A Policy Review of the Mackenzie Gas Project Socio-Economic Agreement

Prepared for

Alternatives North

Prepared by

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Introduction

Alternatives North has asked me to prepare a policy review of the Socio-Economic Agreement (SEA) concluded between the proponents of the Mackenzie Gas Project (MGP and the MGP SEA) and the Government of the Northwest Territories (GNWT). My review focuses on some of the legal aspects of the SEA based on my expertise as a Professor of Law at The University of Calgary where I research and teach in the area of natural resources law. It is important for me to say at the outset that I have prepared this paper as a contribution to the policy debate about agreements such as this. It is not a legal opinion.

1.0 The Questions

My terms of reference asked me to cover a series of questions in my review:

1. Consistency of the MGP SEA with other agreements negotiated by the GNWT.
2. A review of the SEA and its theoretical underpinnings and conceptual organization, structure, comprehensiveness and completeness;
3. An evaluation of whether the SEA can accomplish its goals and contribute to sustainability;
4. The enforceability of the SEA, and
5. An assessment of whether compliance with the SEA should be attached to any potential NEB approvals for the MGP.

By a supplementary email Alternatives North also asked me to consider some further questions including a question as to whether or not the government had a duty to consult members of the public and interest groups prior to entering into this Agreement.

2.0 Preliminary Observations

Any review of a 40 page agreement with 20 pages of additional schedules which attempts to respond to all of these questions must necessarily be selective. In selecting topics for review I have had access to a draft of the companion report prepared for Alternatives North by Professor Ciaran O'Faircheallaigh and since I agree with much of what Professor O'Faircheallaigh has written I have tried to avoid unnecessary overlap and duplication except where I think that my particular academic discipline has something to add to what Dr. O'Faircheallaigh has written. Thus, and just by way of example, a reader of this report will not find here any assessment of the *adequacy* of the resources that the parties have agreed to provide to the Socio-Economic Advisory Board to be established pursuant to Article 8 of this Agreement (see pp. 10 – 11 of Dr. O'Faircheallaigh's report for this) but I have commented on the mandate afforded to the Board by the Parties as part of my response to the question as to the enforceability of the SEA (see section 10 of this Report).

In responding to the list of five questions I have organized this review around each of the questions with the exception of the first question. Thus sections 3 through 8 respond to question 2 (a review of the SEA etc); section 9 responds to question 3 (sustainability); section 10 to question 4 (enforcement) and section 11 to question 5 (the link between the Agreement and any NEB approval).

I have chosen to respond to the first question by making selective references to other SEAs negotiated by the GNWT in the course of discussing the other four questions. Thus, I have tried to point out where the MGP Agreement follows existing models and where it departs from those models. These comparative observations are based on my review of the MGP Agreement as well as the three further agreements provided to me by Alternatives North: (1) the BHP Diamonds Project Agreement of 1996, (2) the Diavik Diamonds Project of 1999, and (3) the Snap Lake Diamond Project Agreement of 2004. Practice has evolved during this eight year period (1996 – 2004) as parties (and especially the GNWT as the common party to all of these agreements) have acquired experience in administering and implementing these agreements and it is hardly surprising that there is most common ground between the MGP Agreement and the most recent Snap Lake Agreement rather than the earlier two agreements.

The MGP Agreement is undoubtedly a much more complex agreement than the three earlier agreements. There are perhaps several reasons for this. First, the MGP Agreement deals with a series of separate but interconnected projects: the development of the anchor fields, the gas gathering system and the main trunkline. Second, the heart of the MGP project is a linear development which passes through different regions and traditional territories and settlement areas under the terms of various land claim agreements. Third, because the MGP Agreement embraces a number of different sub-projects or facilities, there are in effect a number of different proponents for the different aspects of the Project.

In assessing the "consistency" of this SEA with the earlier SEAs it is also important to emphasise the differences between the project that is the subject matter of this Agreement and the projects that were the subjects of the earlier agreements. Each of those projects was a diamond mine which was expected to operate for a number of years. While each of those mines would have a construction phase and an operating phase, the operational phase would continue to employ significant numbers of people in skilled and semi-skilled positions. By contrast a pipeline project is a linear development in which the employment opportunities are concentrated during a relatively short construction phase[1] and decline dramatically for the operational phase. The relatively short construction period makes it difficult to develop and apply on-the-job training schemes. Furthermore there can be little if any carry-over of skills from the construction phase to operations. The drafters of this Agreement clearly appreciated some of these difficulties. For example, Article 8.1.2 acknowledges that project-related employment and procurement opportunities will be significantly down-scaled as activities move from construction to operations. And the Agreement recognizes that it is in the upstream sector (incremental oil and gas drilling activities) where there is some greater potential for ongoing employment and training

[1] The proponents currently envisage (assuming that the project receives approval in 2008) that construction of the main transmission line will occur over 2010 to 2013 with commissioning and start up in the fourth quarter of 2013: Imperial Oil filing with the NEB, March 12, 2007.

(see Article 2.5.8 which provides for a training fund with contributions from both the GNWT and the Operators which will target oil and gas training programs).

3.0 An Overview of the SEA

At a formal level the Agreement is comprised of a preamble, 14 operative articles and a Schedule A which provides for the creation of the NWT Oil and Gas Socio-Economic Advisory Board. Schedule A itself incorporates a Schedule 1 which is a draft application to incorporate a Society with the same name as the Board.

Of the 14 operative articles six articles deal with substantive matters and each of those articles contains its own objective clause. These are the articles dealing with: employment, social and cultural well-being, business opportunities, net effects on government, sustainable development and monitoring, reporting and adaptive management.[2] The balance of the articles deal with more formal issues such as definitions (interpretation), dispute resolution, representations and warranties, notices etc.

Finally, it is important to emphasise at the outset that the project proponents are not the only parties to assume obligations under this Agreement. In particular the GNWT itself assumes important commitments[3] (see, for example, s.2.5.8 (to contribute to the oil and gas training fund); s.2.7.1 (to take measures to assist in building capacity of residents to take advantage of employment opportunities); s.4.6 (to provide support for NWT businesses); and s.8.5.3 (to produce an annual report on such matters as employment, educational attainment, economic effects, health and social well-being, traditional practices). While these commitments are all conditional on available funding (see s.10.1.1) their inclusion in the Agreement represents an important acknowledgement that the goals of this Agreement can only be achieved through the active collaboration of government and the proponents. That said, this Report focuses on the commitments of the project proponents.

With this overview in hand we can now look at some more specific issues associated with my answer to question two above. Thus sections 4 through 8 proceed as follows: section 4 offers some brief comments on the premises and objectives of the Agreement and its legal underpinnings; section 5 deals with a set of issues associated with the question of party status (i.e. the question of who is a party to the Agreement, who can enforce obligations under the Agreement etc.) under the Agreement; section 6 deals with employment targets, section 7 with project monitoring and adaptive management and section 8 with the question of "comprehensiveness" or completeness).

[2] There is one additional substantive article, article 7 dealing with the obligations of operators and contractors but the purpose of this article is to pick up on the substantive obligations of the other articles and extend them to contractors and sub contractors.

[3] The Agreement is structured so that most of the substantive articles commence with the various commitments of the proponents and conclude with the support to be committed by the GNWT.

4.0 Premises, Objectives and Legal Underpinning

4.1 Premises and Objectives

The premises of the Agreement (as set out in the recitals\preamble) are that the project proponents have interests in: (1) the proposed MVP, (2) a proposed gas gathering system, and (3) various discovered natural gas fields (Niglingtak, Parsons Lake and Taglu); that the Project will have an impact on the well being of residents and communities in the NWT but that the proponents have proposed to develop the project in a way that will contribute to sustainable development "and the social, economic and cultural well being" of communities and residents; and that the NWT has concerns that resources in the NWT will be diverted to deal with project impacts unless adequate mitigative measures are taken.

In addition to commitments already made by the proponents in the EIS and to the JRP the Parties propose to make further commitments in this Agreement to optimize beneficial opportunities and mitigate negative impacts.

Finally, the Agreement is also intended to serve as an affirmative action program to benefit classes of persons, particularly aboriginal persons, who have been historically disadvantaged.

While the preamble to an agreement cannot itself create legal obligations it can serve as an interpretive aid to the balance of the agreement. But it is also important to emphasise that even the operative articles of a contract such as this will only create legal obligations to the extent that the language of any particular clause has that effect. In most contracts the parties would routinely use such mandatory language but in the case of this Agreement there are a surprisingly large number of provisions that do little more than recite a statement of fact or intention without actually creating an obligation. Examples of this drafting approach include the following:

- 2.1.1 first two sentences
- 2.5.4 first two sentences
- 2.5.5 first sentence
- 6.4.1 & 6.4.2
- 8.3.1

Rather than quoting all of these examples I will simply quote the most important example taken from s.2.1.1 (the opening clause of the important article dealing with the subject of employment) which contains the observation that:

> "In the EIS and the proceedings before the Joint Review Panel, based upon the factors and assumptions set out therein, it was estimated that up to 16% of direct employment opportunities during Construction and up to 72% of direct employment opportunities during Operations could be filled by Aboriginal Persons and NWT Residents."

It is important to emphasise that this is simply a statement of what has already been presented in evidence before the JRP. It not expressed as a target and the project proponents do not commit to meet this goal or even to use best efforts to do so.

Thus, while such clauses may serve a definitional or interpretive role for the balance of an Article, they do not themselves create obligations for the parties to the Agreement. I comment further on the implications of this drafting approach in section 10 of the report which deals with enforcement.

4.2 Legal Underpinning

In some cases it is clear that project proponents have been required to negotiate SEAs with the GNWT as part of the terms of project approval. For example, the Comprehensive Study Report (CSR)[4] for the Diavik Project required the proponent to enter into an SEA "to provide a formal mechanism to ensure that mitigative measures and commitments of [Diavik] and those outlined in the CSR are appropriately implemented and monitored" (see Diavik SEA, preamble and s.17.14.1). Similarly, the Snap Lake Agreement was negotiated at least in part to satisfy the MVEIRB's environmental assessment report on the project (see Snap Lake SEA, Preamble (C-F) and s.2.1.1). There are similar examples in other jurisdictions such as the Benefits Plans required under the Offshore Accord legislation for Newfoundland and Nova Scotia.

There is not the same clear legal underpinning for the MGP Agreement no doubt (at least in part) because the Agreement has been negotiated before the conclusion of the Joint Review Panel's procedures and the National Energy Board's own hearings.

That said the MGP Agreement (as with the other agreements) has the legal status of a contract. The parties clearly intended to enter into legal relations and this is evidenced by the language used in the Agreement and in particular clause 13 dealing with the applicable law and forms of dispute resolution. Each of the parties has the capacity to contract and indeed Article 9 contains representations to that effect.[5] There is one standard qualification to this representation with respect to the GNWT to the effect that any expenditures to be made by the GNWT under the terms of the Agreement (e.g. GNWT contributions under Article 2.5.8 to the training fund) are subject to the terms of s.46 of the NWT's *Financial Administration Act* which provides that an "expenditure to the contract will be incurred only if there is a sufficient uncommitted balance in the appropriated item for the fiscal year in which the expenditure is required under the contract."

The Q & A issued by the GNWT upon the conclusion of the Agreement indicated that the Government did not consult with aboriginal parties or others (e.g. affected communities or unions) before concluding the Agreement and you have asked me to comment on whether the Government had a duty to consult before entering into an agreement such as this.

[4] Carried out under the terms of the Canadian Environmental Assessment Act (CEAA).
[5] The "reps" and warranties clause of the MVP Agreement is much more extensive than the earlier agreements. Compare Article 9 of the MVP with Article 12 and 13 of Snap Lake and 7.8.1 of Diavik.

While some may argue that the Government *ought* (i.e. it would be good policy) to have consulted in order to obtain valuable input and feedback from other parties I do not think that the Government owes a legal duty to consult non-Aboriginal parties before entering into an agreement such as this. The government does owe a duty to consult Aboriginal peoples which is triggered[6] "when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it". But while this threshold is low it could well be argued that there is nothing in the Agreement that affects such rights, either because of the subject matter of the Agreement or because of the non-derogation and priority of documents clauses of the Agreement (ss.1.3 & 1.4). In any event, there is no general duty on a government to consult non-aboriginal people before exercising a power to enter into a contract.

5.0 Party Status

The question of who is a party to an SEA offers a useful starting point in analyzing the MGP Agreement. Party status is important for two types of reasons; both related to the legal concept of privity of contract. First, only those persons who are party to the agreement will be bound by it; and second, only a party to the contract may complain of its non-enforcement (although Canadian law does recognize certain circumstances in which a third party may be able to claim performance where the contract clearly contemplates such a possibility).[7]

5.1 The Status of Beneficiaries of the Agreement

The principal parties to an SEA will most likely be the industrial proponents and the Government but it is clear that the Government will be only one of the intended beneficiaries of such an Agreement; others will include the communities and members of those communities who stand to gain in the form of employment and business contracting opportunities and who may also need "protection" from the increased demand for governmental and social services that any major project will impose. So, should such persons be included as parties to an SEA? To the extent that SEAs create monitoring bodies of one form or another there is another related question and that is the question of representation on such a body. Should representation on that body be confined to the government and project proponent or should it be extended to others including aboriginal communities who may be affected by the project? While these are two separate questions some of the earlier SEAs merged these two questions.

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[6] *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511; and in an oil and gas context involving project approvals in the Cameron Hills area of the NWT see *Ka'A'Gee Tu First Nation v. AG Canada and Paramount Resources Ltd,* [2007] FC 763.

[7] *District of Kitimat v. Alcan*, [2006] BCCA 75, 51 BCLR (4th) 314. In this somewhat analogous case Kitimat alleged that Alcan was in breach of a 1950 agreement (and as subsequently amended) between Alcan and British Columbia when Alcan elected to sell power from its Kemano generating facilities rather than using the power to operate its aluminum smelters to capacity (and of course employ residents of Kitimat). The Court of Appeal held that Kitimat lacked standing to bring the case. Kitimat has also brought a judicial review application against the other party to the agreement, the province. Alcan has been added as a party to those proceedings: *Kitimat (District) v. British Columbia (Minister of Energy and Mines)* (2006), 61 BCLR (4th) 295 (BCCA).

The MGP Agreement deals with these two questions quite separately and I think appropriately so. The Agreement offers a narrow answer to the question of party status. Thus the Agreement does not offer party status to aboriginal communities and furthermore makes it quite clear that this Agreement is not one of those exceptional agreements that intends to create enforceable rights in third parties. Thus s.14.9.1 provides that:

> 14.9 No Third Party Beneficiaries
>
> 14.9.1 No provision of this Agreement is intended, nor will any provisions be interpreted or deemed to provide or create any third party beneficiary rights or other rights of any kind in any person other than the Parties to this Agreement unless specifically provided herein. No person other than the Parties and their lawful successors and permitted assigns will be entitled to enforce any obligation created hereunder.

It is hard to imagine clearer and more explicit language.

Earlier GNWT SEAs have not been consistent on this question. Thus two of the agreements contemplate that aboriginal organizations are or may become parties to the agreement (the Diavik and Snap Lake Agreements) but this is not the case for the BHP Agreement. But even where aboriginal organizations may become a party to the agreement it appears that their participation is not a necessary condition before the agreement can enter into force. For example, the Snap Lake Agreement (s.14) provides that that agreement enters into force once executed by the proponent and the GNWT. And generally one is driven to the conclusion in the context of these earlier agreements that aboriginal party status is perhaps primarily directed at the question of membership in the socio-economic monitoring agency created by the agreement rather than with the question of beneficiary status to the entire agreement.

5.2 Participation in the Socio-economic Monitoring Agency

And as I have already noted the MGP Agreement deals separately with this issue of representation on the socio-economic monitoring agency. Thus while the only parties to the MGP Agreement are the GNWT and the project proponents, membership on the socio-economic advisory board is dealt with through Article 8 and Schedule A. The key paragraph is s.8.4.2 which contemplates that the Advisory Board will consist of the parties to the MGP Agreement plus "Aboriginal Authorities" who agree to participate on the terms offered in the Schedule. The Schedule is in effect a contract within a contract and an Aboriginal Authority may become a party to that contract but not to the MGP Agreement itself. In addition, Article 8 and the Schedule also contemplate that other upstream developers may become parties to the Advisory Board Agreement down the road.

In sum, the MGP Agreement is structured to make sure that Aboriginal Authorities can be participants in the monitoring arrangements created by the Agreement but also to make sure that they cannot be parties to the Agreement itself. The principal consequence of this is that

Aboriginal Authorities (and indeed others such as communities or business associations) have no role to play and no standing to complain about the failure of a Party to live up to the terms of the Agreement. The actual responsibilities of the Advisory Board (see discussion in Part 10 of this report) tend to reinforce this conclusion.

5.3 Participation on the Proponents' Side

But we can also think about the question of party status from another angle. Who should be party to the Agreement on the proponents' side? Recognizing that there are many persons and entities that may have an ownership interest in a project the typical approach is to have the operator and only the operator as the proponent party to the agreement. The operator is that person designated by the joint owners of the property as the person responsible for the active management of the jointly owned property. The operator usually has some ability to enter into obligations for the joint account of the joint owners but above a certain amount the operators' commitments will require the authorization of the other co-owners.

In general terms this is the approach taken under the MGP Agreement and in addition the GNWT has obtained the useful and important assurance in s.9.1.1(b) that the Agreement also binds the co-owners of the different elements of the project to the terms of the Agreement on the basis of a representation of a principal-agent relationship. But the position is necessarily complicated in the case of the MGP since, as we have already noted the Agreement covers what are in effect as many as five discrete but related projects (see recitals): (1) the MVP trunkline, (2) the gathering system, (3) the Niglingtak Field, (4) the Parsons Lake Field, and (5) the Taglu Field each with a different ownership arrangement and each with a different designated operator.

5.4 Several Liability and Not Joint Liability

Whenever there are multiple parties to an agreement there is an important issue as to whether the obligations or liabilities of the parties under the agreement are joint or several. Where an obligation is *joint,* a party claiming breach of an obligation owed under the agreement (e.g. the GNWT is respect of an obligation owed by the project proponents) may claim against any party and claim full recovery from that party. That is to say the claimant need not establish whether it is A, B or C that is responsible for the breach (that may be an issue that A, B and C will want to or need to sort about between themselves but it is not something that need concern the claimant). An obligation is *several* when each party is only responsible for its own performance and for any default in that performance. That is to say the claimant must identify which of A, B or C was responsible for the contractual duty and the breach of that duty and must seek performance from that party and from that party alone.

Given these two possibilities the claimant will always want the relevant obligation to be a joint obligation (or a joint and several obligation) and the parties owing the duty will always want the obligation to be a several obligation since B will not want to bear responsibility for the non-performance of A or C and vice-versa.

The parties to the MGP Agreement deal with the problem of multiple parties in two principal ways: (1) by stipulating that liability is several and not joint, and (2) by carefully allocating responsibility to different parties under the Agreement.

Section14.1 makes it clear that the obligations of the parties are several and not joint:

> **Obligations several and not joint**
>
> An obligation assumed by more than one Party under the Agreement is several and each Party is liable only for its own performance or for the loss or damage arising from its own breach of the obligation.

There is a similar provision in clause 17.1.1 of the Snap Lake Agreement and thus it is not unusual in this sort of agreement.

The Parties to the Agreement use different terms to allocate responsibility for the performance of different obligations under the Agreement. For example:

- The Agreement uses the term "Parties" to describe obligations that are obligations of both the proponent parties and the GNWT (e.g. s.2.5.8 and the objective clauses of the various articles).
- The Agreement uses the term Operator or Operators where the intention is to prescribe that the obligation is to be assumed by one (or more) of the four operators with respect to that part of the project (trunkline or gathering facilities) for which that party\operator is responsible. See for example ss.6.2.1, and 6.3.1 which uses the term "Operator of the Mackenzie Valley Pipeline"; ss.5.3.6, 4.4.2 and 4.4.3 which uses the term "the Operators.
- The Agreement uses the term "MGP" (s.7.1) where the parties intend that "each of the Operators will comply with, and will ensure that each of the Contractors that undertakes the subject activities complies with such obligations".
- The Agreement uses the term "MGP Parties" (s.7.1) where the parties intend that an obligation "will be performed by one or more of the Operators either directly or indirectly or through one or more Contractors, on behalf of the Operators in compliance with the applicable provisions of this Agreement".

The treatment of the terms "MGP" and "MGP Parties" in the Agreement creates a surprising degree of complexity in this Agreement. While most such terms are defined in Article 1 the definition clause of the Agreement) in both of these cases the definition simply refers the reader to Article 7.1 where these terms are used in the context of an Article which is designed to deal with the problem of how the obligations of the proponent parties to the Agreement are carried through into arrangements made with sub-contractors. While the terminology is clear in the context of that particular problem it is more difficult to make the language work when it is applied back to earlier operative articles of the Agreement. In many cases a single section in an Article will use a number of these different terms which seriously complicates the exercise of allocating responsibility.

A case in point is s.4.4 of Article 4 which deals with support for business opportunities. Section 4.4.1 commences with a recital of two commitments by MGP including an important commitment that MGP "will use reasonable commercial efforts" to structure appropriate bid packages[8]. The next subsection begins with a commitment, but this time by the Operators, to build capacity; but by the second and third sentence the obligations to assist in understanding business opportunities has become an obligation of "MGP Parties". Similarly, s.4.4.3 begins with a commitment by Operators but for purchases by MGP. The intention of the parties in using these terms is to no doubt to divide the obligations associated with the Project into a series of more discrete obligations associated with each of the Facilities or to create more general obligations where appropriate but the result (and I think that the above analysis of part of s.4.4 demonstrates this) is a high degree of complexity which will complicate issues of monitoring and enforcement.

5.5 The Problem of Contractors

The final "party" problem is that posed by the reality that much of the work undertaken on these projects will not be performed by the Operators themselves but by their contractors and sub-contractors who will not be parties to the Agreement.

SEAs and Impact and Benefit Agreements are typically negotiated between governments (or land claim beneficiaries) and project proponents or operators. But such agreements also have to deal with the problem that many activities carried out on the project work site (and especially during construction) will be carried out by other parties (contractors or sub-contractors) under contract to the project operator. It is these contractors who will actually be employing trades people and other skilled and semi-skilled persons and entering into procurement contracts and it is evident that there is no direct privity of contract between these contractors and the government party to the agreement.

The Parties to the MGP Agreement deal with this issue in Article 7 of the Agreement. The parties to the Snap Lake Agreement (SLA) dealt with the issue in Article 3.5 of that agreement. I shall look first at the SLA because it offers a simple and conventional approach to the problem and then consider the more complex and in my view less satisfactory approach taken in the MGP Agreement.

The SLA provides that De Beers will "cause its Contractors" to meet De Beers' own employment and recruitment targets through four techniques. First, all potential contractors will need to provide a commitment to hire in accordance with the agreement's hiring priorities in their bidding documents; second, bid evaluation shall be based at least in part on the contractor's commitment to the hiring priorities; third, the bidding commitment with respect to hiring priorities shall be included in the relevant contract documents, and; fourth, the contract documents must require the contractors to provide De Beers with all the relevant information to allow De Beers to fulfill its reporting requirements under the agreement.

[8] This obligation is apparently subject to MGP's right "to approve or disapprove contracting with any business subject to the Operators' obligations under this Agreement". I confess (no matter how many times I read it) that I cannot understand what this proviso might be referring to.

The MGP Agreement is less prescriptive but also much more complicated than the SLA. Part of the complexity arises from the distinction that s. 7.1.1 draws between obligations of MGP and obligations of "MGP Parties". I have already commented on one aspect of this complexity above but one other implication is that where the obligation is an obligation of MGP the Operators will ensure that contractors comply with the obligations of the Operators whereas that assurance is seemingly lacking where the obligation is an obligation of the "MGP Parties".

The less prescriptive nature of the MGP Agreement is apparent in the next clause (s.7.1.2) which provides that the technique of contractual incorporation shall only be used "as applicable and appropriate".[9] The clause goes on to provide that a contractor who fails to live up to the commitments of the MGP "may be subject to sanctions, applied in the discretion of the respective Operator, up to and including termination of contract." This is a very strange provision for several reasons. First, the clause purports to create a power (the power to sanction\terminate) in an agreement between A and B in relation to an agreement between B and C. It is clear law that an agreement between A and B can never have this effect. Such a power can only arise from general law (e.g. the law of repudiation of a contract for breach of a condition or for a fundamental breach) or from a term of the contract between B and C (i.e. in this case the agreement between the operator and its contractor). Second, the contract does not oblige the Operator to exercise the power but leaves it up to the discretion of the Operator.

This sort of provision is largely meaningless and perhaps worse insofar as it seems to create the impression that there are real enforcement measures "up to and including termination" when that is simply not the case. If the parties to the MGP were serious about creating realistic sanctions they would at the very least have required the Operators to include such powers in any contracts they negotiated with Contractors. They have not done so.

6.0 Employment Targets

All of the earlier SEAs (BHP, Diavik and Snap Lake) negotiated by the GNWT established specific employment targets for their respective projects. For example, s.3.4.1 of the SLA[10] provides that De Beers shall use best efforts to ensure attainment of the following targets for employment of residents of the NWT: (1) 40% throughout construction, (2) 60% (determined on an annual basis) through operations and closure.

[9] In addition clause 7.1.3(b) which provides that the Operators will use "reasonable commercial efforts" (a defined term – see further discussion in section 10.2 of this Report below) to ensure that the Operators' commitments under the Agreement are implemented through the contractual arrangements of the contractors. While this clause is expressed not to limit the "generality of the foregoing" it will in practice do so because the earlier obligations are themselves qualified by the language of "as applicable and appropriate". Taken together this complex language seems to transform an obligation of result into a less demanding ("reasonable commercial efforts") obligation of conduct.

[10] For Diavik see Article 3 and Appendix A; and for BHP see ss.4.3.1 and 4.3.2 and Schedules A and B dealing respectively with construction and operation phases.

There are no similar commitments in the MGP Agreement.[11] Instead the Agreement contains what is in effect little more than a recital (s.2.1.1 and quoted above in s.3.1 of this Report) that certain (and much lower – at least during the construction phase[12]) targets might be achievable (16% during construction and 72% during operations) plus a statement of other more concrete steps that might be taken to "optimize employment opportunities for Aboriginal Persons and NWT Residents".

Many of these more concrete steps are similar to the requirements of the earlier NWT SEAs such as provisions for free transportation from designated points of hire (s.2.3) for each work rotation, (qualified) provisions for flexible work arrangements (s.2.4.5), provisions for recruitment efforts (s.2.5.2) etc. but in some respects they are not as aggressive as some of the provisions contained in the Snap Lake Agreement.

For example, s.3.6 of the SLA not only requires De Beers to provide free transportation from designated pick-up points it also prohibits De Beers from paying for or reimbursing travel costs for persons living outside the NWT for travel to or from the designated pick-up points.

7.0 Project Monitoring and Adaptive Management

Project monitoring is designed to serve multiple objectives. The MGP Agreement contains a list of objectives in s.8.2.1 (and see also the shorter list at s.8.1.1). We can think of two of these four objectives as being primarily designed to contribute to developing the methodology of environmental impact assessment and appropriate mitigation conditions. Thus the first objective refers to verifying the accuracy of predicted project impacts while the second refers to determining the effectiveness of mitigation measures. Both objectives are closely tied to two of the described functions of the Socio-Economic Advisory Board (SEAB) (s.8.4.1).

The third and fourth objectives deal with what is generally referred to in the environmental management literature as adaptive management or learning by doing. The goal here is to create feed back loops between the collection and assessment of project-based monitoring information and to assess how that information should result in changed management practices so as to reduce negative project impacts and enhance positive impacts during the life of the project. Thus the third and fourth objectives of monitoring as listed in the MGP Agreement are:

[11] The Business clause of the MGP Agreement (Article 4) does contain a "reasonable commercial efforts" procurement commitment (s.4.2.4) of 15% during construction and a commitment to "maximize procurement" during operations and decommissioning. This target is considerably less aggressive and the maximizing target considerably less specific than the similar commitments made in the earlier mining SEAs. Furthermore, the mining SEAs accord greater emphasis to providing local preferences than they do to reciting the values of the competitive market which looms large in the MGP SEA (s.4.1.1). See further discussion of the "reasonable commercial efforts" clause in section 10.2 of this Report.

[12] I am obviously not in any position to comment on whether or not these recitals on what might be achievable are appropriate; a key feature of any targets in agreements of this sort is that they should be achievable based upon an understanding of the jobs required and the competencies of the available work force. We cannot simply create pipeline welders because an agreement requires it.

c. the adjustment of existing, or the development of new, mitigation measures as required, and
d. direct and timely response of the Parties to recommendations

Once again these objectives are closely tied to one of the functions of the SEAB which is (s.8.4.1(c)) to "provide advice to the Parties" regarding the "adjustment of existing, and the development of new, mitigation measures, as required".

But how are such adaptive management measures to be incorporated into project management? And how quickly can remedial measures be taken?[13] The Agreement contemplates that the SEAB's advice will only result in revised commitments of the Parties by way of written consent to an amendment of the Agreement (s.8.6.3). In procedural terms this is significantly weaker than the corresponding provisions in the Diavik and Snap Lake Agreements.

For example s.6.5.1 of the Diavik Agreement contemplates that the Advisory Board established by that agreement might make formal recommendation to the parties for adaptive mitigation measures. The Parties in turn commit to taking "reasonable steps to meet such formal recommendations" and, where a party concludes that such a recommendation is unreasonable the party will provide the advisory board with written reasons for not meeting the formal recommendation. The Snap Lake Agreement contains an even more rigorous procedure in Article 10 of that Agreement.

In my view the failure of the MGP Agreement to incorporate these sorts of provisions for responding to SEAB reports and recommendations represents an important weakness in the MGP Agreement especially given the short time frames associated with the construction phase of the main pipeline.

8.0 Comprehensiveness and Completeness

You have asked me to comment on the comprehensive and completeness of the Agreement. This is of course a very open-ended question. One way to answer it is in a comparative manner by looking at the earlier GNWT SEAs and asking whether there are topics that are dealt with in those agreements that are not dealt with the MGP Agreement (and vice versa).

In response to this question my general sense is that the MGP Agreement covers at least as much ground as do the earlier agreements. For example, the MGP Agreement covers all of the topics that are within the subject matter of the Snap Lake Agreement with the addition (in the MGP SEA) of an article dealing with "sustainable development". I think that one can say the same about the Diavik Agreement except insofar as the Diavik Agreement refers (s.4.2) to a side agreement to support the development of a secondary diamond industry.[14] The closest

[13] One of the positive features of the Agreement (s.8.4.6) is that the Parties envisage that the Advisory Group will meet three times annually during *construction*. That said, I also note that Dr. O'Faircheallaigh questions both whether the Board is adequately resourced and whether *annual* meetings during the *operational* phase will prove sufficient.

[14] There is a similar side agreement in relation to Snap Lake.

comparable in the MGP Agreement would be the rather weak provisions (see the brief discussion in the next section) of s.6.4 dealing with technology, knowledge and skills transfer.

Another way to answer the question is to cast a broader comparative net and, for example, to compare the GNWT practice with the practice of the two East Coast Offshore Boards. I have not engaged in this exercise in a systematic way partly for reasons of time, partly because my terms of reference asked me to focus on the GNWT's SEAs, and partly because of a concern that the experience will not be entirely comparable. Thus the East Coast Boards proceed by way of statute and regulatory authority and not by way of contract and the Boards' jurisdiction (supported as they are by both federal and provincial legislation) is undoubtedly broader than that of the GNWT. That said, recent litigation in relation to the Canada-Newfoundland Board (CNOPB)[15] does draw attention to one feature of socio-economic benefits arrangements on the east coast which is not directly reflected in the GNWT's SEAs and that is the requirement that offshore proponents make certain levels of expenditures on Research and Development (R & D) matters for each of the exploration, development and production phases of their projects (in default of which operators are required to contribute any shortfall to a Board administered R & D Fund).[16] There is no comparable provision in this Agreement – only a much weaker set of provisions in s.6.4 dealing with the transfer of technology, knowledge and skills. I offer a more detailed critique of this section in the next part of the paper.

9.0 Can the SEA accomplish its goals and contribute to sustainability (in the NWT)?

9.1 What do we mean by sustainability?

This is a difficult question to answer in the abstract because it involves issues as to the effectiveness of the Agreement (difficult to measure before the Agreement is operationalized) but also the elements of sustainability. Of the three aspects or legs of sustainability, (social, economic and environmental) this Agreement is clearly concerned with the first two, social and economic sustainability. Social sustainability involves ideas of intra-generational as well as inter-generational equity. Intra-generational equity involves the idea that wealth and opportunities should be shared more fairly between current members of society. Inter-generational equity is central to sustainability and maintains that in meeting the needs of the current generation we should not compromise the ability of subsequent generation to meet their needs. Since the exploitation of non-renewable natural resources will always deplete the stock of the resource available to subsequent generations, a sustainability assessment of such a project requires that we look more broadly and ask whether the project enhances the capital endowments (human capital

[15] *Hibernia Management and Development Co. Ltd. v. Canada-Newfoundland Offshore Petroleum Board*, [2007] NJ 168, [2007] NLTD 14.

[16] The CNOPB issued a set of guidelines on benefits plans in February 2006: http://www.cnlopb.nl.ca/. In addition to dealing with R & D issues the Guidelines also emphasise that the relevant legislation requires proponents to establish an office in the jurisdiction with appropriate decision-making responsibility.

and capacity and physical infrastructure) and therefore the range of options available to subsequent generations.

The economic sustainability of a non-renewable natural resource project similarly involves the idea that the project must meet the needs of subsequent generations as well as the present generation. This might be achieved through the capture and capitalization of positive economic rents (e.g. the creation of a heritage fund) or through the creation and maintenance of a physical infrastructure (roads, pipelines, social facilities etc).[17]

In addressing the sustainability issue perhaps the most important question to address is the question of how this Agreement has the potential to enhance the contribution that the MGP Project may be able to make to social and economic sustainability of the NWT. Although the Agreement does not state this as its overall objective and although the Agreement itself only discusses issues of sustainable development in Article 6, one could think of this as the meta-objective of the entire Agreement. Consequently, I shall first examine Article 6 and then offer some general comments as to the extent to which other aspects of the Agreement contribute to this overall goal. The focus of the inquiry should be on the incremental requirements that the Agreement demands of the project proponents, that is to say, those requirements that go beyond the requirements of the general law. In some cases the commitments of the project proponents do little more than mirror the obligations that proponents already have under laws of general application such as those contained in s.2.1.2 (duties not to discriminate) and s.2.4.6 (duties to accommodate) – both of which contribute to ideas of intra-generational equity.

Article 6 deals with five specific issues: (1) the transfer of camp accommodation to housing stock for permanent residents, (2) residential and industrial access to gas, (3) the transfer of technology, knowledge and skills, (4) disposition of camp assets, and (5) information and rights in relation to granular resources.

My general assessment of these clauses (which all deal with good ideas) is that with one exception they do little more than identify opportunities to enhance sustainability without requiring concrete commitments of the project proponents. For example, the two clauses dealing with the transfer of camp accommodation and other camp assets do little more than require the project proponents to enter into good faith negotiations to reach further agreements on commercial terms – in other words an unenforceable agreement-to-agree.[18] Similarly, the lengthy section 6.4 consists of three sub-sections but the first two are little more than recitals of opportunities for technology transfer while the one substantive clause (s. 6.4.3) fails in the end to create any obligation whatsoever since it provides that "an Operator …. may but is not obligated" to collaborate with the GNWT on technology opportunities.

Much more concrete and therefore much more useful is s.6.3 setting out the principles under which the Operator of the MVP will provide access to gas to local residents and businesses. Given the high costs of alternative fuels this should provide concrete benefits to individuals and

[17] I recognize that many of these issues fall more directly within the jurisdiction of the federal government rather than the territorial government because of Canada's continued ownership of the resource.

[18] The same criticism may be leveled at the provisions of Article 5.3 which contemplate that the Operators will negotiate agreements with municipalities with respect to various infrastructure matters.

communities and increase the range of options available to persons in those communities. While these principles will still require the approval of the National Energy Board the proposal will likely enhance the public convenience of the project without falling foul of the just and reasonable tolling standard set by the *National Energy Board Act* (RSC 1985, c.N-7, ss.62 & 67).

In sum, while Article 6 identifies some useful opportunities to enhance the contributions that the project may make to long-term sustainability for the most part the Article fails to translate those opportunities into concrete obligations.

But in addition to Article 6 the other substantive articles of the Agreement also enhance the sustainability contribution of the project. For example:

- The hiring priorities of s.2.2.1 which serve to enhance opportunities for the least advantaged in society, and
- The training fund established by 2.5.8

both serve to meet the goal of intra-generational equity.

9.2 Could more have been done on the sustainability front?

I suspect that more could have been done to enhance sustainability but in the absence of more information about the economics of the project (and the media information all suggests that the economics are at best marginal[19]) it is hard to make more specific suggestions other than the general suggestion that the Agreement needs to go beyond identifying opportunities and should require specific commitments. If it is difficult to draft those commitments in advance then the drafters might use their best efforts to do so but then supplement that with a general commitment by the proponents to at least match the highest (not just the average) standards[20] in the industry or other related resource industries.

10.0 Enforceability

10.1 What do we mean by enforceability?

It is possible to think of the concept of the enforceability of the Agreement in both narrow and broad terms. From a narrow or legal perspective the enforceability question might be posed in terms of the remedies available to the party owed an obligation either to require performance or

[19] See for example Doig's Digest, August 1, 2007.

[20] One might think of this as the functional equivalent of the most favoured nation (MFN) clause familiar to trade and investment lawyers. Where this Agreement does adopt a standard against which to measure the obligations of the project proponents it is generally that of standards prevailing in the industry. This of course reinforces the status quo rather than providing a ratcheting effect of constantly raising the bar. Examples in the Agreement include the definition of "reasonable commercial efforts", and ss.2.5.10.

to obtain damages in substitution for performance. More broadly however the concept of enforcement might embrace a range of mechanisms that may be designed to identify non-performance of an obligation to provide an incentive to perform by, for example, publicizing the breach. Seen from this latter perspective an appropriately designed monitoring program may serve an enforcement goal although such a program may also be designed more neutrally simply to collect relevant information.

10.2 Pre-requisites to Enforcement

One of the pre-requisites for enforceability (whether framed in narrow or broad terms) is that the Agreement be expressed in precise terms and in terms that are creative of obligations. I have already noted that this will create challenges in terms of the enforceability of this particular Agreement. That is, in many cases, it will be difficult to say whether or not a party is in breach. It is perhaps appropriate to mention here one clause that has not been the subject of specific comment to this point and that is s.1.2.9 and the definition of "reasonable commercial efforts". This clause informs the interpretation and sets the performance standard for many of the key obligations of the proponent parties including:

- The obligation to procure at least 15% of certain supplies and services from NWT businesses during construction (s.4.2.4)
- The related (but even more general) obligation to maximize procurement during operations and decommissioning (s.4.2.4).

The real difficulty with this from an enforcement perspective is that it will be exceedingly difficult for any party to establish breach. A party seeking to establish breach of an obligation to take reasonable commercial efforts will have the burden of proving that the performance of the operator fell below that of a similar commercial enterprise with similar resources available to it, taking account not only factors such as profitability but also the "mitigative purpose" of the Agreement. This latter clause seems to introduce (the meaning is not entirely clear) some notion of proportionality between the expenditures required and the purposes of the Agreement. It is exceeding unlikely that a party like the GNWT will even have access to the commercial data and comparative data required to establish a case of breach. A better approach might be the much simpler approach of a "best efforts" commitment to attain a clearly specified goal (the approach taken in the Snap Lake Agreement) perhaps accompanied by an explicit reverse onus provision requiring the proponent to establish that it had used best efforts in any case in which it failed to meet the target.

10.3 Fora for Enforcement

In addition to the precision of expression of obligations we also need to know what fora are available the parties to pursue issues of enforcement.

In the present case, it seems fairly clear that the parties did *not* intend that the monitoring body established by the Agreement, the NWT Oil and Gas Socio-economic Advisory Board, to be

used for the purposes of establishing compliance with the terms of the Agreement. I base this assessment on s.8.4.1 of the Agreement which establishes what are effectively the three-fold terms of reference for the Board which is to consider information and provide advice to the Parties on:

a. the accuracy of predicted socio-economic effects of the project
b. the effectiveness of mitigation measures, and
c. the adjustment and development of new mitigation measures

The Agreement contemplates that further work or studies will require the unanimous approval of the Parties. Consequently, even assuming that the Board had the relevant resources to devote to such an exercise it is easy to imagine any party in potential default simply vetoing any proposal to have the Board consider such questions.

How does this compare with the mandate of the monitoring agencies or advisory committees established by the other three agreements?

The BHP Agreement did not require the parties to establish an independent monitoring function. Instead that agreement (s.5.2) contemplated that the GNWT would monitor the impact of the project on the basis of an agreed list of community health and wellness indicators. It is clear that the term monitoring as used in this agreement did not extend to assessing the compliance of the parties with their undertakings under the Agreement.

The Diavik Agreement (s.2.1.2) provides the most extensive mandate of any of the monitoring bodies established under these agreements and the mandate of the "Diavik Project Communities Group Advisory Board" (s.2.1.2(c) includes the responsibility "to monitor, review, and make recommendations on …. the fulfillment of commitments by the Parties under this Agreement". The Snap Lake Agreement similarly contemplates that the De Beers Socio-Economic Monitoring Agency is responsible for implementing some of the purposes of the SLA (s.8.2.1(a)) which include (s.2.1.1(b)) a "follow-up method by which the implementation of the commitments made regarding socio-economic issues arising from the Project and this Agreement will be monitored and reported". If this is not explicit enough the SLA goes on to contemplate that the Agency will (s.8.2.1(b)) "monitor performance of the commitments made by the Parties under the Agreement" while Article 10 of the Agreement clearly implicates the work of the Agency in the remedies available to the parties.

In sum, it is reasonable to conclude that the parties to the Diavik and Snap Lake Agreements did contemplate that one of the functions of the monitoring agencies established by those two agreements was to contribute to compliance\enforcement of commitments made by the parties. This function has not been included in the MGP Agreement and I think that this is an important departure from earlier practice.

The Agreement contemplates that all disputes including questions of breach and enforcement shall be resolved in accordance with Article 13. Article 13 requires that parties submit their disputes to some combination of negotiation, mediation and arbitration rather than to the courts. An arbitrator would be able to order many of the remedies available to a court to enforce

performance of the Agreement but not "special, exemplary or punitive damages". Unlike the judicial settlement of disputes arbitral settlement is a private rather than a public process and the Agreement does not alter this presumption. The confidentiality of arbitration proceedings involving governments in matters of important public policy has proven to be very controversial in the context of NAFTA Chapter 11 arbitrations with the result that all three NAFTA governments are now committed to making all pleadings and arbitral decision public.

In conclusion, this Agreement departs from the Snap Lake and Diavik agreements which afforded the socio-economic agencies established by those agreements a role in enforcing obligations assumed by parties under the agreements. Instead, this Agreement favours private alternative means of dispute resolution thereby potentially impairing both the transparency and accountability of the obligations assumed under the Agreement.

11.0 The SEA and the National Energy Board's Anticipated Approvals

The terms of reference for this review specifically asked me to consider the implications of having compliance with the Agreement included as a term or condition of any project approval issued by the National Energy Board for the Project.

At the time of writing I am not completely familiar with the filings currently before the NEB but I understand that there is: (1) an application for a certificate of public convenience and necessity for the MVP itself under the National Energy Board Act; (2) applications under the Canada Oil and Gas Operations Act (COGOA) for development plans for the three fields and, (3) applications under COGOA (rather than NEBA) for the Mackenzie Gathering System.[21] There are therefore various authorizations to which such the Agreement might be appended as a term or condition. This is an important complication that any such proposal must wrestle with.

The principal argument in favour of such an approach from the perspective of the GNWT and others who may have an interest in the performance of the Agreement by the project proponents is that it adds another layer of legal characterization to the Agreement. Thus, in addition to its status a contract the Agreement also acquires a certain status in administrative law as part of the terms of the project approval. But what are the implications of this?

Perhaps the most important implication (at least from the perspective of non-party beneficiaries) is that it creates the possibility that a non-party to the Agreement will have standing (before the Board) to complain about the non-performance of the Agreement.

But that said it is difficult to assess the extent to which this will deliver any concrete benefits to a non-party for several reasons.

First, such a non-party will still have to demonstrate an interest in the performance of the Agreement (or more precisely the Certificate of PCN) before it will be able to raise the issue

[21] See NEB Ruling # 16, 10 July 2006 re Motion of Mackenzie Explorers Group.

before the Board. A non-party is most likely to be able to do this if it has participated in the NEB hearings as an intervenor. If it has not done so it may be difficult to persuade the Board to look at the matter.

Second, even if an intervenor has standing to raise an issue of non-performance before the Board it is not at all clear that an intervenor could compel the NEB to take any particular action *especially* if (as here) the performance obligations are not drafted with any precision. An analogous case which illustrates this difficulty is *St. John's (City) v. Canada-Newfoundland Offshore Petroleum Board* [1998] NJ 223. In that case the Board had included in the benefits plan for Petro Canada's (PC) Terra Nova's project a condition which stated that "As soon as practicable after Project Sanction, the proponent relocate engineering and procurement activities for the Project to Newfoundland." Later, the Board, after discussions with PC accepted that because of cost and scheduling concerns it was not practical to move these activities to Newfoundland and the Board further held that on a best efforts interpretation of the condition, PC had complied with the condition by proposing to take employees to the UK for further training.[22] The Board did not waive the condition. The City applied for a declaration that PC be required to move its engineering activities to Newfoundland forthwith and *mandamus* requiring the Board to enforce the condition against PC.

The court rejected the application principally on the grounds that the City lacked the legal capacity to bring the application since its authority to act was limited by its incorporating legislation but also on the grounds that the Accord regime contemplated that only the federal and provincial ministers acting jointly could issue a directive to the Board with respect to benefit plans. While these reasons all illustrate the obstacles associated with a non-party trying to enforce benefits arrangements, more pertinently for present purposes the Court also held that the City could not obtain *mandamus* since the Offshore Accord legislation did not impose on the Board an absolute duty to enforce conditions attached to an approved benefits plan. Instead the relevant Act left the process of enforcement to the discretion of the Board subject only to joint directions from both governments. The same would be equally true of the NEB in relation to this Agreement even if attached as a term or condition of a relevant project approval.

In sum, the lesson for present purposes is that even if an intervenor non-party could persuade the NEB to include the terms of the Agreement as a condition of a certificate of public convenience and necessity such an intervenor (even assuming it had standing) would not be able (through an order of *mandamus* or otherwise) to require that the Board enforce the terms of the Agreement.

Third, even if the Board of its own motion, or on the motion of a party who had participated as an intervenor, calls into question the certificate holder's non-compliance with the terms of the SEA it is not at all clear that the Board will be in a position to craft an appropriate remedy since it is unlikely that the Board would entertain revocation of the project's certificate of PCN.[23]

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[22] The court did hold that this was mistaken and that a best efforts commitment was insufficient since the words "as soon as practicable" rather than "if practicable" made it clear that the condition related to timing only and was not intended to take account of costs or scheduling constraints. Consequently, PC had not fulfilled the condition and while the Board could amend or waive the condition it had yet to do so.

[23] One perhaps should not entirely rule out this possibility. In fact the C-NOPB has recently taken a very proactive stance to provide a real remedy for what it regards as the failure of offshore operators to live up to the terms and

Thus while the technique of incorporating the SEA in the project certificate may provide a public forum in which to draw attention to and examine issues of compliance (and this is an important opportunity) it is unlikely to provide more specific and concrete remedies for breach.

It may also be argued that this approach will do little more than duplicate the role that is contemplated for the dispute settlement mechanisms of Article 13 and perhaps to a certain extent by the monitoring activities contemplated by Article 8 of the Agreement.

It should also be kept in mind that the Agreement records commitments (some of them quite extensive) of the GNWT as well as the commitments of project proponents. Since the NEB has no jurisdiction over the GNWT (it is not a project proponent but merely an intervenor) appending the Agreement to the project certificate can have no legal effect on the status of the GNWT's obligations under the Agreement.

Conclusions

By definition an agreement such as this represents a negotiated solution to competing visions of how to handle the socio-economic impacts of the proposed MGP. The GNWT does not hold the pen and is not able to dictate the language used in the Agreement. The Agreement is not a statute and it is not a project certificate. It is always easy to criticize the language of a negotiated agreement and to suggest (depending on the perspective of the commentator) tighter language and more demanding obligations.

With that caveat in mind however I think that the above analysis suggests some weaknesses of the current Agreement especially when compared with the earlier mining SEAs.

- A surprisingly large number of clauses in the operative part of the Agreement are framed as recitals rather than as obligations and some of the key obligations are limited by the amorphous phrase "reasonable commercial efforts".
- The concept of monitoring articulated by this Agreement is largely concerned with technical matters and is less well integrated with ideas of adaptive management and enforcement than are the earlier SEAs. Given the short timeframes associated with the construction of the main trunkline one might have expected to see tighter rather than looser feedback loops and a greater emphasis on what should happen if targets are not being met or parties are otherwise failing to perform their obligations.
- The socio-economic advisory board to be established under the terms of this agreement has a narrower mandate than the similar agencies established under the Diavik and Snap

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conditions of development approvals that required the operators to undertaken certain levels of research and development activity within Newfoundland. For details see *Hibernia Management and Development Co. Ltd. v. Canada-Newfoundland Offshore Petroleum Board*, [2007] NJ 168, [2007] NLTD 14. But for present purposes it is important to emphasise that the Board here was not purporting to enforce the terms of an agreement that was part and parcel of a project approval but rather was exercising its continuing jurisdiction to ensure that there were appropriate R & D investments related to offshore activities.

Lake agreements, especially in relation to responsibilities for adaptive management and enforcement.

- The drafters have elected to define such critical terms as "MGP" and "MGP Parties" through a clause (s.7.1) which is designed to deal with a specific problem of binding contractors and sub-contractors to the obligations assumed by the proponent parties to the Agreement. This adds an unnecessary layer of complexity but also clouds the interpretation of the basic obligation of the proponent parties to flow-through their obligations to their contractors. This compromises the transparency of the Agreement and will likely make it more difficult to establish accountability for failure to perform.
- The Agreement is not as clear as are some of the earlier SEAs in requiring the parties to the Agreement to make sure that the obligations of the parties are flowed through to contractors and sib-contractors.
- The Agreement is an Agreement between the GNWT and the project proponents. Non-parties to the Agreement lack standing to enforce the terms of the Agreement. The proposal to incorporate the terms of the Agreement as a term or condition of the certificate of public convenience and necessity may serve to provide a public forum within which non-parties to the Agreement may hold the parties to account (i.e. it may improve transparency and accountability) but it is not likely to assist third party beneficiaries or others in the enforcement of the Agreement.