Green hydrogen contracting - community consultation, local development, and transparency

1. Introduction and context setting

The world is at a tipping point in the climate crisis. Green hydrogen offers a sustainable solution to address part of the world's ever-growing energy needs. These projects will be built on renewable power and water, both valuable resources wherever they are found.

Like traditional energy supplies, these projects will be cross border in many respects. Green hydrogen products and energy supplies will be exported and imported across countries. Because the projects require significant up-front capital, financial flows will also be cross-border. The majority of these projects will be international in nature.

Despite the transboundary focus of green hydrogen operations, the positive and negative impacts will be experienced in the first instance by local and regional economies and the individuals and communities who reside close to the project. For example, wind and solar farms (that will generate the electricity which would be used to power the electrolysers) may be constructed in rural areas that are currently used primarily for agricultural activities. Families and traditional communities likewise may live in areas that are suitable for the construction of renewable energy or green hydrogen production plants ('green hydrogen project').

While the green hydrogen projects will have positive impacts on the local economies and communities, the projects may also have a negative effect on several of the communities' rights and interests. The impacts will be accentuated where the green hydrogen projects are competing with local communities for the same resources.

This preliminary set of guidance from the initiative on *Green Hydrogen Contracting – for People and Planet* is aimed to support governments, communities and companies. It is under development and is currently being shared with stakeholders for consultation. The guidance has been developed by a working group consisting of governments, law firms, companies and civil society groups. For further information about the initiative and to access the set of guidance on green hydrogen contracting, visit gh2.org/green-hydrogen-contracting**.** GH2 welcomes comments and feedback on the guidance to be sent to Ines Marques (ines.marques@gh2.org).

Competition and potential limitations on the community members' rights and interests however do not need to present insurmountable issues for green hydrogen projects. If the process is carefully and effectively managed and the communities are afforded a voice from the start of the project potential existential issues may be addressed before they materialize. Moreover, **any efforts to engage and partner with the local communities may assist the green hydrogen project to identify local opportunities and result in the project acquiring a social licence to operate**. A social licence to operate is a critical component of any successful venture and will ensure that the green hydrogen projects have the necessary stakeholder support to thrive.

It is also important to bear in mind that green hydrogen projects may have multiple spheres of influence. In addition to the positive and negative impacts on local communities and economies, the projects may also affect the relevant region, district, province or state, and even the entire country. Particularly in developing countries, citizens who live hundreds of miles away from projects may hear of vast sums of money being invested and jobs being created. They may also wish to benefit from the renewable energy or the different streams of income created from these projects. In the country where the project is located, as well as the countries and communities benefitting from the project abroad, it is highly likely that expectations and hopes for green goods and energy, money, and jobs will be high.

The purpose of this brief is to provide an introduction to some of the best practice mechanisms which green hydrogen projects should pursue in their engagements with interested and affected stakeholders. It comprises four parts.

First, it considers the different components of the legal framework which may vest rights and impose obligations on green hydrogen project developer and operators.

Secondly, it considers relevant practices and specific international trends. This includes the need to have a social licence to operate, meaningful stakeholder engagement and what such a process entails, as well transparency, reporting and disclosure requirements.

Third, the brief identifies important sources of best practice and identifies select objectives and guiding principles for decision-makers.

Finally, the annex to this note provides examples of model clauses which green hydrogen project developers and operators may wish to consider and incorporate into specific agreements during the different stages of contract negotiations.

Part one: International Good Practices in Respect of Community Consultation, Local Development, and Transparency

1. Legal framework

The legal framework that will regulate the production of green hydrogen comprises different sources of law.

Typically, the generation of renewable energy and production of hydrogen will be subject to specific laws, acts, decrees and or regulations, primarily in the country that the project is located ('statutory legal framework'). These may be further supplemented by permits, licences, approval, directives, and guidelines. In some instances, the operators will also conclude a principal agreement with the host state. The agreement itself may have different names, such as an Implementation Agreement or Host Government Agreement. What matters is its contents, however, not its name.

In addition to the statutory legal framework, green hydrogen projects will be further regulated by the terms agreed under several different commercial agreements. Only few of these agreements will be directly with the host government or host state.[1]

The majority of the commercial agreements will however be between private entities. It goes without saying that a plethora of different agreements will be concluded during the life of the project. These will range from those under which the land is purchased or leased, to the construction of the green hydrogen project, the project finance agreements, power purchase agreements, and finally the offtake agreements under which the green hydrogen is sold to end users and consumers.

Owing to the different domestic legal systems and frameworks across the world, the characteristics of a legal framework that will apply to a specific green hydrogen project may vary significantly from one country to the next. Again, the substantive and procedural requirements imposed under the laws, regulations, contracts, and licenses governing the rights, roles, obligations, and responsibilities of the parties to the project is what is important, not where any particular provision is found.

In light of this, a lot of what may follow as good practice or principles may be provided for in the statutory legal framework of a country, the applicable permits, licences, or approvals, the host state agreements (where applicable), or the terms of the commercial agreements.

It is also important to acknowledge that the commercial production of green hydrogen is still in its formative stage. It would therefore be surprising to see laws of a country specifically addressing every aspect of a green hydrogen project's life cycle at this early stage. Several of the rights and obligations and roles and responsibilities of a project developer and the host state will therefore likely be regulated under a contract between those parties.

Finally, there is the contracting process itself. Since green hydrogen projects are still very new, it would also be surprising to see specific guidelines in a country's legal

[1] The host state is the country in which the project is physically located.

framework for granting the right to develop a green hydrogen project. Projects may be awarded through a public auction or concession process. These processes will impose further context-specific procedural and substantive requirements with which bidders (qualified, preferred, or successful) must comply. Accordingly, this brief also briefly discusses good practice for awarding green hydrogen contracts.

2. Relevant practices and international trends

Major cross border investment projects in diverse areas from oil, gas, and mining and large-scale agriculture to renewable energy have seen a huge proliferation of good practice in the areas of consultation, community, local development and transparency. The next section will provide specific international standards and guidelines from various international institutions, think tanks, NGOs, industry associations, among others. This section will highlight important principles and lessons learned from good practice in other sectors and from emerging experience in green hydrogen.

a) Community Consultation

A social licence to operate[2]

Engaging early and often with communities will enable the green hydrogen project to establish and maintain a "Social License to Operate". A social license to operate is a term that usually means that the community impacted by a project supports it and is not actively undermining it. There are numerous examples of communities purposefully sabotaging projects that did not engage with the community on key project development issues that impacted the community. Engaging meaningfully with communities early and often has tended to result in communities that are more supportive of projects and not using tactics like breaking down railroads for supplies or holding management hostage to be heard. These are real events that have occurred in large-scale projects in the oil, gas and mining sectors.

A social licence to operate is a necessary condition to successfully operate any green hydrogen production plant.

To maintain the community's support, the project developers must consult the community throughout the life of the project. The consultation must be conducted in a meaningful manner (considered below). It is critical that the persons responsible for the project begin by going to impacted communities early and do so often.

Meaningful stakeholder engagement[3]

According to the OECD, meaningful engagement occurs when the project developers and the stakeholders continually engage in a process of two-way dialogue. The

[2] https://socialicense.com/definition.html

[3] https://www.oecd-ilibrary.org/oecd-due-diligence-guidance-for-meaningful-stakeholder-engagement-in-the-extractive-sector_5jm3q2mtkxr2.pdf?itemId=%2Fcontent%2Fpublication%2F9789264252462-en&mimeType=pdf

engagement process must in addition be conducted in good faith and the project developers must be responsive to the stakeholders' views.

"Two-way" in this context means that the participants are able to express their views freely and without fear of reprisals. This must include an opportunity to share their perspectives. The different participants must also listen to alternative viewpoints with the ultimate objective being to reach mutual understanding.

Successful engagement processes allow for some sharing of decision-making powers. This means the process should move from away a scenario where the project developers and green hydrogen projects are the primary decision-makers to a more mutual process of decision-making between the interested and affected parties. By following a shared decision-making process stakeholders are actively involved in driving engagement activities themselves. The voice which such a process affords a community promotes community buy-in and strengthens the green hydrogen project's social licence.

The negotiations must also be conducted in “good faith”. The various stakeholders' reason(s) for participating will have a determinative impact on the success of any consultation process. To ensure that the process is meaningful, the parties should engage with a genuine intention to understand how stakeholder interests are affected by the green hydrogen project. On the one hand, community representatives must faithfully represent their interests, intentions, and concerns. The project developers and subsequently the green hydrogen project must, in turn, acknowledge that the operations may give rise to adverse impacts and agree to address or mitigate those impacts.

Finally, responsive engagement means that the stakeholders deliver on the undertakings which were discussed and agreed during the consultation process. The actions could take various forms, including implementation of specific commitments agreed to by the parties, addressing certain issues, or providing remedies and relief where necessary.

Most importantly, engagement is not a once off endeavour. The stakeholder engagement processes must continue for the entire life-cycle of the project: from the date on which the project developers decide to pursue the project until the after the project is decommissioned and the environment is satisfactorily remediated and rehabilitated.

Green hydrogen projects follow best practice when communities are consulted from the outset and feel heard, understood, and valued throughout the project. The inherent dignity and importance of impacted communities should be a guiding principle of project development.

Different forms of stakeholder engagement[4]

i. Frequency, nature and extent of engagement

The required frequency, nature, and extent of the stakeholder engagement processes are subject to several factors. Important factors which will affect the stakeholder engagement processes include the requirements imposed under the statutory framework, the location of the project, the distance from the closest communities, as well as the potential and confirmed impacts on the biological and physical environment, the communities' health and wellbeing, landowners' and land users' rights, and the local economy.

It goes without saying that communities will play an important role during the initial environmental and social impact assessment processes. It is therefore critical that the first phase of any green hydrogen project includes an extensive meaningful process of public consultation. Local communities (who are more familiar with the proposed location for the green hydrogen project) would be able to identify any adverse impacts and potential risks which the project developers could not foresee. This includes any impacts on the communities cultural or religious rights, or sites of archeological importance.[5]

In addition to any statutory requirements, the findings of the impact assessment process (including specific risks and impacts) should then be used to determine how often the communities ought to be consulted. As a rule of thumb, the frequency, nature, and extent of the stakeholder engagement processes must be directly equivalent to the nature and extent of the impacts (positive and negative) which the green hydrogen project may have on the local communities.

ii. Purpose of the engagement process

As mentioned under the previous headings, the engagement process serves several purposes. First, it gives the community an opportunity to voice their opinions. Second, it creates a forum where different stakeholders may be consulted and they could reach a mutual understanding on certain matters. Third, it enables the project developers to gather information from individuals who have firsthand knowledge and experience of the proposed area for the project. Fourth, and most important, it is a means of establishing and maintaining a social licence to operate.

In certain cases, green hydrogen projects will be required to obtain the community members' consent before the project may proceed. The principle, known as "Free Prior and Informed Consent" or "FPIC". This principle states that the communities within the impact zone of a project should give their informed consent without pressure or

[4] https://www.oecd-ilibrary.org/governance/oecd-due-diligence-guidance-for-meaningful-stakeholder-engagement-in-the-extractive-sector_9789264252462-en

[5] The consequence for failing to consider community rights may be severe. See for example Shell prevented from proceeding with seismic survey offshore of South Africa's Eastern Cape Province

coercion before any work on the project may commence. While it started as a standard for indigenous peoples, it has been adopted by other countries for communities that may be displaced or otherwise be impacted by a major investment project.[6]

FPIC may not always be the appropriate standard for all projects.[7] While community members' rights should always be recognized, it would be contrary to the tenets of sustainable development if communities were able to invoke their right to FPIC to suspend an ongoing project where they previously provided their consent and the activities comply with the spirit as well as the letter of the legal framework. It is also important to bear in mind that after the green hydrogen projects are established the developers will have rights to security of tenure. Under these circumstances the relevant regulator would need to strike the appropriate balance between the competing rights. Again, many of these issues may be prevented and addressed if the communities and the project developers continuously and in good faith engage in a two-way process of dialogue.

The International Finance Corporation's Performance Standards ("PS") provide guidance on the resettlement of communities. Performance Standard 5 states:

> *When companies seek to acquire land for their business activities, it can lead to relocation and loss of shelter or livelihoods for communities or individual households. Involuntary resettlement occurs when affected people do not have the right to refuse land acquisition and are displaced, which may result in long-term hardship and impoverishment as well as social stress. PS5 advises companies to avoid involuntary resettlement wherever possible and to minimize its impact on those displaced through mitigation measures such as fair compensation and improvements to and living conditions. Active community engagement throughout the process is essential.*

In addition, Performance Standard 7 may be relevant when indigenous peoples are impacted by an investment. It states:

> *Indigenous peoples (IPs) may be particularly vulnerable to the adverse impacts associated with project development, including risk of impoverishment and loss of identity, culture, and natural resource-based livelihoods. PS7 seeks to ensure that business activities minimize negative impacts, foster respect for human rights, dignity and culture of indigenous populations, and promote development benefits in culturally appropriate ways. Informed consultation and participation with IPs throughout the*

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6 See for example Principles respecting the Government of Canada's relationship with Indigenous peoples.
For example, the United Nation's Food and Agricultural Organisation contends that under FPIC "once [communities] have given their consent, they can withdraw it at any stage." See https://www.fao.org/indigenous-peoples/our-pillars/fpic/en/.

project process is a core requirement and may include Free, Prior and Informed Consent under certain circumstances.

The IFC provides Guidance Notes and Implementation Resources for both PS5 and PS7, including on the next topic, how to engage with communities.

iii. Means of engagement

There are various mechanisms and forms of media which project developers could use when they engage with communities. Under normal circumstances companies may choose to use a combination of notice and comment processes, advertisements on local radio stations on in local newspapers, briefing sessions at local town halls, social media posts, SMS or WhatsApp broadcasting messages, information pamphlets, in-person visits, newsletters, websites, blogs, or public information booths.

Not all modes of engagement will be relevant for all types and stages of operations. For example, during the project scoping phase the impacts will be limited and some future impacts not yet identified. During this phase information sharing and consultation may be sufficient.

The most propitious method will differ from one project to the next. Project developers will therefore need to be guided by the characteristics of the environment where the proposed project will be developed. For example, some areas may not have local newspapers or radio stations. In other areas, information leaflets will not work because the area is sparsely populated.

This being said, it is important that a context-appropriate approach is followed. If a proper mode of engagement is not identified and applied, stakeholders' perspectives may not be adequately integrated into project decisions. This may have an adverse impact on the project in the long term, including the green hydrogen operation losing its social licence.

Information sharing will therefore be appropriate in all stages of a project, especially where there is a need to provide information to stakeholders about the production activities and any expected impacts (positive and negative). During some phases of the project it may also be necessary to consult interested and affected parties on specific issues, to negotiate the resolution of conflict situations, and to obtain the community's consent.

The information must be disclosed in a timely manner, in an accessible place and in a form and language understandable to project-affected parties and other interested parties.

Irrespective of the methods which the project developers use, the primary objective must be to ensure that the interested and affected persons have access to sufficient information on the project and are afforded a meaningful opportunity to voice their opinions. The language in which the information is communicated is particularly

important. Because many of the green hydrogen projects will be constructed in rural areas project developers must ensure that the information is provided in the local dialect of the language that is spoken by the community members who will be affected by the project. The information must also be readily available and easily accessible. For example, project developers cannot assume that all community members have access to social media, the internet or e-mails.

The test in this regard would be whether or not the community members have access to enough information to express an informed view on the impact which the project may have on their rights and interests. This includes sufficient information about the potential risks and impacts which the project may have on different categories of stakeholders.

The engagement process however does not end after community members have voiced their opinions. Meaningful engagement requires that the learnings are incorporated into the project design as well as the green hydrogen production project's operating model. Where the project developers or operators provided certain undertakings, these must be implemented in a timely manner. Meeting commitments in a timely manner is fundamental to establishing trust. If the relationship of trust is broken the green hydrogen operation will lose its social licence to operate. This will affect the medium-to-long term viability of the project. Conversely, if the green hydrogen project delivers on its promises, this will build trust and reinforce its social licence to operate.

The project developers therefore have a duty to place the interested and affected parties in a position where they can provide meaningful input into project design and operating model throughout the different phases of the project.

b) Local development

i. Community Development Agreements or Local Benefit Agreements.

A further (but equally important) mechanism that projects have used to strengthen their social licence to operate is by concluding agreements directly with impacted communities. These are often referred to as *Community Development Agreements* or *Local Benefit Agreements*.

Community development agreements are derived from good faith agreements and have the potential to support positive socio-economic development outcomes. In addition to the requirements imposed under the statutory legal framework, under these agreements the green hydrogen projects are able to further structure the engagement between companies and communities.

These agreements serve various functions.

First, they allow the developers and operators of green hydrogen projects and local communities to agree on the rights, roles, and responsibilities of the different stakeholders (including the community members and their representatives). This can be mutually beneficial to a project and the community, as the community then has firm

commitments about how the project will be operated, how the positive impacts will be enhanced and negative impacts addressed or mitigated, and disputes will be resolved.

Second, they create the framework within which benefits that result from the green hydrogen projects may be shared. The benefit could be monetary or non-monetary as agreed between the developers of the green hydrogen projects and the relevant stakeholders through consultation or negotiation processes. Important examples include:

- the creation of local jobs within safe working environments (this could be further set out under a local employment plan);
- commitments to local procurement (this could be further set out under a local content plan);
- the diversification of income-generating opportunities;
- capacity development and training of local community members;
- technology transfer;
- improvements in local infrastructure or the construction of education and healthcare facilities;
- better access to credit and markets, particularly for small and medium-sized businesses;
- payments for environmental services;
- allocation of revenue such as dividends;
- shareholding options; or
- the creation of trust funds.

Thirdly, the agreements could establish agreed mechanisms which the companies and local community members could use to resolve any tension or disputes between the project and the local community members (grievance mechanisms). It is also important that the project developers and operators respond to unforeseen adverse impacts in a manner that is effective and efficient. By establishing a grievance mechanism, a process is established to give people fearing or actually suffering adverse impacts the opportunity to be heard and assisted. Through the mechanism community members can report real and potential impacts. This can allow for an early remedy to be implemented for impacted stakeholders which may then prevent significant adverse events from materializing in due course. The context-specific remedy may include an apology, restitution, rehabilitation, financial or non-financial compensation, satisfaction and guarantees of non-repetition, modification in procedure, structure or communication.

These community grievance mechanisms may promote a mutual understanding of the community's interests and concerns and defuse tensions before they arise. The agreements also provide a structured, transparent and mutually acceptable means through which the green hydrogen projects may administer aspects such as mitigation and compensation.

ii. Approach

Every community will have different desires and needs for how they accommodate a project. There is no one-size-fits-all model. As with any agreement, the rights, responsibilities, benefits and acceptable dispute resolution mechanism must be negotiated and agreed among the parties. This is why engagement early and often is necessary: different communities have different needs and expectations. Local development is exactly that: extremely local. What one impacted community needs (e.g. access to electricity at a reasonable cost) may not be what another needs (e.g. jobs).

Defining an "impacted community" and who speaks for that community is by no means an easy task in every situation. Indeed, it will often be very challenging. Green hydrogen project developers and operators would need to be guided by the requirements imposed under the statutory legal framework (if any)[8] and the findings of the environmental and social impact assessment process. Ultimately, it is better to address these challenges at the outset of the project rather than once disputes arises (which they inevitably will). The local and national governments may also be required to assist the green hydrogen project developer during the initial stages to ensure that the community leaders are identified and consulted.

iii. Spheres of influence

Owing to the size and economic impact of most green hydrogen projects, citizens beyond those directly impacted may be affected by or interested in the project. This is a common phenomenon in the extractive industries.

The media, civil society organisations, academic institutions, and local and regional think tanks, and non-profit organization ('third-party stakeholders') will monitor a project for its impact on local communities and the larger nation-state. They will often monitor whether companies are adhering to best practice in human rights, environmental, social and governance standards, among others.

These third-party stakeholders will scrutinize the deal to determine if it is fair and whether the contract was concluded in a transparent way. People will want to know how the host government is benefiting from the project, as land and water resources that could be used in other ways will be involved.

Citizen organisations often want to know what local employment, local content (i.e. local goods and services being used by the project), and what revenues the host state is receiving from the project and how the host government is spending them. These will be issues that go well beyond directly impacted communities.

[8] Some countries may have robust community consultation processes embedded in law that apply to any major investment project or the grant of any major land area. Others will not and this will have to be developed, usually in partnership with the host government.

To address these issues before they cause any concerns for the green hydrogen projects, the project developers and operators must develop and implement a best-in-class transparency regime, frequently reporting on the performance of the project, and disclose material information to the public. What such a regime entails is discussed under the next heading.

c) Transparency[9]

For practical reasons it is not possible constantly to engage with all locally affected parties or third-party stakeholders. It is however important that interested and affected parties remain apprised of material matters regarding the green hydrogen project.

A lack of information may create distrust, which would affect the project's social licence. In the alternative, if the project is operated in a transparent and accountable manner this will strengthen the relationship between the project-affected community members and the green hydrogen project.

In light of this, green hydrogen projects should establish a reporting and disclosure regime which ensures that timely and accurate information is disclosed on all material matters regarding their activities, structure, financial situation, performance, ownership and governance of the project. Again, the information should be made available in a form which is easily accessible to the community. Where the community members do not speak English, summaries of the material matters must be provided in the local language (and or dialect).

The green hydrogen project's disclosure policies should be tailored to the nature, size and location of the project, with due regard taken of costs, business confidentiality and other competitive concerns.

According to the OECD multinational enterprises (such as green hydrogen projects) should at the very least disclose information on:

- the project's objectives;
- the operation's financial and operating performance for a specific period (quarterly or annually);
- major shareholders and the ultimate owners of the project. This includes voting rights, whether the project is part of a group of companies, and control mechanisms;
- remuneration of the board and key executives;
- information about the board, its members and key executives, including diversity, the members' qualifications, how the members were selected, other enterprise directorships and whether each board member is regarded as independent by the board;
- related party transactions;

[9] https://mneguidelines.oecd.org/themes/disclosure.htm

- foreseeable risk factors and the measures which the project has implemented to mitigate or address the risks and impacts;
- issues regarding workers and other stakeholders;
- governance structures and policies, in particular, the content of any ESG standards and codes to which the project subscribes, related policies and the implementation process.

It goes without saying that any green hydrogen operation must strive to meet the requirements imposed under high quality international standards for accounting. This includes financial as well as non-financial disclosure as well as environmental and social reporting. The standards or policies under which information is compiled and published should also be reported.

Finally, not only should key project information be made publicly available, but where the project was awarded pursuant to a competitive tender process, the government should disclose information on the process by which a company was selected to be the project sponsor.[10]

3. Guidance on best practice

As the commercial production of green hydrogen is still in its formative stage, good practice specifically tailored to green hydrogen projects is also evolving. As the sector grows, the green hydrogen sector will learn industry-specific lessons which will contribute to a subject matter specific body of best practice.

For example, current studies indicate that some of hydrogen's properties require additional engineering controls to enable its safe use. Specifically, hydrogen has a wide range of flammable concentrations in air and lower ignition energy than gasoline or natural gas, which means it can ignite more easily. Consequently, adequate ventilation and leak detection are important elements in the design of safe hydrogen systems. Because hydrogen burns with a nearly invisible flame, special flame detectors are required. Best practice safety mechanisms for green hydrogen production projects will develop over time. Among other things, the literature will identify the minimum standards with which green hydrogen projects must comply to ensure that communities and the environment are not harmed.

Pending further research and experience, green hydrogen projects should incorporate best practices from other related projects and sectors into their operating models. This includes the incredibly useful guidance developed for other investment projects that have direct relevance for green hydrogen projects.

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10 Among other things the government should disclose:
- what factors made this project and its developer best able to develop this project?
- what measures were taken to ensure integrity, value for money, and that there was no corruption or undue influence in the process?

The list below identifies sources which project developers ought to consider. It is neither a complete or even comprehensive list. It is intended to illustrate the many areas of good practice that already exist, and which are highly relevant for green hydrogen projects. Some of the practice is from international institutions, while other practice comes from certain countries.

Best practice in impact assessment and consultation processes

- World Bank Environmental and Social Framework
    - Assessment and Management of Environmental and Social Risks and Impacts
    - Community Health and Safety
    - Land Acquisition, Restrictions on Land Use and Involuntary Resettlement
    - Indigenous Peoples/Sub-Saharan African Historically Underserved Traditional Local Communities
    - Cultural Heritage
    - Stakeholder Engagement and Information Disclosure
- OECD Guidelines for Multinational Enterprises
    - Disclosure
- OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector
- OECD Guiding Principles for durable extractive contracts
- ICMM Community Development Toolkit
- IFC Performance Standards on Environmental and Social Sustainability
    - Assessment and Management of Environmental and Social Risks and Impacts
    - Community Health, Safety, and Security
    - Land Acquisition and Involuntary Resettlement
    - Indigenous Peoples
    - Cultural Heritage
- UN Guiding Principles on Business and Human Rights
- UN Principles for Responsible Contracts
- Measuring Environmental and Social Impacts
- Integrating Social Accountability Approaches into Extractive Industries Projects : A Guidance Note
- https://unctad.org/meetings/en/SessionalDocuments/tdb64d3_en.pdf

Best practice in community development agreements

- World Bank Community Development Agreement Source Book

- IFC Local Benefit Sharing for Large Scale Wind and Solar Projects
- US EPA Superfund Community Involvement Tools and Resources
- ICMM Community Development Agreements
- Community-Investor Negotiation Guide 1: Preparing in Advance for Potential Investors
- Community-Investor Negotiation Guide 2: Negotiating Contracts with Investors

Transparency and reporting

- Current EITI Standard 2019
- EITI Guidance Note 7 - Contract transparency
- Global Reporting Initiative Sustainability Reporting Standards
- Sustainability Accounting Standards Board: extractives and minerals processing
- CDP: How to disclose as a company

4. Key objectives and guiding principles for decision makers

It is a truism that communities and local development needs are different for every project. This subject matter, by its very nature, cannot be overly prescriptive. How to engage with communities and citizens has no set formula that will work for every project. Instead, key objectives for government and project decision makers in this area must be more general.

Questions that should be asked by a project sponsor and host government include:

- What actions are being taken by the host government and the project sponsor to ensure that the granting of rights to the project has been done with transparency, integrity and in accordance with any applicable local law?
- Does the host government have local laws and regulations that require community engagement by an investor?
  - Have these rules been followed to date and what rules will continue to apply?
  - Do they need to be supplemented with additional rules, rights and obligations in a Host Government Agreement?
  - Do they need to be supplemented with a Community Development Agreement?
  - How should project developers engage with impacted communities even before a contract is agreed between the parties?
- What major project information is required to be transparent and publicly available by local law?
  - What additional information should be made available?
  - Has this been agreed under the Host Government Agreement?
- Have negotiators for both sides done due diligence on community consultation, local development and transparency?
  - What did that process entail?
  - What standards were agreed to and why?
  - How will the standards be enforced?

- What happens when there is non-compliance?
- What remedies are available to injured persons?

5. Conclusion and recommendations

Local community support for any project is critical. Where the support is lacking and the project does not have a social licence to operate, the long-term sustainability of the project is at risk. If the social licence is lost, the absence of such a licence may present an existential threat to the entire operation. Projects that may have an excellent return on paper can be completely derailed by communities and citizens that do not support the project or the government that has promoted it.

Globally, the increasing emphasis on the need to conduct sustainable operations are likewise transforming the way in which enterprises conduct business. Again, the manner in which businesses engage with and respond to local communities and other third-party stakeholders lies at the center of this process.

Community consultation, local development, and transparency are the three pillars on which any community engagement strategy must stand. Likewise, a community engagement strategy will fail if the three pillars are not afforded the time and attention they deserve.

As the world changes, practice in these areas changes with it. One thing is however certain: these issues should not be seen as afterthoughts to a long and hard negotiation over the strictly commercial aspects of a green hydrogen project. Throughout the life-cycle of a green hydrogen project, companies and governments alike should insist that community-centered issues are fully taken into account.

During the initial phases of the project, the project developers should apprise and consult communities, individuals who may be affected by the project, and the third party stakeholders to seek their views and obtain buy-in. Once the project is operational the green hydrogen project should frequently consult interested and affected parties in the form and manner determined during the initial phase. Affected parties must also be consulted when an unforeseen risk occurs.

Whenever the project developers or operators consult interested and affected process they must do so in a manner which promotes a two-way, good faith dialogue. The process will be meaningful if all the participants' views are acknowledged and responded to.

In the intervening periods between formal engagement processes the project operators and developers should ensure that material information is made publicly available in a form which is easily available and understandable to all stakeholders.

The success of any community engagement process may be measured by the green hydrogen project's social licence to operate. The factors which affect trust and weaken

the project's social licence must serve as signposts of areas of risk and should be addressed without delay. Likewise, where the licence is maintained and strengthened it may enhance the longevity and therefore profitability of the green hydrogen projects.

Annex: Model clauses based on international best practice

1. Model clauses which may be used in the different contracts which will govern the relationship between the project sponsor and the host government of the green hydrogen project ('host government agreement').

Community consultation, local development, and transparency are three vastly different areas. Contract clauses on these topics are also vastly different within a contract and across different contracts. We have taken examples from other sectors that may be useful for using as a base for a model agreement or in a negotiation.

Model Mining Development Agreement

The Model Mining Development Agreement was a project of the International Bar Association to provide a "a non-prescriptive, web-based, widely available resource that can lead to informed, transparent, and equitable negotiations and contractual outcomes." The issues of community consultation, local development, and transparency that large scale green hydrogen projects will face are in fact quite similar to those mining agreements with host countries have already provided for contractually. The MMDA provides model language as well as additional examples from other agreements that practitioners may look to as precedent on these topics. Of course, all precedent needs to be tailored to local circumstance and counsel should always be sought in any negotiation. The examples that follow are meant to inspire project developers, host government negotiators and decision makers to tackle these challenging issues in agreements, and not leave these issues to a later time; or worse, not cover them at all. What follows below are some examples of contract language from the MMDA in relevant clauses to community development, transparency, and local development.

- Mutual Obligations

"Where Applicable Law and regulations on environmental and social impact assessment and management, and pollution prevention are less stringent than the IFC Performance Standards, the Company shall undertake its activities in a manner consistent with the IFC Performance Standards. To remove any doubt, the Company and the State recognise that the IFC Performance Standards outline processes to be followed enabling site-specific environmental compliance limits to be developed, where required."

- Social Impact and Assessment Plans

"The Company shall have a Social Impact Assessment and Action Plan prepared with guidance from the IFC Performance Standards (and updated prior to any major change to the mine plan), which shall include [elements as the Parties may agree, such as the following] [the following elements and appropriate provisions for implementing the requirements of Sections 20.0, 21.0, 22.0, 23.0, 24.0, and 25.0 of this Agreement___]:

(a) Provisions to prevent or minimize the potential adverse impact of the Mining Operation on the individuals and communities resident in and around (i) the Project Area and (ii) areas affected by the processing or transport of Minerals whether using Company owned infrastructure of infrastructure provided by the State or third parties;
(b) Provisions to prevent or minimize unreasonable interference with the living conditions of the population lawfully settled within the Mining Area and surroundings, and to cause the Company's employees and contractors to respect the customs of the local populations;
(c) Provisions to mitigate negative social impacts on the local community, including housing, sanitation and public health measures of any temporary or construction work force engaged by the Company.
(d) Provisions (with guidance from IFC Performance Standard 5 as it may from time to time be amended, where the surface of the Mining Area is permanently or seasonally occupied, or resources in the Mining Area are integral to livelihoods or cultural practices of local persons, communities, or Indigenous or Tribal Populations other than artisanal or small scale miners) to:

> *(a) Avoid or minimize displacement of persons or involuntary resettlement wherever feasible.*
> *(b) Make satisfactory arrangements for payment of fair and reasonable compensation for any prospective damage to any crops, buildings, trees or works therein;*
> *(c) Compensate the holders for the use of the surface area, where the surface rights to any land within the Mining Area are held or owned by local or Indigenous or Tribal Populations as recognized by Applicable Law or relevant customary law, at a reasonable rate agreed by the holder and the Company;*
> *(d) Recognize the rights of surface right owners and occupiers, the rights of Indigenous or Tribal Populations, or other community in the Project Area is located, to continue utilizing land within the Project Area for subsistence purposes, including grazing livestock, using water, cultivating crops, hunting game, and collecting fruits and fuel wood, provided that such subsistence use would not be unsafe and does not substantially interfere with Mining Operations;*

(e) Provisions for developing a plan of resettlement if at any point a resettlement of the local population appears to be essential, having regard to the requirements of IFC Performance Standard 5, as the same may from time to time be amended, including provisions to;

> *(a) Conduct full Consultation with Local Governments and all persons who may be displaced or relocated, with the goal of developing a resettlement program to which they consent;*
> *(b) Mitigate adverse social and economic impacts by ensuring that resettlement activities are implemented with appropriate disclosure of information and Consultation;*
> *(c) Improve, replace or restore the livelihoods of displaced persons to ensure in all material respects the availability of means of livelihood adequate to maintain a an*

appropriate quality of life in the community; and
(d) Improve, replace or restore living conditions among displaced persons through provision of adequate housing with security of tenure at resettlement sites.

(f) A procedure where, if the surface of the Mining Area is occupied by artisanal miners or persons conducting small scale mining activity, the Company shall treat such persons as displaced persons and implement the resettlement under the foregoing provisions, provided that the Company shall not be liable to compensate or resettle any artisanal miners who first occupy the Mining Area after the Effective Date, including a procedure to ensure that information regarding the Effective Date is well documented and disseminated throughout the Mining Area in a culturally accepted manner and that the resettlement plan is developed in Consultation with those artisanal miners or persons conducting small scale mining activity; and
(g) A plan for the transition of the Project Area to a post mining economy."

- Anti-Corruption

"The Investor and its Affiliates are subject to the anti-bribery/corruption laws of the jurisdictions in which the Investor or its Affiliates (as applicable) are organized, including Host Country, and the Investor and its Affiliates shall conduct their activities in Host Country in accordance with their obligations under such laws."

- Local Development and Community Development Agreements

22.1 Community Development Agreement

Within thirty (30) Days after the Effective Date of this Agreement, the Company shall enter into Consultation and negotiations with the objective of concluding one or more community development agreements as described in this Section or agreements with communities impacted by the Project, to promote sustainable development and enhance the general welfare and quality of life of inhabitants, as well as to recognize and respect the rights, customs, traditions and religion of the affected persons (each, a "Community Development Agreement"). It is the objective of each of the Parties hereto that the Mining Operations shall be carried out in a manner that is consistent with the continuing economic and social viability of centers of population that have formed and which may form as a result of such operations during the term of this Agreement. Upon request of the State at any time the Company shall consult with the State and with the community mutually to establish plans and programs for the implementation of this objective and thereafter the Company shall cooperate with the State with regards to its effort concerning the realization of such plans and programs.
Each Community Development Agreement shall be subject to Applicable Law, and shall;

(a) Address both how local communities can take advantage of the development opportunities presented by the Project, and how the Project's adverse impacts can be mitigated;
(b) Serve as the agreement that specifies how the Company's obligation to spend funds for

local development shall be met;
(c) Address environmental, social, and economic conditions during mining and after mine closure, and the eventual transition from a mining economy to a post-mining economy in the Project Area as may be agreed upon among the Parties to such Community Development Agreement; and
(d) Be based on the objectives listed in Annex B.

22.2 Relationship of This Agreement to Community Development Agreement

[Where an inconsistency occurs between a provision in the Community Development Agreement and the terms or conditions of this Agreement, the provision in the Community Development Agreement shall prevail unless this Agreement specifically states that the provision in this Agreement shall prevail.] [A final written and reasoned decision of a duly constituted court or arbitral panel declaring a material breach of the Community Development Agreement by the Company, shall constitute a breach of this Agreement.] [A breach of the Community Development Agreement shall be governed by the terms thereof.] [See comments for discussion of issue.]

22.3 Local Business Development Plan

The Company resolves to cooperate with the State in carrying out the State's responsibilities by developing a local business development program to promote economic development and growth in the area of communities impacted by the Project. Such a program would be modified from time to time to fit the existing circumstances related to the particular operating phase (development, construction and operation) in the life of the Project. The program would be based on the objectives listed in Annex C."

- Transparency

"This Agreement will be published in [government gazette/federal register] or publicly available at [ministry website/ ministry library/ parliamentary records]. Information in relation to activities under these agreements shall be kept confidential if requested by a Party, to the extent that such Party establishes that confidentiality is necessary to protect business secrets or proprietary information. Such confidentiality is subject to [relevant disclosure laws], as well as to applicable laws and regulations, including stock exchange and securities rules, and requirements for the implementation of the Extractive Industries Transparency Initiative."

2. Examples of Community Development Agreements (CDAs)

The following organizations have databases of publicly available Community Development Agreements. The industries range from mining of a wide variety of minerals to agriculture (food and forestry), hydrocarbons and ethanol. Given the length of these agreements, we have not provided any example text. However, we encourage project developers, government negotiators and anyone else interested in Good Green Hydrogen Contracts to look at these databases and create CDAs that are tailored to the local context.

- Open Community Contracts, Columbia Center for Sustainable Investment
- CDA Library, Sustainable Development Strategies Group