. In fact, moratoria have been imposed and removed eight times since the first one was imposed in 1959. However, with British Columbia in need of additional economic activity and revenue, lifting the moratorium has become a priority with the current government, provided activity can be done in an environmentally responsible and scientifically sound manner.

In 2001, a six-member sub-committee of the BC government Caucus held a series of public hearings on the issue of the offshore oil and gas moratorium. The committee held hearings in nine coastal and northern communities. The mandate of this committee was to solicit the viewpoints of individuals and groups who would be most affected by potential changes to the provincial moratorium on offshore development. In one of many conclusions and recommendations made to the Minister of Energy and Mines, the Task Force reported that coastal communities wanted to be active participants in the debate on offshore development. Community concerns focused not only on the potential economic and social benefits but also on the potential economic and social costs of such an industry.

Guided by these recommendations, the BC Offshore Oil and Gas Team is pursuing key initiatives that will strengthen the provincial government’s commitments to First Nations and coastal communities. Morris (2003) describes various options available to the Team with respect to income distribution in a global environment. Although the government is in the process of engaging First Nations and communities in discussions about offshore development, existing trade agreements may interfere with future decision-making and “tie our hands” by limiting the policy tools that are available.

What do we mean by “benefits”? In the context of this paper, the term “benefits” is not to be confused with the term “compensation”. This discussion is not about compensation measures for mitigating risks, but about the types of agreements that help communities receive tangible direct and indirect benefits such as employment and business activity.
Benefits arrangements may vary by degrees. This will depend on the level of intervention by government.

In support of the Team’s goals, this report will evaluate the implications of trade agreements on benefits planning and determine how provisions in trade agreements may complicate the use and implementation of benefits plans. The first section will provide a description and overview of the practice and implementation of IBAs and include examples from other Canadian jurisdictions. The following section will assess the trade implications of the NAFTA and AIT on benefits agreements by focusing on performance requirements and national treatment.

I. Impact Benefit Agreements

When deciding whether, when and how a publicly owned resource should be developed, it is important to consider the socio-economic and environmental benefits for local communities. Natural resource operations can provide benefits but the extent to which communities are affected depends on the legal and regulatory framework and structure of the regional economy under which the operations take place and the management of the relationships and processes involved.

One policy option is the use of an Impact Benefit Agreement. This form of agreement is negotiated between the company, various levels of government and the community to enhance the local benefits from a project. Such benefits often include employment considerations, economic development and business opportunities and social, cultural and community support.

From the point of view of local communities, agreements can be used to address concerns of First Nations and communities about the adverse effects of large-scale mineral development and ensure local communities get both short and long-term benefits from development. These benefits often include employment and training, economic development and business opportunities and social, cultural and community support.
From a company point of view, negotiated agreements may be useful in order to distinguish the responsibilities of the company and the government especially in terms of training programs (normally the responsibility of government). Agreements also help to identify risk and uncertainty related to a project and perhaps to avoid resistance and confrontation by local communities.

The negotiation of Impact Benefit Agreements depends on where operations are taking place and with whom. As such, there is no specific definition: they are used to enhance positive opportunities and to mitigate negative impacts. The majority of agreements are negotiated between the company, various levels of government and the community to enhance local benefits from a project. Donihee (2002) has raised concerns about the relationship between benefits agreements and public policy issues based on experience in the Northwest Territories. First, he suggests that the results of negotiations may have more to do with raw bargaining power than with public policy. Second, the relationship between agreements and distribution between beneficiaries and non-beneficiaries may lead to divisions within a community. Finally, treatment for tax and royalty purposes of cash payments and expenditures related to IBA commitments has to be taken into account for fiscal policy purposes.

**Alternatives to IBAs**

Many communities have implemented alternatives to benefits agreements. Aboriginal and multi-party protocols and guidelines don’t have the force of law but have been used by the Innu Nation of Voisey’s Bay and the Inuit of Nunavik. Resource development committees provide a convenient entry point into communities for companies wishing to embark on a consultation process or solicit community participation. Such committees have been used by the Tahtlan of BC and the Innu of Voisey’s Bay.

In the Mackenzie Valley of the Northwest Territories, institutional arrangements such as co-management agreements have been used whereby the government and First Nations enter into formal agreements specifying respective rights, powers and obligations with respect to the management and allocation of resources in a particular area. Also in the
Northwest Territories, a joint venture has been formed, Deton’cho Diamonds Inc., where First Nations groups are majority shareholders.

In 1998, the Yukon Territorial Government assumed provincial-type powers to manage and regulate Yukon onshore oil and gas resources. Consistent with the Yukon Oil and Gas Act (YOGA, 1997), a benefits agreement must provide for opportunity, employment and procurement for the Yukon First Nation, its citizens, residents of communities affected by the oil and gas activity and all other Yukon residents. Benefits are directed at the immediate locale, and focus on geography rather than status. The people near the resource benefit from the activity regardless of whether they are First Nations or non-First Nations, and regardless of whether the jurisdiction is under the Yukon or First Nation government.

Although benefits agreements have been used widely in Canada especially in the mining sector in the North, our main interest in this paper is the use of agreements in the offshore oil and gas industry. This means the provinces of Newfoundland and Nova Scotia.

i. Newfoundland
Consistent with the provisions of the Atlantic Accord (1985), a Memorandum of Agreement between the Government of Canada and the Government of Newfoundland Labrador on offshore petroleum resource management and the Canada-Newfoundland Atlantic Accord Implementation Act (1987), an Act to implement an agreement between the Government of Canada and the Government of Newfoundland and Labrador on offshore petroleum resource management (the Acts), operators must commit to a benefits plan that addresses the following requirements:

Services provided from within Newfoundland and goods manufactured in Newfoundland must be provided with “full and fair opportunity” to compete for the supply of goods and services for any work or activity proposed. Newfoundland residents, as defined by members of the provincial labour force, are to be given first consideration for training and employment. However, the Acts do not define “full and fair” opportunity nor do they
define “first consideration”. As noted by Marte (2003), preference for Canadian vendors for Husky’s White Rose operations has resulted in significant Canadian-based vendor content. However, he determines that over 50% of component contracts were awarded to foreign suppliers.

**ii. Nova Scotia**

Consistent with the provisions of the Canada-Nova Scotia Petroleum Resources Accord (1986), an agreement between Canada and the Province of Nova Scotia to establish through mirror legislation a unified and fiscal regime for petroleum resources in the offshore area, and the Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act (1988), an Act to implement an agreement between the Government of Canada and the Government of Nova Scotia on offshore petroleum resource management (the Acts), operators must commit to a benefits plan that addresses the following requirements: opportunity, procurement, establishment and employment. These are basically the same as listed under Newfoundland except for the additional requirement that the plan must address the establishment of an office within the province.

However, Gardner Pinfold (2002) concludes that, although the Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act (1988) stipulates that Nova Scotia industry must be given “full and fair opportunity”, the Act does not define “full and fair” nor does it set any targets for Nova Scotia participation. To date, application of the benefits plan requirement has resulted in 30-40% Nova Scotia content during the development stage and 35-50% during the production phase.

As demonstrated by the experiences of the two Atlantic provinces, these agreements may not be enough to ensure all benefits are shared and must be used in conjunction with a proper and enforceable legal and regulatory framework. Even in the case of BC where the government has engaged First Nations and communities in discussions about offshore development, existing trade agreements may interfere with future decision-making and “tie our hands” by limiting the policy tools that are available.
The following section attempts to address those concerns by examining the relevant sections of the Agreement and what they mean to British Columbians.

II. Trade Implications of Benefits Agreements

i. North American Free Trade Agreement (the NAFTA)

Under the NAFTA, Canada still has control over its own domestic policy. However, Shrybman (undated) argues that the free market objectives of trade liberalization that are expressed by the NAFTA are fundamentally incompatible with public policies that seek to restrict market forces in aid of serving other societal goals. The inherent contradictions between these respective agendas explains why Canada has to take steps to protect social and public policy from impacts of trade agreements.

Unless specifically excluded, Articles 1102 and 1103 require that foreign investors and service providers be given the same rights and opportunities made available to Canadian investors and service providers. However, the vagueness of the wording and the lack of proper definitions have resulted in a number of lawsuits in the last few years brought by and against Canada. In particular and relevant to our discussion is the case brought by Canada against long-standing “Buy America” laws aimed at ensuring benefits to American companies. Canada in turn, has been sued by United Parcel Services of America Inc. (UPS) alleging that Canada provides treatment less favourable to UPS Canada than it does to Canada Post Corporation.

Under Article 1106, Canada is prohibited from creating regulation that would tie business operations with obligations to support the local economy. For example, percentage of domestic content could be construed as an “advantage” or subsidy that could distort trade. However, this section is qualified: these activities are allowed but it is the extent to which they are conducted that will be cause for concern.

One avenue that the province could explore is the use of reservations under the trade agreement. These are sector-specific reservations (see appendix) taken by Canada with respect to existing or future measures that do not conform to obligations imposed. These
may cover new initiatives that may be more discriminatory of non-Canadian parties as long as the initiatives are within the public policy and legal framework described by the reservation. For example, the Atlantic Accords were specifically identified under the NAFTA as Reservations for Existing Measures. This means that these arrangements are excluded from obligations as discussed above but are prevented from becoming more discriminatory.

Canada also reserves the right to deny rights or preferences provided to Aboriginal peoples. This means that arrangements made with First Nations groups may not necessarily be limited by the trade agreement. However, caution must be used because any transfer of resources from the government to First Nations may be perceived as a “subsidy” if it affects trade and would conflict with NAFTA provisions.

ii) Agreement on Internal Trade
Through the Agreement on Internal Trade (AIT, 1995), the federal, provincial and territorial governments have agreed to reduce trade barriers within Canada. The goal is to have people, goods, services and investments moving freely across the country. The Agreement requires governments to treat all persons, goods, services and investments from other provinces as well as they treat their own. However, Article 1801 qualifies certain limitations and exceptions if a party is pursuing regional economic objectives.

Provinces agree to treat residents, goods, services, and investments of any other province no less favourably than they treat their own. For example, Article 706 requires that workers from one jurisdiction be provided access to employment opportunities in another jurisdiction and measures may not be adopted or maintained that create obstacles to trade. In the case of government regional economic development purposes, exceptions apply as long as they do not unduly restrict trade more than necessary.

As is the case under the NAFTA, any transfer of resources from the government to First Nations may be perceived as a “subsidy” if it affects trade and would conflict with the provisions of the Agreement.
Conclusion

Presenters to the Offshore Oil and Gas Task Force in 2001 expressed concerns about trade agreements and their potential to interfere with local hiring practices. Presenters were right to be concerned: performance requirements forbid parties from imposing or enforcing preferential treatment for goods and services provided by local suppliers or the pursuit of a given level or percentage of domestic content. However, in many cases, qualifications within the agreements provide means for British Columbia to pursue benefits planning as part of its long-term economic objectives.

Under both agreements, governments still have control over their own domestic policy. Where local employment and services is called into question, the rules are qualified if a party is pursuing regional economic objectives. Coastal communities of BC fall into this category and certain limitations and exceptions may not necessarily apply as long as measures taken are carried out in the least trade-restrictive way.

In the end, it all comes down to one thing: the ability to compete. The province has declared itself to be competitive and open for business. In a competitive climate, all companies have the right to compete for work not just local companies, and BC companies and workers have to make sure they are up to the challenge: no one company has a guaranteed right to a successful bid. If the government alters the bidding process in favour of local companies and workers through a change in policy or law, then non-local companies could argue that by taking away the right to compete, the province has effectively violated the terms of the trade agreements.

Appendix

NAFTA Articles

Article 1102: National Treatment

1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

4. For greater certainty, no Party may:
(a) impose on an investor of another Party a requirement that a minimum level of equity in an enterprise in the territory of the Party be held by its nationals, other than nominal qualifying shares for directors or incorporators of corporations;

**Article 1103: Most-Favored-Nation Treatment**
1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to investors of any other Party or of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

**Article 1106: Performance Requirements**
1. No Party may impose or enforce any of the following requirements, or enforce any commitment or undertaking, in connection with the establishment, acquisition, expansion, management, conduct or operation of an investment of an investor of a Party or of a non Party in its territory:
   - (b) to achieve a given level or percentage of domestic content;
   - (c) to purchase, use or accord a preference to goods produced or services provided in its territory, or to purchase goods or services from persons in its territory;
   - (g) to act as the exclusive supplier of the goods it produces or services it provides to a specific region or world market.

3. No Party may condition the receipt or continued receipt of an advantage, in connection with an investment in its territory of an investor of a Party or of a non-Party, on compliance with any of the following requirements:
   - (a) to achieve a given level or percentage of domestic content;
   - (b) to purchase, use or accord a preference to goods produced in its territory, or to purchase goods from producers in its territory;

4. Nothing in paragraph 3 shall be construed to prevent a Party from conditioning the receipt or continued receipt of an advantage, in connection with an investment in its territory of an investor of a Party or of a non Party, on compliance with a requirement to locate production, provide a service, train or employ workers, construct or expand particular facilities, or carry out research and development, in its territory.

**Canadian Reservations for Existing Measures**
(a) Article 1102, 1202 or 1405 (National Treatment)
(b) Article 1103, 1203 or 1406 (Most-Favored-Nation Treatment)
(c) Article 1205 (Local Presence)
(d) Article 1106 (Performance Requirements) or
(e) Article 1107 (Senior Management and Boards of Directors)

**Canadian Reservations for Future Measures**
(a) Article 1102 or 1202 (National Treatment)
(b) Article 1103 or 1203 (Most-Favored-Nation Treatment)
Aboriginal and Minority Affairs
Canada reserves the right to adopt or maintain any measure denying investors of another Party and their investments, or service providers of another Party, any rights or preferences provided to aboriginal peoples.

Canada reserves the right to adopt or maintain any measure according rights or preferences to socially or economically disadvantaged minorities.

Canadian Exceptions to Most-Favoured-Nation Treatment
Canada takes an exception to Article 1103 [Most Favoured-Nation Treatment] for treatment accorded under all bilateral or multilateral international agreements in force or signed prior to the date of entry into force of this Agreement.

AIT Articles
Article 1801: Regional Economic Development
1. The Parties recognize that measures adopted or maintained by the Federal Government or any other Party that are part of a general framework of regional economic development can play an important role in encouraging long-term job creation, economic growth or industrial competitiveness or in reducing economic disparities.

2. Subject to [] Parts III [General Rules] and IV [Specific Rules] of this Agreement do not apply to a measure adopted or maintained by the Federal Government or any other Party that is part of a general framework of regional economic development, provided that:
   a) the measure does not operate to impair unduly the access of persons, goods, services or investments of another Party; and
   b) the measure is not more trade restrictive than necessary to achieve its specific objective.

Provincial Obligations Under Chapter Four: General Rules
Article 401: Reciprocal Non-Discrimination
1. Subject to Article 404 [Legitimate Objectives], each Party shall accord to goods of any other Party treatment no less favourable than the best treatment it accords to:
   (a) its own like, directly competitive or substitutable goods; and
   (b) like, directly competitive or substitutable goods of any other Party or non-Party.

2. Subject to Article 404, each Party shall accord to persons, services and investments of any other Party treatment no less favourable than the best treatment it accords, in like circumstances, to:
   (a) its own persons, services and investments; and
   (b) persons, services and investments of any other Party or non-Party.
Article 403: No Obstacles
Subject to Article 404, each Party shall ensure that any measure it adopts or maintains
does not operate to create an obstacle to internal trade.

Article 404: Legitimate Objectives
Where it is established that a measure is inconsistent with Article 401, 402 or 403, that
measure is still permissible under this Agreement where it can be demonstrated that:
(a) the purpose of the measure is to achieve a legitimate objective;
(b) the measure does not operate to impair unduly the access of persons, goods, services
or investments of a Party that meet that legitimate objective;
(c) the measure is not more trade restrictive than necessary to achieve that legitimate
objective; and
(d) the measure does not create a disguised restriction on trade.

Provincial Obligations Chapter Six: Investment
Article 603: Reciprocal Non-Discrimination
1. Subject to Article 605, each Party shall accord to an investor of a Party treatment no
less favourable than the best treatment it accords, in like circumstances, to an investor of
any Party.

2. Subject to Article 605, each Party shall accord to an enterprise of any other Party,
established and carrying on business activities in its territory, treatment no less
favourable than the treatment it accords, in like circumstances, to its own enterprises.

3. With respect to the Federal Government, paragraphs 1 and 2 mean that, subject to
Article 605, it shall ensure that any measure it adopts or maintains does not operate so as
to discriminate between Provinces or regions.

Article 607: Performance Requirements
1. No Party shall impose or enforce, in relation to an investor of a Party or an enterprise
in its territory, or condition the receipt of an incentive by an enterprise on compliance
with, any requirement to:
(a) achieve a specific level or percentage of local content of goods or services;
(b) purchase or use goods or services produced locally; or
(c) purchase goods or services from a local source.

2. For greater certainty, nothing in paragraph 1 shall be construed to prevent a Party from
conditioning the receipt of an incentive on any requirement to carry out economic
activities in its territory or to create or maintain employment.

3. A Party may, under exceptional circumstances, adopt or maintain a measure
inconsistent with paragraph 1 for regional economic development purposes, provided
that:
(a) the measure does not operate to impair unduly the access of persons, goods, services
or investors of another Party;
(b) the measure is not more trade restrictive than necessary to achieve its specific objective; and
(c) the Party promptly notifies the other Parties of the details of the measure.

**Provincial Obligations Under Chapter Seven: Labour Mobility**

**Article 706: Residency Requirements**
1. Subject to paragraph 2 and Article 709, no Party shall require a worker of any other Party to be resident in its territory as a condition of:
   (a) access to employment opportunities;
   (b) licensing, certification or registration relating to the worker's occupation; or
   (c) eligibility for the worker's occupation.

2. Subject to Article 709, in providing access to employment opportunities, each Party shall accord to workers of any other Party a treatment no less favourable than the treatment it accords, in like circumstances, to its own workers.

**Article 709: Legitimate Objectives**
1. Where it is established that a measure is inconsistent with Article 706, 707 or 708, that measure is still permissible under this Chapter where it can be demonstrated that:
   (a) the purpose of the measure is to achieve a legitimate objective;
   (b) the measure does not operate to impair unduly the access of workers of a Party who meet that legitimate objective;
   (c) the measure is not more mobility-restrictive than necessary to achieve that legitimate objective; and
   (d) the measure does not create a disguised restriction to mobility.

**Provincial Obligations Under Chapter Twelve: Energy**
In terms of energy negotiations, these are still under way but are a major factor for Alberta’s agreement with BC. Chapter 12 relating to Energy was not included in the Agreement when provincial First Ministers first signed it in 1994. It is currently awaiting approval from Trade Ministers and is to be negotiated in accordance with Article 1810 (Future Negotiations).

**Provincial Obligations Under Chapter Eighteen: Final Provisions**

**Article 1802: Aboriginal Peoples**
This Agreement does not apply to any measure adopted or maintained with respect to Aboriginal peoples. It does not affect existing aboriginal or treaty rights of any of the Aboriginal peoples of Canada under section 35 of the "Constitution Act," 1982.
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