

Extracting Innovations

Mining, Energy, and Technological
Change in the Digital Age

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Vignette: Local Level Agreement Making in the Extractive Industries—A Viewpoint on Context, Content, and Continuing Evolution

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CONTENTS

20.1 Introduction	267
20.2 A Context for Local Level Agreements: The Challenge of Diffuse Governance	268
20.3 Content and Considerations within Local Level Agreements	269
20.4 The Future: Protecting a New Approach from Old Habits.....	272
References.....	273

20.1 Introduction

For 30 years, the emerging political empowerment of land-connected people¹ in both developed and developing economies has presented a challenge to natural resource developers and sovereign nations that wish to simultaneously foster democratic forms of government and subnational economic development (Langton and Longbottom 2012; O’Faircheallaigh 2016). An innovation in social governance that has surfaced in response and continues to evolve is Local Level Agreements (LLAs).² LLAs are negotiated between resource developers and local land-connected peoples to secure,

¹ Land-connected peoples are defined here as social groups that have demonstrated residency and/or livelihood connections to definable geographic areas that have persisted over more than one generation. This include peoples labeled Indigenous, as well as multi-generational real property owners and others who have an emotional and/or spiritual attachment to the land in question. The land connection may involve exclusive or non-exclusive rights and frequently also include waters within the same geographic domain.

² There is a plethora of local agreement nomenclature, much of it value laden, including Community Development Agreements (CDAs), Impact Benefit Agreements (IBAs), and Indigenous Land Use Agreements (ILUAs). The generalised term Local Level Agreement (LLA) is preferred by the author.

under mutually agreed terms, consents and regional development pathways for resource projects and host communities. With many being embryonic, particularly in their implementation, there has been constant innovation in the detail of how LLAs are negotiated and structured to solve particular contextual challenges. LLAs hold much promise as an innovative approach for more direct, collaborative, and transparent interaction between extractive companies and host communities. To fully develop their potential, however, the temptation to impose “top-down” detailed prescription, often a result of involvement by governmental and multilateral policymakers, must be resisted in favor of regulatory oversight restricted to ensuring procedural and distributional fairness.

20.2 A Context for Local Level Agreements: The Challenge of Diffuse Governance

Globalization, among other things, involves a transformation of social geography. In nationalistic political contexts, governance takes a predominantly territorial form, with centralized authority claiming comprehensive, exclusive jurisdiction over a territory and its inhabitants. However, many people now have an opportunity to emphasize identities that supplement and, in some cases, override feelings of national identity. Under these conditions, local, regional, and identity groups have gained important degrees of freedom over their own governance and self-determination. At a substate level, this has involved a devolution of domestic powers from central state governance to more local and provincial forms; for example, the Scottish Parliament and the Welsh Assembly in the United Kingdom, and the Territory of Nunavut in Canada. The resurgence of Indigenous identification around the world, promulgated in sovereign laws that recognize Indigenous rights and interests, is a form of this evolving diffuse governance.

Devolved governance is not a new idea; it is central to the political science concept known as “subsidiarity,” a principle of social organization first formally described within the Roman Catholic Church in the nineteenth century. In its most basic formulation, it holds that social and political issues should be dealt with at the most immediate (or local) level that is consistent with their resolution. Successful resource developers have become comfortable with this idea, recognizing and making agreements directly with host communities. The challenge is convincing others, and particularly nationalist governments, that subsidiarity and LLA create optimal conditions for local social and economic development.

LLAs were originally conceived to govern resource development and other aspirations with land-connected Indigenous peoples in Common Law counties such as Canada, Australia, New Zealand, and Papua New Guinea.

LLAs are now evolving globally in a wide range of legal, cultural, and industry sector situations. They have been adopted in some form as a legislated requirement in more than 30 countries (Dupuy 2014) and international financial institutions increasingly recommend them as a condition of finance, often by reference to offered agreement templates or stipulated formats (World Bank 2012).

20.3 Content and Considerations within Local Level Agreements

The purpose and content of LLAs can vary significantly, from simple, non-binding, memoranda to complex, multifaceted contracts that run to hundreds of pages covering many areas of mutual concern and resolution, or hybrids of them (Rio Tinto 2015). Some examples of content are summarized here. Definitional aspects of LLA might include consensus on what constitutes “local” in the context being considered; governance and audit provisions for joint and delegated management bodies; complaints, disputes, and grievance resolution processes; formulation of evaluation criteria to measure agreed commitments; the expectations on relationships with other parties (e.g., governments); and the establishment of dedicated Trusts to receive funds for purposes specified within the agreement. A second content theme relates to shared and/or responsible use of land and resources, considering things like formalized compensation for loss of property and amenities; land and natural resource access and rent provisions (e.g., for water and forests); joint security and land access protocols; environmental co-management arrangements; shared access to major infrastructure (roads, harbors, airports); and consideration of post-closure land use. Methods of fostering closer integration of business and community are also usually an important consideration: for example, training and employment terms and targets for local people; commitments to engaging with local supply chains and business development; potential subsidiary business opportunities; equity provisions within the hosted business; and even partnering for lobbying regional and/or central government and other agencies. Finally, context-specific obligations might arise as being desirable for both parties, such as ensuring contributions to social and civic infrastructure (e.g., health clinics and scholarships) or resources and initiatives aimed at maintaining cultural heritage practices.

While the contents of resource development LLAs can be extremely varied, reflecting the context in which they are negotiated, certain vital principles have proven to be essential for successful implementation. The first of these is that agreements should center on proximal—most often land-connected—communities and their representatives, rather than provincial-level or national governments. It is also important that, regardless of the involvement

or non-involvement of governmental authorities, an institutionalized relationship is adopted: that is, a structured relationship between a local community group and a business as institutions is assumed, rather than LLAs being something agreed between certain individuals.

Second, the parameters and underpinning basis of LLA is, understandably, also key to their success. For instance, the concept of a “value exchange” must be established: specifically, there must be clear evidence of the mutual obligation on which local community support for a resource project is based and an agreement that all parties will commit to working toward achieving shared objectives. Relatedly, there should also be clear statements of community support for the resource development, describing the process by which community support for the resource project is given and the terms of that support, and vice versa. Expected outcomes should be clear, with measurable performance indicators and consequences for non-performance, but with scope for non-core implementation elements to be (collaboratively) revised relatively easily to match changing circumstance and learning arising out of implementation. These parameters provide communities and companies with well-defined, mutually agreed terms of who they are dealing with, toward what end, and how the success of the agreement can be monitored. In fact, LLAs frequently include more detail than prescribed in legislative requirements regarding the management of social and environmental interaction.

Experience has shown that the process of reaching agreement is as important as the LLA itself, reflecting people’s innate desire for “procedural fairness” as a precursor to trust (also a central facet in a company’s “social license to operate.” This has led to continuing innovation. For instance, it can be useful to reach subsidiary agreements along the way. These can include initial non-binding Memoranda of Understanding (MOUs), followed by agreements about process and interim agreements, before proceeding to a comprehensive agreement. Other options include the parties choosing to address specific themes or discrete geographic domains separately, reach agreement about each of them, and treat the amalgam of those agreements as a final composite LLA.

The approach to making LLAs needs to be quite different from the tactics frequently applied in negotiating agreements between commercial enterprises, which can be adversarial and aimed at securing a short-term transaction rather than a long-term relationship. In contrast, LLAs adopt a more reciprocal and incremental approach, reaching agreements along the way, which builds trust between the parties, and confidence in agreement making and their institutional capability. Such interim agreements are also a useful way to prototype longer term, substantive agreements. In most situations, it is useful to start with agreement on principles, process, and the definition of roles and responsibilities. Then the focus can shift to subject-specific areas where early agreement is most likely, before tackling resource-allocation and more onerous obligations. The “ultimate” LLAs can be comprehensive

and reflect the joint resolution of all areas of mutual interest between a business and a local community group, as well as transparent implementation commitments and institutional arrangements for the parties' ongoing relationship.

In the longer term, LLAs need to be flexible and allow for the reality of inter-generational social flux and changes in the business over time. Flexibility needs to be simultaneously balanced against a business's need for certainty for the life of its operations. One way to achieve this balance is to structure a comprehensive LLA in components. The overarching, "umbrella" component includes only those core elements that will remain constant. This component can be supported by a suite of annexures that represent stand-alone, binding management plans, each capable of being independently updated by agreement of the parties as required. The advantage of this innovation is that operational components of the LLA can be varied, while leaving the core financial, legal, and governance elements immutable.

While many LLAs have been successful in creating governance conditions that support stable and predictable societal conditions at a local level, thus enabling extractive businesses to operate through generational transition without social conflict, some have unfortunately failed to achieve this balance. LLAs generally fail when agreement making has been approached expediently as a commercial transaction to be completed as quickly as possible without much thought to implementation and governance. As such, it would appear that the ethos and implementation of LLAs are inextricably linked.

A refined understanding is required of the governance imperatives that need to be in place to ensure long term stability and success. This requires a spectrum of measures, the most important of which include, first, balanced representation, where there is an insistence that representatives from various credible community sub-groups, such as women, youth, elders, and church, are all present on governance committees. Second, the agreement should emphasize cultural fit and endowment, in which governance arrangements have enough traditional resonance in place to ensure customary self-regulating behavior. Third, the agreement should be "broad-spectrum," being comprehensive in its scope and not overly focused on cash benefactions even when these are present. Finally, a series of checks and balances being in place, which might include various sub-bodies set up with responsibilities for different aspects of an LLA, with specific powers in that regard and a mutual ability to keep each other in check alongside formal custodial and independent provisions, such as custodial trustees and fiscal fiduciary arrangements. Collectively these measures provide for a form of power separation like company governance, where executive functions are separate to and constrained by "wise heads" situated at board/policy level.

Such arrangements provide a good governance mesh that prevents intemperate decision making, dishonesty, and factional capture. While they can also be bureaucratic and prevent fast action, to a large extent this is the point.

That is, it is better to stifle the potential for corruption of public office and goods, and leave innovation to flourish in the private realm of individual families, people, and enterprises. Such are the lessons of thousands of years of history, by trial and error, gradually evolving political order for increasingly complex social contexts. The lessons are available for selective innovation to fit local circumstance by adjusting scale, scope, and “contextual fit.”

20.4 The Future: Protecting a New Approach from Old Habits

The frequency of community conflict with resource projects and the negative consequences for resource developers and affected communities has increased in the past two decades (Davis and Franks 2014), demonstrating that resource developers can no longer rely on central government decree for ongoing consent and the operational certainty they need. In response, LLA-making is spreading and evolving rapidly as developers and governments realize it addresses local aspiration and mobilizes the power of self-destiny without threatening national sovereignty (O’Faircheallaigh 2013). In short, demonstrating an earned social license is increasingly a necessary pre-condition for the issuance of a legal license. The innovation of LLAs does this and meets the diffuse governance needs of a globalizing world while promoting the ability of local peoples to govern their own lives. Indeed, the idea is catching on beyond the resource sector; other industries, service groups, NGOs, and governments are adopting LLA approaches.

The direction of LLA innovation will, pragmatically, be governed by experiment, and some LLA processes will be more successful than others. Experience suggests that placing the principle of procedural and distributional fairness, as determined by all parties, ahead of prescribed content is necessary to form sustainable LLAs. Currently, however, much of the LLA experimentation is unfortunately going in the other direction. A recurring trend among many governments in Africa, Asia, and South America (Chilenye 2016), and even in international agencies, is to mistakenly work from the idea that their regulatory role is to dictate terms and content by prescription and offered templates. This approach effectively re-appropriates the local empowerment that LLAs seek to promote.

Regulation and policymakers should instead focus on ensuring procedural equity, allowing the LLA parties to reach their own accommodation relevant to circumstance, not some deemed universality. Procedural equity means governments and financial institute umpires should focus on ensuring all parties have equal access to advice, representation, and resources to counterbalance each other. Achieving power balance is the key to successful and appropriate LLA outcomes. Attempting to prescribe the content of LLA is antithetical to innovation. Conversely, focusing on creating an open-ended and fair playing

field creates conditions for infinite innovation. LLAs and diverse processes for making them will continue to open opportunity for resource developers, other enterprises, and host communities, but only where the latter conducive conditions prevail.

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