

# Green Hydrogen Contracting Guidance

## **Community consultation and transparency**

### Key considerations

Green hydrogen projects are likely to raise high expectations and hopes for clean energy, money, and jobs in host countries. It is critical that project developers start engaging local communities early and deeply. Communities should be consulted from the outset and need to know that they are heard, understood and valued throughout the project to obtain a social license to operate.

To engage more broadly with citizens in the entire country in which a project is located, transparency of key project information is an effective route of building country-wide support for specific projects and for the industry as a whole. In the oil, gas and mining sectors, transparency of project information has included making the main agreement between the host state and the project sponsor publicly available, as well as payments made under those contracts and all major environmental and social impact assessment documentation.

One mechanism that projects have used in other industries is having a contract directly with impacted communities. These are often referred to as Community Development Agreements or Local Benefit Agreements. This involves the project sponsor directly negotiating and agreeing on rights, roles, responsibilities and dispute resolution mechanisms directly with impacted communities. Such agreements can be helpful to a project as the community then has firm commitments about what it will receive and how to address grievances in a way that they themselves have agreed to.

The guidance on community consultation and transparency presents international standards, guidelines and good practices for governments and project developers that can be applied to green hydrogen projects. It proposes model clauses relating to compliance with environmental and social standards, social impact assessment and plans, anti-corruption, local development agreements and transparency.

This brief forms part of a set of guidance from the initiative on [Green Hydrogen Contracting – for People and Planet](#). The project supports governments, communities and companies in developing contracting practices for green hydrogen projects that ensure rapid expansion to everyone's benefit. The guidance has been developed by a working group consisting of governments, law firms, companies and civil society groups to draw lessons learned from emerging practices in the green hydrogen industry.

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# Introduction

The energy transition will require massive scaling up of renewable energy sources and the decarbonisation of critical industries in order to limit global warming to 1.5°C. Green hydrogen has great potential to be a sustainable pathway to decarbonise hard to abate sectors.

One of the practical implications for developing green hydrogen markets and supply chains is the need to quickly build new industrial infrastructures and green hydrogen production facilities. However, no large-scale projects can be carried out without wide social acceptance. This 'social license to operate' begins with the surrounding communities, which are usually impacted by the construction and operation of these projects. The formal processes for granting construction and operating licenses can take many years and be delayed if expectations and interests between the national government, the local government, the company and the community are not aligned.

**Establishing clear and inclusive processes to build trust with the local communities and host populations will help avoid the mistakes of the fossil fuel industry.** Transparency of the key documents will support the efforts of government policymakers and planners, investors, and development finance institutions to accelerate energy market development and to reap the benefits of open competition.

The purpose of this guidance is to introduce some of the good practice mechanisms which green hydrogen projects should pursue in their engagements with interested and affected stakeholders. The guidance considers the different components of the legal framework which may vest rights and impose obligations on green hydrogen project developers and operators. This includes the need to have a social licence to operate, meaningful stakeholder engagement and what such a process entails, as well as transparency, reporting and disclosure requirements.

The guidance identifies important sources of best practice and guiding principles for decision-makers, while the annex provides examples of model clauses which green hydrogen project developers and operators may wish to consider and incorporate into specific agreements.

# 1. International good practices for community consultation 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 of a green hydrogen project will also conclude a contract with the host state. The contract itself may have different names, such as an Implementation Agreement or Host Government Agreement.

The project may also be subject to mandatory human rights and environmental due diligence laws in countries where the company is headquartered or otherwise operates. Such laws often apply extraterritorially to human rights impacts occurring abroad, including those linked to green hydrogen projects.<sup>1</sup> There are cases in which communities have filed lawsuits against renewable energy companies for non-compliance with human rights laws and guidelines.<sup>2</sup>

In addition to the statutory legal framework, green hydrogen projects will be further regulated by the terms agreed under several different commercial agreements. Only some of these agreements will be directly with the host government<sup>3</sup> and state-owned enterprises.

The majority of the contracts will be between private entities. A number 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 offtake agreements under which the green hydrogen is sold to end users and consumers.

<sup>1</sup> International frameworks such as the United Nations Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises may also be relevant due to emerging legal obligations to comply with international human rights standards embedded in mandatory human rights and environmental due diligence (mHREDD) laws.

<sup>2</sup> See examples in CCSI (2022), [Respecting the Human Rights of Communities: A Business Guide For Commercial Wind and Solar Project Deployment](#).

<sup>3</sup> The host state is the country in which the project is physically located.

There will also be a host of ancillary contracts and procurements for goods, works and services connected to a specific project. This and other guidance on community engagement, transparency and due diligence should apply across the entire value chain of a green hydrogen project.

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. Best practice is to extent possible build key terms into the generally applicable laws and regulations, which have been developed on the basis of a comprehensive and realistic green hydrogen strategy for the country. This will provide for non-discriminatory treatment of investors, limit the scope for project-specific terms, increase transparency and reduce the administrative burden of enforcement.

Finally, there is the contracting process itself. Since green hydrogen projects are still new, it is less common to see specific guidelines in a country's legal 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.

## 2. Relevant practices and international trends

Major cross border investments 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 provides international standards, guidelines and lessons learned from good practice in other sectors and from emerging experience in green hydrogen.

### **a. Community Consultation**

#### **A social licence to operate <sup>4</sup>**

Engaging early and often with impacted 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 community opposition to projects that failed to adequately and meaningfully engage with the community on

<sup>4</sup> <https://sociallicense.com/definition.html>

key project development issues that impacted the community. In other sectors, conflict with local communities has led to significant financial and operational risks for projects, including but not limited to community roadblocks, litigation, delays and cancellation.<sup>5</sup> Engaging meaningfully with communities early and often has, on the other hand, tended to result in communities that are more supportive of projects, which further mitigates financial and operational risk.

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. This may often mean going beyond the minimum legal requirements for public consultation to ensure that such processes are truly inclusive.

A key prerequisite to obtaining a social license to operate is to ensure that from the very outset, project information is transparent and explained to the local community. Communities in any area within the influence of a project will need to really understand the implications of the project and what is being presented, so the consultation and engagement processes will need to be implemented with this in mind.

### **Meaningful stakeholder engagement**<sup>6</sup>

According to the OECD, meaningful engagement occurs when the project developers and the stakeholders continually engage in a process of two-way dialogue. The engagement process must in addition be conducted in good faith and with the objective of obtaining the community's consent, and the project developers must be responsive to the stakeholders' views.

"Two-way" in this context means that the participants can express their views freely and without fear of reprisals. This must include an opportunity to share their perspectives and to influence decisions about the design and deployment of the green hydrogen project. **Project developers should facilitate arrangements for the community stakeholders to be empowered and informed, and to have access to independent**

<sup>5</sup> Studies have shown that tenure related risk, for instance, has the potential to significantly increase operating costs by as much as 29 times over a normal baseline scenario. Another study shows that non-technical risks, and primarily stakeholder related risks, accounted for nearly half of the total risks faced by companies. As such, community engagement should be a crucial element of any successful hydrogen project's strategy. See Davis, R., & Franks, D. (2014). *Costs of Company-Community Conflict in the Extractive Sector*. Retrieved from The University of Queensland Australia - Centre for Social Responsibility in Mining, <https://www.csr.uq.edu.au/publications/costs-of-company-community-conflict-in-the-extractive-sector> and further The Munden Project (2012, December). *The Financial Risks of Insecure Land Tenure: An Investment View*. <https://rightsandresources.org/publication/the-financial-risks-of-insecure-land-tenure/>

<sup>6</sup> OECD (2017), OECD Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector <http://dx.doi.org/10.1787/9789264252462-en>

**legal or technical assistance and adequate resources to participate in the engagements.** The engagements themselves must also be accessible, and inclusive to all community members, especially women, children, migrants, and other minority groups.

As well as giving stakeholders a voice, project developers should be open to listen and ensure that stakeholder concerns are addressed and clearly operationalized at a company level. Successful engagement processes allow for some sharing of decision-making powers. This means the process should avoid a scenario where the project developers 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 license.

Discussion and negotiations with communities 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 a green hydrogen project. Importantly, the community of stakeholders will themselves be diverse and may represent different constituencies with differing objectives and ambitions which will require careful navigation and reconciliation. The project should, in turn, acknowledge that the operations may give rise to adverse impacts and agree to address or mitigate those impacts.

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 one-off engagement. It 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.

## **Different forms of stakeholder engagement**<sup>7</sup>

### i. Frequency, nature and extent of engagement

The required frequency, nature, and extent of the stakeholder engagement processes are subject to several factors. These 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.

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 project location 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 archaeological importance.<sup>8</sup>

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. The frequency, timing, method of engagement and processes to document various steps and activities in the engagement should also be agreed upon with the community during preliminary consultations. 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. The agreed terms of the engagement should also provide sufficient time for meaningful community preparation and deliberation.

### ii. Purpose of the engagement process

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

<sup>7</sup> [https://www.oecd-ilibrary.org/governance/oecd-due-diligence-guidance-for-meaningful-stakeholder-engagement-in-the-extractive-sector\\_9789264252462-en](https://www.oecd-ilibrary.org/governance/oecd-due-diligence-guidance-for-meaningful-stakeholder-engagement-in-the-extractive-sector_9789264252462-en)

<sup>8</sup> 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](#).

individuals who have first-hand 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" concerns the right of Indigenous and tribal peoples to collectively decide on matters that stand to affect their lands, territories, resources, and cultural integrity. This principle requires that project-affected communities and peoples are able to participate in decision-making, and give or withhold informed consent without pressure or coercion before any work on the project may commence and throughout the life cycle of the project on an ongoing basis.

While it started as a principle for protecting the rights of indigenous peoples, it has been adopted by other countries and various industry and multi-stakeholder initiative standards for all communities that may be displaced or otherwise be impacted by a major investment project.<sup>9</sup> Regardless of whether a country has adopted FPIC as a requirement for all communities, all persons have the human rights to public participation and information that would similarly require companies to meaningfully and adequately engage with all communities affected by the project.

Just as a social licence to operate can be lost, FPIC involves the right to withdraw consent. The withdrawal of consent is typically recognized where consent has been improperly obtained or where the conditions upon which consent was given have been violated. To provide certainty and manage expectations, companies may wish to agree with the community, in writing, to the terms upon which consent may be withdrawn.

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.

<sup>9</sup> See for example [Principles respecting the Government of Canada's relationship with Indigenous peoples](#); Liberia's *Land Rights Act* of 2018 which contains FPIC requirements; and EO100 Standard for Responsible Energy promotes FPIC as a good practice for all project affected communities.

***Resettlement of Communities and Indigenous People***

The International Finance Corporation's Performance Standards provide guidance on the resettlement of communities and with respect to the special considerations needed when engaging with Indigenous Peoples.

**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.*

**Performance Standard 7 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 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.

### Steps for FPIC community engagement

1. **Scoping** to identify affected communities and their rights
2. **Planning, research and evaluation** on potential community impacts
3. Identify **engagement method in consultation and communities**
4. **Consultation** while providing complete and accurate project information
5. **Negotiations** with adequate independent legal advice
6. **Agreement** and consent to secure project approvals
7. Implementation of agreements with ongoing dialogue

Source: Columbia Centre on Sustainable Investment (2022) [Respecting the Human Rights of Communities: A Business Guide For Commercial Wind and Solar Project Deployment](#).

### 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 or 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 effective 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, and should agree with communities on the methods of engagement. 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. If radio is used, call-ins could be hosted to encourage a two-way conversation. It is important that a context-appropriate approach is followed depending on the medium.

iv. Complete, timely and accessible project information to build an informed view

Information sharing itself needs to be appropriate and complete and relevant to the precise stage of the project 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 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 the trust that affect the medium-to-long term viability of the project.

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.

Project developers can consider conducting surveys in the communities in the area of influence to ascertain their perception of the project, to inform community engagement plans.

Management measures agreed between project developers or operators and the communities at an early stage of the project cycle should be adjusted annually and progress communicated regularly. An example of continual social relation monitoring is InterEnergy Holding's (IEH) wind farm project in Penonomé, Panama, where a dedicated community relations coordinator carries out stakeholder analysis, annual stakeholder meetings, monthly bulletins to share news of the projects social and environmental activities, and grievance mechanism monitoring.<sup>10</sup>

#### v. Inclusive, accommodating, and open engagements

Community engagements should be open to all members of the affected community, especially women, children, migrants, and members of other minority groups. Engagements must be non-discriminatory in terms of race, gender, age, income, language, literacy, or disability, and therefore must be accessible to and accommodate all members. Engagements should also be designed in a manner that is culturally-appropriate, gender-sensitive, and context-sensitive. The company should work together with the community to build such an environment.

Companies should not merely engage with formal representatives, but ensure that all members have the opportunity to participate in a meaningful and effective manner.

Participants should feel free to share their views, which means that the engagements must be free from retaliation against disagreement or dissent, and be openly accommodating of all opinions, decisions, and a people's right, and where applicable, a community's right to give or withhold consent.

Lastly, companies should be respectful of inter-community confidentiality when sharing information and documentation from community engagements with others.

Community attendance lists should be kept confidential and protected to ensure that members are not placed at risk.

<sup>10</sup> See further examples in Energy Partnership Chile – Alemania (2021), *Requirements for the production and export of green-sustainable hydrogen*, [https://www.energypartnership.cl/fileadmin/user\\_upload/chile/media\\_elements/Studies/EP\\_CHL\\_Production\\_of\\_green\\_sustainable\\_hydrogen\\_final\\_ISBN.pdf](https://www.energypartnership.cl/fileadmin/user_upload/chile/media_elements/Studies/EP_CHL_Production_of_green_sustainable_hydrogen_final_ISBN.pdf).

### Examples of corporate human rights and community engagement policies

Ørsted's [Local Community Engagement Policy](#) with guidelines for local community engagement that apply to all projects.

Enel's [Human Rights Policy](#) with a commitment to respect the UN Declaration on the Rights of Indigenous Peoples and to consultation and continuous listening activities with all local communities.

Acciona's [Human Rights Policy](#) commits to respect the rights of Indigenous and tribal peoples, whether or not they are included in the host's state's domestic laws.

*Source: Columbia Centre on Sustainable Investment (2022) [Respecting the Human Rights of Communities: A Business Guide For Commercial Wind and Solar Project Deployment](#).*

## 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 license 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 have the potential to support positive socio-economic development outcomes. These agreements can further structure the engagement between companies and communities, serving 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 certain 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:

- Increased access to clean energy (in particular in the operation and maintenance stage where the local community could be supplied with energy);
- Water supply to the community during the project implementation;
- 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;
- New and improved 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; and
- The creation of trust funds or community development funds.

While such agreements are promising on paper, additional measures should be taken to ensure that outcomes of the agreement are successfully met. Particularly, community representatives should be supported to develop the technical skills to participate in governance decisions, given veto rights in the case of a minority stake, and protected against the dilution of their shares or representation. The community may also benefit from independent technical and legal assistance to help advocate for their rights and interests.

As with community engagements more broadly, this is suggested to mitigate any power imbalances between the company and community during consultation, negotiation and operation of any such scheme.

## ii. Grievance mechanisms for dispute resolution

Another important mechanism for trust-building and conflict resolution is establishing 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. A grievance mechanism establishing a fair, impartial process to give people fearing or actually suffering adverse impacts the opportunity to be heard and assisted. It has been a key mechanism to mitigate community conflicts in high-risk environments and investments and its use for any future green hydrogen project is strongly recommended. Community members can report real and potential impacts through the mechanism and seek resolution and redress if the claim is credible and genuine.

Grievance or redress mechanisms are designed to deal with local stakeholder issues. If the topic is related to a dispute between the contracting parties, other mechanisms are more appropriate and are covered more in a separate guidance brief.<sup>11</sup>

The more transparent and independent the process is, the more it is likely to foster trust. Best practice approaches use independent representatives to adjudicate and allow for a dialogue between parties (and hopefully early mitigation of a harm). 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.

Again, the credibility of the process is enhanced if the company makes it known that it will act on the independent findings. 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.

<sup>11</sup> *Green Hydrogen Contracting Guidance on Dispute Resolution*

The *United Nations Guiding Principles on Business and Human Rights* provide guidance on what effective company grievance mechanisms look like. Such mechanisms should be legitimate, accessible, predictable, equitable, transparent, rights-compatible, confidential, a source of continuous learning, designed and monitored in consultation with communities, culturally appropriate, gender-sensitive and context-sensitive.<sup>12</sup>

### iii. Approaches to community development

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 community needs (e.g. job opportunities).

Defining an “impacted community” and who speaks for that community is by no means an easy task and 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)<sup>13</sup> 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 arise. 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.

### iv. 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. 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. It is highly likely that expectations and hopes for green products and energy, money, and jobs will be high. This is a common phenomenon in the extractive industries.

<sup>12</sup> [OHCHR Accountability and Remedy Project: Meeting the UNGP's Effectiveness Criteria](#) (2021); and Guiding Principle 31, [United Nations Guiding Principles on Business and Human Rights](#) (2011).

<sup>13</sup> 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 by the project developer, usually in partnership with the host government.

The media, civil society organisations, academic institutions, and local and regional think tanks, and non-profit organisations (“third-party stakeholders”) may 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, transparency, good governance, anti-corruption among others.

These third-party stakeholders may be interested in issues that go well beyond directly impacted communities including;

- Whether the deal was fair.
- Whether the contract was concluded in a transparent way.
- How the host government is benefiting from the project.
- What land and water resources are being used and what else they could be used for.
- Local employment and development content (i.e., local goods and services being used by the project).
- What revenues the host state is receiving from the project and how the host government is spending them.

To address these issues before they cause any concerns for the green hydrogen projects, the project developers and operators must develop and implement a high quality transparency regime, frequently reporting on the performance of the project, and disclose material information to the public.

### **c. Transparency**<sup>14</sup>

Being, and being seen to be, transparent by proactively disclosing timely, complete, and accessible information and listening to feedback arising is best practice. Moreover, it is central to winning a social license to operate.

All 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 in the local language (and or dialect).

Generally, in emerging markets where governments are often at a disadvantage when negotiating with companies, the asymmetry of information can lead to suboptimal deals even if the government is negotiating in the interest of its citizens.

<sup>14</sup> <https://mneguidelines.oecd.org/themes/disclosure.htm>

Contract transparency will help provide an incentive for governments and companies to make more durable deals, and deter corruption. Transparency is ultimately a risk-reduction tool for both project developers and utilities/governments. Energy and power projects tend to have decades-long lifespans that considerably outlast the term of any individual government. Transparency will uncover concerns about deal terms that should allow firms to better judge political risk from government turnover and/or ensure deals have broad and durable support across major political groups, rather than benefiting a narrow elite that may or may not be in power for the duration of the contract life.

Importantly, the disclosures should be tailored to the nature, size and location of the project and also what specific concerns the communities and stakeholders have raised. Inevitably, there will be costs, business confidentiality, and other competitive concerns to be navigated as well, although these usually are not too constraining given both the size and scale of the investment and the disproportionate costs of getting social engagement wrong.

The [OECD's Guidelines for multinational enterprises](#) sets out recommended minimum disclosures related to project objectives, financial and operating performance, major shareholders and ultimate owners, board and key executives, related party transactions, foreseeable risk factors and governance structures and policies.<sup>15</sup>

GH2's **Green Hydrogen Standard**<sup>16</sup> includes provisions addressing transparency and accountability. It relies on project operators to make a complete and compelling case of how they are meeting the Standard. These disclosures are subject to independent review and an appeals mechanism. The Standard includes the following provisions:

- **Corporate governance.** An overarching requirement that the project operator has sound corporate business structures, policies and practices; addresses transparency, integrity and accountability issues; can manage external governance issues (e.g., institutional capacity shortfalls, political risks including transboundary issues, public sector corruption risks); can ensure compliance; and procurement processes are equitable, transparent and accountable;
- **Anti-corruption.** A requirement the project operator establishes codes of conduct and anti-corruption standards that clearly prohibit bribery and corruption, including facilitation payments to government officials to obtain routine services. The standards should address the obligations for employees and contractors and include a risk-based system for due diligence.

<sup>15</sup> OECD Guidelines for multinational enterprises: <https://www.oecd.org/corporate/mne/>

<sup>16</sup> <https://greenhydrogenstandard.org/>

- Project information. An expectation that the project operator publicly discloses key information of public interest about its corporate structure, contractual terms related to the project and financial transactions with the government.
- Payments to government and subsidies. An expectation that the project operator comprehensively discloses the payments they make to governments at both central and subnational level, and subsidies awarded to the project operator as individual subsidies or as part of a subsidy scheme. Types of payments to government include taxes levied on the income, production or profits of companies, royalties, dividends, licence fees, rental fees and other considerations for licences or concessions.
- Beneficial ownership. An encouragement for project operators to disclose legal and beneficial ownership, including the identity(ies) of their beneficial owner(s), the level of ownership and details about how ownership or control is exerted.
- Contracts. An encouragement to disclose the full text of any contract, concession, production-sharing agreement or other agreement granted by, or entered into by, the project operators which provides the terms attached to the utilisation of electricity and water and the production of green hydrogen.

These disclosure requirements are well-established in other industries such as the oil, gas and mining sector. Through implementation of the [Extractive Industries Transparency Initiative \(EITI\) Standard](#), implemented by 57 countries, nearly USD 3 trillion have been disclosed in payments to government, 1000s of companies have disclosed their real owners and nearly 3000 contracts between host countries and companies have been published. These are standards and practices the renewable energy and green hydrogen industries can agree and build on at an early stage, to ensure a level playing field.

While project information is critical at this stage for local communities, the government should over time establish systems and procedures for the regular disclosure of information related to the green hydrogen industry. For instance, disclosures related to award of permits, licenses and contracts are key to give industry confidence that there is a level playing field for project developers and that the most qualified companies are being selected in tender processes.

The government should disclose a description of the process for transferring or awarding the license, the technical and financial criteria used and information about the recipients of the permit or contract that has been awarded. In cases where governments can select different methods for awarding a contract, the description of the process for awarding or transferring a license could include an explanation of the rules that determine which procedure should be used and why a particular procedure was selected.<sup>17</sup>

### **Public bidding process for land rights for green hydrogen projects in Namibia**

In 2021, the Namibian government (through the public intermediary [Green Hydrogen Namibia](#) and with support from the [Namibia Investment Promotion and Development Board](#)) issued a [request for proposal](#) for renewable energy and green hydrogen project developers to bid for feasibility study rights with an option to develop renewable assets. A preferred bidder was announced after five months after a competitive tender process.

As part of Namibia's [Green Hydrogen Strategy](#) launched in November 2022, the government has committed to create a transparent, streamlined and user-friendly process for all stakeholders in prospective hydrogen projects. At the centre of this process will be a new Implementation Authority Office (IAO) which will oversee the auction of state-owned land, plan and implement procurement processes for infrastructure development, facilitate preparation and submission of all permitting and approval applications..

A fuller list of proactive disclosures and best practices in reporting along the entire chain of an oil, gas and mining project is available from the EITI Standard<sup>18</sup> and from guidance from the Natural Resources Governance Institute and the Open Contracting Partnership<sup>19</sup>. A key lesson from such disclosures is that the best practices involve understanding what stakeholders want to know and bringing key relevant information together in user-friendly formats to respond to those needs.

<sup>17</sup> See EITI Standard provisions on [Contract and license allocations \(2.2\)](#) and [accompanying guidance for practitioners](#).

<sup>18</sup> EITI Standard, <https://eiti.org/collections/eiti-standard> and EITI Guide, <https://eiti.org/guide-implementing-eiti-standard>.

<sup>19</sup> OCP and NRG (2018), Open Contracting for Oil, Gas and Mineral Rights: Shining a Light on Good Practice, <https://resourcegovernance.org/analysis-tools/publications/open-contracting-oil-gas-and-mineral-rights>

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.

### 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 industry grows, it will learn industry-specific lessons which will contribute to a subject matter specific body of best practice.

Pending further research and experience, green hydrogen projects can incorporate best practices from other related projects and sectors into their operating models. The non-exhaustive list in Annex 1 identifies guidance on best practices from IFC, OECD, EITI and other sources which are likely to be useful for project developers.

### 4. Key considerations for decision makers

Communities and local development needs are different for every project. How to engage with communities and citizens has no set formula that will work for every project.

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? If so, which ones?
  - Do they need to be supplemented with a Community Development Agreement? Which topics should be considered in such an 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 and why?
  - If there is no legal obligation to publish any project information, what is the minimum information that should be made public available in order to improve the dialogue with local communities?
  - Has this been agreed under the Host Government Agreement or other agreement with the host state (if there is one)?
- 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 expected return on paper can completely stall as a result of community opposition.

Community consultation, local development, and transparency are pillars on which any community engagement strategy must stand. Likewise, an engagement strategy will fail if the pillars are not afforded the time and attention they deserve. These issues should not be seen as afterthoughts to a long 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 considered.

A robust, independent community redress or grievance mechanism is key to mitigating risks and remedying any harms. Proactive transparency and disclosure of information which is timely, comprehensive, user-friendly, and put into accessible formats to reach stakeholders is another vital trust-building mechanism.

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. Consultations must be undertaken in a manner which promotes a two-way, good faith dialogue.

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 1: Guidance and standards on community consultation and transparency

### Best practice in impact assessment and consultation processes

- [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](#)
- [OECD Guidelines for Multinational Enterprises](#)
- [OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector](#)
- [OECD Guiding Principles for durable extractive contracts](#)
- ICMC [Community Development Toolkit](#)
- [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](#)
- [EO100 Standard for Responsible Energy](#)
- [Social Acceptance Index](#) developed by GIZ's Renewable Energy and Energy Efficiency Program in Chile
- [Requirements for the production and export of green-sustainable hydrogen](#), produced by Energy Partnership Chile - Alemania

### 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

- [Extractive Industries Transparency Initiative \(EITI\) Standard 2019](#)
- [Guide to implementing the EITI Standard](#)
- Global Reporting Initiative [Sustainability Reporting Standards](#)
- Sustainability Accounting Standards Board: [Extractives and Minerals Processing](#)
- CDP guidance. [How to disclose as a company](#)

[Open Contracting for Oil, Gas and Mineral Rights: Shining a Light on Good Practice](#) by the Natural Resources Governance Institute and the Open Contracting Partnership

## Annex 2: Model clauses based on international best practice

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').

### 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 or 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**

The model Transparency clause is not from the MMDA project, but instead comes from the report "Contracts Confidential: Ending Secret Deals in the Extractive Industries".

*"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."*

### 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](#)