



**The  
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# Journal

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Caroline Trum

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# THE FOUNDATION JOURNAL

## FOR NATURAL RESOURCES AND ENERGY LAW

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## PREFACE

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Alex Ritchie  
Executive Director

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# Time to Stand Up: Elevating Human Rights in Joint Venture Legal Agreements

by Neetin Gulati, James Bamford, Tracy Branding Pyle, and Kaitlyn Rentala  
Ankura Consulting Group, LLC  
Washington, D.C.

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## I. INTRODUCTION\*

Today, companies are under extreme pressure to improve environmental, social, and governance (ESG) performance. For mining and other firms whose operations are often located in remote geographies, may interfere with indigenous peoples' lands or existing communities, and involve inherently dangerous activities, protecting human rights and building productive relationships with local communities are fundamental to maintaining a firm's social license to operate. To date, most mining companies have focused their human rights and community engagement efforts and reporting on wholly owned and other operated or controlled assets, believing that such operations both expose the firm to higher risks and provide greater ability to mitigate those risks.

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\* Neetin Gulati is a Senior Director, James Bamford is a Senior Managing Director, Tracy Branding Pyle is a Managing Director, and Kaitlyn Rentala is a former Business Analyst, within the Joint Venture and Partnership practice of Ankura Consulting. The authors would like to thank their Ankura colleagues Marta Bayarte, Lois Fernandes D'Costa, Joshua Kwicinski, Kira Medish, and Saadhika Sivakumar for their supporting analysis, and Reg Fowler for his thoughtful comments on this article.

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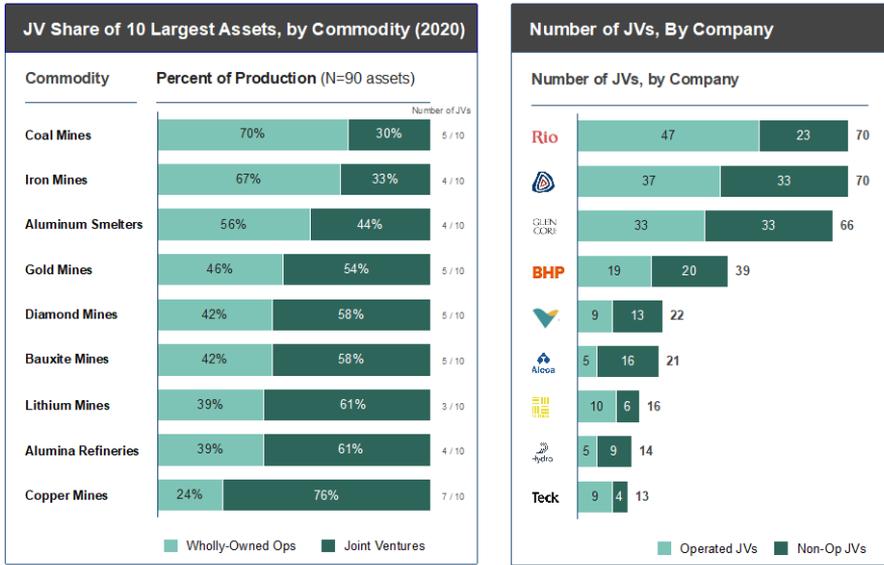
But these efforts are insufficient as they do not address investments in which the company holds a minority or non-operating position. While mining companies may address these issues in their non-operated joint ventures (JVs)<sup>1</sup> on an ad hoc basis, most have not yet focused systematically on human rights and community engagement issues in this asset class.

Now is the time to do so. Why? First, JVs are highly material to the mining sector. Mining industry JVs employ or otherwise impact hundreds of thousands of people; the largest JVs in the industry, such as Debswana, Escondida, Grasberg, Oyu Tolgoi, and PT Vale Indonesia, each directly employ several thousand people—and, in some cases, far more. Relatedly, JVs also account for a material share of production across major mining commodity groups and are highly prevalent in the holdings of many global mining firms (Exhibit 1). For instance, of the 10 largest copper mines in the world, 76% of production comes from JVs. Similarly, most major mining companies, including Rio Tinto, Anglo American, Glencore, and BHP, hold portfolios of 20 or more JVs, many of which are non-operated. While many global mining companies would prefer to invest in wholly owned or operated assets, numerous forces are driving them in the opposite direction. Many of the best mineral resources are in high-risk geographies with strong nationalistic sentiments and ambitions to have local assets majority owned by local partners. At the same time, lower cost and aggressive Chinese competitors are vying to develop and operate assets around the world. Taken together, this means that Western mining companies are likely to enter more—not fewer—JVs that they do not operate.

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<sup>1</sup> We use the phrase “non-operated JVs” for consistency across this article. Other terms commonly used include non-controlled JVs, non-managed JVs, partner-operated JVs, and operated-by-others (OBO) assets. These non-operated ventures may be incorporated JVs with separate legal entities or unincorporated JVs in which no new legal entity is established. In some cases, these ventures may be operated by one partner, while in others the JV itself may be the operator.

**Exhibit 1: Importance of JVs in Mining Industry**



Source: Ankura Metals & Mining Database

Second, investors, advocacy groups, and other external stakeholders are waking up to the fact that non-operated JVs are critical to the ESG profile of natural resource companies. For instance, in 2020, the Environmental Defense Fund and Rockefeller Asset Management published *Emission Omission* highlighting that most international oil companies fail to report methane emissions from their non-operated JVs, creating an incomplete accounting of emission.<sup>2</sup> Such scrutiny towards non-operated assets is expanding into other ESG topics and sectors. In 2021, Human Rights Watch published a report on the aluminum supply chain that highlighted human rights issues at bauxite mines in Guinea, including Compagnie des Bauxites de Guinée SA (CBG), a long-standing JV between the Guinean government and a holding company majority-owned by Rio Tinto and Alcoa.<sup>3</sup>

Third, and related, companies are now facing direct pressure and demands from customers, lenders, and regulators to provide guarantees and disclosures regarding human rights and other ESG performance measures, which extend to JVs. For instance, some European governments, including Germany, are now mandating that large companies conduct human rights and environmental due diligence within their supply chains, which means that mining JVs can expect to be questioned by their customers about human rights and environmental issues and the results of such diligence could affect demand for prod-

<sup>2</sup> Env'tl. Def. Fund & Rockefeller Asset Mgmt., "Emission Omission: A Shareholder Engagement Guide to Uncovering Climate Risks from Non-Operated Assets in the Oil and Gas Industry" (Oct. 2020).

<sup>3</sup> Human Rights Watch, "Aluminum: The Car Industry's Blind Spot" (July 22, 2021); see also Human Rights Watch, "What Do We Get Out of It? The Human Rights Impact of Bauxite Mining in Guinea" (Oct. 4, 2018).

ucts. In February 2022, the European Commission issued its Proposal for a Directive on Corporate Sustainability Due Diligence to address human rights and environmental impacts across global value chains.<sup>4</sup> The proposed directive imposes a corporate due diligence requirement on both European Union (EU) and non-EU based companies to identify and remedy adverse human rights and environmental impacts caused by their own operations, their subsidiaries, and their value chains, including JVs and other investments.<sup>5</sup> Similarly, the International Finance Corporation (IFC), a key source of capital in many mining projects, requires borrowers to comply with its Environmental and Social Performance Standards (IFC Performance Standards).<sup>6</sup>

Finally, mining companies have publicly committed to endeavoring to implement high-quality standards in their non-operated JVs. Top mining company codes of conduct include language such as “This Code applies to everyone working for and with us, from our employees and contractors to our partners” and “We encourage our non-operated joint ventures and minority interests to adopt similar principles and standards to [the company’s].” If companies are not in fact engaging with partners and JV companies to ensure responsible practices with respect to human rights and local communities, they are ignoring their own codes of conduct.

So, whether due to the materiality of JVs to mining companies, pressure related to ESG, or internal policies and procedures, it is no longer an option for non-operating partners to be passive and hope their JVs are adequately addressing human rights and community engagement issues.

This article first discusses the levers JV partners can use to oversee and improve human rights and community engagement issues in their non-operated JVs. It then examines one of these levers—JV legal agreements—to show (1) what human rights and community engagement-related terms JV partners have historically included in JV agreements and related resource extraction contracts between the JV and host government, and (2) ways non-operating partners can use legal agreements in the future to up their game related to these important ESG topics. While this article is principally aimed at those negotiating new JV agreements, company boards and executive leadership teams can also benefit from it as it can provide a better understanding of how to oversee human rights and community engagement issues and can provide a framework for benchmarking JV contractual terms when evaluating new deals brought forward for approval.

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<sup>4</sup> European Commission, Proposal for a Directive of the European Parliament of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, COM(2022) 71 final (Feb. 23, 2022).

<sup>5</sup> For further discussion, see Reg Fowler, “Corporate Social Responsibility and Joint Venture Governance—The Forgotten Issues,” 14 *J. World Energy Law & Bus.* 297 (2021).

<sup>6</sup> The IFC Performance Standards cover eight topics: (1) risk management, (2) labor, (3) resource efficiency, (4) community, (5) land resettlement, (6) biodiversity, (7) indigenous people, and (8) cultural heritage. See IFC, “IFC Performance Standards on Environmental and Social Sustainability” (Jan. 1, 2012).

II. OVERVIEW OF LEVERS AVAILABLE TO NON-OPERATING PARTNERS

Non-operating JV partners have three primary levers—due diligence, contract terms, and governance—to promote and protect human rights and community engagement performance in JVs (Exhibit 2).



\* Applicable in concession / license agreements between JV co-ventures and host governments in certain industries, including oil & gas and mining  
Source: Ankura Analysis

The first lever, due diligence, informs both *whether* and *how* to do the deal. Due diligence is customary before entering into any transaction and may cause a company to walk away from a venture because of intolerable human rights or community risks, or to structure the transaction in such a way as to mitigate against those risks. Historically, many companies’ human rights due diligence has been a surface-level investigation into the prior actions of the partners, such as past human rights abuses, local community disputes, and impact on land and water. Going forward, companies’ due diligence will likely need to go deeper, investigating broader topics such as treatment of migrant and contract workers, conflicting land claims, and the human rights records of security forces, paramilitaries, and law enforcement. In addition, companies should go beyond a desk-based review of documents and court cases to include onsite due diligence that could involve interviews with local community members, employees, contract workers, NGOs, and subject matter experts, as well as discussions with the operating partner’s co-venturers in other JVs. On-site community engagement is also an important part of obtaining free, prior, and informed consent from impacted communities. Furthermore, companies will be increasingly expected, and in some cases legally required, to look to the future—conducting diligence on potential adverse human rights and local community impacts that the venture’s operations will have. For example, companies should examine whether the venture’s operations will threaten cultural heritage sites, require community resettlement, or impact water and land resources that communities rely upon for their livelihood. If there are such im-

pacts, companies should ask what remediation options exist and how such options impact the feasibility and risks of the transaction.

The second lever, contract terms, relates to the foundational agreements for the JV—specifically, the JV agreement among the co-venturers and the concession agreement between the co-venturers and the host government giving the co-venturers the right to operate on and extract resources from the land. Contract terms can protect both the company entering into the JV and the rights of people working in or living around the venture. For instance, representations and warranties and indemnities can protect the company investing in the venture from preexisting issues. By contrast, terms requiring the JV to meet certain human rights standards or to have an executive dedicated to ESG are intended to prevent future violations of human rights or conflicts with the community. By including robust and potentially creative terms in the legal agreements at the time of the deal, non-operating partners can test co-venturers' and the host government's shared commitment and values to human rights and local communities, and secure guarantees, rights, protections, and leverage that are *simply not available post-close*. Once the deal is signed and absent such contractual rights, a non-operator's access to information, leverage, and decision power may fall precipitously.

The third and most commonly used lever is governance. Non-operating partners use governance channels, such as the JV board and committees, to monitor human rights and community engagement issues and to improve JV workings in these areas as needed. The challenge of using governance channels is that a non-operating partner has a limited ability to implement desired changes unilaterally. Instead, most changes involve alignment among partners and/or influencing the JV management team or operator.

This article focuses primarily on the second lever, contract terms, though these terms are informed by due diligence and enable post-close governance.

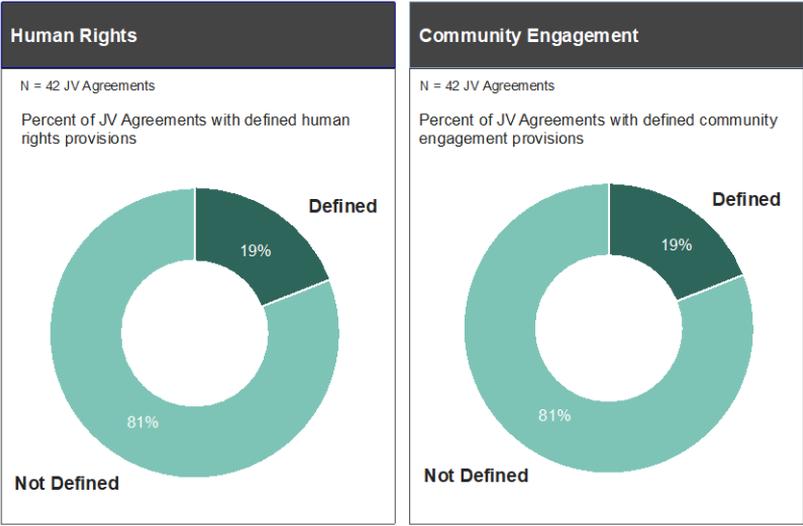
### III. BENCHMARKING ANALYSIS OF CONTRACT TERMS

We reviewed the legal agreements of 62 mining JVs to better understand terms related to human rights and community engagement. Of these, 42 agreements were JV agreements between the co-venturers setting forth how the partners would operate and govern the JV. The remaining 20 agreements were resource extraction contracts, also called concession or license agreements, between the co-venturers and the host government that provide the JV with a license to extract minerals from and operate on the land. We reviewed these agreements and looked for any clause directly or indirectly related to human rights or community engagement, including those related to performance standards, company assessment and audit rights, reporting, voting and governance, management appointment rights, and representations and warranties.

We found very few clauses relating to human rights or community engagement in the JV agreements reviewed (Exhibit 3). Out of the 42 JV legal agreements, only 19% included *any* provisions that explicitly referenced human

rights topics.<sup>7</sup> And when agreements referenced human rights, they typically addressed only one or a small subset of human rights issues, and often not very well. For example, the agreement for a bauxite mining venture in Africa required the JV to provide sanitary coverage and living quarters for personnel and to comply with World Bank guidelines when resettling communities. However, the agreement did not address security around the JV perimeter, the JV having a grievance mechanism for complaints, what code of conduct or other human rights-related standards the JV should have, or any other provisions related to human rights.

**Exhibit 3: Prevalence of JV Agreement Clauses by ESG Category**



Source: Ankura Joint Venture Database; Ankura Analysis

Similarly, only eight of the 42 JV agreements included any community engagement-related clauses,<sup>8</sup> and those that addressed community relations did so in short requirements about varied topics. For example, clauses related to community engagement ranged from requiring employment of local personnel, to requiring the JV to fund local community projects, to prohibiting the displacement of objects of cultural significance without government authorization. Thus, JV agreements neither consistently nor holistically addressed human rights and community engagement. The reason for the lack of terms may be as simple as that the partners assumed they would address such matters

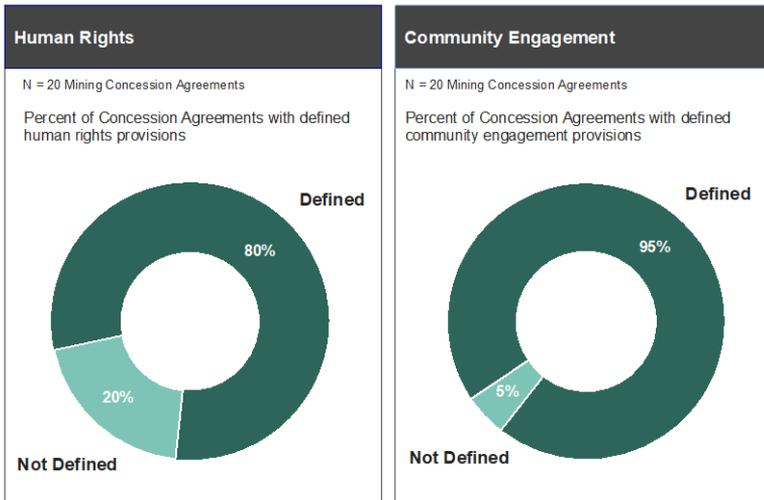
<sup>7</sup> For purposes of this article, human rights topics include avoiding modern slavery, avoiding child labor, mitigation of adverse economic impacts, managing security of property and workers, avoiding involuntary resettlement, obtaining consent from indigenous peoples, providing fair pay and working hours, and promoting workplace diversity.

<sup>8</sup> For purposes of this article, community engagement topics include protecting cultural artifacts, supporting local community projects, giving preference to local workers, community access to natural resources, implementing a workforce training programs and providing educational opportunities for local people, engaging with NGOs, and having community forums.

through the JV’s governance system, or these topics were not top priorities when these JV agreements were entered into, which may have been decades ago.

We also reviewed 20 mining concession agreements for terms related to human rights and community engagement (Exhibit 4). These agreements contained far more terms related to these topics than JV agreements, with 80% of agreements referencing human rights and 95% referencing local communities. Yet here as well, terms varied widely, and agreements typically only addressed one or two human rights or community engagement issues. For example, with respect to human rights, some agreements referenced resettlement, others security, and other standards the JV must adhere to, but no agreement addressed all three topics. A similar picture emerges on community engagement topics. Some concession agreements reference hiring local workers, others community development programs, and others protection of cultural artifacts. Yet only one agreement addressed all three of these community engagement topics. Requirements to use local workers was the most prevalent clause found in these agreements related to community engagement.

**Exhibit 4: Prevalence of Concession Agreement Clauses by ESG Category**



Source: Ankura Joint Venture Database; Ankura Analysis

In mining and other extractive industries, it is essential that co-venturers secure explicit buy-in from the host government on the approach to human rights and local communities. In fact, strong language in the JV agreement, when coupled with weak or missing language in the concession agreement, has the potential to leave co-venturers *worse off* than having no language at all in the JV agreement. The reason is twofold. First, implementing strong human rights and community management practices often requires the explicit support, or at least the nodding acceptance, of the host government. In some jurisdictions and venture structures, the host government may have the formal right to approve the annual plan and budget for the venture, and thus could

impact the strategy and spending on ESG compliance. The host government may also have the right to approve certain third-party contracts, and indeed may own or control key local suppliers, including security services. The host government will also play a direct role in enforcing its laws, including investigating human rights abuses and local community complaints, and may challenge the co-venturers in their right to perform their own investigations into suppliers or other third parties. Second, if the JV confronts any human rights or local community problems, civil society and other external stakeholders will invariably turn to the co-venturers and rightfully assert that they knew the standards, and indeed defined the standards in the JV agreement. External groups are unlikely to understand or care about the subtle role of the host government in approving or implementing human rights or local community practices. Rather, external groups expect JV partners, including non-operators, to use their leverage to persuade the operator and, where needed, the host government to do better. Partners cannot stop because their leverage has not worked. Today, the expectation is that partners in a JV will use their leverage to change the outcomes, and if they fail, they will pull out of the venture. By including strong human rights and other ESG expectations in the concession agreement, co-venturers secure a formal commitment from the state to meet defined standards. Of course, a company cannot force the host government to comply with its own laws or agreements, but at least there is an agreed promise.<sup>9</sup>

#### IV. DRAFTING CONSIDERATIONS

While mining companies have not historically included human rights and community engagement related terms in their JV legal agreements, doing so can provide a non-operating partner with the rights and protections it needs to influence the JV to adopt strong human rights and community engagement practices in the future.

Below we provide guidance for non-operating partners to consider, organized into 10 deal terms that JV partners should negotiate for that provide protections, transparency, and influence with respect to human rights and community engagement. When combined with due diligence and robust governance practices, such legal terms should allow a non-operating partner to meet its own performance expectations, fulfill emerging legal duties of care, and provide comfort to external investors and other stakeholders.<sup>10</sup>

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<sup>9</sup> For a more fulsome discussion on this theme, see Fowler, *supra* note 5.

<sup>10</sup> Prior to drafting contractual terms, it may be beneficial for the parties to align to a set of key business principles that establish their shared philosophy with regard to how the JV will operate. Typically, such principles are aspirational in nature, and include statements regarding partner roles, the operating model, health, safety, environment, human rights, and community engagement. Examples of such principles include “adopt a goal zero approach: zero safety incidents, zero accidents, and zero environmental releases;” “achieve carbon neutrality by 2040;” and “have a transformational impact on local communities where the joint venture operates.” To give these principles status, they can be memorialized as a schedule to the JV agreement or approved as a day 1 board resolution. However, while key business principles can be valuable to ensure the parties are

### A. Performance Standards

Contract terms that establish what human rights and community engagement standards the JV will adhere to are critical to aligning partners on how the venture will operate and providing partners with a basis for assessing performance and holding all parties to account. Such standards also establish a valuable benchmark for lenders and insurers.

Co-venturers have various options for how to incorporate such standards into the legal agreements. Such options include (1) being silent, and determining the approach post-close through board or management decision; (2) setting the explicit expectation that the JV will comply with all local laws and regulations (i.e., explicitly reinforcing that which is implicitly the case); (3) requiring the JV to adhere to “good mining industry practice”; (4) requiring the JV to meet the operating partner’s own corporate standards (relevant when the JV will be operated by one partner, rather than an independent entity and management team); (5) requiring the JV to adopt a non-operating partner’s corporate standards; (6) requiring the JV to meet established international standards, conventions, or guidelines; and/or (7) developing venture-specific standards to be agreed pre-close.

In general, non-operating partners are advantaged by securing terms with greater specificity. Remaining silent on human rights and community engagement standards or agreeing only to standards linked to meeting potentially weak local laws or undefined “good mining industry practice” provides non-operating partners with limited rights or protections. While explicitly requiring the venture to adhere to the operator’s own corporate standards may provide greater comfort—especially when the operator is a known and highly reputable international company—it still leaves the decision about these standards in the hands of the operator, who could have a different view on what investment and activities are or are not acceptable.

A stronger contractual approach is to include an operating covenant committing the venture to uphold international standards that the co-venturers feel are applicable. There are a number of international standards and frameworks that could be referenced, such as the United Nations (UN) Guiding Principles on Business and Human Rights,<sup>11</sup> the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises,<sup>12</sup> the UN Global Compact,<sup>13</sup> the UN Sustainable Development Goals,<sup>14</sup> and relevant Modern Slavery Acts.<sup>15</sup> While such international standards are a valuable

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aligned early in the negotiation process and broadly agree on how a JV should be managed, they are not substitutes for more specific performance standards that can be used to audit against.

<sup>11</sup> UN, *Guiding Principles on Business and Human Rights* (Jan. 2011).

<sup>12</sup> Originally adopted in 1976, the OECD Guidelines for Multinational Enterprises were most recently updated in 2011. OECD, *OECD Guidelines for Multinational Enterprises* (rev. ed. 2011).

<sup>13</sup> UN, “The Ten Principles of the UN Global Compact,” <https://www.unglobalcompact.org/what-is-gc/mission/principles>.

<sup>14</sup> UN, “The SDGs explained for Business,” <https://www.unglobalcompact.org/sdgs/about>.

<sup>15</sup> Examples include the UK Modern Slavery Act (2015), the Australian Modern Slavery Act (2018), and the California Transparency in Supply Chains Act (2010).

starting point, they may not be specific enough for performance audits or to provide a non-operating partner with sufficient overall comfort. To fill that gap, co-venturers might incorporate explicit references to more detailed human rights-related standards that have been created and adopted by industry or other groups like the International Council on Mining and Metals (ICMM).<sup>16</sup> Additionally, the co-venturers should also define how the parties will reconcile differences between local laws and international standards should they arise. Finally, if the co-venturers are unable to agree on a specific performance standard for the JV, they should, at a minimum, agree on *the process* for establishing such standards, including how the decision will be made, by when, and by whom, and what happens if no agreement is reached.

To further ensure compliance with the chosen performance standards, the JV agreement should also set a performance standard for the JV's suppliers, subcontractors, and other third parties. This standard should be the same human rights and community engagement standard to which the venture itself is held.<sup>17</sup> To guarantee the host government is onboard with the chosen performance standard, any concession agreement with the host government should also reference the standard.<sup>18</sup>

### *B. Assessments, Certifications, and Audits*

A company contemplating a non-operating position in a JV will want to ensure that the venture is adhering to the agreed standards and supporting policies and procedures. Thus, a non-operating partner should seek to include assessment, certification, and audit-related provisions in the JV agreement. This is particularly critical when the agreed standards go above and beyond

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Other international standards include the Voluntary Principles on Security and Human Rights, the International Labour Organization (ILO) Indigenous and Tribal Peoples Convention, and the UN Declaration on the Rights of Indigenous Peoples.

<sup>16</sup> ICMM, "Mining Principles," <https://www.icmm.com/en-gb/about-us/member-requirements/mining-principles>.

<sup>17</sup> The JV agreements could also require the JV or operator to conduct regular human rights due diligence on its suppliers, with the findings and actions taken in response to the findings made available to all co-venturers. In the case of one company, their supplier due diligence process included confidential interviews with employees and contract workers, thorough reviews of legal, recruitment and human resources documentation, and comprehensive questionnaires for management and workers at the supplier on the full range of ESG issues. While this level of diligence may sound like a lot of work, the company viewed it as necessary considering the reputational risks from working with suppliers and other third parties worldwide.

<sup>18</sup> In the mining and other extractive industries, concession agreements provide license holders with certain exploration and development rights in exchange for meeting certain obligations. In most developing economies, these obligations typically include requirements related to tax and royalty payments, local sourcing, local community investments, and host government approval of annual plans and budgets. In other words, very little human rights and local community investment and action happens without at least the nodding acceptance—if not active support—of the host government. Therefore, securing the buy-in of the host government, even if only on paper, is quite important. Absent such a reference to a defined human rights standard in the concession agreement, co-venturers may find that the host government may block the venture from performing certain human rights or local community-related activities or be unwilling to allow the venture to treat costs as recoverable under the tax or royalty regime.

what is required by local law or when the host government's monitoring and enforcement capabilities are not robust.

How might the parties define these rights in the agreements? For starters, the co-venturers might agree that the operator is required to conduct human rights and community impact assessments on a regular basis, such as every two years or prior to commencing any significant activities, including large capital projects, with the JV board receiving the results. The agreements might also specify that such assessments will be performed by reputable independent experts agreed by the JV board. Companies might also consider contractual terms to require the JV to seek membership in—and be certified by—an internationally-recognized industry group, such as the Aluminum Stewardship Initiative (ASI)<sup>19</sup> or the Initiative for Responsible Mining Assurance (IRMA).<sup>20</sup> Such memberships would typically require the member to periodically submit to assessments, which the JV could use as a benchmark for improvement.<sup>21</sup> Finally, the JV agreement might provide individual partners with the right to conduct their own human rights and community engagement audits at any time, subject to reasonable notice, and specify that such audits may include site visits, access to management and other relevant stakeholders, and receipt of relevant information and data.

### *C. Reporting*

Few agreements we reviewed included requirements to report on human rights or community engagement metrics. One exception was a concession agreement that required the JV to “notify the Government promptly of any death of or serious injury to any employee of the Company or any of its contractors or any other persons that occurs as a result of Operations.” However, even this agreement included a narrow set of metrics and no requirement to report to JV partners.

Despite lack of extensive precedent, it is certainly possible for the parties to pre-agree that the JV board and any non-operating partner will receive regular reports and information on human rights and community engagement, and to define certain metrics to be reported.

While such metrics defined in the legal agreements will vary based on the particular issues confronting the JV, they might include the number of people resettled; water quality in local communities; number of community complaints or grievances; time to respond to complaints; percent of complaints resolved; number, severity, and type of local community incidents; percent of

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<sup>19</sup> ASI, “Standards for the Aluminum Value Chain,” <https://aluminium-stewardship.org/asi-standards>.

<sup>20</sup> IRMA, “The Standards for Responsible Mining,” <https://responsiblemining.net/resources/#full-documentation-and-guidance>.

<sup>21</sup> Many industry groups have established human rights and community engagement standards that could serve as the contractually referenced performance standard for the JV, as described in the prior section. Depending on the thoroughness of an industry group's standard, it may be preferable to require the JV to become a member of such organization and be certified by them, using the results to guide an improvement program.

JV employees receiving human rights training; percent of JV employees who are from the local community as opposed to brought in from other areas; and benchmarks on employee remuneration, benefits, and working conditions. The JV agreement may address both the nature and frequency of such reporting, as well as how such reporting may change over the lifecycle of the venture.

#### *D. Voting and Governance*

A non-operating partner's ability to influence the JV's ongoing approach to human rights and community engagement will be determined in part by its voting rights—either directly as a shareholder or through its representatives on the JV board.

Non-operating partners might seek to secure approval or veto rights on *general matters* (e.g., the annual operating plan and budget, material third-party contracts, selection of auditors) that affect spending and other decisions that impact human rights and community engagement. A separate analysis we conducted showed that most minority partners in JVs have more negotiating leverage than they realize and that a firm's ownership stake does not dictate, nor even correlate with, the voting rights it receives.<sup>22</sup> Said differently, a 20% owner is just as likely to have approval rights on key operating decisions as a 49% owner. What voting rights a company secures is a function of its negotiating prowess and leverage, not its contributions or ownership interest.

Additionally, a non-operating partner might seek approval or veto rights on *decisions specific* to human rights and community engagement. For instance, the venture agreements might require the JV to establish specific policies or plans—such as a code of conduct, human rights policy, indigenous peoples and cultural heritage policy, and community engagement plan—and require the affirmative approval of all partners to adopt or modify such policies and plans.<sup>23</sup> For example, the JV agreement for a South American copper mine requires the JV board, including non-operating partner-appointed directors, to approve business policies including with respect to environmental matters, health and safety, business ethics, hiring and human resources, and community development. Similarly, approval or veto rights could also include the right to approve plans related to resettlement, remediation, or other projects with potentially significant human rights implications.

Ideally, the non-operating partner's vote would be required to approve the adoption of or changes to these policies, particularly if the JV operator or the majority partner in the JV is likely to have a different view about human rights matters. However, if a partner is a significant minority in a multiparty JV (e.g., a 15% owner in a JV with six partners), alignment with other partners may be required to veto or approve a decision about these items, which may be challenging or even impossible (e.g., a 15% owner in a JV with six partners may

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<sup>22</sup> See Lois Fernandes D'Costa, Tracy Branding Pyle & James Bamford, "Small Stake, Big Voice," *MIT Sloan Mgmt. Rev.* (Aug. 19, 2021).

<sup>23</sup> Ideally, the parties would draft and agree, as a condition of closing, on one or more of the actual policies.

need another partner to agree with its position in order to block adoption of a human rights policy if the voting threshold for adoption is 75% of interests in the JV). While formal approval rights provide the strongest protection, there are also benefits to a minority partner to having a key decision approved by the board by simple majority. That at least affords the minority partner with visibility into the decision and a voice in the discussion, as well as a chance to log its negative vote in the board minutes.

Beyond voting, a non-operating partner may wish to memorialize in the agreements that the JV board include a sustainability committee (or equivalent body) charged with first-line governance of human rights and community engagement. Additionally, the agreements might specify that the committee is to be chaired or co-chaired by the non-operating partner on a rotational or permanent basis, and even include independent advisors with expertise in human rights and community engagement. Because JV boards typically are composed of executives with finance, commercial, or operating backgrounds, a well-designed sustainability committee, composed of subject matter experts, can bring needed focus and expertise to social management issues.<sup>24</sup>

#### *E. Management Structure and Appointment*

Our analysis showed that almost 20% of mining JV agreements provide one or more partners with the right to nominate or appoint individuals to specific positions in the venture, generally with the expectation that such “reserved slots” will be filled with parent company secondees (i.e., loaned employees).<sup>25</sup> By having the right to place a known, highly qualified individual into a key role, a non-operating partner is able to gain added transparency into day-to-day operations and assurance that its expectations are being translated into action on the ground.

As such, a non-operating partner might seek the right to appoint individuals into roles that oversee human rights and community engagement. These roles may be a Chief Sustainability Officer, Head of External and Community Affairs, or Head of Human Rights. Similarly, a company might have the right to nominate individuals into general management roles, such as the CEO, CFO, COO, General Counsel, or Chief Human Resources Officer, who have significant sway on human rights and community engagement decisions in the JV.

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<sup>24</sup> For additional discussion on JV governance, see James Bamford et al., “Joint Venture Governance Index: Calibrating the Strength of Governance in Joint Ventures,” *Harvard Law School Forum on Corporate Governance* (Mar. 12, 2020); James Bamford & David Ernst, “Governing Joint Ventures,” *McKinsey Quarterly* (2005 spec. ed.); James Bamford & David Ernst, “CalPERS Global Governance Principles: Joint Venture Governance Guidelines,” *CalPERS* (Mar. 16, 2015); and James Bamford, Tracy Branding Pyle & Lois D’Costa, “Public Company vs. JV Governance,” *Harvard Law School Forum on Corporate Governance* (Dec. 28, 2019).

<sup>25</sup> The prevalence of such management appointment rights in the mining industry is lower than what we see in other industries. A cross-industry analysis showed that 63% of JVs have at least one management position reserved for a shareholder. See Jason Reid & James Bamford, “Reserved Seating and Open Tables: Staffing Management Positions in JVs,” *The Joint Venture Exchange* (Dec. 2019).

In cases where a partner cannot negotiate for a reserved slot, fallback positions include securing an approval or veto right over a nominee to one of these key roles, or simply requiring that certain full-time human rights and community engagement leadership positions exist in the JV. Agreements we reviewed included requirements for positions such as a Chief Internal Auditor reporting to the JV board that would presumably also audit human rights-related policies and procedures. However, more ESG-specific positions could be created to elevate the importance of these issues within the JV.

In addition, the JV agreement or a business plan agreed by partners concurrently can require there to be adequate resources in the JV to address human rights and community engagement challenges. Ideally, the contractual language would make it clear that such positions will be adequately resourced to allow the venture to live up to the owners' and venture's commitments on human rights and community engagement.

#### *F. Owner-Provided Services and Other Direct Support*

If a non-operating partner is particularly worried about human rights and community engagement risks, it might seek to contractually agree that it will provide services or other direct support to the JV, either on a permanent or temporary basis. Owner-provided services appear in more than 85% of JV agreements, and it is not uncommon for non-operating partners to provide such services, whether to independent JVs or those operated by one of the partners.<sup>26</sup> Non-operating partners might provide entire functions (e.g., external affairs, sustainability, procurement, internal audit, human resources) to the JV under a master service agreement, or provide more targeted services to support higher-risk activities (e.g., resettlement program management or security services). For example, in an African platinum JV, a non-operating partner provides supplier due diligence services to the venture, while in a South American copper JV, the non-operating partners jointly provide the internal audit function to the JV. In addition to providing such support directly through a formal service agreement, a non-operating partner might additionally agree to provide technical advisors to the venture or agree to provide on-call "help-desk" support and tools to the venture more on a "pull" basis.

The nature and scope of owner-provided services will vary based on the salient issues the JV is facing and is best done for services where there are doubts that the JV operator has the capability to properly implement the services to the performance level expected by the venture partners. Considering that many human rights issues involve labor policies, human resources may be an appropriate function where an owner might provide services and ensure the JV operates in a manner that complies with the ILO's Declaration on Fundamental Principles and Rights at Work on matters such as freedom of association and right to collective bargaining, non-discrimination, equal pay for equal

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<sup>26</sup> For an analysis of owner-provided services in JVs, see Shishir Bhargava, Edgar Elliott & James Bamford, "The Codependency of Joint Ventures: Designing and Managing Owner-Provided Services in JVs," *Ankura Whitepaper* (Dec. 1, 2021).

work, and elimination of forced labor and child labor. When providing services, the venture partner can control the quality and type of activities being conducted and thus better manage risks in that area. However, it does come with added risks—if the partner is contractually obligated to engage in activities for the JV, the partner may be liable for any breaches of its obligations. In addition, providing services for a JV may open the door for courts to find that the partner is exercising sufficient control over the actions of the JV such that it may be liable for the subsidiary's actions.<sup>27</sup>

### G. Exit and Termination

A JV agreement may include the right for a partner to exit if the venture or another partner engages in material human rights violations that remain uncured within a certain period of time.<sup>28</sup> This type of provision seeks to protect a partner from the reputational and financial impacts of human rights abuses occurring in the JV and gives it leverage to encourage the JV and its partners to avoid human rights issues. Such a right to exit should only be triggered for sustained, highly material breaches of human rights obligations to avoid the provision being used as an escape hatch for a partner looking to exit for other reasons.

Also, using such a right to exit in the midst of an unresolved human rights or community issue could be poorly received by the public, expose the exiting JV partner to public scrutiny, and potentially even make the human rights issues worse. Additionally, companies could remain liable after exit for legacy human rights impacts. Thus, use of such an exit right should be a balanced decision given the circumstances at the time of potential exit and companies should seek to resolve issues before they exit when possible.<sup>29</sup>

The right to exit could take different forms depending on the situation. First, the right to exit could be the right to sell the exiting partner's shares to the other partner at a pre-determined price, particularly if the other partner is the JV operator and thus responsible for failing to cure the human rights issue. Second, it could be the right to force the operating partner to sell its shares to the non-operating partner so that the non-operating partner would own and

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<sup>27</sup> See *supra* note 10.

<sup>28</sup> For a further discussion on JV exit rights, see Tracy Branding Pyle, Edgar Elliott & James Bamford, "Joint Venture Exits: Five Steps to Structuring Robust JV Exit Terms," *Ankura Whitepaper* (Feb. 2022).

<sup>29</sup> It is important to distinguish *the right to exit* from *the decision to exit*, and human rights implications of the decision to exit. Under the OECD Guidelines for Responsible Business Conduct, exit or divestment from a venture should be a matter of last resort after failed attempts at mitigation of violations, or where mitigation is not feasible. OECD, *supra* note 12, at ch. II, Commentary on General Policies, ¶ 22. This may be the case for a non-operating venture partner with limited leverage. The OECD Guidelines also advise considering the potential social and economic adverse impacts on other stakeholders related to the decision to exit. *Id.* For example, if a venture partner discovers that a JV utilizes child labor, divestment from the JV would not stop the human rights abuse (or remediate the past abuse), and the decision to exit should be evaluated with consideration to Guiding Principle 22, which obligates a business to provide for or cooperate in the remediation of any adverse human rights impacts that it has caused or contributed to.

control 100% of the JV. A less draconian version of this option is including a right in the JV operating agreement to terminate the operator if the operator fails to comply with human rights policies or standards; this approach requires a non-operating partner or other party to step in as operator but would allow the current operator to retain its ownership, even if it loses operatorship. Third and finally, the right to exit could be the right to terminate and liquidate the JV. Which of these measures is appropriate will depend on the venture's particular circumstances, particularly how any liability for past human rights issues can be allocated.

#### *H. Financing and Insurance*

It may not be politically prudent for a non-operating partner to impose a multitude of views on human rights and community engagement standards on a JV during intense deal negotiations given that this may be one of many contentious issues. One way to achieve the non-operating partner's goals in these areas while maintaining a good rapport with partners is to bring other institutions, such as banks and insurers, into the deal and allow them to impose human rights and other standards on the venture. Doing this can make financing and insurance providers important allies to a non-operating partner when pushing for improvements to human rights and community engagement performance.

To ensure such parties are brought into the deal, the non-operating partner could seek to include a requirement in the JV agreement that the venture only obtain financing from the IFC or other financial institutions that have adopted the Equator Principles. The Equator Principles are a due diligence and risk management framework for assessing and managing ESG risk in project finance based on the IFC Performance Standards.<sup>30</sup> Similarly, the JV agreement could require the venture to only obtain insurance from a signatory company to the UN Environment Programme Finance Initiative Principles for Sustainable Insurance, which is a global framework for the insurance industry to address ESG risks and opportunities.

#### *I. Economic Stabilization*

Concession and licensing agreements with host governments may include stabilization clauses to address changes in law during the life of a project. Stabilization clauses protect investors from governments using their law and rulemaking authority to adversely impact the investors in the project. One agreement in our dataset illustrates fairly typical language:

With regard to the activities undertaken under this [Agreement], [the local government] shall not modify the legal, fiscal, and customs regimes currently in force in such a way as to adversely affect the rights and obligations of [the JV] or the [partners] arising from this [Agreement] and no legislative, regulatory, or administrative measure contra-

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<sup>30</sup> See Equator Principles Ass'n, *The Equator Principles* (July 2020).

ry to the provisions of this [Agreement] shall apply to [the JV] or the [partners] without [the JV's] prior written consent.

While stabilization clauses significantly enhance investor confidence and protections, they should not be used by co-venturers as a mechanism to avoid laws that advance human rights and sustainable development. To give governments sufficient latitude to meet their human rights obligations, co-venturers might propose or accept carve-outs to stabilization clauses that exclude laws, regulations, and policies that both apply to similarly situated companies and reflect international standards or best practices in human rights areas, including health and safety, labor, and environmental impact.

For example, when the Zambian government passed the 2015 Gender Equity and Equality Act, there were several copper mining development agreements in place that included stabilization clauses in effect until 2020. The law created new obligations for private companies, such as 14 weeks of maternity leave, equal pay regardless of gender, and reporting requirements. Despite the law applying to all Zambian companies and moving Zambia towards better gender equality, a JV with a stabilization clause could have chosen to not implement the requirements of the law and incur the associated costs.

As an alternative to carving out human rights matters from a stabilization clause, mining companies can structure stabilization clauses to apply to specific types of laws and regulations of concern. For example, the stabilization clause for a Liberian mining concession agreement limits the stabilization clause to the country's tax code and laws, thus implicitly excluding human rights or other ESG-related laws.

### *J. Representations and Warranties*

One significant risk when entering into a JV is that the company investing is thereafter linked to past and future human rights violations by the other partners (and the JV itself, if investing in an existing venture). Preferably, these issues would be found in the pre-investment human rights due diligence. To address issues that are missed in due diligence, a JV agreement can require partners to make human rights-related representations and warranties about their own activities and the activities of the JV, to the extent it is in existence prior to the deal.

These representations can cover significant ground. They can state that neither the partners nor the JV itself have outstanding litigation or other proceedings related to human rights, that the partner and JV are and have been for the applicable lookback period in compliance with certain human rights standards, that they have provided copies of all the JV's current policies and procedures, and/or that they have obtained the free, prior and informed consent of all indigenous peoples displaced (or who will be displaced) by the project. These additional representations may be required beyond common representations such as that the partner and JV have been in substantial compliance with applicable laws, particularly where the local law is below or inconsistent with international or desired standards.

The non-operating partner should be indemnified for breach of any of these representations by the party making such false representations. These representations and warranties may appear in the JV agreement or in a separate purchase agreement if the non-operating partner is buying into an existing company. Regardless of where the terms appear, they can provide a non-operating partner entering into a JV with a level of assurance that it will not be paying for certain acts that have occurred in the past.

#### IV. CONCLUSION

Non-operating partners may not be able to control their non-operated JVs once they are up and running and thus may have little say over the JV's approach to human rights and community engagement. But when the deal is being put together and the non-operating partners have leverage, they can make clear that human rights and community engagement issues are a priority. Beyond conducting due diligence on a potential venture and working through governance channels in an existing venture, non-operating partners can lock in human rights and community engagement rights and elevate the importance of these issues in JVs. Doing so in JV legal agreements will start the JV off on the right foot regarding these important matters, and help the non-operating partner feel safe that these critical ESG issues are being addressed.