

**MANAGING OIL REVENUES FOR SOCIO-ECONOMIC DEVELOPMENT  
IN NIGERIA: THE CASE FOR COMMUNITY-BASED TRUST FUNDS**

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## **ABSTRACT**

*The commercial exploration and exploitation of oil and gas deposits can be a source of immense wealth for countries embarking on the venture. However, it is also fraught with multifarious consequences as the case of Nigeria amply demonstrates. Nigeria has experienced the effects of the resource curse. Members of Nigeria's oil-producing communities have borne the greater burden of oil production, directly suffering social, economic and environmental problems. Different financing mechanisms introduced by the Nigerian government and oil corporations for ameliorating these problems and improving their plight have not been very effective. It is imperative to design institutions and arrangements that prudently manage oil revenues meant for oil-producing communities for their socio-economic development. Community-based trust funds are presented here as representing viable, innovative alternatives.*

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## INTRODUCTION

Remember, I lived in Nigeria exactly at the time the oil boom started. The Economic Minister meets with the Prime Minister. “Sir,” he says, “I have got some good news and bad news.” The Prime Minister asks for the good news first and is told that the country has just discovered vast reserves of petroleum. The Prime Minister is happy. He says, “Well, this is great. We can accelerate income growth in this country. What could the bad news possibly be,” he asks his Economic Minister. The reply is, “The bad news is that we have just discovered vast reserves of petroleum.”<sup>1</sup>

The story of oil production in Nigeria is a sad one. Nigeria epitomizes what economists refer to as the resource curse.<sup>2</sup> Years of oil development have not translated into socio-economic development for the people of Nigeria. Instead, the country has experienced a deterioration of fortunes, using every conceivable metric. Sadly, the people in the oil-producing communities have suffered the most socially, economically and environmentally.

The social, economic and environmental problems that have attended oil production in Nigeria were recently brought to the forefront when the African Commission on Human and People’s Rights reviewed a complaint against the government of Nigeria. The complaint alleged that oil production under the joint venture between the State-owned oil corporation (NNPC) and Shell Petroleum has had huge social, economic, health and environmental impacts on the people of Ogoniland, in the Niger Delta. In a decision communicated on May 2002, the Commission held the Nigerian government in violation of several articles of the African Charter on Human and

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<sup>1</sup> Emmy B. Simmons, *Keynote Address, Conference on Linking Trade and Sustainable Development*, 18 AM. U. INT’ L. REV. 1271, 1292 (2003).

<sup>2</sup> See RICHARD M. AUTY, *SUSTAINING DEVELOPMENT IN MINERAL ECONOMIES: THE RESOURCE CURSE* THESIS (1993).

People's Rights<sup>3</sup>. The Commission appealed to the Nigerian government to ensure the protection of the environment, health and livelihood of the Ogoni people, ensure adequate compensation to the victims of human rights violations, provide information to oil communities, and grant them access to participate in the making and implementation of decisions that affect them.

This research aims to answer three related questions:

- What mechanisms have the major actors in the Nigerian oil industry, notably oil corporations and the national government, introduced to ameliorate the adverse effects of oil exploration and production activities?
- To what extent have these efforts and mechanisms been effective, and to what extent have they been ineffective, in addressing these adverse effects – and what are the reasons for the effectiveness or ineffectiveness?
- How can these mechanisms be improved, or alternative mechanisms instituted, to address more effectively the negative impact of oil and gas development in Nigerian communities? In particular, how can a comparative study of programs instituted in other Sub-Saharan African states (e.g. the Chad/Cameroon pipeline project) provide useful lessons to be implemented in shaping more successful Nigerian programs?

In 2001, Shell Petroleum Development Company spent \$52 million dollars in the Niger Delta. Exxon Mobil spent \$12 million. Other oil corporations operating in Nigeria made similar expenditures. These contributions aim to promote the social and economic development of the oil communities and perhaps cushion the negative effects of oil and

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<sup>3</sup> African Commission on Human & People's Rights, Re Communication 155/96, May 27, 2002. Decision reached at the 30th Ordinary Session held in Banjul, The Gambia, from October 13 – 27, 2001.

gas development. To translate cash into tangible projects in the communities, companies have utilized various financing mechanisms. One approach is referred to here as the direct financing arrangement (DFA). Under DFAs, corporations embark on projects on their own and pay for the costs directly. In some other cases, they have made Community Grants, Contributions and Disbursements (CGs) channeled through the leadership of the communities.

Preliminary assessment of the above two approaches is not favorable. Projects have been improperly executed or abandoned. Allegations of corruption among community leaders and corporate officials are rife. There is a clear lack of transparency and accountability. These have escalated tensions and resulted in further conflicts, while leaving the social, economic and environmental problems still unattended. Ostensibly realizing the weakness of DFAs and CGs, corporations have begun to shift to new, indirect arrangements. In one instance, oil companies engaged a leading NGO, the Niger Delta Wetlands Centre, to manage their community assistance or development projects in Bonny, where the Nigerian Liquefied Natural Gas (NLNG) is located. Most recently, ChevronTexaco launched a public-private partnership (PPP) with the United Nations Development Programme (UNDP), while Shell entered into a similar arrangement with United States Agency for International Development (USAID).

This thesis sets out to make a 2-fold contribution. It describes, analyzes and evaluates existing arrangements introduced by 2 major MNCs in Nigeria (Royal/Dutch Shell and ChevronTexaco) to address the social, economic and environmental problems arising from their operations, and evaluate the comprehensive impact of these efforts. Additionally, it examines and evaluates the potentials for success of the public-private

partnership between ChevronTexaco and UNDP and between Shell and USAID. However, because this is a new project, the approach here will be in the form of a prognosis, not analysis, of its operation in Nigeria. This work also introduces trust funds as alternative private financing mechanisms to complement existing arrangements, with attention to the comparative experiences related to the Chad/ Cameroon pipeline as well as the specific, unique Nigerian context.

The work proceeds from a working hypothesis that the social, economic and environmental consequences in Nigeria's oil producing communities can successfully be addressed only by an arrangement that promotes participatory processes in conjunction with transparency and accountability. The existing arrangements do not do that. Community-based trust funds contain the necessary features for accomplishing this task.

This argument is broken down as follows:

- The damage inflicted upon oil producing communities in Nigeria by oil exploration has been perverse and pervasive.
- The strategies and efforts of corporations (in collaboration with both national and local governments to address these problems, while recording some minimal successes, have not generally been accompanied by satisfactory results.
- The unsatisfactory results of these corporate-sponsored efforts and government initiatives have primarily been a function of structural problems and institutional weaknesses; also, a number of obstacles and barriers notably corruption at both the corporate and governmental levels have intervened to block success.

- Therefore, a trust fund model, which incorporates transparency, accountability and community participation, suggests a more effective approach with greater chance of overcoming the obstacles and barriers identified above.

In undertaking the assignment that it has taken upon itself, this work has adopted a research methodology that includes an extensive review of the literature in development economics and political science relating to the resource curse thesis and situate them within the context of the Nigerian experience. I also examine collections of research data that have been published on the impact of oil and gas development in Nigerian communities and the efforts of multinational oil corporations to respond to exploration's adverse effects. I have relied on publicly available materials including books, newspaper articles and reports. Information was also obtained through interviews and email exchanges with community activists in Nigeria. I also undertake brief case studies of the community development activities of the two selected multinational oil corporations in oil-producing communities in Nigeria. In the selection of the corporations, and within the constraints of time and space, I focus on two of the oil corporations that have had the longest presence and thus have had more opportunities to cause harm or be a blessing to communities in which they operate.

These oil corporations - Shell and ChevronTexaco - have also faced the greatest controversy in recent times regarding their operations in Nigeria and both of them are the subject of separate lawsuits in the United States. I also briefly and less extensively describe the community development efforts of some other corporations in Nigeria. Information was obtained from corporate publications, reports by human rights and environmental groups, public materials from the Nigerian government and the

publications of multilateral donors and development institutions, and a questionnaire completed by the two selected companies. I evaluated all the materials in light of my personal observations and previous research work in this area.

This thesis is organized into six major chapters. Chapter 1 presents an overview of Nigeria and the country's petroleum industry. The country's petroleum (oil and gas) resources, the existing contractual arrangements and federal laws governing petroleum operations and institutions administering them are also discussed. Chapter 2 provides a theoretical foundation for the general discussion in this work by examining the resource curse thesis. This covers conceptual matters, the causes of the curse including the social, economic, political and institutional arguments, and proposals that have been advanced for addressing the curse.

Chapter 3 discusses the resource curse in Nigeria. It seeks to show that oil production in Nigeria, as is the case with virtually every oil-dependent country, has not translated into improved living conditions for the vast majority of Nigerian citizens. Instead, they have had to suffer the negative social, economic and environmental effects of oil development. People in oil-producing communities have suffered the most.

Chapter 4 focuses on the efforts of the Nigerian government to ameliorate the impact of oil production and improve the socio-economic conditions in the oil-producing areas. The discussion is in the context of two of the recent agencies in that regard - the Oil Minerals Producing Areas Development Commission (OMPADEC) and the Niger Delta Development Commission (NDDC). Private initiatives introduced by oil corporations for community development are also evaluated.

Chapter 5 includes a discussion of trust funds as tools for managing oil revenues. The Chad-Cameroon Pipeline Project, which incorporates a trust-like mechanism for addressing the resource curse, is closely examined. This chapter argues that the arrangement in Chad is not replicable in Nigeria on a national scale because of Nigeria's size and implications for sovereignty. However, the community-based trust fund draws some relevant features from Chad's Revenue Management Plan (RMP), including management and monitoring committees and international oversight.

This work is important because, unlike most scholarly efforts on the resource curse that focuses on national and macro-economic solutions, it concentrates on improving the socio-economic and environmental conditions in the communities that produce oil. The uniqueness of this work also lies in the fact that it introduces an innovative concept, namely the institution of trust funds, and applies it to the situation in Nigerian oil-producing communities. It is my modest contribution to remedying the plight of the people in these communities. It is my fervent hope that it will receive the support it deserves and be operationalized in these communities.

## CHAPTER 1

### OVERVIEW OF NIGERIA AND ITS OIL AND GAS INDUSTRY

#### I. NIGERIA

Nigeria is the most populous country in Africa and in some of respects, one of the leading countries in the world.<sup>4</sup> Accurate census figures on this country that lies on the West Coast of Africa do not exist. But current estimates put the country's population in the region of 135 million people.<sup>5</sup> This number represents people from about 250 ethnic groups.<sup>6</sup> The three major ethnic groups are Hausa/Fulani, Igbo and Yoruba. Most of Nigeria's oil production today takes place in areas populated by the smaller ethnic groups including Ijaw, Itsekiri, Ogoni and Urhobo, although oil is also produced in the Igbo states of Imo and Abia and the Yoruba-dominated state of Ondo.

Nigeria gained its independence from Britain on October 1, 1960. The colonial authority lasted from 1914 when Nigeria officially came into being until 1960. At independence, Nigeria continued with the parliamentary system of government bequeathed by the colonial leaders. In 1963, Nigeria became a republic. The civilian arrangement was disrupted in January 1966 by a military coup. Military rule continued until 1979 when civilian rule was restored. The military returned in 1983 and stayed till 1999, when the current civilian dispensation commenced.

Nigeria is a federation, subdivided into 36 states and a federal capital territory

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4 See USAID/Nigeria, Country Strategic Plan 2004-2009 at 1 ("With a population of 135 million, Nigeria has a commanding presence in world affairs by virtue of its size alone.")

5 The CIA puts it at 133 million people. See CIA Fact Book, *available at* <http://www.cia.gov/cia/publications/factbook/geos/ni.html#People>. Last visited May 3, 2004.

6 Philip C. Aka, *Nigeria: The Need for an Effective Policy of Ethnic Reconciliation in the New Century*, 14 TEMP. INT'L & COMP. L.J. 327 (2000).

(FCT). The states were carved out of the original three regions (West, South, East) and the Midwest created in 1963 out of the Western region. The federal government is comprised of an executive arm led by the president, a federal judiciary (with the Supreme Court at the apex) and the National Assembly (consisting of the Senate and the House of Representatives).

The 36 states are each led by a governor and there are unicameral state legislatures (known as Houses of Assembly) and a state judiciary headed by the state chief judges. (the state judiciaries are also under the Supreme Court of Nigeria and appeals against state decisions go to the federal Court of Appeals and then the Supreme Court). The federal capital territory at Abuja is headed by a mayor.

Below the states are local government areas (LGAs), which currently number up to 774, although states have been seeking to create additional LGAs, with opposition and non-recognition from the federal government. The LGAs are led by Chairmen supported by a legislative body known as local government councils. There are no local or municipal judiciaries.

## **II. PETROLEUM IN NIGERIA**

### **A. Petroleum Resources and Exploitation**

#### **1. *Crude Oil in Nigeria***

The oil industry is broadly divided into the upstream and downstream sectors and that is the case with Nigeria.<sup>7</sup> The upstream sector is made up of exploration and production, while the downstream sector represents refining, marketing and distribution. Nigeria is a major oil producer. With a daily production of about 2 million barrels of day, it is the is

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<sup>7</sup> See PAUL FRANKEL, THE ESSENTIALS OF PETROLEUM: A KEY TO OIL ECONOMICS (1969).

the largest oil producing country in Africa,<sup>8</sup> the 6<sup>th</sup> largest oil producer in the World,<sup>9</sup> the fifth largest producer in the Organization of the Petroleum Exporting Countries (OPEC)<sup>10</sup> and the fifth largest supplier of oil to the United States.<sup>11</sup> Nigeria's crude is of very high quality; it is of the sweet (almost sulfur-free) variety, sharing similarities with the type found in the North Sea.<sup>12</sup> The price for Nigeria's crude is linked to the price for Brent.<sup>13</sup>

Oil was discovered in commercial quantities in Nigeria in 1956 at Olobiri in present day Bayelsa State.<sup>14</sup> The first consignment of Nigeria's oil was delivered to Europe in 1958.<sup>15</sup> Significant quantities did not start to flow until 1965 when a terminal was completed on Bonny Island on the Atlantic Coast and pipelines constructed to feed the terminal.<sup>16</sup> The Nigerian civil war that lasted from 1967-1970 caused a drop in production, but at the end of the war in 1970, there was a rapid rise in output.<sup>17</sup> By 1974, oil had assumed a dominant position accounting for 80 per cent of total federal revenues and more than 90 per cent of export earnings.<sup>18</sup> This picture has hardly changed since then.<sup>19</sup>

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8 See *Famine as government policy*, CHI. TRIB., Apr. 2, 2004, at 20.

9 See Jonathan Power, *Nigeria Struggles Against The Curse of Oil*, INT'L HERALD TRIB., Jan. 8, 2004.

10 See *Nigeria Labour Movt Threatens Strike Over Petrol Tax*, AGENCE FRANCE PRESSE, Jan. 7, 2004, available on Lexis Nexis News File.

11 See Mark Mazzetti, *Pax Americana*, U.S. NEWS & WORLD REPORT Oct. 6, 2003, at 31. See also Department of Energy, *Country Analysis Briefs: Nigeria*, available at <http://www.eia.doe.gov/emeu/cabs/nigeria.html>. Last visited Apr. 17, 2004.

12 Human Rights Watch, *The Price of Oil: Corporate Responsibility and Human Rights Violations in Nigeria's Oil Producing Communities* (1995).

13 *Id.*

14 For an extensive discussion of the history of the Nigerian oil industry, see G. ETIKERENTSE, *NIGERIAN PETROLEUM LAW 1-15* (1985), LAWRENCE ATSEGBUA, *NIGERIAN PETROLEUM LAW: THE ACQUISITION OF OIL RIGHTS IN NIGERIA* (1993).

15 Patrick D. Okonmah, *Right to A Clean Environment: The Case for the People of Oil-Producing Communities in the Nigerian Delta*, 41 J. AFR. L. 43, 43 (1997).

16 Human Rights Watch, *supra* note 12.

17 *Id.*

18 *Id.*

19 *Id.* See also Briony Hale, *Nigeria's Economy Dominated by Oil*, BBC News, January 16, 2002, available at <http://www.globalpolicy.org/security/natres/oil/nigeria/2002/0116strike.htm>; Antony Goldman,

Activities in Nigeria's downstream sector are not as robust as those upstream. Nigeria has four refineries located in Eleme and Port Harcourt in Rivers State, Warri in Delta State and Kaduna in Kaduna State. None of these refineries has been performing up to its capacity and Nigeria has been an importer of refined petroleum products for some time now. This has been a bonanza for a rent-seeking elite and corrupt government officials, who have capitalized on this deficiency to rake in millions of dollars instead of improving the efficiency of the refineries. There have been calls for the privatization of the refineries or transfer them to credible investors on a lease-contract basis for a couple of years. While slating the state-owned refineries for privatization, Nigeria announced plans to permit private persons to own and operate refineries. The government has received up to 300 applications from interested investors and some private licenses have been granted.

## ***2. Natural Gas in Nigeria***

Nigeria has natural gas in abundance, a natural resource that was first discovered in the country in 1956.<sup>20</sup> It is one of the four largest gas provinces in the world.<sup>21</sup> Nigeria has proven natural gas reserves estimated at 124 trillion cubic feet (Tcf) which is the 9<sup>th</sup> largest in the world.<sup>22</sup> Although Nigeria is more well known for its crude oil, it actually

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et al., SURVEY-NIGERIA: *Hold on Economy is Ever-Stronger: Oil*, FINANCIAL TIMES, Apr. 9, 2002 (stating: "The oil industry has dominated the country's economy since the start of large-scale exploitation in the 1960s and 1970s of its substantial reserves of high-quality crude. Oil exports in 2000 reached Dollars 19.1bn, or more than 90 per cent of the value of total exports, according to International Energy Authority data." Id.)

20 Bode Agoro, *Nigeria's LNG Project: Developments, Prospects and Challenges*, INT'L ENERGY L. & TAX'N REV. 85, 85 (2001). I have devoted a lot of attention to natural gas here because it is a largely ignored sector by writers on Nigeria, when compared to crude oil.

21 Sola Adepotun & Kemi Segun, *Nigeria: The Liquefied Natural Gas Project*, OIL & GAS L. & TAX'N REV. 436, 436 (1995).

22 EIA Country Analysis Briefs, *supra* note 11.

has more gas than oil.<sup>23</sup> This has earned it the description of “a natural gas area with some oil in it.”<sup>24</sup> Nigeria’s gas is expected to last for over one hundred years, compared it to its crude oil, which may be exhausted in about thirty years.<sup>25</sup>

For several decades, Nigeria concentrated on oil development, ignoring the gas sector and choosing instead to flare the gas associated with oil. Gas flaring continues and Nigeria indeed has one of the highest flare rates in the world.<sup>26</sup> Many reasons have been adduced for Nigeria’s attitude toward gas development that only begun to really change quite recently. First of all, there were factors that were not entirely within the control of the country. Nigeria was open to commercial exploitation of natural gas as far back as the 1960s. British Gas Corporation, seeking to build on its pioneering gas trade with Algeria, approached Nigeria in the mid-1960s with a proposal to import Nigeria’s associated gas after liquefaction.<sup>27</sup> Only a few days before the conclusion of a sales contract with British Gas, huge gas discoveries were made in the North Sea, effectively rendering redundant, the need for Nigerian gas.<sup>28</sup>

The Nigerian civil war of 1967-1970 also militated against the development of the Nigerian gas sector.<sup>29</sup> Also contributory to the delay in commercial production of

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23 The volume of gas over oil in Nigeria has variously been estimated at twice the quantity of oil and up to ten times that quantity. See Adeoye Adefulu, *How Can Nigeria Develop a Domestic Market for its Gas*, INT’L ENERGY L. & TAX’N REV. 99, 99 (2000) (stating that Nigeria’s proven gas reserves on an energy basis are “estimated to be more than twice the quantity of its crude oil reserves.”); Agoro, *supra* note 20, at 85 (stating that “today Nigeria’s known gas reserves total more than double its crude oil reserves on energy terms.”); Sola Adepun & Kemi Segun, *supra* note 21, at 436 (1995) (stating that Nigeria’s natural gas reserves are “ten times more than her oil reserves.”)

24 SARAH AHMAD KHAN, NIGERIA: THE POLITICAL ECONOMY OF OIL 157 (1994).

25 Adepun & Segun, *supra* note 21, at 438.

26 Nigeria flares about 70-76 per cent of associated gas, a sharp contrast to the worldwide average of about 4 per cent. See Joint UNDP/World Bank Energy Sector Management Assistance Programme (ESMAP), *Africa Gas Initiative: Main Report*, Vol. 1 (Feb. 2001).

27 Adefulu, *supra* note 23, at 99. See also JONATHAN STERN, *INTERNATIONAL GAS TRADE IN EUROPE: THE POLICIES OF EXPORTING AND IMPORTING COUNTRIES* (1984).

28 Adefulu, *supra* note 23, at 99; Agoro, *supra* note 20, at 85.

29 Agoro, *supra* note 20, at 85

Nigeria's natural gas was the corruption or ineptitude of the people in government. Two LNG projects that were proposed and approved in the 1970s could not go on because estimated costs at the merger of the two projects into one (Bonny LNG Project) jumped from \$4.5-4.9 billion to \$14-16.5 billion in less than five years. This led to the project's voluntary liquidation<sup>30</sup>

There is also the issue of the capital-intensive demands of the gas sector.<sup>31</sup> Moreover, the domestic gas market was not quite developed. One of the reasons for this low development of the domestic natural gas market was the Nigerian government's decision in the 1960s to give preference to hydroelectric projects over small gas-fired power stations.<sup>32</sup> Initially, Shell/BP had entered into gas supply agreements with the state-owned power company, the Electricity Corporation of Nigeria (predecessor of today's National Electric Power Authority (NEPA)) between 1960 and 1966.<sup>33</sup> The decision might have been influenced by an assumption that it would cost the country less to rely on hydropower than gas, a fact not borne out by subsequent studies by NEPA that indicated that gas holds economic advantages over hydropower.<sup>34</sup>

Gas usage in Nigeria was also low because of the absence of the necessary infrastructure for its use, such as adequate pipelines to connect a number of businesses that were interested in utilizing the gas.<sup>35</sup> In addition, there was the issue of low level of industrial development coupled with an economy that was mismanaged by military rulers

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30 Adefulu, *supra* note 23, at 99.

31 Lawrence Atsegbua, *An Appraisal of the Nigerian Liquefied Natural Gas Venture*, OIL & GAS L. & TAX'N REV. 35, 35 (1998) (citing E.I. Kachikwu, *Legal Issues in Oil and Gas Industry*, 2:9 *Gravitas* 34, 39 (1989)). See also Adepetun & Segun, *supra* note 21, at 439 (stating that "LNG projects, wherever undertaken, are capital intensive and financial constraints have been a major reason for the late start in Nigeria's venture into this area of energy exploitation.")

32 Adefulu, *supra* note 23, at 100.

33 *Id.* at 99.

34 *Id.* at 100.

35 *Id.*, at 101.

resulting in the closure of several industries and, in the absence of government encouragement, non-emergence of new ones. Such a small industrial base can only use so much gas.<sup>36</sup>

The government's policy of subsidizing the price of petroleum products such as gasoline may have also played a role. The intent behind the policy was to enable Nigerian citizens benefit from "the accruing petroleum rent."<sup>37</sup> However, the effect has been to provide a disincentive for individuals and industry to consider gas as a viable option.<sup>38</sup>

Nevertheless, it is instructive to note that "[e]ven if all the industries and power stations in the country were powered by gas the demand level would still not be high enough to use all the available natural gas."<sup>39</sup> The logical import of this, therefore, was that any expectation that Nigeria would develop its natural gas needed to be supported by a strong assurance that external markets existed.

Unfortunately, "international demand for gas [was] not firm enough to show a realistic short-term payout for such investment."<sup>40</sup> Yet the imperative of developing Nigeria's natural gas remained strong. The benefits of utilizing the abundant quantities of gas found in the country are numerous, ranging from economic, environmental and technological advantages.

**a) Economic Benefits**

Economically, it would provide a much-needed diversification of the country's sources of revenue, in contrast to the near total reliance on oil.<sup>41</sup> It is expected that the base project

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36 *Id.* at 101.

37 *Id.* See also Yinka Omorogbe, *Petroleum Studies and the Petroleum Trust Fund: The Nigerian Alternative*, OIL & GAS L. & TAX'N REV. 206 (1997).

38 Adefulu, *supra* note 23, at 101.

39 *Id.*, at 101.

40 Atsegbua, *supra* note 31, at 35. Citation omitted.

41 Adefulu, *supra* note 31, at 99. See also Adepetun & Segun, *supra* note 21, at 439.

will generate about U.S. \$1 billion per year during the 22½ -year contract period. This is based on an oil price of U.S. \$13 per barrel; thus, with the increase in oil prices, a corresponding increase in revenue from LNG export is expected.<sup>42</sup> Extra revenues are also expected from the addition of, and increased production from, more trains.<sup>43</sup> Domestic utilization of gas could also boost industrialization and in “the export of value-added products, such as aluminium, steel, petrochemicals, etc., which consequently boosts export revenue.”<sup>44</sup> There is also the added socio-economic benefit that gas development will generate thousands of jobs for Nigerians.<sup>45</sup>

***b) Environmental Benefits***

Ecologically, gas development and use hold some benefits for the Nigerian people and the environment. Developing the gas will minimize or possibly eliminate the flaring of gas, a major source of air pollution in Nigeria. Estimates are that the base project will reduce gas flaring from its present level of 70 per cent to about 30 - 40 per cent.<sup>46</sup> The plan is that the base project would consume up to 26 million standard cubic meters of gas per day to produce 7.15 billion cubic meters per annum of LNG (the equivalent of 140,000 barrels of oil).<sup>47</sup> The full development of the LNG Project is estimated to consume up to 2.5-3 billion cubic feet of gas per day and would consequently consume about 80 per cent of associated gas that is being flared at the moment.<sup>48</sup> It should be pointed out however, that the LNG project might take a while before it starts reducing gas flaring. As the World Bank has observed:

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42 Agoro, *supra* note 20, at 87. Oil prices climbed up to \$38 in March 2004.

43 *Id.*.

44 *Id.*

45 *Id.* at 86 (stating that Nigerians constituted 86 per cent of the 18,000 people from 47 countries that were working on the Nigerian LNG project during construction.)

46 *Id.* at 86.

47 *Id.*

48 *Id.*

Although gas utilization will increase, in the near term it will be based on economical non-associated gas supplies and not reduce gas flaring. The largest outlet for Nigeria's gas, the Bonny LNG plant, will liquefy primarily non-associated gas.<sup>49</sup>

Developing the gas would also encourage its domestic use, and since gas is generally acknowledged as a cleaner-burning than other fossil fuels, this would bring additional environmental benefits to Nigerians.<sup>50</sup>

*c) Technological Advancement*

Technologically, Nigeria could benefit in the sense that the use of sophisticated technology is a prerequisite for the operation of an LNG project. According to one commentator, "undertaking of the project therefore will result in progressing Nigeria's technological advancement through technology transfer to Nigeria."<sup>51</sup> There is a lot of room for skepticism though, seeing that technology-dependent oil production in Nigeria has not necessarily resulted in a strong technological base in Nigeria, even after almost five decades.<sup>52</sup> Nevertheless, there remains the possibility that technology transfer can be one of the notable outcomes of the LNG project.

Obviously in realization of the above positive factors and with an improving international gas market, Nigeria started taking some serious measures in relation to

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49 WORLD BANK, DEFINING AN ENVIRONMENTAL DEVELOPMENT STRATEGY FOR THE NIGER DELTA, (May 25, 1995) Volume II, annex J (cited in JEDRZEJ GEORG FRYNAS: OIL IN NIGERIA: CONFLICT AND LITIGATION BETWEEN OIL COMPANIES AND VILLAGE COMMUNITIES 89 (2002 edition). It bears noting though that the LNG project plans to use both associated and non-associated gas. See Adepetun & Segun, *supra* note 21, at 439.

50 Adefulu, *supra* note 23, at 99.

51 Agoro, *supra* note 20, at 87. See also Adepetun & Segun, *supra* note 21, at 439.

52 See Lawrence Atsegbua, *The New Reforms in the Nigerian Oil Industry*, OIL & GAS L. & TAX'N REV. 279, 279 (1997) (discussing a new policy position as late as 1997 to promote technology transfer in the oil industry. Professor Atsegbua also examines reasons for the lack of technology transfer including the absence of an energy policy and the "comprador" nature of the Nigerian state. *Id.*)

developing its gas reserves.<sup>53</sup> Nigeria promulgated the Nigeria Liquefied Natural Gas (Fiscal Incentives, Guarantees and Assurances) Decree No. 39 of 1990 and Decree 113 of 1993 to jumpstart things and provide legal backing to assurances previously given to shareholders in the LNG project.<sup>54</sup>

The Nigerian LNG Limited (NLNG Ltd.) was incorporated in 1989 as a joint venture.<sup>55</sup> The company's objectives are, *inter alia*, to "acquire and ensure a growing share of the international gas market for Nigeria's abundant natural gas reserves, by the promotion, implementation and efficient operation of a gas transmission system, a Liquefied Natural Gas (LNG) Plant and a shipping fleet."<sup>56</sup>

Stakeholding in the NLNG was initially apportioned as follows: NNPC (60 per cent), Shell Gas BV (20 per cent), Elf Aquitaine's Cleag (10 per cent) and Agip International (10 per cent). A bid to secure external financing led to a re-structuring that conferred 49 per cent of the stake on the NNPC, 24 per cent to Shell, 15 per cent to Elf and 10 per cent to Agip<sup>57</sup> and 2 per cent reserved for the International Finance Corporation (IFC).<sup>58</sup> With the IFC not taking up its share, there was a further restructuring that increased Shell's and Agip's stakes to 25.6 per cent and 10.4 per cent

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53 See C. Emole, *Nigeria's LNG Venture*, 8 AFR. J. INT'L & COMP. L. 169 (1996).

54 Adepotun & Segun, *supra* note 21, at 438. Nigeria has also passed an Oil and Gas Export Free Zone Decree. The law, promulgated in March 1996, is laden with incentives to encourage investment in the oil and gas sector. See Omogbai I. Omo-Eboh, *Establishment of Oil and Gas Export Free Zone: A Recent Measure to Attract Foreign Investment in Nigeria*, 2 OIL & GAS L. & TAX'N REV. 42 (1997).

55 Agoro, *supra* note 20, at 85.

56 N. Mannedeere, *Nigerian LNG Restructured*, 2:3 AFRICAN PETROLEUM MONITOR 32, 32 (1993) (cited in Atsegbua, *supra* note 31, at 36. The detailed objectives are: (i) constructing and operating a gas transmission system for gas supplies and a two-train gas liquefaction plant in Bonny, Rivers State; (ii) securing the constant supply of natural gas for the plant from the project's shareholders or their affiliates' upstream joint ventures in Nigeria; (iii) arranging a project financing package; (iv) marketing LNG in Europe and the United States; (v) transporting the LNG to buyers. See Agoro, *supra* note 20, at 85 n.2; Adepotun & Segun, *supra* note 21, at 436.

57 *Id.*

58 Atsegbua, *supra* note 31, at 36.

respectively.<sup>59</sup> Reducing NNPC's stake in 1995 from 60 per cent to the current level effectively privatized the project.<sup>60</sup> Shell Gas Nigeria BV serves as the technical adviser of the project and is properly positioned to do so, going by the considerable commercial and technical experience that the company has from implementing other LNG projects in Brunei, Malaysia and Australia.<sup>61</sup>

Nigeria completed a multi-billion liquefied natural gas (LNG) facility on Bonny Island in Rivers State, which came on stream with 2 trains in October 1999.<sup>62</sup> The total cost of the initial two-train project, i.e., the base project was estimated at \$3.8 billion making it the largest construction in sub-Saharan Africa.<sup>63</sup> The facility is projected to process 252.4 billion cubic feet (Bcf) of LNG annually. Initial supplies to the facility came from dedicated natural gas fields, though it is expected that in the next few years, half of the input gas will consist of associated natural gas that is currently flared.

In December 2002, the third LNG production train started operations.<sup>64</sup> It has an annual capacity of 130.6 Bcf. With the third train, the overall processing capacity of the Nigerian Liquefied Natural Gas Corporation (NLNG) will increase to 383 Bcf per year.

Construction has also commenced on two additional liquefaction trains. NLNG expects them to be in operation by the end of 2005. The combined capacity of the two new trains will be 363.5 Bcf per year. A sixth additional train is expected to come into operation in 2006.

NLNG Ltd shipped its first cargo in October 1999 and this was the first time that

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<sup>59</sup> *Id.*

<sup>60</sup> Agoro, *supra* note 20, at 85.

<sup>61</sup> Adepotun & Segun, *supra* note 21, at 436.

<sup>62</sup> *Id.* See also *Everything to Play For*, PETROLEUM ECONOMIST, June 10, 2003, at 26.

<sup>63</sup> Agoro, *supra* note 20, at 85.

<sup>64</sup> *Id.*

LNG would be exported from sub-Saharan Africa.<sup>65</sup> NLNG has also entered into long-term purchase agreements with a number of customers. Since 2000, NLNG has delivered 21 spot LNG cargoes to the Lake Charles Louisiana LNG receiving terminal. Plans were also made for additional delivery of 17 cargoes in 2003.

There is also the Escravos Gas Project (EGP). EGP-1, the first phase of the EGP, processes 165 Mmcf/d of associated natural gas, which is supplied to the domestic market by pipeline. EGP-2 commenced operations in late 2000 and processes an additional 135 Mmcf/d of natural gas. Currently, gas from EPG-2 is being used domestically. However, there are plans for international use, as EPG-2 gas will also be exported to Benin, Togo and Ghana through the West Africa Gas Pipeline (WAGP).

Phase 3 of the Escravos Gas Project (EGP-3) will increase gas processing to 400 Mmcf/d of natural gas from ChevronTexaco's northern offshore fields. Gas from EGP-3 will serve as feedstock for the Escravos gas-to-liquid (EGTL) plant, a \$1.3 billion project, scheduled to start operations in 2005.

Nigeria also plans to establish more LNG facilities in cooperation with (other) oil corporations (besides those in the original LNG project). An MOU has been signed since 2001 to conduct feasibility studies for a second LNG facility, known as West Niger Delta LNG. The plant is expected to commence operations in 2005.

Nigeria has also entered into a third MOU for the establishment of the Brass River LNG plant. This facility is expected to start operating in 2007. It will have a capacity of 850 Mmcf/d and will be the world's first offshore LNG plant. Nigeria is also preparing to sign another MOU in the fourth quarter of 2003 to construct a new LNG plant – a floating offshore LNG processing facility. The feedstock gas will come from the

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<sup>65</sup> *Id.*

Nnwa/Doro (OPL 218) gas fields. OPL 218 is estimated to have nearly 10 Tcf of gas reserves. Upon approval and construction, the Nnwa LNG facility is likely to start operations in 2007.

The future of the Nigerian LNG project looks bright. Even though Russia, Iran, Kazakhstan, Saudi Arabia, Qatar, Turkmenistan, and Australia hold more than half of the world's gas reserves, these countries are remotely located from the major gas markets.<sup>66</sup> Nigeria, on the other hand, shares more proximity with Europe and the United States than the gas producers in the Middle East and Australia.<sup>67</sup> In addition, the fact that six of Nigeria's seven LNG ships were purchased at a much lower cost than newly built ones, when combined with the geographical advantage, ultimately translates to the marketing of the Nigerian LNG at a more competitive rate than LNG from the established exporters.<sup>68</sup>

Moreover, major gas consuming nations are experiencing a dwindling of their local gas supply and will increasingly depend on gas sources from outside. This is believed to have been the major driving force behind Italy's interest in Nigerian gas with the Italian firm ENEL Gas being one of the first to sign up as potential purchasers of Nigeria's LNG.<sup>69</sup>

Apart from LNG, Nigeria is also involved in a major gas project, the West African Gas Pipeline project. The West African Gas Pipeline (WAGP) project between Nigeria, Togo, Ghana and Benin is also making some progress. According to an Agreement signed in 2003, Final Investment Decision (FID) will be made in the first

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<sup>66</sup> *Id.* at 87. See also Philip Weems, *Overview of Issues Common to Structuring, Negotiating and Documenting LNG Projects*, INT'L ENERGY L. & TAX'N REV. 189 (2000).

<sup>67</sup> Agoro, *supra* note 20, at 87.

<sup>68</sup> *Id.*

<sup>69</sup> Adepetun & Segun, *supra* note 21, at 439.

quarter of 2004.<sup>70</sup> WAGP will transport 450 Mmcf/d of gas when fully operational.<sup>71</sup> Expectations are that the project will deliver gas to Cotonou in Benin, Lome in Togo and Tema and Takoradi in Ghana starting in mid-2005. There is also the possibility of an extension to Cote d'Ivoire.<sup>72</sup>

Also on the international front, Nigeria is also proposing the construction of a Trans-Saharan Gas Pipeline from Nigeria to Algeria. The proposed 2,500-mile (4,000-kilometer) pipeline when constructed will carry gas from oil fields in the Delta region of Nigeria via Niger to Algeria's Beni Saf export terminal on the Mediterranean. This is a \$7 billion project. It is expected that construction will commence in 2006 and that gas will start flowing through the completed structure by 2009.<sup>73</sup>

The facilitation and promotion of natural gas consumption at the domestic level is also becoming a priority for the Nigerian government. In that regard, it has proposed the \$580 million Ajaokuta-Abuja-Kaduna pipeline to supply natural gas to central and northern Nigeria. Also proposed is the Aba-Enugu-Gboko pipeline, which will deliver gas to some parts of eastern Nigeria. There are also on-going or proposed (governmental and corporate) arrangements to supply natural gas to at least 150 industrial customers, 250,000 residential/commercial customers and 25 independent power plants.

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<sup>70</sup> *New WAGP Agreement Signed*, World Markets Analysis, May 20, 2003.

<sup>71</sup> *Id.*

<sup>72</sup> *Petroleum Economist*, June 20, 2003.

<sup>73</sup> Norval Scott, *Nigeria-Algeria Pipe Dream to Become Reality?* WORLD MARKETS ANALYSIS, July 11, 2003.

## **B. Contractual Arrangements in the Nigerian Petroleum Industry**

The Nigerian petroleum industry is governed by a number of contractual arrangements including joint ventures, production sharing contracts and risk service contracts and by an array of petroleum and allied matters legislation.

### **1. *Joint Ventures***

Participation joint ventures are the traditional mode of participation by the state or state-owned oil companies in petroleum development.<sup>74</sup> A participation joint venture (PJV) has been defined as:

an enterprise, corporation or partnership formed by two or more companies, individuals or organisations at least one of which is an operating entity which wishes to broaden its activities for the purpose of conducting a new profit-motivated business of permanent duration. In general, the ownership is shared by the participants with more or less equal distribution and without absolute dominance by one party.<sup>75</sup>

Typically, in the oil industry, it is an arrangement involving a partnership between the national oil company and a corporation (a “contractor”) to exploit an oil discovery.<sup>76</sup>

Until 1971, the Nigerian government was not participating in the oil industry and so there were no joint ventures. With a number of international developments including declarations and resolutions from the UN and OPEC on a State’s sovereignty over its natural resources, and Nigeria’s decision to be a member of OPEC Nigeria created a state oil company and started acquiring interests in the petroleum sector.<sup>77</sup>

Participation joint ventures in Nigeria are unincorporated vehicles constituted by a Participation Agreement and a Joint Operating Agreement between the national oil

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<sup>74</sup> Mirian Kene Omalu, *Developments in Petroleum Exploration and Production Arrangements in Nigeria*, OIL & GAS L. & TAX’N REV. 70, 70 (1996).

<sup>75</sup> EDGAR HERZFELD, JOINT VENTURES 3 (2d ed. 1983).

<sup>76</sup> Omalu, *supra* note 74, at 71.

<sup>77</sup> *Id.* at 70 - 71.

company (NOC) and foreign oil companies.<sup>78</sup> Algeria pioneered in 1968, the type of PJV practiced in Nigeria.<sup>79</sup> The essential elements of the PJV include:

- a) The designation of a foreign oil company (FOC) as the operator (although in later PJVs, Nigeria's state-owned oil company, the NNPC, can take over the operatorship of all or part of a leased area;
- b) Exploration activities are funded by contributions made by the NNPC and FOCs in proportion to their participation interests;
- c) Provision for an undivided interest of the NNPC in the concessions as well as in the assets and liabilities of the venture, on the basis of participating interest share;
- d) Entitlement of the NNPC to its participation share percentage of the available crude oil from exploration activities.<sup>80</sup>

NNPC currently has 6 joint ventures involving the major oil companies including the JV with Shell Petroleum Development Co. (operator), Elf and Agip; JV with Chevron Nigeria Limited (operator); JV with Mobil Producing Nigeria Unlimited (operator); JV with Nigerian Agip Oil Company (operator) and Phillips Petroleum; JV with Elf Petroleum Nigeria Limited (operator); JV with Texaco Overseas Petroleum Company of Nigeria Unlimited (operator) and Chevron.<sup>81</sup> It should be noted that some of these companies have undergone some restructuring since they entered into the JVs with NNPC.

The joint ventures produce a substantial portion of Nigeria's oil.<sup>82</sup> However, in the

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78 *Id.*, at 71.

79 See George S. Akpan, *State Participation in Nigeria: past, Present and Future*, OIL & GAS L. & TAX'N REV. 309, 313 (1997).

80 Omalu, *supra* note 74, at 72. For further discussion on joint ventures, see K. Adeniji, *Nigerian Petroleum Industry*, J. WORLD TRADE L. 156, 160 (1977).

81 See Human Rights Watch, *The Price of Oil*, *supra* note 12.

82 In 1995, it was 95 per cent.

early 1990s, the Nigerian government announced that it would no longer enter into joint ventures and that new contractual arrangements would be via production sharing contracts.<sup>83</sup>

## **2. Production Sharing Contracts**

This species of contract originated in Indonesia in the 1960s.<sup>84</sup> A production sharing contract (PSC) can be defined as:

an agreement under which a foreign company serving as a contractor to the host country/its national oil company recovers its costs each year from production and is further entitled to receive a certain share of the remaining production as payment in kind for the exploration risks assumed and the development service performed if there is a commercial discovery.<sup>85</sup>

Under this contractual arrangement, the apportionment of responsibilities and benefits to the FOC encompasses: acting as a contractor; provision of all the financing needed for exploration and development of a given acreage, recovery of the money expended from the proceeds of the sale of crude; receipt of a percentage of the remaining production and; indemnity if oil is not discovered.<sup>86</sup>

Nigeria entered into a PSC for the first time in 1973, with Ashland Oil Co.<sup>87</sup> This particular contract was criticized for being very onerous on the country and too generous

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83 See C. Ubezonu, *New Legal and Exploration Arrangements in the Nigerian Oil Industry*, OIL & GAS L. & TAX'N REV. 221 (1994); Chijioke E. Emole, *Recent Legislative Developments in Production Sharing Contracts in Nigeria*, INT'L ENERGY L. & TAX'N REV. 72, 72 (2000) (noting that because the Nigerian government was not able to meet its cash-call obligations, it was adopting PSCs as "the sole contractual mode for the exploration and production of petroleum in Nigeria.")

84 Sola Adepetun & 'Yomi Audifferen, *Production-Sharing Contracts: The Nigerian Experience*, OIL & GAS L. & TAX'N REV. 73, 73 (1995); Omalu, *supra* note 74, at 73.

85 ZHIGUO GAO, INTERNATIONAL PETROLEUM CONTRACTS: CURRENT TRENDS AND NEW DIRECTIONS 72 (1994).

86 Omalu, *supra* note 74, at 73.

87 *Id.*

to Ashland.<sup>88</sup> It later underwent a series of amendments.<sup>89</sup> Nigeria currently has numerous PSCs with a number of oil companies and today PSCs have overtaken JVs as the most-widely adopted contractual form in the Nigerian oil industry.<sup>90</sup> Nigeria's interest in PSCs is anchored in the belief that PSC holds the advantage of eliminating the responsibility and financial risks on the Nigerian government to contribute financially to new petroleum activities (as is the case with PJVs) while shifting the burden to the oil companies.<sup>91</sup> Theoretically, such funds that are freed from investment in investment in the development of new fields can be used to fund other obligations of the government to the citizens.<sup>92</sup>

Some commentators have made an observation regarding the perceived attractiveness and PSCs and the limitations thereof:

Despite the apparent attractiveness of the PSC to both parties, it does have certain drawbacks, which may be traceable to its cost recovery provisions. For instance, there is always the danger that the Contractor may find it more economically attractive to concentrate its investment efforts on existing prolific fields while scaling back or stopping altogether investments in the exploration of new and potentially risky fields. There is also the possibility of the Contractor incurring unqualified expenditure to the disadvantage of the NOC which would have to concede an increased volume of available crude oil for cost-recovery purposes.<sup>93</sup>

Nevertheless, PSCs in some respects, are probably the best option for Nigeria and other developing countries engaged in oil development.<sup>94</sup> Apart from the advantages that the PSC confers, the drawbacks can be curtailed or eliminated through proper contract

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<sup>88</sup>*Id.*

<sup>89</sup> *Id.*

<sup>90</sup> Emole, *supra* note 83, at 72.

<sup>91</sup> See Omalu, *supra* note 74, at 74.

<sup>92</sup> *Id.*, at 75 (quoting a statement from Nigeria's Department of Petroleum Resources.)

<sup>93</sup> Adepetun & Audifferen, *supra* note 84, at 76. For a contrary view, that is, that PSCs may not be so attractive, see George S. Akpan, *supra* note 79, at 315 (noting that the transfer of risk to FOCs defeats the whole idea of state participation in the oil and gas industry.)

<sup>94</sup> Adepetun & Audifferen, *supra* note 84, at 76.

drafting.<sup>95</sup> For instance, the contract can set maximum allowable amounts for certain items, make use of “price caps” to ensure that “windfall profits” from excess pricing of crude oil accrues to the state, not the FOC, and incorporate relinquishment clauses which would make it expedient for the FOC to expedite operations.<sup>96</sup>

### 3. Risk Service Contracts

The classical form of risk service contracts originated from Brazil.<sup>97</sup> Since then, it has undergone modifications and there is, for instance, a variable service contract.<sup>98</sup> Risk Service Contracts (RSCs) share a lot of similarities with PSCs. “The only difference between the PSC and RSC in Nigeria is the fact that [the] NNPC pays the FOC for its services in cash and not in kind (though NNPC may so elect to pay it). In effect, the FOC has no title to the oil produced [under an RSC].”<sup>99</sup>

RSCs are not very popular in Nigeria. The NNPC entered into RSCs with Agip Energy and Natural Resources and Elf Aquitaine Nigeria in 1979.<sup>100</sup> It is not likely that the Nigerian government will enter into new RSCs as it has already taken the decision to restrict new contractual arrangements to PSCs.<sup>101</sup>

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95 *Id.*

96 *Id.*

97 J.S.C. Neto, *Risk-Bearing Service Contracts in Brazil*, 3 J.E.N.R.L. 114 (1985).

98 See Lawrence Atsegbua, *An Appraisal of the Nigerian Liquefied Natural Gas Venture*, OIL & GAS L. & TAX’N REV. 35 (1998) (recommending a variable service contract for the development of the Nigerian gas sector.)

99 Akpan, *supra* note 79, at 315.

100 *Id.*

101 See Bode Agoro, *The Nigerian Oil Industry Privatisation Process: An Alternative*, INT’L ENERGY L. & TAX’N REV. 225, 225 N.8 (2000).

## C. Regulation of the Nigerian Oil and Gas Industry

### 1. *Petroleum Law*

The principal enactment under this head is the *Petroleum Act* of 1969.<sup>102</sup> The Act vests petroleum resources in Nigeria in the federal government.<sup>103</sup> It contains provisions relating to the assignment and revocation of oil prospecting licenses (OPL) and oil mining leases (OML). The Act provides for delegated legislation<sup>104</sup> upon the basis of which the state authority then responsible for such matters, the Federal Commissioner for Mines and Power, promulgated the *Petroleum (Drilling and Production) Regulations* 1969.<sup>105</sup> The Regulations dealt with a variety of matters including environmental protection. Regulation 25 thereof provides that the licensee or lessee of an oil exploration or prospecting license or a mining lease:

shall adopt all practicable precautions, including the provision of up-to-date equipment approved by the Chief Petroleum Engineer, to prevent the pollution of inland waters, rivers, water courses, the territorial waters of Nigeria or the high seas by oil, mud or other fluids or substances which might contaminate the water, banks or shoreline or which might cause harm or destruction to fresh water or marine life, and where any such pollution occurs or has occurred, shall take prompt steps to control and, if possible, end it.<sup>106</sup>

These provisions appear too hortatory and vague to have any meaningful impact.

The *Oil Pipelines Act* enacted in 1956<sup>107</sup> provides that the Governor General (now the President) may by regulation prescribe “measures in respect of public safety, the

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102 *Petroleum Act* 1969 (Nigeria), 1990, c.350. This statute repealed and replaced the *Petroleum Act* of 1916. My review of Nigerian laws draws extensively from my previous research work on this issue at different places and points in time.

103 *Id.*

104 *Id.*, S. 8.

105 L.N. 69 of 1969.

106 *Id.*

107 C.145 *Laws of the Federation of Nigeria* 1958 [enacted as Ordinance 31 of 1956].

avoidance of interference with works of public utility in, over and under any land and the prevention of pollution of any land or water.”<sup>108</sup>

## **2. Maritime Law**

The *Oil in Navigable Waters Act*,<sup>109</sup> the implementing legislation of the *International Convention for the Prevention of Pollution of the Sea by Oil* 1954<sup>110</sup> and its 1962 amendment<sup>111</sup> makes it an offence for any Nigerian ship to discharge oil (defined to include crude oil, fuel oil, lubricating oil and heavy diesel oil) into the “prohibited sea area.”<sup>112</sup> Prohibited sea areas, in line with the provisions of the above-mentioned international convention, include areas within 50 miles from land and outside the territorial waters of Nigeria and some listed seas.<sup>113</sup> This accords with the notion of flag State jurisdiction by which discharge violations in areas outside another State’s territorial or internal waters are punishable by the State of the ship’s registry and under its law.<sup>114</sup>

The Act prohibits the discharge of oil into Nigerian navigable waters by any vessel or from a place or land adjoining such waters, or from an apparatus transferring oil, an offence for which the owner or master of the ship, the occupier of the land or the operator of the apparatus in question respectively, may be culpable.<sup>115</sup> Navigable waters of Nigeria refer to all navigable inland waters and the whole of the sea within the seaward limits of the country’s territorial waters.<sup>116</sup>

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108 *Id.*, S 31 (c).

109 *Oil in Navigable Waters Act* 1968 (Nigeria), 1990 c.337

110 327 U.N.T.S. 3 [hereinafter OILPOL].

111 *Oil in Navigable Waters Act*, *supra* note 109, Preamble

112 *Id.*, S.1.

113 *Id.*, Parts 1 and 2 of the Schedule to the Act.

114 See ETIKERENTSE, *supra* note 14, at 72.

115 *Oil in Navigable Waters Act*, *supra* note 109, s. 3 (1).

116 *Id.*, S 3 (2).

The Act provides a number of defenses to the offences created therein, and some of these defenses have been a source of strong criticisms:<sup>117</sup> Some of these criticisms however, cannot stand up to intense scrutiny. For instance a number of commentators are alarmed by the defense available to a person who discharges oil in order to save lives.<sup>118</sup> There is nothing inherently or patently wrong with excusing ship masters who discharge oil into the sea in the event of a maritime casualty or real likelihood of it, if such discharge will lighten the ship and save lives. It must be conceded that it opens an avenue for unscrupulous ship masters to discharge oil in other cases and claim that it was necessary for the safety of lives, but that does not afford enough ground to deny other persons the opportunity to do so legitimately.

The critics also create the impression that the Nigerian enactment is weakened by the fact of “the myriad of very liberal defenses it allows.”<sup>119</sup> The point is that it is not the enactment that allows them; the legislature was in general, simply complying with the provisions of the international law upon which the Nigerian law was based.<sup>120</sup> That being the case, what ought to have been pointed out is the fact that the law is based on an international arrangement that deserves criticism.

The real problem therefore with the *Oil in Navigable Waters Act* is that it is based

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117 See David Iyalomhe, *Environmental Regulation of the Oil and Gas Industry in Nigeria: Lessons from Alberta’s Experience* 60 (Unpublished LL.M. Thesis, 1998) (On file with the University of Alberta Library).

118 See Akin Ibidapo-Obe, *Criminal Liability for Damages Caused by Oil Pollution*, in ENVIRONMENTAL LAWS IN NIGERIA 231, 239-240 (J.A. Omotola, ed., 1990); Ambrose O.O. Ekpu, *Environmental Impact of Oil on Water: A Comparative Overview of the Law and Policy in the United States and Nigeria*, 24 DENV. J. INT’L L. & POL’Y 55, 83 (1995).

119 Ekpu, *supra* note 118, at 83.

120 See OILPOL, *supra* note 110, art. IV.

on an obsolescent and inadequate arrangement that has been overtaken by later events.<sup>121</sup> The 1954 convention and its 1962 amendment have undergone further amendments in 1969 and 1971<sup>122</sup> which are not reflected in the legislation. The gravity of the lack of the incorporation of the amendments into Nigerian law pales into insignificance when juxtaposed with the fact that the 1954 OILPOL and its amendments are hardly considered as law by many countries in these present times. This is because the convention has been replaced, in the case of a number of the parties, by the 1973 *International Convention for the Prevention of Pollution from Ships*.<sup>123</sup> This latter convention has in turn undergone changes including the 1978 Protocol relating thereto<sup>124</sup> and the 1992 amendments introducing the double hull arrangement for oil tankers.<sup>125</sup> That Nigeria should be relying on the 1954 convention and its 1962 amendment today shows how far removed some of the country's laws are from present realities.

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121 See R. M'GONIGLE & M. ZACHER, POLLUTION, POLITICS, AND INTERNATIONAL LAW: TANKERS AT SEA 219 (1979); R.B. Bilder, *The Canadian Arctic Waters Pollution Act: New Stresses on the Law of the Sea*, 69 MICH. L. REV. 1, 34 (1970).

122 See D.P. O'CONNELL, THE INTERNATIONAL LAW OF THE SEA 1002, Vol. II (I.A. Shearer ed., 1984).

123 I.M.C.O. Doc. MP/CONF/WP 35 (Nov. 2, 1973) reprinted in 12 I.L.M. 1319. The Convention is meant to supersede the 1954 convention for those States who are parties to the two treaties. See also Robin R. Churchill & Geir Ulfstein, *Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law*, 94 AM. J. INT'L L. 623, at 631 (2000); James Carlson, *Presidential Proclamation 7219: Extending the United States Contiguous Zone – Didn't Someone Say This Had Something to do with Pollution?* 55 U. MIAMI L. REV. 487, 504 (2001).

124 The Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, I.M.C.O. Doc. TSPP/CONF/11 (Feb. 16, 1978) reprinted in 17 I.L.M. 546 [hereinafter MARPOL 73/78].

125 MARPOL 73/78 Amended for New and Existing Tankers, 2 IMO NEWS (1992), at 3.

### 3. *Environmental Law*

The *Federal Environmental Protection Agency Act 1988*<sup>126</sup> establishes a Federal Environmental Protection Agency (FEPA) as a body corporate consisting of a chairman, distinguished scientists, representatives of certain federal ministries and the Director of the Agency.<sup>127</sup> The Agency was initially placed under the supervision of the Federal Ministry of Housing and the Environment, but by an amendment to the original enactment, FEPA was moved to the Presidency.<sup>128</sup> The present civilian government of Nigeria has created a full-fledged Ministry of Environment under which FEPA now operates.<sup>129</sup>

FEPA is given the “responsibility for the protection and development of the environment in general and environmental technology, including initiation of policy in relation to environmental research and technology.”<sup>130</sup>

Under Part II of the Act, FEPA is required to make recommendations establishing

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126 Federal Environmental Protection Agency Act 1988 (Nigeria), 1990 c. 131 [hereinafter FEPA Act].

127 See also S. 2 (1) (a) and (b) of the FEPA Act for a full composition of the membership of the agency.

128 Federal Environment Protection Agency (Amendment) Decree (Nigeria) 1992, c.59.

129 See Muhammad Kabir Sa'id, Honourable Minister of Environment, Protecting Our Environment and Natural Resources for Sustainable Development, Ministerial Media Summit, May 23, 2002, available at <http://www.nigeria.gov.ng/ministryinformation/mediasummit/Environment.htm>. Last visited November 5, 2002. (stating that “the Federal Ministry of Environment was created in 1999 with the fundamental objectives of securing a quality environment adequate for good health and well-being, conserving and using the environment’s natural resources for the benefit of present and future generations.”)

130 FEPA Act, *supra* note 126, S. 4

water quality standards<sup>131</sup> for the protection of the public health and enhancement of the quality of water.<sup>132</sup>

The Act prohibits the discharge of hazardous substances into the air, land, waters and shorelines except for cases permitted by law.<sup>133</sup> FEPA has defined hazardous substances (even though oil is not specifically mentioned) to include some waste from the refining process such as slop oil, emulsion solids and leaded tank bottoms.<sup>134</sup> Any breach of the above provision is punishable and attracts a fine or a term of imprisonment or both.<sup>135</sup> A person accused of an offence under this head could plead that the offence was committed without his or her knowledge or that he or she exercised all due diligence to prevent the commission of such offence.<sup>136</sup>

The above however, does not exonerate the owner or operator of any vessel or facility that causes such discharge of hazardous substances from bearing the cost of removing such substances, or the “restoration or replacement” of natural resources damaged thereby<sup>137</sup> or the responsibility for cleaning up the affected areas and removing the substances.<sup>138</sup> There is also a duty on the “spiller” to promptly inform the Agency and other relevant bodies in the event of a discharge.<sup>139</sup>

FEPA has issued a number of regulations relating to oil pollution issues, one of

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131 Id., S. 5(1) & S. 15 (1).

132 Id., S. 15 (1).

133 Id., S. 20 (1).

134 FEPA, Guidelines and Standards for Environmental Pollution Control in Nigeria (1991).

135 FEPA Act, supra note 126, S. 20 (2).

136 Id., S. 20 (4).

137 Id., S. 21.

138 Id., S. 21 (2) (b).

139 Id., S. 21 (2) (a).

which is the *National Environmental Protection (Effluent Limitation) Regulations*,<sup>140</sup> which allow an oil and grease content in brine and other production wastes of not more than 10 mg/liter for discharge into Nigeria's inland waters. Another statutory instrument issued by FEPA, the *National Environmental Protection (Pollution Abatement in Industries Generating Wastes) Regulations*,<sup>141</sup> prohibits the release of hazardous or toxic substances into the air, water or land of Nigeria's ecosystems beyond approved limits. Specifically, it prohibits the discharge of oil, in any form, into public drains, rivers, lakes, sea, or underground injection without a permit issued by FEPA or any organization designated by it.<sup>142</sup>

The FEPA Act represents an improvement on Nigeria's previous attempts to address environmental questions through legislation. For instance, it provides for an enforcement scheme to ensure that its provisions are given effect. However, there is room for a lot of improvement. The Act restrictively emphasizes pollution arising from industrial activities including voluntary discharge of hazardous substances into the air, on land, and the waters of Nigeria when environmental degradation also arises from those economic activities that are considered "normal" and with which we are confronted from day to day.

In addition, enforcement may also be hindered by the wording of the statute. Under section 20, the discharge of hazardous substances must be in "harmful quantities," thus requiring a case by case determination before liability can be established.<sup>143</sup> A

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140 S.I. 8 of 1991.

141 S.I. 9 of 1991

142 Id., regulation 15 (2).

143 Ekpu, *supra* note 118, at 85.

similar language was used in the United States *Clean Water Act*<sup>144</sup> and this was interpreted to impose a requirement to show that a discharge caused actual harm before liability could attach to that discharge.<sup>145</sup> The section was later amended with the new provision prohibiting discharge of oil or hazardous substances in such quantities “as may be harmful” as determined by regulations made under the legislation.<sup>146</sup> This amendment was construed by the court as providing that actual harm to the environment was not a relevant factor in the determination of the question of the violation of the discharge prohibition in the relevant section.<sup>147</sup> It also has the added advantage of removing the administrative burden of case-by-case proceedings.<sup>148</sup> It is submitted that this latter legislative approach is better for Nigeria since FEPA might find it nearly impossible to cope with the demands of the present position, considering the volume of spills and its other constraints.<sup>149</sup>

The provisions of the Act on the clean up of spills are unlikely to have much impact in either deterring the occurrence of spills or providing an incentive to undertake a clean up where hazardous substances are discharged. Corporations would certainly prefer the payment of the paltry penalty of one thousand Naira (about 10 dollars) for every day

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144 Federal Water Pollution Control Act, 33 U.S.C. 1251 - 1387 (1988). The Act was originally enacted in 1948.

145 *United States v. Chevron Oil Company*, 583 F.2d 1357 (5th Cir. 1978). See also Ekpu, *supra* note 118. 146 33 U.S.C. 1321 (b) (3).

147 *Chevron U.S.A., Inc. v. Yost*, 919 F.2d 27 (5th Cir. 1990). See also Ekpu, *supra* note 118.

148 *Id.*, See also *Orgulf Transport Co. v United States*, 711 F. Supp. 344 (W.D. Ky. 1989). See also Ekpu, *supra* note 118.

149 Ekpu, *supra* note 118, at 85. These constraints include budget facilities, personnel competencies, and the role of the government in the oil industry. *Id.*, at 98 - 99.

the offence persists to mapping out huge sums of money for clean up or to take precautionary measures.<sup>150</sup>

In general, it can be fairly stated that the Act was only a starting point and additional legislation was needed as time went on. In recognition of this fact, additional environmental guidelines have been enacted. In 2002, the Nigerian government announced the introduction of some new guidelines on the environment.<sup>151</sup> It is only expected that they would be a considerable improvement on previous efforts, both in content and implementation.<sup>152</sup> This augments earlier regulations that have also been found to be generally satisfactory.

Nevertheless, there has been a steady improvement in Nigeria's environmental legal framework. After conducting a comprehensive and comparative analysis of

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150 Joshua P. Eaton, *The Nigerian Tragedy, Environmental Regulation of Transnational Corporations, and the Human Right to a Healthy Environment*, 15 B.U. INT'L L. J. 261, 288 (1997).

151 NIGERIA: New Environmental Guidelines for Oil Industry, UNITED NATIONS, Office for the Coordination of Humanitarian Affairs (OCHA) Integrated Regional Information Network (IRIN), August 1, 2002. The Special Adviser to the Nigerian president on Petroleum Matters, Dr. Rilwan Lukman, stated that the Guidelines are the outcome of a review of old rules with a view to bringing them in line with global trends while at the same time setting high performance standards for the country's oil industry. According to the report:

[Dr.]Lukman acknowledged that the environmental practices of oil transnationals in Nigeria had been found to be below internationally acceptable standards. He said the government had information that oil companies had stockpiled about 35,000 metric tonnes of drilling waste in various parts of the Niger Delta, and had planned to dump them in remote locations.

Id.

152 "Senior officials said the 300-page guidelines provided rules to reduce pollution, procedures for environmental monitoring and analytical parameters. The government, through its Department of Petroleum Resources, will also conduct regular health, safety and environment audits on the oil companies." Id.

Nigerian environmental laws, one writer stated that “Nigeria’s environmental permitting and impact assessment requirements and waste management regulations are, for the most part, comparable with those in” Louisiana, California, Alberta (Canada) and the United Kingdom.<sup>153</sup> They are also “considerably more prescriptive and developed than those of some other sub-Saharan African countries.”<sup>154</sup> The major problem has been enforcement.<sup>155</sup>

#### ***4. Natural Gas-Specific Law***

In 1979, Nigeria passed an Associated gas Re-Injection Act with the central objective of conserving the country’s gas and developing a scheme for gas processing for industrial purposes.<sup>156</sup> This Act imposed a requirement on all oil companies operating in Nigeria to submit by October 1, 1980, schemes for the utilization and re-injection of associated gas. There was a prohibition of gas flaring after 1984 and the penalty for breach was a forfeiture of all concessions granted in respect of the particular field or fields. These legal stipulations were greeted with cold shoulders by the oil companies who disregarded them, since flaring was less expensive and thus more rewarding than developing schemes for re-injection of associated gas.<sup>157</sup> Developing a re-injection scheme also imposed an overwhelming cost on the NNPC, which as joint venture partner

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153 Jim Thomas, *Nigerian Environmental Law and the Petroleum Sector: Comparative Review and Current Trends*, OIL & GAS L. & TAX’N REV. 454, 454 (1997); See also HRW, *The Price of Oil*, supra note 12.

154 Thomas, *supra* note 153, at 454.

155 Human Rights Watch, *The Price of Oil*, *supra* note 12.

156 See Atsegbua, *supra* note 31, at 35 (citing E.I. Kachikwu, *Legal Issues in Oil and Gas Industry*, 2:9 GRAVITAS 34, 39 (1989).

157 Yinka Omorogbe, *Regulation of Oil Industry Pollution in Nigeria*, in NEW FRONTIERS IN LAW 147, 163 (E. Azinge, ed., 1993); Atsegbua, *supra* note 31, at 35.

was required to pay 60 per cent of the cost of such development.<sup>158</sup> Obviously, the government needed to formulate a policy that considered the huge financial commitment required to comply with its dictates.

With this law being honored more in breach than in observance, the government was left with little alternative but to review it. Thus, the Associated Gas Re-Injection (Continued Flaring of Gas) Regulations of 1984 and the Associated Gas Re-injection (Amendment) Act of 1984 were introduced. These enactments did away with the deadlines imposed by the 1979 Decree. The Amendment Decree also provides for circumstances under which gas flaring is permissible. In addition, the Amendment Decree gives the Minister of Petroleum the authority to issue a certificate to the oil companies where the Minister is satisfied that it is not appropriate or feasible to utilize or re-inject the gas produced or in a particular field or fields. In such a situation, the Minister is also empowered to impose a penalty for gas so flared.

These later two enactments had the effect of totally exempting 86 out of 155 oil fields from re-injection schemes.<sup>159</sup> For the rest of the fields, flaring called for a penalty of 2.5 cents per 1,000 cubic feet of gas flared.

The Nigerian government has re-committed itself to eliminating gas flaring in the country. After some period of vacillation, the government has set a new deadline of 2008 for the cessation of all gas flaring. Since, this is not the first time that such deadlines have been set, there is an understandable level of cynicism as to whether this target will be achieved.

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<sup>158</sup> Omorogbe, *supra* note 157, at 161-64.

<sup>159</sup> Omorogbe, *supra* note 157, at 163.

## CHAPTER 2

### THE RESOURCE CURSE PHENOMENON

#### INTRODUCTION

Resource-rich countries, almost without exception, are riddled with multifarious social, economic, and political problems. Stories of extreme poverty, environmental degradation, human rights abuses, authoritarianism, civil conflicts and war are rife. Over the years, scholars in development economics and political science have devoted considerable attention to the subject of the resource curse.<sup>160</sup>

In recent years, there has been a resurgence of interest in this subject. One reason behind this revival is the anticipated massive inflow of funds from new oil developments in some African countries, including Chad, Cameroon, Sudan, Sao Tome, and Equatorial Guinea. The motivation is to ensure that these projects do not face the same plight as their older counterparts, while reversing the curse where it already exists.<sup>161</sup>

This Chapter presents a theoretical discussion of the resource curse thesis, as a form of foundation for the ensuing discussion on the negative social, economic, and environmental cost of oil and gas development in Nigeria. This Chapter is organized into four major parts. Part I examines the concept of the resource curse through a survey of relevant literature on the subject. In Part II, I examine the reasons advanced by various scholars as causes of the resource curse. Economic explanations including Dutch Disease are discussed. More importantly, the nature of political dynamics in oil producing states

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160 RICHARD M. AUTY, *SUSTAINING DEVELOPMENT IN MINERAL ECONOMIES: THE RESOURCE CURSE THESIS* (1993).

161 See Paul Stevens, *Resource Impact - Curse or Blessing? A Literature Survey* (2003).

cannot be glossed over. Thus, I look at political science explanations for the resource curse. Emphasis is placed on state-centered explanations, the most prominent of which is the rentier thesis. This part also examines the role of institutions as independent or explanatory variables for the stunted development outcomes in countries that are rich in resources. Part III discusses the proposals for addressing the curse.

## **I. CONCEPT**

One of the most puzzling and perplexing discoveries of modern scholarship<sup>162</sup> is a paradoxical phenomenon referred to as the resource curse. The resource curse thesis posits that there is a negative relationship between endowment with natural resources and social and economic development. Countries that have deposits of natural resources in abundant quantities tend to perform worse than those not similarly endowed on virtually every social and economic indicator.<sup>163</sup>

Jeffrey Sachs and Andrew Warner note that this paradox “has been a constant motif of economic history.”<sup>164</sup> Paul Stevens observes that “[c]oncern over the impact of great wealth on a society goes back at least as far as the writing of the 14<sup>th</sup> Century Arab philosopher Ibn Khaldun in which he identifies the fifth stage of the “state” as one of waste and squandering.”<sup>165</sup> In the 17<sup>th</sup> century, although Spain had silver and gold flowing in abundance from the colonies, it still had a much weaker economy compared with the Netherlands, which was resource poor. The 19<sup>th</sup> and 20<sup>th</sup> centuries saw the rise of the Swiss and Japanese economies while resource-rich Russia lagged behind. In more

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162 Alan Heston, *Crusades and Jihads: A Long-run Economic Perspective*, 588 ANNALS of POL. & SOC. SC. 112, 126 (2003) (“What has been discovered in the past fifty years is that the blessings of natural resources can be a curse in disguise.”).

163 See ALAN GELB & ASSOCIATES, *OIL WINDFALLS: BLESSING OR CURSE?* (1988).

164 Jeffrey D. Sachs and Andrew M. Warner, *Natural Resource Abundance and Economic Growth*, Development discussion Paper No. 517a, (October 1995), at 2.

165 Stevens, *supra* note 161.

recent times, poor resource countries such as Korea, Taiwan, Hong Kong and Singapore have been able to build strong economies at the same time that their resource rich counterparts like Mexico, Nigeria and Venezuela have been beset with economic calamities.<sup>166</sup>

This sad development, while a constant feature in many resource-rich economies, is particularly evident in the petroleum producing countries. Professor Terry Lynn Karl describes what she refers to as oil's "paradox of plenty" in the following words:

Countries that are dependent on petroleum revenues for their livelihood (with the notable exception of Norway) are among the most economically troubled, the most authoritarian, and/or the most conflict-ridden in the world. This is true across regions - in the Middle East, Asia, Africa and Latin America. Oil-exporting countries grew more slowly than non-oil rich countries over time (between 1965-1980 OPEC members experienced an average decrease in their per capita GNP of 1.3 per cent per year, while their non-oil counterparts grew by an average of 2.2 per cent per year), and they diversify their economies less easily. They have unusually high poverty rates compared with countries dependent on the export of agricultural products. The infant mortality, malnutrition, and life expectancy at birth is worse than in non-oil/mineral dependent countries of the same income level. Their health care and their school enrolment tend to be less than in their non-resource rich counterparts; OPEC countries spend less than 4 per cent of their GNP on education compared with almost 5 per cent for the world as a whole (1997 figures). But they are more likely to spend from two to ten times more on their militaries and to be ruled by authoritarian leaders. The localities surrounding oil installations are among the most environmentally damaged and conflict-ridden in the world. Worst of all, the probability of having civil wars is higher in oil-exporting countries than in their resource-poor counterparts. This is oil's "paradox of plenty" and it is not a pretty picture.<sup>167</sup>

Although doubts have been raised about the existence of this phenomenon,<sup>168</sup> the evidence supporting the prevalence of the resource curse seems to be particularly

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166 Sachs and Warner, *supra* note 164, at 2.

167 Terry Lynn Karl, *The Oil Trap*, Transparency International Quarterly Newsletter (September 2003) at 1, 9.

168 See G. Davis, *Learning to Love the Dutch Disease: Evidence from the Mineral Economies*, 23:10 WORLD DEVELOPMENT (1995).

strong.<sup>169</sup> Thomas Palley presents a useful summary of some of the evidence from available scholarly works. Sachs and Warner analyzed the impact of mineral and other resource exports on GDP in 97 countries over a nineteen-year period from 1971 -1989 and in their cross-country statistical regression analysis came to the conclusion that the negative relationship between resource abundance and rapid economic growth holds true. Leite and Wydmann as well as Glyfalon and others replicated these findings. After controlling for GDP levels, Michael Ross linked higher mineral and oil dependence to a high level of poverty, disproportionate military expenditures by governments and a higher level of authoritarianism. The probability of civil-war in any given five year period is also greater in countries dependent on oil and minerals as demonstrated by Collier and Hoeffler. Corruption is also prevalent at a higher level in these countries according to the findings of Leite and Wydmann and Glyfalon and others.<sup>170</sup>

It should be noted that the existence of the resource curse is not a law cast in stone, as countries can take initiatives to check it.<sup>171</sup> Yet, the extent of its existence presents sufficient cause for pause and bewilderment. In the first place, it appears to cut across virtually every barrier. Countries that have little or nothing in common ethnically, geographically, culturally and in the type of regime still seem to face the same predicament.<sup>172</sup> Secondly, it is counter-intuitive.<sup>173</sup> Both common sense and economic

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169 Kym Anderson, Are Resource-Abundant Economies Disadvantaged? CIES Seminar Paper 97-03 (1997) (“Empirical evidence suggests that economies well endowed with natural resources relative to other factors of production have grown slower than other economies over the long term.” Id. at 3).

170 Thomas I. Palley, Combating the Natural Resource Curse with Citizen Revenue Distribution Funds: Oil and the Case of Iraq, Discussion Paper, July 2003, at 7.

171 See R. Auty, Industrial Policy Reform in Six Large Newly Industrializing Countries: The Resource Curse Thesis, 22:1 WORLD DEVELOPMENT 11 (1994).

172 TERRY LYNN KARL, PARADOX OF PLENTY: OIL BOOM AND PETRO-STATES xv-xvi. (1997).

173 See Erling Roed Larsen, Escaping the Natural Resource Curse and the Dutch Disease? Norway’s Catching up with and forging ahead of Its Neighbors (stating that “[g]rowth studies show, counter to

theory present a basis to believe that more resources should be a blessing, not a curse.<sup>174</sup> The presence of natural resources in commercial quantities leads to the generation of valued foreign exchange, brings in investors from other parts of the world with much needed capital and increases the chances of producing goods in view of the availability of raw materials.<sup>175</sup> Indeed, “few people would argue that more income is a bad thing. Standard economic theory asserts that one can never be made worse off by a positive wealth effect.”<sup>176</sup>

In decades past, some prominent economic theorists had stridently argued that low growth in developing countries could be linked to a lack of access to the necessary capital for development. The “staple theory” of growth maintained that countries rich in oil and mineral resources could overcome this predicament through the attraction of foreign companies to exploit these resources. Money generated from a growing extractive sector would be used in the construction of needed infrastructure and in the establishment of secondary industries and diversification.<sup>177</sup> In a similar vein, the “big push” theory of economic development made the case that what developing countries needed was a “big push” which involves expanding demand in such large measure as to provide the needed encouragement for private corporations to make an investment in industrialization.<sup>178</sup> With the massive infusion of capital from resource exports, a more propitious opportunity for the validation of these theories could not have arrived. Unfortunately, this has not

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intuition, that the discovery of a natural resource may be a curse rather than a blessing since resource-rich countries grow slower than others.”)

174 Stevens, *supra* note 161, at 3.

175 Maria Sarraf and Moortaza Jiwaji, *Beating the Resource Curse: The Case of Botswana*, (The World Bank Environment Department, Environmental Economics Series) (October 2001) at 3.

176 *Id.* at 1.

177 Michael Ross, *Extractive Sectors and the Poor* (An Oxfam America Report) (2001) at 6 (hereinafter Ross, *Extractive Sectors and the Poor* ).

178 *Id.*

proven to be the case. Poor countries that have considerable endowment of resources have not escaped their pre-resource discovery miseries. If anything, resources have exacerbated their already pitiable conditions. This is another piece of the puzzle.

In fairness to those who expect resource wealth to translate to economic development, there is rich precedent for such optimism. Gavin Wright and Jesse Czelusta seek to present a counterargument to the idea that resource abundance portends bad news for economic growth by highlighting examples of countries that have successfully utilized resources to achieve development.<sup>179</sup> Petroleum and other resources contributed immensely to the emergence of United States, Canada and Australia as strong economies.<sup>180</sup> Coal and iron deposits played a fundamental role in the success of the Industrial Revolution.<sup>181</sup> Norway was the poorest country in Europe in 1900, but is now one of the richest European States primarily due to utilization of resources including oil.<sup>182</sup> Botswana has catapulted itself from one of the poorest countries at independence in 1965 to an upper income society through its diamond mines.<sup>183</sup>

Karl rejects the argument, however, that the energy-influenced development of yesteryears can be compared to the situation of oil exporters today. She argues that “the oil-led development model of today is significantly different from the role that energy played in the late 19<sup>th</sup> and early 20<sup>th</sup> centuries in the United States, Canada and Australia” because in those earlier experiences that succeeded, the contribution of mining to the overall economic input was quite small, as opposed to the domineering position it

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179 Gavin Wright and Jesse Czelusta, *Exorcizing the Resource Curse: Minerals as a Knowledge Industry, Past and Present* (Stanford University, July 2002).

180 *Id.*

181 Jeffrey D. Sachs, *Tropical Underdevelopment*, National Bureau of Economic Research Working Paper No. 8119 (2001).

182 Save the Children, *Lifting the Resource Curse: Extractive Industry, Children and Governance*, 9 (2003).

183 Sarraf and Jiwanji, *supra* note 175.

occupies today in the economies of oil-exporting nations.<sup>184</sup> It should be noted, however, that resource-based economic growth and a bad press have been companions for centuries now,<sup>185</sup> a fact that tends to weaken Karl's assertion. In the 18<sup>th</sup> century, Adam Smith wrote:

Projects of mining, instead of replacing the capital employed in them, together with the ordinary profits of stock, commonly absorb capital and stock. They are the projects, therefore, to which of all others a prudent law-giver who desired to increase the capital of his nation, would least chuse to give any extraordinary encouragement . . . .<sup>186</sup>

Thus, notwithstanding that centuries ago, reliance on minerals for economic development was the subject of strictures as it is today, many countries as indicated above did not allow their natural resource wealth to truncate their march toward economic growth. On the other hand, they used these resources as a springboard to propel them to the socio-economic status that they enjoy today.

Even if natural resource wealth does not confer a comparative advantage, it is not expected to be a definite disadvantage. Again, in line with the paradox, this hard to imagine scenario seems to be the dominant trend socially, politically and economically. "Oil and mineral exports do not simply fail to alleviate poverty; they appear to make it worse."<sup>187</sup> From a political perspective, evidence from many studies indicates that there is a tendency for governments to become more democratic in the event of rising incomes. However, a rise in incomes occasioned by oil wealth is said to lead to a converse result: increased wealth's effect at democratization reduces or evaporates. Michael Ross

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184 Terry Lynn Karl, *Oil-led Development: Social, Political and Economic Consequences*, THE ENCYCLOPEDIA OF ENERGY (Cutler J. Cleveland, ed.), at 4 (2004) (hereinafter Karl, *Oil-Led Development*).

185 Wright and Czelusta, *supra* note 179, at 2.

186 ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 562 (1776) (1976) (quoted in Wright and Czelusta, *supra* note 179, at 2.).

187 Ross, Extractive Sectors and the Poor, *supra* note 177, at 5.

contends that a component of the resource curse is that “oil and mineral wealth tends to make states less democratic.”<sup>188</sup>

A recent study disputes the conclusion that oil wealth is more closely linked with nonviability of regimes and political instability. The counter-contention, based on cross-sectional time-series data from 107 countries in the developing world between 1960 and 1999, is that “oil wealth is robustly associated with increased regime durability, even when controlling for repression, and with lower likelihoods of civil war and anti-state protest.”<sup>189</sup>

An eclectic way of looking at it is to aver that the impact of oil wealth on democracy may be two-sided. While it may be said that oil wealth impedes democracy in some cases, there are also instances where the flow of oil rents have helped undermine the stability of authoritarian regimes such as that of the Shah in Iran that fell in 1979.<sup>190</sup> In Venezuela, the presence of oil may have played a major role in democratizing the country.<sup>191</sup>

Furthermore, if the abundant flow of oil revenues or external rents works against democracy, the converse claim may also hold: the absence of massive flow of oil (or other external) rents would help or accelerate democracy. However, cases of steep decline in oil revenues and lower receipts of strategic rents have not necessarily been accompanied by a weakening of authoritarian institutions or entrenching of democracy,

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188 Michael L. Ross, *Does Oil Hinder Democracy?* 53 *WORLD POLITICS* 325, 328 (2001).

189 Benjamin Smith, *Oil Wealth and Regime Survival in the Developing World, 1960-1999*, 48:2 *AM. J. POL. SCI.*, abstract (2004) (hereinafter Smith, *Oil Wealth*).

190 Gary C. Gambill, *Explaining the Arab Democracy Deficit, Part I*, 5:2 *MIDDLE EAST INTELLIGENCE BULLETIN* (Feb-March 2003), available at [http://www.meib.org/articles/0302\\_me.htm](http://www.meib.org/articles/0302_me.htm). Last visited on April 10, 2004.

191 *Id.*

especially in the Middle East.<sup>192</sup> In some cases, instead of oil wealth undermining regime viability, it could actually enhance its durability.<sup>193</sup> This could be explained from the perspective that while oil wealth weakens state institutions, under certain conditions, it could be a vehicle for constructing viable regime coalitions and vibrant state institutions that prove useful in maintaining the rule of leaders of these countries when they face the kind of crises that undercut other governments.<sup>194</sup>

Finally, in continuation of the justifiable bewilderment occasioned by the effect of resource wealth, it is pertinent to note that while resources have not provided the needed engine for growth in many resource-rich countries, the lack of resources have not hindered resource-poor countries from accelerating to enviable heights in the arena of economic growth and social development. It could actually be argued that not having these resources freed this category of countries from the shackles that have been associated with resources. Unencumbered by resource wealth, and propelled by the circumstances in which they found themselves, they were able to make their way toward rapid growth. This explanation, while plausible, does not remove the element of paradox that is presented by this picture.

## **II. WHAT CAUSES THE CURSE?**

While there is hardly any question that the resource curse is a reality, scholars in economics and political science have had a much harder time explaining its causes in

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192 Id.

193 See Smith, *Oil Wealth and Regime Survival*, supra note 189, at 1, 2.

194 Benjamin Smith, *The Wrong Kind of Crisis: Why Oil Booms and Busts Don't Lead to Democratic Transition*, Manuscript (2003), at 2.

general and as applied to specific countries. This prompted Hausman and Rigobon to observe: “The concern that natural resource wealth may somehow be immiserating is a recurring theme in both policy discussions and in empirical analysis. The empirical regularity seems to be in the data but understanding its causes has been a much harder task.”<sup>195</sup>

A variety of variables may account for the resource curse. Existing explanations can be categorized into three broad areas – social, economic and political.<sup>196</sup>

#### A. **Social Explanation**

The social explanation is anchored on the premise that laziness is a concomitant of the abundance of natural resources. Several centuries ago, the French scholar, Jean Bodin opined that:

men of a fat and fertile soil, are most commonly effeminate and cowards; whereas contrariwise a barren country makes men temperate by necessity, and by consequence careful, vigilant, and industrious.<sup>197</sup>

In essence, the aphorism “necessity is the mother of invention” could well be a true explanation of this paradox. The fact that a number of resource-poor countries have prospered far more than their resource-rich counterparts tends to accentuate this point. However, it should also be borne in mind that a number of countries in the past have used

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195 R. Hausman and R. Rigobon, An Alternative Interpretation of the Resource Curse: Theory and Implications for Stabilization, Saving, and Beyond, Paper prepared for the Conference on Fiscal Policy Formulation and Implementation in Oil Producing Countries, International Monetary Fund (2002).

196 See Michael L. Ross, *The Political Economy of the Resource Curse*, 51 *WORLD POLITICS* 297 (1999). Ross, however categorizes what I refer to as the “social explanation” here under the political science rubric of “cognitive explanations.” I do not reject the validity of such categorization, but believe that the cognitive explanations are better suited for the public actors, while the “social explanation” should be used for cases that cover the whole of the society.

197 JEAN BODIN, *SIX BOOKS OF A COMMONWEALTH*, 5, 1:565 (ed. and trans. M.J. Tooley) (1967).

minerals and commodities as a foundation for their economic development. Today, Norway's success in the management of its resources tends to debunk the "laziness" myth.

### **B. Economic Explanations**

Four major economic explanations for the negative correlation between resource wealth and economic growth have been identified namely: "a decline in the terms of trade for primary commodities, the instability of international commodity markets, the poor economic linkages between resource and nonresource sectors, and an ailment commonly known as the "Dutch Disease."<sup>198</sup>

The first economic explanation is premised on the assumption that the terms of trade are major determinants of economic growth. If this premise is accepted, it stands to reason therefore that when there is a decline in the terms of trade for primary commodities, the result may be a resource curse.<sup>199</sup> However, the terms-of-trade effect, while seemingly "statistically robust at the global level" has proven very difficult to test at the case-study level.<sup>200</sup>

The argument on instability of international commodity markets is that resource-dependent countries suffer from the resource curse because of unstable commodity markets. While the instability of export earnings from commodity exports is hardly disputable, the issue is whether this necessarily translates into something negative for the commodity exporters. Scholars contend that this instability would actually lead to higher economic growth by promoting unusually high levels of private investment, which

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198 Ross, *Political Economy*, supra note 196, at 298.

199 Id. at 303.

200 Id. at 304.

exporters use as a way of protecting themselves against future price shocks.<sup>201</sup> Besides, not even studies that conclude that export instability retards growth have been able to establish a link between export instability and the resource curse.<sup>202</sup>

The resource curse is also attributed to the fact that commodity exports do not generate much growth in other sectors of the economy.<sup>203</sup> To settle the problem of linkages, States have taken action to nationalize their mineral and petroleum industries and adopted strong measures to capture the economic rents that multinational corporations used to repatriate to their home countries.<sup>204</sup> Yet, the resource curse persists in these countries.

The Dutch Disease, which owes its origin to the experience of Netherlands with the discovery of North Sea natural gas in the 1960s, has two elements in its technical form.<sup>205</sup> According to economists, the first element is the spending effect. Natural resource booms tend to lead to appreciation in real foreign exchange rate, driving spending to the nontradeable sector (e.g., construction), which results in inflation. The second element is the migration of labor and capital to the booming and nontradeable sectors. Both of these elements combine to render the non-boom tradeable sector (e.g., manufacturing, agriculture) less (or non) competitive and effectively crowd out previously productive sectors. Nigerian scholar Pat Utomi links the problem in the Nigerian economy to Dutch Disease. Utomi bases his position principally on data that indicate that in the years that Nigerian oil revenues dwindled (1987-1990), manufacturing boomed. The oil windfalls

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201 Id.

202 Id. at 304.

203 Id. at 305.

204 Id. at 305.

205 The general form associates the term with every conceivable malady occasioned by resource abundance.

of 1991 put paid to this progress and with consistent growth in oil revenues since 1999, Nigeria's economy has been in doldrums.<sup>206</sup>

It should be noted that while the Dutch Disease appeared to be a promising explanation for the resource curse a few years ago, it has been convincingly shown that it may not be as widespread as earlier thought and that States have a range of options to offset its impact, if they considered that a necessary course of action to take.<sup>207</sup> These policy options include “maintaining tight fiscal policies, temporarily subsidizing their agricultural and manufacturing sectors, and placing their windfalls in foreign currency to keep their exchange rates from appreciating.”<sup>208</sup>

### C. Political Explanations

Political scientists have also advanced a plethora of reasons as the underlying causes of the resource curse and they fall into three principal categories: cognitive explanations, societal explanations and statist explanations.<sup>209</sup>

Cognitive explanations suggest that being rich in resources induces myopia or extravagance in policy makers. Societal explanations contend that where natural resources abound, members of the society favor policies that impede growth. Statist explanations stake the proposition that booms in resources have a tendency to weaken state institutions.

Arguably, the leading state-centered argument is premised on the rentier thesis. In a seminal article first published in 1970, Hossein Mahdavy defined rentier states as “those

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206 Pat Utomi, *Managing the Curse of Oil*, THE GUARDIAN (Nigeria), November 24, 2003.

207 Ross, *Political Economy*, supra note 196, at 305.

208 Id. at 307.

209 Id.

countries that receive on a regular basis substantial amounts of external rent.”<sup>210</sup> External rents are “rentals paid by foreign individuals, concerns or governments to individuals, concerns or governments of a given country.”<sup>211</sup> The basic feature of external rents is that they are received without much input from the productive processes of the domestic economy of the country receiving it. Based on this conceptualization, Mahdavy includes oil revenues received by governments of oil exporting countries in the definition of external rents.<sup>212</sup> Karl concurs that in general, “oil rents produce a rentier state.”<sup>213</sup>

Mahdavy’s definition of a rentier state has generally been accepted and adopted by other writers.<sup>214</sup> Hazem Beblawi and Giacomo Luciani,<sup>215</sup> while resuscitating Mahdavy’s idea of the rentier state, rejected its underlying meaning.<sup>216</sup> These scholars abandoned an exclusive focus on the state in conceptualizing the issue, insisting on an emphasis on the economy. Accordingly, they advanced the concept of the “rentier

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210 H. Mahdavy, *The Pattern and Problems of Economic Development in Rentier States: The Case of Iran*, in, *STUDIES IN THE ECONOMIC HISTORY OF THE MIDDLE EAST* 428, 428 (M.A. Cook, ed., 1970).

211 *Id.*

212 *Id.* at 428-29.

213 Karl, *Oil-Led Development*, *supra* note 30, at 3.

214 See, e.g., Karl, *Oil-Led Development*, *supra* note 184, at 1 (defining a rentier state as a “state that lives from externally generated rents rather than from the surplus of production of the population”), Pauline Jones Luong & Erika Weinthal, *Prelude to the Resource Curse: Explaining Oil and Gas Development Strategies in the Soviet Successor States and Beyond*, 34 *COMP. POL. STUD.* 367, 368 (2001) (stating that a rentier state is “a state that primarily procures revenue from external sources and then redistributes it to the population as a form of social and political control”), Isam al Khafaji, *In Search of Legitimacy: The Post-Rentier Iraqi State*, *Contemporary Conflicts*, <http://conconflicts.ssrc.org/iraq/khafaji/> Last visited March 2, 2004 (defining rentierism “in its broadest sense as the regular dependence of a country on substantial amounts of external economic rents whose variations are not related to changes in productivity or changes in inputs to the production process . . .”), Jonathan Symons, *NGOs in International Organizations: Searching for Legitimacy in Global Governance*, Paper presented to the Australasian Political Studies Association Conference, University of Tasmania, Hobart, Sept. 29 – Oct. 1, 2003, at 15 (noting that rentier states are “states that are substantially financed through externally generated revenues (such as those derived from oil) rather than extraction of the domestic population’s surplus production.” Citation omitted).

215 *THE RENTIER STATE, VOL. 2, NATION, STATE AND INTEGRATION IN THE ARAB WORLD* (Hazem Beblawi & Giacomo Luciani ed., 1987).

216 See DOUGLAS A. YATES, *THE RENTIER STATE IN AFRICA: OIL RENT DEPENDENCY AND NEOCOLONIALISM IN THE REPUBLIC OF GABON* 12 –13 (1996).

economy” of which the rentier state is a subset.<sup>217</sup>

According to Beblawi, there are four key features that are *conditio sine qua non* for the characterization of a state as rentier. First, there must be a dominance of rent situations in the economy. Second, the rent must originate from foreign sources or sources that are external to the economy. This excludes domestic rents, even if they come in substantial and domineering numbers. Third, only a tiny minority participates in generating the rent. Thus, where a majority of the citizens play an active role in the generation of rent, the economy is not rentier, even if rent situations (e.g., from tourism) predominate. Fourth, the major recipient of the external rent in the economy must be the government.<sup>218</sup>

Luciani’s emphasis, on the other hand, is more on the origins or “sources” of the state revenue (that is, external/internal) and less on the nature or “structure” of the revenue (that is rent/taxes).<sup>219</sup> Luciani sees as major impact of a rentier state’s dependence on oil, state autonomy - that is, the freedom that rent provides the state from the need to extract income from the internal or domestic economy.<sup>220</sup>

Without the need for taxes from the citizens goes the need for citizens to demand accountability of those who spend the tax revenues.<sup>221</sup> The wealth of information that is generated by a vibrant tax bureaucracy is also lost, which also means the loss of a vital tool for social and economic planning.<sup>222</sup> Moreover, dependency on taxes from citizens to

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217 See id.

218 Hazem Belawi, *The Rentier State in the Arab World*, *THE RENTIER STATE*, supra note 215, at 49, 51-52. See also Yates, supra note 216, at 14.

219 Giacomo Luciani, *Allocation vs. Production States: A Theoretical Framework*, *THE RENTIER STATE*, supra note 215, at 63.

220 Id. at 69 (“The essential impact of oil production and exports is that they free the state from the need of raising income domestically.”); See also Yates, supra note 216, at 14 -15.

221 See Karl, *PARADOX OF PLENTY*, supra note 172.

222Id.

run the state would invite the interest of political leaders to introduce wealth creation policies. Where there is no need to tax, because resource revenues are sufficient to keep the machinery of government running, government officials are not impelled to focus on creating wealth that they can eventually tax.<sup>223</sup> Karl, in what has been described as “the most ambitious comparative analysis of rentier states”<sup>224</sup> devotes extraordinary attention to this question of the ability to extract taxes from the citizens:

How these [resource-rich] states collect and distribute taxes, in turn, creates incentives that pervasively influence the organization of political and economic life and shapes government preferences with respect to public policies. In this manner, long-term efficiency in the allocation of resources is either helped or hindered, and the diverse development trajectories of nations are initiated, modified, or sustained.<sup>225</sup>

In essence, the thrust of the argument is that the state could undergo an evolution from an extractive one to a distributive one when oil revenues begin to assume the status of the dominant source of government revenue, leading to consequences that evidence the resource curse.<sup>226</sup>

It should be mentioned however that “[u]nlike economic explanations, political explanations for the resource curse have been criticized for the absence of careful hypothesis testing.”<sup>227</sup>

#### **D. The Role of Institutions**

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223 IMF Says Nigeria’s Natural Resources is a Curse, THE PUNCH (Nigeria), April 1, 2004 (citing the views of Xavier Sala-I-Martin).

224 Smith, Oil Wealth, supra note 189, at 4-5.

225 Karl, PARADOX OF PLENTY, supra note 172, at 7.

226 Smith, Oil Wealth, supra note 189, at 3. See also Jacques Delacroix, The Distributive State in the World System, 15 STUDIES IN COMPARATIVE INTERNATIONAL DEVELOPMENT 3, 18 (1980).

227 YOUNKYOO KIM, THE RESOURCE CURSE IN A POST-COMMUNIST REGIME: RUSSIA IN COMPARATIVE PERSPECTIVE 3 (2003).

Apart from the social, economic and political explanations discussed above, institutions have been presented as holding an additional potential to explaining the resource curse.<sup>228</sup> The view has been advanced that the resource factor is not necessarily at the root of the economic malaise seen in a number of resource-rich countries. Instead institutions determine levels of economic growth. Douglass North broadly defines institutions as “the rules of the game in a society or, more formally, . . . the humanly devised constraints that shape human interaction.”<sup>229</sup> Good institutions are believed to make all the difference. According to Acemoglu, Johnson and Robinson, the concept of good institutions incorporates “constraints on government expropriation, independent judiciary, property rights enforcement, and institutions providing equal access to education and ensuring civil liberties.”<sup>230</sup> Rodrik’s definition of good institutions includes a “regulatory apparatus curbing the worst forms of fraud, anti-competitive behavior and moral hazard, a moderately cohesive society exhibiting trust and social cooperation, social and political institutions that mitigate risk and manage social conflicts.”<sup>231</sup>

The argument is that those countries that are growth losers suffer from a deficit in institutions. Formal and informal institutions are identified as pivotal to the growth process. Thus, Ross contends that the inability of a state to “enforce property rights may directly or indirectly lead to a resource curse.”<sup>232</sup> On the other hand, if the right institutions are put in place, resources can actually constitute a blessing.<sup>233</sup>

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228 Ross, Political Economy, supra note 196.

229 DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE 3 (1990).

230 D. Acemoglu, S. Johnson and J.A. Robinson, The Colonial Origins of Comparative Development: An Empirical Investigation, AM. ECON. REV. 1369 (2001).

231 D. Rodrik, Institutions for high-quality growth: What they are and how to acquire them, National Bureau of Economic Research Working Paper N. 7540.

232 Ross, Political Economy, supra note 196.

233 Halvor Mehlum, et al., Institutions and the Resource Curse, Memorandum No. 29/2002, Department of

The critical role of institutions in promoting economic development has a strong scholarly support. Brindley, drawing from North, Thomas and Rodrik, summarizes the importance of institutions:

While recognizing that the concept of institutions remains somewhat ambiguous, their importance in supporting the process of economic development is uncontentious. Countries that enforce private property rights, and protect their citizens from too much government expropriation, will invest more in human and physical capital and use these factors more efficiently.<sup>234</sup>

The fact that a number of growth winners like Norway, Botswana, Canada, and Australia have been able to thrive in spite of – or with the benefit of – their natural resource endowments seems to strengthen this argument.<sup>235</sup>

Dani Rodrik, Arvind Subramanian and Francesco Trebbi examine the factors that determine income levels around the world. Employing recently developed instruments for institutions and trade, they look at geography (which is a major determinant of such things as climate and endowment of natural resources), international trade and institutions. The major conclusion from their study is that “the quality of institutions “trumps” everything else.”<sup>236</sup> They further state that after controlling for institutions, the impact of measures of geography on incomes are “at best weak.”<sup>237</sup> A similar conclusion is made in relation to trade, the direct effects of which are considered insignificant.<sup>238</sup>

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Economics, University of Oslo (2002), available at <http://econwpa.wustl.edu:80/eps/ge/papers/0210/0210004.pdf>. Last visited on April 10, 2004.

234 Damian Brindley, Diseases, Institutions and Economic Development, Discussion Paper, School of Economics, University of New South Wales (September 2003) at 10, available at <http://economics.web.unsw.edu.au/research/DP/dp-2003-07.pdf>. Last visited April 10, 2004.

235 Id.

236 Dani Rodrik, Arvind Subramanian and Francesco Trebbi, Institutions Rule: The Primacy of Institutions Over Geography and Integration in Economic Development, (October 2002), abstract.

237 Id.

238 Id.

Looking at Nigeria's socio-economic malaise and political predicament despite years of being a major oil exporter, Xavier Sala-i-Martin and Arvind Subramanian explain this problem in terms of "stunted institutional development" and contend that "[w]aste and corruption rather than Dutch disease has been responsible for [Nigeria's] poor long run economic performance."<sup>239</sup>

Rodrik and others also raise a crucial point about the contribution of resources to the deficiency or poor quality of institutions. Their position is that geographical factors (including natural resource endowments) do "have a strong indirect effect [on incomes] by influencing the quality of institutions."<sup>240</sup> Sachs and Warner who see the impact of resource abundance on institutional quality as at most weak reject the contention that the abundance of resources only cause deterioration in institutions.<sup>241</sup> The Sachs-Warner position is believed to enjoy lesser empirical support.<sup>242</sup>

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239 Xavier Sala-i-Martin and Arvind Subramanian, Addressing the Natural Resource Curse: An Illustration from Nigeria, NBER Working Papers 9804 (June 2003), abstract.

240 Id.

241 See Mehlum, et al., *supra* note 233, at 14. See also, Jeffrey D. Sachs, Institutions Don't Rule: Direct Effects of Geography on Per Capita Income, National Bureau of Economic Research Working Paper No. 9490 (2003) (questioning the conclusions of Acemoglu, et al, Easterly and Levine and Rodrik et al., and noting that "many of the reasons why geography seems to have affected institutional choices in the past (e.g. the suitability of locations for European technologies, the disease environment and risks to survival of immigrants, the productivity of agriculture, the transport costs between far-flung regions and major markets) are indeed based on direct effects of geography on production systems, human health, and environmental sustainability, and many of those very same channels would still be likely to apply today." Id. at 2.).

242 See Ola Olsson, Geography and Institutions: A Review of Plausible and Implausible Linkages (Sept. 25, 2003), available at <http://www.handels.gu.se/epc/archive/00002978/01/gunwpe0106.pdf>. Last visited April 10, 2004.

Proponents of the third and perhaps most subtle hypothesis argue that institutions like private property rights, free trade, and the rule of law are the primary determinants of levels of economic development. . . . However, the quality of a society's institutions is in turn strongly influenced by its geography. Climate, topography, geology, and biogeography all contribute to mould the rules that societies live by. . . . Most of the major research efforts during the last two or three years have focused on this connection and has shown that it appears to be the one that has the greatest empirical support. . . .

### III. PROPOSALS FOR ADDRESSING THE RESOURCE CURSE

Oil production, contrary to legitimate expectations and economic theory, has not been largely beneficial to countries blessed with the natural resource. This problem is particularly acute in Africa. Scholars in economics and political science have tried to explain the resource curse, attributing it to a number of factors. As more African countries make a foray into oil development, there is the concern that they may go the way of their predecessors. It is imperative therefore to design arrangements that will help address this problem in both old and new producers.

A number of ideas have been generating interest as panaceas to the resource curse.<sup>243</sup> They include promotion of revenue transparency by oil corporations and oil-exporting governments. This form of information disclosure, exemplified by the Extractive Industries Transparency Initiative (EITI)<sup>244</sup> and the ‘Publish What You Pay’

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Id. at 2. See also D. Acemoglu, S. Johnson and J.A. Robinson, *Reversal of Fortune: Geography and Institutions in the Making of the Modern World Income Distribution*, 117:4 Q. J. ECON. 1231 (2002); D. Acemoglu, S. Johnson and J.A. Robinson, *The Colonial Origins of Comparative Development: An Empirical Investigation*, 91:5 AM. ECON. REV. 1369 (2001), W. Easterly and R. Levine, *Tropics, Germs and Crops: How Endowments Influence Economic Development*, National Bureau of Economic Research Working Paper No. 9106. But see Brindley, who rejects the views of Acemoglu, Rodrik and others and offers support to Sachs’ position:

The evidence presented in this paper comes out on the side of Sachs and his co-authors, as it suggests that geographical factors do have a direct influence on levels of economic development beyond their effect on institutions. It is argued that while the role of institutions should be in no way diminished, it is not the entire story.

Brindley, *supra* note 234, at 2.

<sup>243</sup> See Karl, *Oil-Led Development*, *supra* note 184, at 11.

<sup>244</sup> Extractive Industries Transparency Initiative, at [http://www.dfid.gov.uk/News/News/files/eiti\\_core\\_script.htm](http://www.dfid.gov.uk/News/News/files/eiti_core_script.htm). Last visited Dec. 27, 2003. See also World Bank, *WBG Endorses Extractive Industries Transparency Initiative*, Dec. 9, 2003.

campaign,<sup>245</sup> promotes the publishing of corporate payments to governments and expects the governments to disclose their oil receipts. The object is to ensure that oil revenues are fully accounted for and properly utilized.

Suggestions also include different kinds of funds for stabilization and sterilization and for proper allocation and utilization of resources. A stabilization fund would provide well-needed mitigation to the price shocks that have become a part and parcel of the oil industry. A sterilization fund would keep resources away from officials who are prone to engender the Dutch Disease through irresponsible application of resources.<sup>246</sup> Funds controlled by a trust or trust-like institution are viewed as particularly important in the petroleum industry where oil trusts can provide an effective check on rent-seeking activity, improve domestic governance in oil-producing countries and avoid, mitigate or reverse the resource curse.<sup>247</sup> An institutional arrangement by which an independent institution under the direct control of the judiciary is assigned the responsibility of monitoring the management of petroleum funds has also been proposed.<sup>248</sup>

Revenue distribution arrangements are also being promoted.<sup>249</sup> The idea is that such distribution will offer citizens the benefit of resources with which their country has been endowed, while taking away huge revenues from the government in order to enable the political leaders to build enduring institutions for economic development.<sup>250</sup> The need for reform of government institutions cannot be overemphasized. Accordingly, scholars

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245 See Palley, *Publish What You Pay: An Open Society Campaign?* (2003) .

246 See Utomi, *supra* note 206.

247 Stephen D. Krasner, *Troubled Societies, Outlaw States, and Gradations of Sovereignty*, Stanford University (July 20, 2002), at 41.

248 Leonard Wantchekon, *Why Do Resource Abundant Countries Have Authoritarian Governments?* Yale University Leitner Center Working Paper 99-12 (1999), at 21.

249 *Id.* (proposing the Alaskan model).

250 See Sala-i-Martin and Subramanian, *supra* note 239; Palley, *Combating the Natural Resource Curse*, *supra* note 170.

have been focusing on the importance of transparency in governance, democratization and reforms of taxation and the civil service.<sup>251</sup>

Changes in the ownership structure in the oil industry have also been proposed as an option that could most effectively lead to democracy and economic development.<sup>252</sup> Perhaps, this can be achieved through privatization, which has also been commended as a way to steer States away from a rentier State mode and avoid the resource curse. The contention here is that in countries where the element of political contestation is present, transferring the ownership of the oil industry to private domestic interests obviates some of the problems attendant to the concentration of oil resources in the government or foreign private interests. Building on the argument that the resource curse is associated with State ownership, this argument calls for privatization.<sup>253</sup>

This thesis closely examines one of these proposals, namely national oil trusts. It evaluates them and notes some impediments surrounding them. Most significantly, State sovereignty is a critical factor that needs to be aligned to the interests of the people, not the corrupt and oppressive governments. Not satisfied that only national solutions are needed and recognizing that some national prescriptions may be infeasible, this work also argues that it will be helpful to consider local-based solutions. Accordingly it canvasses the institution of community-based trust funds as a complement or alternative to national trust funds.

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251 Karl, *Oil-Led Development*, *supra* note 184, at 11. See also Pauline Jones Luong & Erika Weinthal, *Contra Coercion: Russian Tax Reform, Exogenous Shocks, and Negotiated Institutional Change*, 98:1 APSR (2003).

252 Ricky Lam & Leonard Wantchekon, *Political Dutch Disease*, Manuscript (Apr. 10, 2003), at 17.

253 See Jones Luong & Weinthal, *supra* note 214; Pauline Jones Luong & Erika Weinthal, *Energy Wealth and Tax Reform in Russia and Kazakhstan*, 27 RESOURCES POL. 215 (2001).

## CHAPTER 3

### RESOURCE CURSE IN NIGERIA

When crude oil was discovered in Nigeria in the late 1950s, it was hoped that its exploitation, refining and marketing would improve the lots of all Nigerians especially, the people of the Niger Delta Region. Unfortunately, this “black gold” which has made many Nigerians and their leaders millionaires, has more or less become a curse on the people of the Niger Delta.<sup>254</sup>

#### INTRODUCTION

Nigeria presents a fitting illustration and telling confirmation of the resource curse. Nigeria is the largest oil producing nation in Africa,<sup>255</sup> the 6<sup>th</sup> largest oil producer in the World,<sup>256</sup> the fifth largest producer in the Organization of the Petroleum Exporting Countries (OPEC)<sup>257</sup> and the fifth largest supplier of oil to the United States.<sup>258</sup> Since the mid-1970s, Nigeria has earned enormous amounts of money from oil production and export, yet it is one of the poorest countries in the world—nearly 70% of Nigeria’s people live below the World Bank’s designated poverty line, subsisting on less than \$1 per day.<sup>259</sup> Ironically, the rural communities where about 75% of Nigeria’s petroleum is produced may in fact be the poorest.

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254 Professor M.I.O. Ikejiani-Clark, Foreword, in E.J.C. DURU, *OIL MULTINATIONALS AND THE NIGER DELTA CRISES: ISSUES AND PERSPECTIVES* (1999).

255 See *Famine as government policy*, CHI. TRIB., Apr. 2, 2004, at 20.

256 See Jonathan Power, *Nigeria Struggles Against The Curse of Oil*, INT’L HERALD TRIB., Jan. 8, 2004.

257 See *Nigeria Labour Movt Threatens Strike Over Petrol Tax*, Agence France Presse, Jan. 7, 2004, available on Lexis Nexis News File.

258 See Mark Mazzetti, *Pax Americana*, U.S. NEWS & WORLD REPORT Oct. 6, 2003, at 31. See also Department of Energy, *Country Analysis Briefs: Nigeria*, available at <http://www.eia.doe.gov/emeu/cabs/nigeria.html>. Last visited Apr. 17, 2004.

259 Allan H. Meltzer, *The World Bank: One Year After the Commission’s Report to Congress*, available at

The socio-economic and political predicament of Nigeria is breathtaking in its terribleness, considering that Nigeria is estimated to have earned up to \$320 billion from crude oil exports between 1970 and 1999,<sup>260</sup> enough to improve the lot of the people and address the lingering issues that lead to conflicts and crisis within the country. The rate at which poverty is growing in this country of 123 million is alarming. According to the Federal Office of Statistics in Nigeria, poverty has increased from 28% of the population in 1980, to 46% in 1985, to 66% in 1996.<sup>261</sup> It seems paradoxical that in a country so rich in oil reserves and where production accounts for 90% of the country's income, that development and infrastructure could be so poor. According to the World Bank, 'Nigeria has been characterized as a country of "Poverty amid Plenty."' <sup>262</sup>

Oil production in Nigeria is primarily a joint venture between some multinational oil corporations including ExxonMobil, Royal/Dutch Shell, ChevronTexaco, and TotalFinaElf, which partially fund the development process, and the Nigerian government, which has rights to all mineral resources in the country.<sup>263</sup> While these two entities have profited handsomely from the extraction business, the remainder of the

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<http://www.dundee.ac.uk/cepmlp/journal/html/vol8/article8-14.html>. Last visited Mar. 8, 2004 (noting that \$1 a day is the World Bank's measure of extreme poverty.)

260 U.N. Office for the Coordination of Humanitarian Affairs, Integrated Regional Information Network, Nigeria: Focus on the Scourge of Poverty, June 11, 2002; available at <http://www.irinnews.org/report.asp?ReportID=28258>. Last visited September 18, 2002.

261 Id. (stating that surveys conducted by Nigeria's Federal Office of Statistics indicate that while 28 per cent of Nigerians lived in poverty in 1980, the level of poverty increased substantially over the years, with 66% of Nigerians living in poverty, subsisting on less than \$1.40 a day in 1996.)

262 World Bank, Environmentally Sustainable Development, available at <http://www.worldbank.org/afr/ng/essd.htm>. Last visited Apr. 10, 2004.

263 Nigeria is gradually moving away from participation joint ventures and toward production sharing contracts. This move is considered beneficial to both the government and the oil corporations since the government was always having a difficulty coming up with its own part of the investment costs required under the joint ventures. Under the production sharing contracts, the oil companies invest in the exploration without government support and if there is commercial discovery, they recover their investments as well have a share in the crude that is produced during the life of the contract. See generally, Mirian Kene Omalu, Developments in Petroleum Exploration and Production Arrangements in Nigeria, OIL & GAS L. & TAX'N REV. 70, 70 (1996).

country—particularly the oil producing areas—has suffered on many fronts. Corruption is pervasive in the country, and those living in oil-affected communities suffer many human rights abuses.<sup>264</sup>

Decades of oil production and huge revenues accruing from oil exports, as the above facts clearly show, have not translated into an improved standard of living for the average Nigerian citizen. On the contrary, Nigeria has experienced economic doldrums, social upheavals and political instability, leading to increased hardship to the citizenry.

While the national economy has been nothing to write home about, the situation is even worse in the local communities that produce oil in Nigeria. Oil-producing communities have borne the brunt of oil production in Nigeria, suffering severe social, economic and environmental consequences.

This chapter discusses the negative effects of oil exploration and development in Nigeria, with special emphasis on the local oil producing communities. Discussions also focus on the causes of the resource curse in Nigeria, with a particular focus on the Dutch Disease, rentier state structure and the absence of institutions. To address these important issues, this chapter is divided into four major parts. Part I discusses the economic effects of oil production, discussing both the national and local economies. Part II concentrates on the environmental impact, while Part III focuses on the social consequences, particularly in the oil producing communities. Part IV is the concluding portion.

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<sup>264</sup> Human Rights Watch, *The Price of Oil*, *supra* note 12.

## I. PETROLEUM AND THE NIGERIAN ECONOMY

### A. National Economy

At least, since the 1970s, the Nigerian economy has been dominated by oil. Natural gas, a later entrant in the economic equation, is fast becoming a major contributor to the Nigerian economy. In 1966, the contribution of petroleum exploration and production to total Nigerian GNP was 1.7 percent and the contribution to GDP was 3.0 per cent.<sup>265</sup> In that same year, the proportion of crude oil in the total export of Nigeria was 33%, which though a significant increase from the 0.8% in 1958, was not domineering.<sup>266</sup>

By the early 1990s, the role of oil in the Nigerian economy has become markedly different. Petroleum production accounted for more than 90 per cent of foreign receipts, 70 percent of budgetary revenues, and 25 per cent of GDP.<sup>267</sup> Today, Nigeria produces over 2 million barrels of oil per day and with the rising price of crude oil, oil receipts have been huge. However, the economic situation in Nigeria presents a sad picture and the level of poverty is astounding. Nigeria is prominent exemplar of the resource curse in action.

A number of scholars, within and outside Nigeria, attribute the resource curse in Nigeria to Dutch Disease. One of the strongest pieces of scholarship in support of the existence of the resource curse is *Natural Resource Abundance and Economic Growth* by Jeffrey D. Sachs and Andrew M. Warner.<sup>268</sup> The authors analyzed the impact of mineral and other resource exports on GDP in 97 countries over a nineteen year period from 1971

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265 SCOTT R. PEARSON, *PETROLEUM AND THE NIGERIAN ECONOMY* 57 (1970).

266 L. H. SCHÄTZL, *PETROLEUM IN NIGERIA* 152 (1969).

267 KHAN, *supra* note 24, at 183.

268 Jeffrey D. Sachs and Andrew M. Warner, *Natural Resource Abundance and Economic Growth*, Harvard Institute for International Development (1995).

-1989 and came to the conclusion that the negative relationship between resource abundance and rapid economic growth holds true. Sachs and Warner would place the reason for Nigeria's predicament on the feet of "Dutch Disease.

Sarah Ahmad Khan in an influential study on the political economy of oil in Nigeria, states that the symptoms of the Dutch Disease began to manifest in Nigeria in the 1970s.<sup>269</sup> The effect of this was the establishment of an economy that lacked the ability to adjust to the production cuts introduced by OPEC and the reverse price shock of 1986.<sup>270</sup>

Nigerian scholar Pat Utomi also links the problem in the Nigerian economy to Dutch Disease. Utomi bases his position principally on data that indicate that in the years that Nigerian oil revenues dwindled (1987-1990), manufacturing boomed. The oil windfalls of 1991 put paid to this progress and with consistent growth in oil revenues since 1999, Nigeria's economy has been in doldrums.<sup>271</sup> Further support for these views can be found in the statement by another Nigerian scholar, V.A. Adeyeye, that the "development history of Nigeria has revealed that despite abundant natural resource endowment including numerous favourable agricultural and industrial opportunities, Nigeria has tended to neglect the agricultural and other non-oil sectors" while placing an overwhelming reliance on the export of crude oil.<sup>272</sup> Adeyeye argues that the features of Dutch Disease were in clear view in Nigeria in the 1980s, "when the real exchange rate

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269 KHAN, *supra* note 24, at 183.

270 *Id.*

271 Utomi, *supra* note 206.

272 V.A. Adeyeye, The Place of Non-Oil Export, in ALTERNATIVE SOURCES OF FUNDING FOR THE OIL AND GAS INDUSTRY IN NIGERIA 23, 23 (Muyiwa Sanda and Jide Owoeye, ed. 2002).

appreciated five-folds and the relative profitability of domestically produced goods and resources fell.”<sup>273</sup>

This is unfortunate, considering that in the past, agricultural products, such as cocoa, groundnuts and groundnut products, palm oil and palm kernels, raw cotton, hides and skins, rubber, timber, and plywood played a dominating role in the export of Nigerian commodities.<sup>274</sup>

While the evidence supporting the existence of Dutch Disease in Nigeria may be strong, it does not necessarily present a complete explanation of Nigeria’s socio-economic predicament. Xavier Sala-i-Martin and Arvind Subramanian in *Addressing the Natural Resource Curse: An Illustration from Nigeria*,<sup>275</sup> identify the salient features of the resource curse in Nigeria in the following words:

Nigeria has been a disastrous development experience. On just about every conceivable metric, Nigeria’s performance since independence has been dismal. In PPP terms, Nigeria’s per capita GDP was US\$1,113 in 1970 and is estimated to have remained at US\$1,084 in 2000. The latter figure places Nigeria amongst the 15 poorest nations in the world for which such data is available. Nigeria, unfortunately, fares much worse on measures of poverty and income distribution. Between 1970 and 2000, the poverty rate, measured as the share of the population subsisting on less than US\$1 per day increased from close to 36 percent to just under 70 percent . . . . This translates to an increase in the number of poor from about US\$19 million in 1970 to a staggering US\$90 million in 2000 . . . . Similarly, the income distribution has deteriorated very sharply. . . . [W]hereas in 1970 the top 2 percent and the bottom 17 percent of the population earned the same total amount of income, in 2000 the top 2 percent had the same income as the bottom 55 percent.<sup>276</sup>

Sala-i-Martin and Subramanian explain this problem in terms of “stunted institutional development” and contend that “[w]aste and corruption rather than Dutch disease has

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273 Id. at 24.

274 SCHÄTZL, *supra* note 266, at 152.

275 Sala-i-Martin and Subramanian, *supra* note 239.

276 Id., at 4.

been responsible for [Nigeria's] poor long run economic performance."<sup>277</sup> The story of the pervasive and corrosive monster of corruption in Nigeria is legendary. Nigeria has consistently ranked low in Transparency International's Corruption Perceptions Index.<sup>278</sup> Corruption, which has a pernicious effect on economic growth, is evident in virtually every layer of the Nigerian society.<sup>279</sup> The current administration of President Olusegun Obasanjo has commenced steps to tackle corruption through the creation of anti-corruption commission and an Economic and Financial Crimes Commission, but the country is still awaiting substantial progress on this issue.<sup>280</sup>

The rentier state structure, especially when fused with the institutional explanation, can also provide a useful glimpse as to why oil production has not been the blessing it should be for Nigerians, but has instead turned into a curse. As a rentier state, Nigeria has depended substantially on oil rents to fuel its economy. One writer has stated:

The nature of Nigeria's political economy, characterized by its dependence on oil revenues, was captured in the concept of a 'rentier state.' . . . the Nigerian state revenues were extracted from taxes and 'rents', largely in the form of oil revenues from foreign companies, rather than from productive activity. Nigerian business was said to be restricted to 'unproductive' activities, which included . . . '*commercial and service activities, small-scale capitalism and non-capitalist formations.*'<sup>281</sup>

Terry Lynn Karl believes that this sort of dependence on oil revenues is a recipe for economic disaster, among others.<sup>282</sup> For instance, rentier states enjoy a form of

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277 Id., abstract.

278 See Transparency International, Corruption Perceptions Index 2003, Oct. 7, 2003 available at [http://www.transparency.org/pressreleases\\_archive/2003/2003.10.07.cpi.en.html](http://www.transparency.org/pressreleases_archive/2003/2003.10.07.cpi.en.html). Last visited May 3, 2004.

279 See Okechukwu Oko, *Subverting the Scourge of Corruption in Nigeria: A Reform Prospectus*, 34 N.Y.U. J. INT'L L. & POL. 397 (2002).

280 See Ebere Onwudiwe, *Nigeria* (Country Report) in FREEDOM HOUSE, COUNTRIES AT THE CROSSROADS 2004: A SURVEY OF DEMOCRATIC GOVERNANCE (2004) available at <http://www.freedomhouse.org/research/crossroads/cac.htm>. Last visited April 25, 2004.

281 FRYNAS, *supra* note 49, at 27. Emphasis in the original.

282 Karl, *Oil-led Development*, *supra* note 184, at 4 (2004).

autonomy from citizens occasioned by an absence of an incentive to levy taxes, since oil rents provide sufficient revenues for the government.

Without the need for taxes from the citizens goes the need for citizens to demand accountability of those who spend their tax revenues.<sup>283</sup> The wealth of information that is generated by a vibrant tax bureaucracy is also lost, which also means the loss of a vital tool for social and economic planning.<sup>284</sup> Moreover, dependency on taxes from citizens to run the state would invite the interest of political leaders to introduce wealth creation policies. Where there is no need to tax, because resource revenues are sufficient to keep the machinery of government running, government officials are not impelled to focus on creating wealth that they eventually can tax.<sup>285</sup> Karl, further elaborates on the dangers of this approach to revenue generation, noting that:

How these [resource-rich] states collect and distribute taxes, in turn, creates incentives that pervasively influence the organization of political and economic life and shapes government preferences with respect to public policies. In this manner, long-term efficiency in the allocation of resources is either helped or hindered, and the diverse development trajectories of nations are initiated, modified, or sustained.<sup>286</sup>

In essence, the thrust of the argument is that the state could undergo an evolution from an extractive one to a distributive one when oil revenues begin to assume the status of the dominant source of government revenue, leading to consequences that evidence the resource curse.<sup>287</sup> This, without doubt, has been the case with Nigeria.

Other features of a rentier state include corruption and an overwhelming focus on

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283 See generally KARL, *PARADOX OF PLENTY*, *supra* note 172.

284 *Id.*

285 . *IMF Says Nigeria's Natural Resources is a Curse*, THE PUNCH (Nigeria), April 1, 2004 (citing the views of Xavier Sala-I-Martin).

286 Karl, *PARADOX OF PLENTY*, *supra* note 172, at 7.

287 Benjamin Smith, *Oil Wealth and Regime Survival in the Developing World, 1960-1999*, 48:2 *AMERICAN JOURNAL OF POLITICAL SCIENCE*, 3 (2004). See also Jacques Delacroix, *The Distributive State in the World System*, 15 *Studies in Comparative International Development* 3, 18 (1980).

rent-seeking activities. People use whatever means available to them, sometimes, outside the law to try to capture some of the oil rents. In the major cities, rent-seeking involves developing a close relationship with those in political offices to secure lucrative contracts. The politicians themselves are deeply involved in capturing huge portions of the oil rents. In the oil-producing communities, rent-seeking, takes the form of demonstrations for increased amenities and benefits from oil development. It may also involve the vandalization of pipelines to collect crude oil for sale. It should be noted that oil companies often claim sabotage (a valid and complete defense under Nigerian law) to escape their responsibilities in the event of pipeline leakages, but there is no doubt that some of the pipeline breakages have been the handiwork of community members seeking to secure whatever little they can from resources contained in their area. Unfortunately, this has often come with disastrous consequences as illustrated by the Jesse incident in 1998 that claimed hundreds of lives.<sup>288</sup>

Rentier states are also marked by a renter mentality. Where this mentality exists, government contracts are awarded for reasons entirely divorced from economic rationale. The civil service is such where premium is not placed on hard work but where civil servants are satisfied with merely reporting for duty. Industrial activity is also abandoned by business people in favor of real estate speculation or other pursuits that have a connection with a booming oil sector. There is also the greater attractiveness and allure of government employment, with the effect that smart and energetic members of the society are propelled toward public employment, instead of business. The elite in rentier states are also afflicted by this mentality, making them unflustered by the unduly high levels of

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288 See Nigeria Digs Mass Grave for Pipeline Victims: At Least 500 Killed in Explosion, Fire, CNN, October 19, 1998, available at <http://www.cnn.com/WORLD/africa/9810/19/nigeria.explosion.05/>.

poverty and lack of social progress in their countries.<sup>289</sup> All these features which lead to economic stagnation and technological backwardness as well as socio-political inertia,<sup>290</sup> define oil-dependent Nigeria.

## **B. Local Economy**

As earlier stated, while the national economy has received minimal benefits from oil production, the economy of oil producing communities has fared even worse. The local economies are dominated by fishing and farming. Pollution and other sources of environmental degradation has succeeded in ruining significant aspects of the local economy and pushing community members to destitution.

Crops are destroyed when oil leaks occur from high-pressure pipelines. Also adversely affected are artificial fish ponds used for fish farming, economically valuable trees and other income-generating assets. It has been stated that even a small leak possess sufficient capability to erase the income equivalent of a whole year's supply for an entire family.<sup>291</sup>

Pollution from oil production has also resulted in many members of oil producing communities being compelled to spend money on items that they would have gotten almost free of charge. For instance, in Eket, a town in oil-producing Akwa-Ibom state,

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289 See Mahdavy, *supra* note 210; YATES, *supra* note 216.

290 *Id.*

291 W.S Owabukeruyele: Hydrocarbon Exploitation, Environmental Degradation and Poverty in the Niger Delta Region of Nigeria, available at [www.waado.org/environment/petrolpollution/enveconomics.htm](http://www.waado.org/environment/petrolpollution/enveconomics.htm). See also *Shell Petroleum Development Company of Nigeria Limited v. Ambah*, 3 N.W.L.R. 1, (Part 593, 1999). For commentaries on this case that went to the Nigerian Supreme Court involving the destruction of the plaintiff's fish ponds, creeks, lakes and channels without compensation from Shell, see Kaniye S.A. Ebeku, *Compensation for Damage Arising from Oil Operations: Shell Petroleum Development Company of Nigeria v. Ambah Revisited*, INT'L ENERGY L. & TAX'N REV. 155 (2002); Olawale Animashaun, *Compensation for Damage Arising from Oil Operations: Shell Petroleum Development Company of Nigeria v. Ambah Revisited – A Rejoinder*, INT'L ENERGY L. & TAX'N REV. 164 (2002).

the operations of Exxon Mobil has resulted in the loss of fish populations along the coast. Community members, unable to afford houseboat engines and trawlers to venture into the high seas, are left with little option but to buy fish from commercial fishermen. So, not only do they lose money from fishing, but they also are forced into expenses that were not the norm before the advent of oil production.<sup>292</sup>

Community members also face a negative impact from federal legislation (e.g., Petroleum Act) that has vested all mineral resources in the country in the federal government. With the Land Use Act of 1978, community members are limited in the level of compensation they receive when oil is discovered on their lands. It is hard to calculate the economic benefits that such community members would have received from the land, without oil production, and the hardship that results in the event of the forced transfer of the property to the government.

## **II. ENVIRONMENTAL IMPACT OF OIL PRODUCTION**

The Niger Delta area, which produces the bulk of Nigeria's oil is characterized by its rich biodiversity. The Niger Delta contains the world's third largest wetlands. While it bears mentioning that a significant portion of environmental problems in the oil producing communities is not attributable to oil production, yet Nigeria's foray into oil production has been accompanied by massive devastation of the environment in these communities.<sup>293</sup> This has largely been due to gas flaring and oil spills.

Nigeria flares, (i.e. burns) about 70 per cent of gas associated with oil. This is

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<sup>292</sup> For an extensive discussion of the numerous negative effects on oil communities in Nigeria, see AUGUSTINE A IKEIN, *THE IMPACT OF OIL ON A DEVELOPING COUNTRY: THE CASE OF NIGERIA* (1990).

<sup>293</sup> Human Rights Watch, *supra* note 12.

significant, considering that the worldwide average of gas flares is 4 per cent. Apart from the economically inefficient nature of this practice, there are huge environmental consequences. One of these consequences is acid rain, which has stunted the growth of crops, contaminated drinking water and corroded the corrugated iron sheets used in roofing houses in these communities, thereby reducing the roofs' life spans. The alternative is to resort to asbestos roofs which are more expensive and dangerous. According to the deputy governor of Imo State, Mr. Ebere Udeagu, during a visit of the Senate Committee on the Niger Delta Development Commission (NDDC) to oil-producing communities in his state: "Gas flaring by oil companies in the oil producing communities has terribly devastated a substantial portion of farm lands leaving the streams polluted. These areas have been turned into ghettos and swamps with the indigenes becoming destitutes in their fatherland. Their source of livelihood which is farming and fishing have been closed as the streams have lost life in it, the lands no longer fertile".<sup>294</sup>

Also, with flares lighting the skies for 24 hours, community members are not only deprived of the natural distinction between night and day, but hunters are also frustrated as animal lifestyles are also changed.<sup>295</sup> Gas flaring also contributes to global warming.<sup>296</sup> The gas often released in Nigeria during flares is methane, which has more global warming potential than carbondioxide.

Another major source of environmental pollution in these communities is the incidence of oil spills. These spills have become a basic feature of life in the oil

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294 Quoted in Eugenia Okpara, Deputy Governor Laments Menace of Gas Flaring, DAILY TIMES, Nov. 27, 2003.

295 Human Rights Watch, supra note 12.

296 *Id.*

producing communities, occurring from on site leaks, pipeline ruptures, loading, offloading and transportation of crude oil. Spills pollute creeks, ponds and rivers, destroying sources of drinking water (in communities that generally lack alternative, portable sources of water) and killing fish that people harvest for consumption and sale.<sup>297</sup>

In 1997, samples of water used for drinking and washing were taken from Ogoniland – an oil producing area – for analysis in the United States. Interestingly, the water was taken from a portion of the community where oil production had not gone on for four years. Yet, results showed that the sample contained a hydrocarbons level of 18 ppm (parts per million), 360 times more than what is allowable for drinking water in Europe.<sup>298</sup>

This problem is exacerbated by the fact that clean up is hardly undertaken on time, if at all. A CIA Report in 2000 indicated that the Niger Delta has suffered the equivalent of 10 Exxon Valdez oil spills, and this has gone without any clean up. Old, rusty pipelines that are not changed as often as they should also contribute in causing and worsening this situation at the same time.

### **III. SOCIAL CONSEQUENCES OF PETROLEUM DEVELOPMENT**

The social consequences of petroleum development has taken many and varied forms in Nigeria. Some of the consequences are locally concentrated, while others have a more national impact.

One social problem that has accompanied oil production is the migration of labor to oil producing areas and the exodus of productive members of other communities, with

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<sup>297</sup> *Id.*

<sup>298</sup> Owabukeruyele, *supra* note 291.

the attendant consequences. Migration puts a lot of strain on the local economy leading to inflation and high cost of housing. Resentment also brews when community members see the non-indigenes as encroaching on their territories to take away their jobs. On the other hand, some of the men that migrate to these communities leave their families behind, putting a strain on family life as wives (often with little financial support) are saddled with the onerous responsibility of almost single-handedly raising the children.<sup>299</sup>

With the destruction of traditional economies of fishing and farming, unemployment is bound to arise. Young men and women also need jobs and look to the oil industry for solace. But, oil is an enclave industry that can only employ a few people with highly specialized skills. Some of the community members lack these skills and those that have the requisite skills have not always been fortunate in securing the well-paying oil industry jobs.<sup>300</sup>

Prostitution is also another offshoot of petroleum development.<sup>301</sup> Young women who cannot find decent employment or whose families cannot afford the costs of higher education are constrained to resort to selling their bodies to make ends meet. Yet, some other women, lured by the false attraction of easy money from the wealthy Nigerian and expatriate oil workers, see sex work as a legitimate means of reaping the benefits of oil production in these communities.

The numerous conflicts that have become a staple in these communities are also attributable to oil production. These conflicts take the forms of intra-community battles,

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299 See Eno Okoko, *Women and Environmental Change in the Niger Delta, Nigeria: Evidence from Ibeno*, 6:4 JOURNAL OF GENDER PLACE AND CULTURE: A JOURNAL OF FEMINIST GEOGRAPHY 373 (1999).

300 STEVE AZAIKI, *INEQUITIES IN NIGERIAN POLITICS* (2003).

<sup>301</sup> See Henry Clark, et al, *Oil for Nothing: Mutlinational Corporations, Environmental Destruction, Death and Impunity in the Niger Delta*, (Jan. 25, 2000) available at [http://www.essentialaction.org/shell/Final\\_Report.pdf](http://www.essentialaction.org/shell/Final_Report.pdf). Last visited April 25, 2004.

inter-community conflicts, corporate- community conflicts and community-government conflicts. Community members resort to violence sometimes as way of airing their grievances. In April 2004, 2 American workers who were employed by a contractor to ChevronTexaco and 2 Nigerian sailors were killed when the boat in which they were traveling was fired at.<sup>302</sup> Some other times, it could be their option to capture part of the oil rents. While such rent-seeking activity has taken the forms of peaceful protests and demands, sometimes it has turned violent and resulted in deadly consequences. Community members also seek to capture these rents by rupturing pipelines transporting crude oil. While this has met with occasional success, it is fraught with immense danger and hundreds of people have died as a result.

Members of oil producing communities have suffered numerous human rights abuses. From a deprivation of property rights when oil is located on their land to infraction on their civil and political rights, when military or police repression is resorted to in order to break their protests, the unfair plight of these communities can hardly be overstated.<sup>303</sup>

#### **IV. CONCLUSION**

Similar to the situation in virtually every oil producing country, oil has brought a curse on Nigerians. Economically, it has brought no appreciable improvement in the standard of living and may have worsened it. Socially, it has infused the populace with laziness, has bred unhealthy habits such as prostitution and has created numerous conflicts among the

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<sup>302</sup> Mike Oduniyi and Josephine Lohor, *Niger Delta: Chevron Suspends Production: Death Toll Rises to 7 – FG Orders Arrest of Killers*, THISDAY (Nigeria) Apr. 25, 2004; Louis Odion, *Warri: The Making of a Middle East*, THE SUN (Nigeria), May 2, 2004.

<sup>303</sup> Human Rights Watch has authored a number of reports on these and related issues, available at their website, [www.hrw.org](http://www.hrw.org).

various stakeholders. Environmentally, the consequences have been alarming, with gas flares and oil spills polluting water sources and affecting local economic life. The Nigerian government has taken measures to address these problems at the national and local levels. The focus of this work is on the local problems and solutions and the next chapter will examine the efforts of the government in that regard. The role corporations have been playing in promoting community development in these areas also forms part of that chapter.

## CHAPTER 4

### PUBLIC AND PRIVATE INITIATIVES TO ADDRESS NEGATIVE IMPACT OF OIL AND GAS PRODUCTION

I'm seeing soldiers, bandits, actually coming to take away this stuff [crude oil] and develop their own home while pretending to be running Nigeria. Oil has brought nothing but disaster to our people.<sup>304</sup>

#### INTRODUCTION

The previous chapter dealt with the resource curse in Nigeria. Indeed, the negative social, economic, and environmental effects of oil and gas development in Nigeria are glaring. While Nigeria as a country has seen the effects of the resource curse, people in the oil-producing communities have experienced the adverse effects of oil production more than the rest of the country. Over the years, a number of legislative initiatives, policy instruments and private arrangements have been introduced to address the problems faced by these communities.

This chapter focuses on the role that both the Nigerian government and oil corporations have played to ameliorate the plight of oil producing communities, who have more directly borne the brunt of oil and gas development than any other part of Nigeria. The government's approach has been two-pronged: corrective (i.e. an attempt to repair the damage done by oil and gas development) and progressive (i.e. provide opportunities for people in these communities to share in the benefits of petroleum

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304 Ken Saro Wiwa (quoted in Chinedu Reginald Ezetah, *International Law of Self-Determination and the Ogoni Question: Mirroring Africa's Post-Colonial Dilemma*, 19 *LOY. L. A. INT'L & COMP. L.J.* 811, 816 n.24 (1997). Wiwa was Leader of the Movement for the Survival of Ogoni People (MOSOP) who was killed in 1995 after a trial that was widely condemned for not meeting basic due process requirements).

exploration and extraction).

The two major vehicles by which the Nigerian government has manifested its intention in the past decade or so are the Oil Mineral Producing Areas Development Commission (OMPADEC) and the Niger Delta Development Commission (NDDC), both of which were established by federal legislation. While OMPADEC was severely criticized leading to its disbandment, the NDDC is still new. Its newness, however, has not completely shielded it from scathing attacks.

Apart from governmental efforts, and in addition to them, the oil corporations operating in Nigeria have instituted private financing initiatives to develop their host communities. Oil corporations have embarked on a number of community assistance and development projects ranging from scholarships to construction of roads and buildings. They have also started extending loans for micro-enterprises and support for agricultural projects. Corporate efforts have also involved public-private partnerships with development agencies including the United Nations Development Programme (UNDP) and the United States Agency for International Development (USAID).

This chapter presents a critical appraisal of the public and private initiatives to cushion the negative effects of oil and gas production and ensure the development of these communities. The chapter is organized into 4 major parts. Part 1 focuses on the public initiatives. Of particular importance are the practices under the defunct OMPADEC, discussed in section A of this part, and the nascent NDDC, discussed in section B. Section C of this part presents a critical appraisal of the public initiatives, concluding that they have been ineffective in the case of OMPADEC and at best mixed in the case of NDDC. Part II examines corporate approaches to community development in

the oil-producing communities of Nigeria. It presents a general discussion of the various activities of the major oil-producing companies in Nigeria. Particular attention is paid to the approaches adopted by Royal Dutch/Shell and ChevronTexaco. These two companies were selected because they are two of the largest oil companies in Nigeria. They have also had some of the longest presence in Nigeria. Both of these factors suggest that they have also had a lot of opportunity and capacity to inflict maximal damage on the environment and lives of people in these communities. Finally, these two companies have been the subjects of the greatest controversies concerning oil production in Nigeria. Both companies are currently the subjects of two separate lawsuits in the United States regarding their operations in Nigeria.<sup>305</sup> This discussion includes a detailed description and evaluation of the corporate initiatives. The assessment, like the case with the public initiatives, is that they have not been very effective.

A number of factors account for the dismal performance of the public and private actors, but the most prominent appear to be corruption at all levels of Nigerian life and the absence of a meaningful participation of the public in the formulation and implementation of these policies and projects. Part III focuses on these two factors. To see tangible and enduring improvements, there is the dire need to stamp out corruption or minimize its influence. Public participation, which has gained ascendancy in the international arena as an important component of sustainable development, also deserves

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305 Shell was sued in New York and the lawsuit is still pending. See *Wiwa v. Royal/Dutch Shell*, 226 F. 3d 88 (2d. Cir. 2000), cert denied, 532 U.S. 941 (2001). A lawsuit is also pending against Chevron in California. See *Bowoto v. Chevron* No. C99-2506 CAL (N.D. Cal. 1999); In March 2004, a federal court in San Francisco ruled that ChevronTexaco can face trial in the US for actions of its subsidiary in Nigeria. See *Judge Refuses to Halt Suit Against ChevronTexaco Unit*, N.Y. Times, March 27, 2004, at Section C, Page 2.

greater attention that is presently the case in Nigeria. It is crucial to ensure that community members have a stake in these programs and are allowed to take their destiny in their own hands. A real challenge is to design a framework for institutional arrangements that take these factors into consideration.

Part IV concludes on the note that community-based trust funds could be a recipe for effective management of oil revenues in the oil-producing communities. It should be mentioned that this chapter, and indeed the entire work, focuses on governmental and corporate financing initiatives for community development. It does not address other mechanisms or avenues available or utilized by community members to seek redress for the negative impact of oil production, such as tort litigation, political negotiations and extra-legal measures.

## **I. PUBLIC INITIATIVES**

### **A. Oil Mineral Producing Areas Development Commission (OMPADEC)**

OMPADEC was established by the administration of General Ibrahim Babangida in 1992 to assuage the restiveness in the oil producing areas.<sup>306</sup> The government instituted the commission to placate the people and give a veneer of assurance that it was interested in improving their plight.<sup>307</sup> After increasing the financial allocation that the federal government makes to oil-producing areas from 1.5 per cent to 3 per cent of revenues derived from upstream activities,<sup>308</sup> the Babangida administration established OMPADEC

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306 See Aka, *supra* note 6, at 346 (noting that OMPADEC was “meant to be a more substantive concession” to the demands and the anti-oil protests of oil-producing minorities”)

307 Ezetah, *supra* note 304.

308 Ike Oguine, *Nigeria's Oil Revenues and the Oil Producing Areas*, Centre for Energy, Petroleum, Mineral Law & Policy, University of Dundee, web site journal, Volume 4, No. 10, Jan. - May 1999, available at [www.cepmlp.org](http://www.cepmlp.org). (Last visited Apr. 27, 2004.) See also Ike Oguine, *Nigeria's Oil Revenues and the Oil Producing Areas*, 17 J. Energy & Nat. Resources L. 111.

and gave it the mandate to distribute the allocation.<sup>309</sup>

OMPADEC's primary assignment was to propose and execute development projects in the oil and mineral producing communities with the consent of the president.<sup>310</sup> Its mandate encompassed addressing problems pertaining to infrastructure, jobs, education, and environment in the oil mineral producing areas.<sup>311</sup> In relation to the environment, OMPADEC was charged with the responsibility of "tackling ecological problems that have arisen from the exploration of oil minerals;" consulting "with the relevant Federal and State Government authorities on the control and effective methods of tackling the problem of oil pollution and spillages;" and liaising "with the various oil companies on matters of pollution control."<sup>312</sup>

During its existence, OMPADEC embarked on a number of construction and other developmental projects including roads, schools, water and electricity projects. Some of these projects were abandoned, with the nod of OMPADEC, after contractors received some payments.<sup>313</sup>

## **B. Niger Delta Development Commission (NDDC)**

The Niger Delta Development Commission (NDDC) was established in 2000 to replace the Oil Mineral Producing Areas Development Commission (OMPADEC). Shortly after assuming the reins of office in May 1999, Nigeria's President Olusegun Obasanjo commenced efforts to address the complaints of the people in the oil-producing

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309 FRYNAS, *supra* note 49.

310 See Eghosa E. Osaghae, *The Ogoni Uprising: Oil Politics, Minority Agitation and the Future of the Nigerian State*, 94 AFRICAN AFFAIRS 325, 332 (1995) (cited in Aka, *supra* note 6, at 346.)

311 OMPADEC Decree, section 2.

312 *Id.* section 2 (1) (a) (ii), (c), (d).

313 See IKE OKONTA & ORONTO DOUGLAS, *WHERE VULTURES FEAST: SHELL, HUMAN RIGHTS, AND OIL IN THE NIGER DELTA* 34-35 (2001).

communities of Nigeria.<sup>314</sup> Mr. Obasanjo introduced a Bill to the National Assembly in 1999, which after going through the legislative process with some tinkering from the legislators, became law - the Niger Delta Development Commission Act - in 2000.<sup>315</sup> The Act established the Niger Delta Development Commission.

A replacement legislation for the OMPADEC Decree, the NDDC Act was designed to avoid the pitfalls of the precursor legislation.<sup>316</sup> The NDDC was established as a “new Commission with a re-organized management and administrative structure for more effectiveness” in addressing the negative effects of oil exploration.<sup>317</sup> This is obviously a tacit acknowledgment that OMPADEC was not as effective as it should be.

The NDDC Act adopts an expansive definition of the Niger Delta Area to include the nine oil-producing states of Abia, Akwa-Ibom, Bayelsa, Cross River, Delta, Edo, Imo, Ondo and Rivers.<sup>318</sup> Each of these states is represented in the 19-member Governing Board of the NDDC. The remainder of the Governing Board’s composition, under the NDDC Act consists of the following: three members representing the non-oil producing states of the country drawn from the three geo-political zones of the North East, North Central, and North West, a representative of the oil corporations operating in the Niger Delta; a representative of each of the federal ministries of Finance and Environment, a managing director, and two executive directors.<sup>319</sup> Unlike the other members of the Board, the three directors serve on a full-time basis.

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314 Kaniye S.A. Ebeku, *Critical Appraisal of Nigeria’s Niger Delta Development Act 2000*, INT’L ENERGY L. & TAX’N REV. 203, 203 (2003).

315 NDDC Act, available at [http://www.nddconline.org/The\\_NDDC\\_Act.shtml](http://www.nddconline.org/The_NDDC_Act.shtml). (Last visited Apr. 27, 2004.)

316 Ebeku, *supra* note 314, at 203.

317 NDDC Act, preamble.

318 For the different definitions of “Niger Delta” including the restrictive and expansive ones, see AZAIKI, *supra* note 300.

319 NDDC Act, section 2 (1).

Ostensibly to ensure a closer connection between the oil-producing communities and the Commission, the NDDC Act provides that state representatives on the NDDC Governing Board must come from an oil-producing community within the state.<sup>320</sup> Similarly, the three directors (managing and executive) are also to be selected from oil-producing areas.<sup>321</sup>

The president enjoys broad powers of appointment. He appoints the Chairman and members of the NDDC Board. Apart from the oil companies' representative who is nominated by the companies and forwarded to the president, the rest of the members are directly appointed by the president. All the appointments, however, are subject to confirmation by the Senate, in consultation with the House of Representatives.<sup>322</sup> Members of the Board are appointed for a term of four years which is renewable for another term.<sup>323</sup> Provision is also made for the rotation of the Chairmanship among the Member States (i.e., oil producing states, in alphabetical order).

In addition to the Governing Board, the Act also establishes a Management Committee consisting of the Managing Director, two executive directors, and the directors in charge of the Commission's 11 directorates.<sup>324</sup>

Monitoring of the activities of the Commission is primarily entrusted to the care of two entities. First is an Advisory Committee whose membership includes the governors of the Member States and two other persons appointed by the President.<sup>325</sup>

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320 NDDC Act, section 2 (1).

321 NDDC Act, section 12 (1).

322 NDDC Act, section 2 (2).

323 NDDC Act, section 3 (1).

324 NDDC Act, section 10. The Directorates are: administration, community development, utilities development and waterways, environmental protection, finance, agriculture, planning and research, legal services, education and health, commercial and industrial development, and projects monitoring. A directorate of youth and women affairs was approved later.

325 NDDC Act, section 11.

There is also a monitoring committee charged with the responsibility of monitoring the implementation of projects and management of the funds of the Commission.<sup>326</sup> The members of this committee are appointed by the President from the National public and civil service.

The mandate of the NDDC, similar to that of OMPADEC, includes the formulation of policies and guidelines for the development of the Niger Delta area, the conception, planning, and implementation of projects and programs for the sustainable development of the area in the fields of transportation (including roads, jetties, and waterways), health, education, employment, industrialization, agriculture and fisheries, housing and urban development, water supply, electricity, and telecommunications; and the handling of ecological and environmental problems that are the consequence of oil exploration in the area.<sup>327</sup>

The NDDC Act also contains provisions on the sources of the Commission's funds.<sup>328</sup> The federal government is the major contributor while additional contributions come from the oil-producing states and the Ecological Fund. The oil corporations operating in the Niger Delta are also required to contribute 3 per cent of their annual budget to the Commission. In March 2004, it was reported that the oil companies have not been fully living up to their responsibilities in this regard. All the companies (foreign and indigenous<sup>329</sup>) so far have short-changed the NDDC or defaulted in making their contributions.<sup>330</sup> In some cases, the companies justify their lower contribution to deductions for community development activities and for the cost of their participation in

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326 NDDC Act, section 21.

327 NDDC Act, section 7 (1).

328 NDDC Act, section 14.

329 See Uchenna Awom, *Oil Firms Ordered to Pay N58 Billion*, Daily Independent online, Feb. 19, 2004.

330 See Jide Ajani, *How Oil Companies Short Change the NDDC*, Mar. 19, 2004.

the Liquefied Natural Gas Project, even when the law that set up the NDDC says nothing about these deductions.<sup>331</sup>

NDDC has since commenced operations. It developed an “interim action plan” which encompasses the construction of roads, health and educational facilities, shore protection, and building of jetties.<sup>332</sup> Communities are consulted and allowed to bring their proposals regarding the projects to be sited in their areas.<sup>333</sup> Contracts are generally executed by indigenes of the beneficiary communities.<sup>334</sup> The interim action plan also has a human development component that incorporates skills development for the youths in the oil-producing areas. The object is to steer the attention of the youth away from violent tendencies.<sup>335</sup> Upon completion of their training, NDDC plans to support their building an entrepreneurial base by proving them with micro-credit advances.<sup>336</sup> The human development scheme also includes free medical programs to be run in conjunction with pro-health and charitable medical organizations.<sup>337</sup> NDDC has also developed a master plan – an undertaking that took about two years – to cover its long term goals in the Niger Delta.

NDDC views itself as a dramatic departure from OMPADEC and other previous attempts to address the needs of the people of the Niger Delta. According to NDDC Chairman Ugochukwu, agencies such as OMPADEC and the Niger Delta Development Board of 1962 were intervention agencies, which adopted a crisis management approach.

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331 *Id.*

332 See *My Plan for Niger Delta*, Newswatch (Nigeria), February 28, 2003 (hereinafter, Newswatch Interview).

333 *Id.*

334 *Id.*

335 See Joseph Winter, Nigeria’s Elections in the South, BBC Delta Region, Apr. 15, 2003, available at <http://news.bbc.co.uk/go/pr/fr/-/2/hi/africa/2949809.stm>. (Last visited Apr. 16, 2003.)

336 Newswatch Interview, *supra* note 332.

337 *Id.*

On the other hand, the crisis management approach equates to NDDC's interim action plan, which is only a small component of the huge tasks that the NDDC intends to undertake.<sup>338</sup> NDDC's master plan is a big point of divergence. NDDC also professes to differ from OMPADEC because unlike its predecessor, it has adopted a bottom-up approach to community development. An additional point of departure is that the NDDC promotes partnership with other agencies for the task of developing these communities.

Ugochukwu puts it in the following words:

I was talking about the master plan and the bottom up which is a major departure point for the NDDC [sic]. We believe that unless the people own the process of their development then there is no way anybody can sustain it. That is why we want their involvement. The people must be in the driving seat of their development. So our own [approach] is to involve them right from conception, design and implementation. And that is the only way you can sustain any development plan. If the people don't own it, they can't sustain it. The other departure point for us arises from the act itself. The NDDC is conceived as a partnership. A partnership of various agencies and stakeholders who will unite in developing this place. . . . We have made a great effort to forge a partnership with all the agencies. We go on very well with several of the state governments, with the oil companies, with the World Bank, the UNDP. They want to be our partners in providing certain services in the area. I believe the United States will also participate.<sup>339</sup>

NDDC is still in its infancy and time will reveal the extent to which this new institution differs from those of yore, and how far it goes in tackling the serious problems confronting the people in oil producing communities in Nigeria. Nevertheless, there is some basis for evaluating the work so far, as well as the previous efforts under OMPADEC.

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338 *Id.*

339 *Id.*

### C. Evaluation of Public Initiatives

OMPADEC provided a number of benefits such as rural electrification and provision of clean water to some of the target communities.<sup>340</sup> OMPADEC failed miserably on a number of fronts. In the environmental arena, OMPADEC did virtually nothing. However, this has been explained as the product of the overwhelming demands for development projects with which it was inundated and which inhibited it from diverting attention to the environment.<sup>341</sup>

Another rationale offered for OMPADEC's relative inaction on environmental issues is that there is little indication that OMPADEC was properly equipped to carry out its environmental responsibilities. It was not empowered to make regulations, enforce laws, or sanction for breach of environmental laws.<sup>342</sup> It is possible that these limitations may have affected OMPADEC's ability to discharge its duties. There is need for caution, however, not to encourage and excuse ineptitude. If OMPADEC wanted to develop directives on how to improve the environment and insisted on implementing them, it is doubtful that there would have been many legal impediments to its doing so. Besides, if it sought to carry out its environmental mandate and was hamstrung by a lack of enforcement capacity, it would then be obvious that the limitations in the law constituted an obstacle. This would lay a legitimate foundation for future legislative reform. But there is hardly anything to indicate that OMPADEC even got to this point.

Indeed, it is unlikely that OMPADEC perceived itself to be weak. We are speaking here of a commission that had the nerve to thumb its nose at a properly procured

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340 FRYNAS, *supra* note 49, at 49.

341 Oguine, *supra* note 306 (stating: "This clamour for development projects was so great that OMPADEC's other major function of tackling ecological problems was all but forgotten.").

342 Joshua P. Eaton, *The Nigerian Tragedy, Environmental Regulation of Transnational Corporations, and the Human Right to a Healthy Environment*, 15 B.U. INT'L L.J. 261, 289 (1997).

court order. When the Federal High Court in Benin City issued an order restraining OMPADEC from swearing in Joseph Popo as the new commissioner for Delta state, OMPADEC proceeded with the swearing in, in defiance of the court order.<sup>343</sup>

OMPADEC's structure also constituted an impediment. The Commission's budget was controlled by the Head of State, a factor that may have affected its independence and flexibility in the discharge of its duties. It could be said that there might have been some good reason for keeping a leash on the commission through the controls afforded by the budgetary process. If that was the intendment, it does not seem to have worked. OMPADEC apparently operated without any credible financial oversight in view of the fact that its work was marred by gross mismanagement of funds and monumental corruption.<sup>344</sup> OMPADEC's chairman, Albert K. Horsfall, was removed following an investigation launched by the Nigerian government and replaced by a sole administrator, Professor Eric Agume Opia. Opia could not account for approximately \$80 million belonging to OMPADEC and was removed as a result.<sup>345</sup> Opia eventually "disappeared" with a cloud of suspicion and allegations of corruption surrounding and trailing him.

On the other hand, it could be said that even though OMPADEC's budget was controlled by the head of state, the commission's poor performance is actually traceable to "the absence of performance guidelines or controls," leading it to embark on projects without restriction.<sup>346</sup> This opened the door to inefficiency and corruption. One striking

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343 FRYNAS, *supra* note 49, at 124.

344 *Id.* at 49 (noting that "a significant proportion of the funds allocated to the OMPADEC was mismanaged. OMPADEC's chairman, Albert K. Horsfall was to report directly to the head of state, but there was no supervisory authority over the agency.").

345 *Id.* at 50.

346 *Id.*

example perhaps suffices to substantiate this point. In 1993, OMPADEC, according to reports, financed the construction of the Eleme Gas Turbine in Port Harcourt, Rivers State. At the end of 1995, the project had still not been completed and if it were to be completed, it would require the infusion of additional funds.<sup>347</sup>

With Opia's removal, OMPADEC underwent a re-structuring and Vice Admiral Dan Preston Omatsola was appointed as chairman.<sup>348</sup> The major feature of the restructuring was the decentralization of the commission's operations through the establishment of zonal offices in proximity to the oil producing areas.<sup>349</sup> But this did not appear to have taken care of all the problems and was criticized as creating additional levels of bureaucracy that "translate to new opportunities for corruption and waste and new theatres of conflict over contracts and jobs."<sup>350</sup>

Another major issue with OMPADEC was the absence of a meaningful opportunity for community members to participate in the whole process. Critics believe that OMPADEC should have been structured in such a way that allowed "local communities to take charge of their own affairs" with as little direct interference as possible.<sup>351</sup>

At the end of the day, OMPADEC proved an ineffective and inefficient institution. It did little to "channel resources to the oil producing areas [and provided a clear example of] the use of public oil revenues for the benefit of specific individuals at the expense of village communities affected by oil operations on the ground."

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347 OKONTA AND DOUGLAS, *supra* note 313, at 34-35 (2001).

348 FRYNAS, *supra* note 49, at 50.

349 Oguine, *supra* note 308.

350 *Id.*

351 Ibibia Lucky Worika, *Deprivation, Despoilation and Destitution: Whither Environment and Human Rights in Nigeria's Niger Delta*, 8 ILSA J. INT'L & COMP. L. 1, 27 n.77 (2001).

The creation of the NDDC, just like that of its predecessor OMPADEC,<sup>352</sup> was mired in controversy. Oil corporations, as well as oil-producing states and communities, raised objections either to its very existence or with some aspects of it with which they were not comfortable.<sup>353</sup> Yet, the NDDC entered the stage with the intention of avoiding some of the criticisms leveled against OMPADEC.<sup>354</sup> For instance, OMPADEC was criticized for a composition that did not require that members of the commission's Board to be selected from oil producing communities.<sup>355</sup> The NDDC Act introduced this requirement. However, perhaps, as a harbinger of what the attitude of the government would be in relation to following the stipulations of the law, this requirement has not been fully or faithfully followed. The current Chairman of the Board, Mr. Onyema Ugochukwu, a close associate of Mr. Obasanjo, is not from an oil-producing community in his native Abia state. Mr. Obasanjo, whom Mr. Ugochukwu served as a Senior Special Assistant before the appointment, insisted on his confirmation by the Senate in flagrant violation of the NDDC Act's provisions and eventually had his way.<sup>356</sup>

The NDDC is viewed by some scholars and community members as not being a vast improvement on OMPADEC. One commentator scathingly remarks that the "NDDC is hardly different from OMPADEC apart from its name."<sup>357</sup> Perhaps, this is a harsh assessment. But there are valid reasons why the NDDC has come under a barrage of criticisms.

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352 Oguine, *supra* note 308.

353 See Scott Dolezal, *The Systematic Failure to Interpret Article IV of the International Covenant on Civil and Political Rights: Is There a Public Emergency in Nigeria?* 15 AM. U. INT'L L. REV. 1163, 1207 (2000) (stating that "[f]undamental weaknesses in the [NDDC] bill initially led officials from every state in the Delta to unanimously oppose the creation of the NDDC").

354 Ebeku, *supra* note 314, at 203.

355 Oguine, *supra* note 308.

356 See Emeka Chianu, *NDDC - Another Shot at Infrastructural Development of Nigeria's Oil Producing Areas*, Int'l Energy L. & Tax'n Rev. 214, 215 (2001).

357 Ebeku, *supra* note 312, at 204.

One of such reasons is the absence of clear provisions in the NDDC Act mandating the commission to remediate and compensate for past oil operations damage. This is seen as a factor that could militate against its progress.<sup>358</sup> However, it could also be pointed out that although there are no specific provisions conferring such a mandate, the NDDC may still be able to fit such an assignment into its broad mandate. A critical question, however, is whether this is the kind of matter with which the NDDC should be concerned. It may be better for the federal and state governments through the environmental protection agencies to handle remediation, since they are more likely to be equipped (in terms of staffing and funding) for such tasks. Compensation issues could be worked out under separate arrangements involving the various stakeholders.

Part of the criticisms against the NDDC stems from the fact that the NDDC is not required to allocate projects in proportion to the volume of oil revenue accruing from each state.<sup>359</sup> But at some point, this argument was considered and rejected. Adhering to such a formula would have promoted some level of inequity in the process, since some of today's minor oil-producing communities were among the leading, if not dominant, producers in the past. It may be unfair to treat them as minor players today and discard them when the country relied on their resources all these years without much appreciation or compensation for losses suffered.<sup>360</sup>

The NDDC Act is also assailed because of the provision that the president is empowered to give directives to the commission (from time to time) with which the commission is bound to comply.<sup>361</sup> This is seen as unnecessary.<sup>362</sup>

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358 Id. at 204 n.18.

359 Dolezal, *supra* note 353, at 1207.

360 See Chianu, *supra* note 356.

361 NDDC Act, section 23.

The NDDC is also subjected to severe strictures because of the budgetary process that is placed under the control of the National Assembly. The annual budget of the commission must be approved by the federal legislative body. This could be viewed as the kind of over centralization that in the end may not prove helpful. The budget approval process invites lobbying of legislators<sup>363</sup> with the attendant opportunity for corruption and rent seeking.

A major problem with the NDDC is that it is not insulated from politics, or more precisely partisanship. In an interview with a national magazine in Nigeria, NDDC Chairman, Mr. Onyema Ugochukwu expressed his strong desire to work for Mr. Obasanjo's re-nomination and re-election.<sup>364</sup> He makes no bones about his partisanship and one wonders to what extent party loyalties affect the carrying out of his or the commission's functions. A development agency like the NDDC should be thoroughly de-politicized. It should be an apolitical body run by people who have no overt political affiliations or interests. For instance, the Social Security and Medicare Trust Funds in the United States are not susceptible to this level of politics. That could explain why they are not subject to the whims and caprices of politicians acting on purely partisan (as opposed to ideological) basis.

One scholar catalogs additional criticisms against the development body, covering a variety of factors:

The greatest problem relates to the Commission's composition. Moreover, the Act lacks other appropriate and necessary participatory provisions.

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362 Chianu, *supra* note 356, at 217.

363 *Id.*

364 See Newswatch Interview, *supra* note 332 ("For me the main objective was, I work for the president, to contribute to his re-nomination and re-election. For that objective alone, we had to put aside our egos or any other considerations and join in the reconciliation to ensure that most Abia votes will go to the president.").

Specifically, the NDDC Act does not make provision for the representation of the indigenous people (for whose benefit the Act was made) in the executing body nor is there a provision for their participation in the planning and execution of projects. The provision for the representation of state members in the Commission cannot be properly regarded as affording representation to the local people, since they have no input in the process of appointment. The problem with this situation lies in the fact that such appointees are likely to see themselves as representing the state authorities that appointed them, and not the people. Moreover, they may be persons who are unfamiliar with the problems and needs of the local people.<sup>365</sup>

Taking the specific issue of composition, the structure of the NDDC (and OMPADEC before it) does not permit the communities to have true representation in the body. It is true that community members are represented in the commission, but the reality is that you can only have one representative from one community representing the interests of myriad, not necessarily friendly, communities. It is hard to believe that these communities see such representation as holding much significance for them.

Yet, the issue of active participation remains of great importance to community members. Chizor Wisdom Dike, former president of Ogbogu (an oil-producing community in Rivers State) Development Association, and currently Executive Director of Community Rights Initiative, a social and economic rights NGO in Port Harcourt, Rivers State commented in response to my questions after an interview:

The basic issue about NDDC is that decision-making about projects for communities is centralised, bureaucratic, clumsy and elitist. There is absolute lack of community involvement in the choice of projects according to actual community needs. The state offices of the NDDC are not functional. They do not have the power to discuss or award contracts. Project monitoring and evaluation is done without the participation of communities. The amount of money accruing to the NDDC vis-à-vis the projects and programmes on ground shows non-performance. Since 2000,

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365 Ebeku, *supra* note 314, at 204.

over 60 Billion Naira was released to the commission with very little to show for it. The NDDC has not performed to public expectation.<sup>366</sup>

In addition, there are still concerns that the NDDC is not truly immune from the specter of corruption that plagued its predecessor, OMPADEC.<sup>367</sup> There have already been allegations that up to 300 Million Naira (approximately \$3 million) was taken from the coffers of the NDDC to support a campaign against president Obasanjo's political opponents.<sup>368</sup>

Finally, whether it is OMPADEC or NDDC, it is instructive to note that, notwithstanding the rhetoric,<sup>369</sup> the government seems to favor a top-down approach with the president and national institutions controlling virtually every aspect of the commission's work from the appointment to execution of their responsibilities and monitoring of their activities. This work favors a bottom-up approach in which people at the local communities play a bigger role on how development activities are carried out.

Asked to assess the NDDC, Shell would only give it a fair grade at this point. According to a company representative, "It is still early to judge their performance, but there has to be separation of their process from influence of government and politics. Transparency and process alignment with what obtains in the industry are factors that will enhance success."<sup>370</sup>

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366 Chizor Wisdom Dike, Email Communication, May 1, 2004.

367 See Ebeku, *supra* note 314, at 204 n. 25 (stating that "[a]lready the NDDC has been criticised as another aloof government agency and another cocoon for official corruption").

368 Tony Eluemunor, Obaseki's Sack to Expose Shady Deals in NNPC, *Daily Independent (Nigeria)* Nov. 9, 2003.

369 For instance, the NDDC Chairman, Mr. Onyema Ugochukwu, has stated that the NDDC adopts a bottom-up approach. See *Newswatch Interview*, *supra* note 332.

370 Shell Nigeria, *Response to the Researcher's Questionnaire*, Apr. 2004 (hereinafter *Shell Nigeria, Response to Questions*).

## II. PRIVATE INITIATIVES: CASE STUDIES

In addition to the public initiatives discussed above, there have also been corporate initiatives to contribute to community development. The corporate approaches have varied from direct funding arrangements to community grants. Of late, there has been interest in contracts with credible non-governmental organizations and public-private partnerships with development agencies such as USAID and UNDP. This part presents case studies on Chevron and Shell as well as general commentary on other oil corporations operating in Nigeria in relation to their community development activities.

### A. ChevronTexaco

ChevronTexaco was formed in 2001 with the merger of two major oil companies - California-based Chevron and Texas-based Texaco.<sup>371</sup> Before the merger, both companies had been operating in Nigeria independently or in partnership with the Nigerian government under joint ventures or through production sharing contracts. ChevronTexaco's affiliates have had operations in Nigeria for over 40 years.<sup>372</sup> Chevron (then Gulf) discovered the Okan oil field in 1964, the first commercial field that was discovered on Nigeria's continental shelf.<sup>373</sup> The field began oil production in 1965.<sup>374</sup> One of the company's major operating facilities is the Escravos oil terminal in Warri, Delta State, which is operated by Chevron Nigeria Limited (CNL) in partnership with

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371 Robert Evans, What Every Lawyer Needs to Know Now About MD&A Disclosure: ChevronTexaco Corp., 1329 PLI/Corp. 945, 947 (2002).

372 ChevronTexaco, 2002 ChevronTexaco Corporate Responsibility Report: Integrity and Learning in an Evolving World 10 (2003).

373 FRYNAS, *supra* note 49, at 12.

374 *Id.*

NNPC. This terminal processes about 480,000 barrels of oil a day.<sup>375</sup> Most of ChevronTexaco's operations in Nigeria are offshore and less than 30 per cent of the operations are on shore.

ChevronTexaco explains its philosophy regarding community development this way:

[I]n many of the communities where we operate, poverty persists and multinational corporations such as ChevronTexaco increasingly are being called upon to fill roles that have traditionally been the domain of government, such as providing health care, education and basic infrastructure. We believe that as a private-sector company we cannot - and should not - take on the role of government. But we believe we can make many meaningful contributions to improving the quality of life in the communities where we operate and are focusing our resources toward helping to address these issues.<sup>376</sup>

Thus, ChevronTexaco asserts that governments should not abdicate their traditional roles or transfer them to oil corporations. Based on that a company should contribute to community development, but only to a limited extent. ChevronTexaco declares that it recognizes the need to be "cognizant" of how it "manage[s] the social, economic and environmental impacts of [its] operations."<sup>377</sup> Certainly, there is no shortage of these negative effects and these problems confront ChevronTexaco and other oil corporations operating in Nigeria at every corner. A former Columbia University anthropologist that ChevronTexaco hired to assist in redesigning its community development strategy noted:

In my view, this area [Nigeria's Niger Delta] presents one of the most difficult social environments in the world, especially after 37 years of military government. Traditional economies and social organizations have been severely damaged, leaving the area with no way to make consensus decisions or resolve conflict. Meanwhile, anger is growing among local villagers, who feel they have received few benefits from either oil

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375 Chevron Texaco, Corporate Responsibility Report, supra note 372, at 10.

376 Id.

377 Id. at 5.

companies or the government.<sup>378</sup>

In carrying out its community development (CD) activities in Nigeria, Chevron employs a mix of direct funding, contracts with NGOs (sometimes called “voluntary development agencies”) and public-private partnerships.<sup>379</sup> ChevronTexaco does not make direct monetary grants to communities save in the cases of land or property acquisition and compensation for oil pollution damage.<sup>380</sup> The company contributes to community development through sponsoring of educational and health programs including scholarships, building and equipping science laboratories, renovating dilapidated structures, incentivising the teaching of English and the Sciences in the remote, rural areas by paying stipends to teachers to do so, building classrooms and residences for teachers, hospitals and river boats and “donation as well as construction of infrastructure of various other kinds.”<sup>381</sup> ChevronTexaco states that it spends between \$55 million and \$63 million on community investments worldwide annually.<sup>382</sup> In 2002, the company reportedly spent \$62.8 million on that. In Nigeria, Chevron Nigeria Limited is said to have spent more than \$90 million so far on community development and this has gone toward the provision of water and power, roads, canals, jetties, schools, and hospitals.<sup>383</sup>

In carrying out its CD activities in Nigeria, the company does not pay money directly to communities as grants for the construction of projects. Instead, contracts are awarded to the lowest bidder or a community contractor if he or she submits a bid that is

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378 Id. at 10.

379 ChevronTexaco Nigeria, Response to present researcher’s questionnaire (hereinafter ChevronTexaco, Response to Questions).

380 Id.

381 Id.

382 Chevron Texaco, Corporate Responsibility Report, *supra* note 372, at 14.

383 Id. at 10.

not the lowest, yet within 10 per cent of the lowest bidder.<sup>384</sup> With regard to micro enterprise development, the company utilizes the services of NGOs sometimes referred to as voluntary development agencies that have “a track record and expertise in rural development.”<sup>385</sup> The decision to work through these agencies, according to ChevronTexaco, was informed by “years of unsatisfactory performance” when the company tried to carry out some of these activities themselves.<sup>386</sup> ChevronTexaco’s focus is beginning to gravitate toward micro enterprise development and away from infrastructure building (brick and mortar) because much of the infrastructure erected by the company “has been burned by rival ethnic groups during frequent inter-ethnic clashes.”<sup>387</sup>

In addition, ChevronTexaco has also embarked upon public-private partnerships with UNDP and USAID in Angola<sup>388</sup> and with UNDP in Nigeria.<sup>389</sup> It also partnered with the UNDP, the European Bank for Reconstruction and Development (EBRD) and the U.S. Department of State regarding its Small and Medium Enterprise (SME) Program in Kazakhstan, which concluded in 2002.<sup>390</sup> In its *2002 Corporate Responsibility Report* released in 2003, Chevron stated that its partnership with UNDP is for the development of a “coordinated master plan for separate Delta projects, such as building schools, roads and hospitals.”<sup>391</sup> But in response to the present researcher’s questions, ChevronTexaco Nigeria stated that in Nigeria, the company’s “relationship with UNDP is to help strengthen and improve [ChevronTexaco’s] record on M & E [Monitoring and

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384 ChevronTexaco, Response to Questions, *supra* note 379.

385 *Id.*

386 *Id.*

387 *Id.*

388 Chevron Texaco, Corporate Responsibility Report, *supra* note 372, at 16.

389 *Id.* at 10.

390 *Id.* at 15.

391 *Id.* at 10.

Evaluation], and adherence to [the] Sustainability Index.”<sup>392</sup> UNDP will also provide “greater expertise in oversight functions” as ChevronTexaco increases the number of NGOs with which the company is partnering.<sup>393</sup> It would appear that by engaging UNDP in the building of schools, ChevronTexaco would be conceding that the partnership was influenced by inadequacies in the existing arrangements for funding community development projects, but ChevronTexaco in their response to my questions insisted that that was not the case.<sup>394</sup>

On the issue of corruption, ChevronTexaco concedes that corruption is a recurring issue at the community leadership level, making it, *inter alia*, a hindrance to channeling community development money through community leadership. However, it refutes the allegation that the community relations staff are also engaged in corrupt practices thereby working against the efficacy of CD initiatives. ChevronTexaco asserts that it maintains a zero tolerance policy toward internal corruption. According to the company:

Zero tolerance is our policy. It is the key to ensuring that corruption never rears its ugly head, and stamping it out if it does. Any employee caught is promptly dismissed. Cash for development is not handled by community relations staff but paid directly to NGOs accounts or, in the case of infrastructure construction, through a building contractor’s accounts. These are easily verifiable and can be audited by third parties.<sup>395</sup>

On the government development measures, ChevronTexaco is of the view that “[m]any lessons learned from OMPADEC can [be] and are being avoided by NDDC.”<sup>396</sup> The company, in their assessment of the performance of the NDDC adds: “When compared with OMPADEC, NDDC’s performance is encouraging - still there is much to be desired.

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392 ChevronTexaco, Response to Questions, *supra* note 379.

393 *Id.*

394 *Id.*

395 *Id.*

396 *Id.*

The issues around the Niger Delta are overly politicized. This tends to hamper genuine improvements.”<sup>397</sup>

While admitting that there’s still room for improvement, ChevronTexaco expresses satisfaction with its accomplishments in community development and aims to acquire recognition as the industry leader in community engagement and development.<sup>398</sup>

Yet, the situation of people in the oil producing communities remains dire, signifying that obviously a lot more needs to be done. The continuing restiveness in communities in which ChevronTexaco operates clearly indicates that either the company is exaggerating its achievements or that their community development budgets are no match for the social, economic, and environmental problems existing in these communities, some of which cannot be separated from the fact of oil exploration and production in the area. To underscore their dissatisfaction with ChevronTexaco, local women from the Itsekiri, Ijaw and Ilaje ethnic groups occupied the Escravos terminal of Chevron Nigeria Limited in the summer of 2002. The women wanted Chevron to provide services, facilities and additional jobs to members of the area.<sup>399</sup>

A similar controversy over the provision of amenities a few years earlier led to more serious problems. In May 1998, Ilaje community members occupied Chevron’s Parabe oil platform protesting against the company and asking for the provision by the company of portable drinking water, since sources of drinking water has been polluted as a consequence of the company’s oil production. They also called for employment for the

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397 Id.

398 Chevron Texaco, Corporate Responsibility Report, *supra* note 372, at 14.

399 See Id. at 10. See also Women Remain at Chevron Terminal; Nigerian women storm facility demanding amenities, 131:52 Oil Daily, July 11, 2002, Michael Peel, Chevron near deal to end women’s sit-in, Fin. Times (London), July 17, 2002, at 5, Nigerian women expand Chevron takeover: Demands for jobs, improvements, spread to four more facilities of oil giant, Edmonton J., July 18, 2002, at A5, Daphne Wysham, America’s SUVs and the women of the Niger Delta, Plain Dealer, Aug. 11, 2002, at F1.

indigenes of the area and generally, the demonstration of greater corporate social responsibility by the company.<sup>400</sup> Chevron's alleged response through military, naval, and mobile police personnel resulted in the death and injury of some of the protestors and a lawsuit in federal court in San Francisco against Chevron.<sup>401</sup>

## **B. Royal Dutch/Shell<sup>402</sup>**

Shell commenced petroleum activities in Nigeria in 1937 as Shell D'Arcy (renamed Shell-BP in 1956), a joint venture between Shell and Anglo-Iranian (British Petroleum from 1954) for Nigerian operations.<sup>403</sup> Shell D'Arcy was granted a license to explore oil in 1938 and this license covered the entire territory of Nigeria.<sup>404</sup> The Second World War caused the company to withdraw in 1941, but it returned in 1946 to resume exploration work.<sup>405</sup>

The joint venture which had a monopoly over the exploration of oil in Nigeria started its drilling activities in 1951 and discovered some oil (450 barrels) at Oloibiri in 1953.<sup>406</sup> In 1956, Shell-BP made a commercial discovery of oil at Oloibiri, the first time oil would be found in commercial quantities in Nigeria.<sup>407</sup> Two years later, in 1958, a major find was made in the Ogoni area.<sup>408</sup> Shell has remained the leading oil producer in

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400 See Scott Pegg, *The Cost of Doing Business: Transnational Corporations and Violence in Nigeria*, 30 SECURITY DIALOGUE 473, 478 (1999), EMEKA A. DURUIGBO, *MULTINATIONAL CORPORATIONS AND INTERNATIONAL LAW: ACCOUNTABILITY AND COMPLIANCE ISSUES IN THE PETROLEUM INDUSTRY* 162 (2003).

401 Id.

402 For an extensive discussion of Shell's operations in Nigeria, see Joyce C. Wigwe, *Shell in the Niger Delta Region of Nigeria: A Case for Mandatory Codes of Conduct* (Unpublished J.S.M. Thesis, 1997) (on file with Stanford University).

403 FRYNAS, *supra* note 49, at 9 n. 7 and accompanying text.

404 Id.

405 Id.

406 Id. at 9.

407 Id.

408 Id.

Nigeria. With the leading position has also come a corresponding responsibility to assume major obligations in relation to community development and major controversies pertaining to its operations.

The corporate philosophy of Shell with regard to community development and allied matters is encapsulated in its *Sustainable Development Policy (SDP)*.<sup>409</sup> According to a Shell Nigeria official, the policy or practice of the company in relation to CD is driven by the SDP and “is informed by [a] desire for project sustainability, and participation [in] projects selections and implementation by communit[ies].”<sup>410</sup> The company says that it maintains the same policy toward community development in every country in which it operates, “but with variations to suit needs that are specific for countries.”<sup>411</sup>

An aspect of Shell’s corporate philosophy toward CD (similar to ChevronTexaco’s) is the belief that the primary responsibility for taking care of the social and economic needs of the people rests with public officials and that companies should not be saddled with a role that governments should be playing.<sup>412</sup>

Shell Nigeria’s contributions to the development of communities in which it operates take the forms of the company’s contributions to the NDDC, direct funding of social investment programs and contributions the company makes in partnership with other donors.<sup>413</sup> On the questions of whether the company makes direct monetary grants to build infrastructure such as roads and schools and to whom this money is made

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409 See Shell’s website, at [www.shell.com](http://www.shell.com).

410 Shell, Nigeria Response to Questions, *supra* note 370.

411 *Id.*

412 *Id.* (stating: “Generally speaking, the expectations [of community members on the company] are enormous, a situation where the communities expect Shell to replace [the] government and provide virtually all her social needs in the areas of operations.”)

413 *Id.*

available in the communities, Shell responded that it makes funds directly available to community-based organizations (CBOs) and Project Management Committees (PMCs) established for specific project implementation.<sup>414</sup>

Concerning allegations of corruption among its staff, especially the completion of an elementary school in Ogoniland at an estimated cost of \$5 million when projections indicate that it could have been constructed at a fraction of that sum,<sup>415</sup> Shell responded with a less than categorical denial:

There are policies and procedures for placing contracts that are awarded to third party contractors. Contracts are generally placed through open tendering and awards based on benchmark costs. Project costs are controlled by many factors including location, size, quality, duration, cost of labour, etc. Variations in costs are normally within allowable tolerances. The group business principle guides the conduct of staff on ethics and staff who are found to have compromised are released if investigations prove complicity.<sup>416</sup>

In November 2003, Shell entered into a memorandum of understanding (MOU) to develop projects in the Niger Delta.<sup>417</sup> This is a \$20 million Nigerian Development Program with Shell contributing \$15 million over the next five years to the partnership and USAID contributing \$5 million.<sup>418</sup>

Sir Philip Watts, former Chairman of the Committee of Managing Directors of the Royal Dutch/Shell Group of Companies, said on the day of announcement of the partnership:

Shell already spends about \$60 million annually in the Niger Delta on its well-established social investment program. I am proud that Shell will

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414 Id.

415 Michael Fleshman, Personal Interview with the Author, New York, Jan. 30, 2004. Mr. Fleshman conducted field investigations in the Niger Delta a few years ago. See Michael Fleshman, Report From Nigeria 2. New York: The Africa Fund, June 17, 1999.

416 Shell, Response to Questions, *supra* note 370.

417 USAID/Nigeria, Country Strategic Plan 2004-2009 at 23.

418 USAID and Shell Form Partnership to Launch \$20 Million Nigerian Development Program, Press Release, Nov. 14, 2003, available at <http://www.usaid.gov/ng/pressrelease.htm>. (Last visited Jan. 28, 2004.)

now be able to extend this important work with this partnership with USAID. I am confident that that our program together will make a significant contribution to socio-economic development in Nigeria and in the Niger Delta in particular.<sup>419</sup>

This partnership, which is the largest USAID partnership to date, will focus on projects in the areas of agriculture, malaria prevention and enterprise development.<sup>420</sup> The Cassava Enterprise Development Project (CEDP) will receive the initial funding under this MOU.<sup>421</sup> Shell will directly contribute \$3 million in addition to the USAID Nigerian Mission's investment of \$1.2 million in CEDP for 2003.<sup>422</sup> The USAID-Shell partnership is also a supporter of the Presidential Cassava Initiative, a program that will receive a combined contribution of \$17.1 million from the Federal Government, state governments and the Niger Delta Development Corporation (NDDC).<sup>423</sup> The focus of the program will be in eight states in the South-Eastern and South-Southern parts of Nigeria.<sup>424</sup>

Shell's community development record has not been viewed favorably. Two Nigerian activists, Ike Okonta and Oronto Douglas documented a number of incidents in which Shell failed woefully to attend to the problems in many of the communities in which it has operations including Ogoniland (where it has not been allowed to resume operations), Nembe, Okoroba, Iko, Bonny, Forcados, and Ughelli.<sup>425</sup> Certainly, it can be easily concluded that the plight of these communities have worsened with oil production. Shell indicates that there are areas in its current approach to community development that would benefit from improvement. To that end, aspects the company has identified include

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419 Id.

420 USAID/Nigeria, *supra* note 417, at 23.

421 Id.

422 Id.

423 Id.

424 Id. at 23-24.

425 See OKONTA and DOUGLAS, *supra* note 313, at 74-95.

“external stakeholder engagement, NGOs or partnerships for joint funding of programmes . . . and [p]roject execution supervision . . . possibly done by external bodies [and] NGOs.”<sup>426</sup>

### **C. Other Corporate Arrangements**

In November 1998, a MOU was signed between three companies - Shell, Mobil and NLNG - and representatives of the Bonny Kingdom. Under the MOU, described as “the first agreement of that nature signed between oil companies and a community”<sup>427</sup> the companies agreed on the construction of a 2.7 km road on Bonny Island and the provision of pipe-borne water and electricity in the space of two years.<sup>428</sup> One advantage of this arrangement is that the companies entered into an area to operate with the express consent of the community, not simply the consent of the state governor as has previously been the case.<sup>429</sup> Such state of affairs could play a role in reducing conflicts, especially if all the parties live up to their bargains.<sup>430</sup>

However, the initial stage of implementation of this arrangement encountered some major problems. Protests erupted in Bonny when the youths from that town complained that the management of the NLNG consortium was not implementing the terms of the MOU.<sup>431</sup> The protests led to stoppage of NLNG operations for about three days. Military invitation and intervention on this issue led to the death of a protestor and injury to many others. The protests raised the ire of Nigeria’s president who visited

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426 Shell, Response to Questions, *supra* note 370.

427 FRYNAS, *supra* note 307, at 52.

428 *Id.*

429 *Id.*

430 See *id.*

431 Worika, *supra* note 357.

Bonny and made it clear that the government would not hesitate to deal ruthlessly with such activities that could hamper economic growth and send the wrong signals to foreign investors. On their part, the youths claimed that they were not afforded an opportunity to state their case.<sup>432</sup>

Another interesting arrangement is that entered into between the partnership between BP and the Norwegian state oil company, Statoil on the one hand and some NGOs on the other. The Akaska Project was a self-help project to promote sustainable development.<sup>433</sup> BP-Statoil engaged the services of two respected NGOs ProNatura International and the Niger Delta Wetlands Centre to execute the projects on its behalf.<sup>434</sup> The strong point of this arrangement is that it has the potential to “satisfy the demands of communities better than pervious development projects because the local people would have a much greater say in the execution of the project.”<sup>435</sup>

### **III. CORRUPTION AND PUBLIC PARTICIPATION**

#### **A. Corruption**

Corruption has been defined as the co-optation or use of public resources for private or personal benefit.<sup>436</sup> Corruption rears its ugly head in various facets of Nigerian life.<sup>437</sup>

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432 Id.

433 Id.

434 Id.

435 Id. at 52-53.

436 The World Bank, *Helping Countries Combat Corruption: The Role Of The World Bank* 8 (1997); Transparency International, *Frequently Asked Questions About the Corruption Perceptions Index: 2002*, Press Release, Aug. 28, 2002. See also Human Rights Watch, *Some Transparency, No Accountability: The Use of Oil Revenue in Angola and Its Impact on Human Rights* 39 (2004). Larry Diamond remarks that the past few years have witnessed an increased rejection of the idea favored in some (including respected) quarters not too long ago that corruption could have some beneficial effects in countries where it was prevalent. Professor Diamond calls this, rightly in my view, a

Because of its size and value in Nigerian life, the oil and gas industry presents numerous opportunities for corruption at different levels.

Corruption has been identified as a major factor for the ineffectiveness of community development and poverty alleviation efforts in the oil-producing communities. “[O]ne of the most likely explanations [of the failures of government and corporate development efforts] is the influence of the prevalent corruption and inefficiency in Nigeria on the conduct of government officials, oil company staff and local contractors.”<sup>438</sup> OMPADEC essentially failed because of mismanagement of resources and massive corruption.<sup>439</sup> Corruption will probably make or mar the NDDC. It is disturbing that at this early point in NDDC’s operations, the commission would be associated with controversy as to its spending enormous amounts on an issue

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revolution:

Over the past decade, a revolution has been gathering force in politics, development, and international affairs. At every level of public life, people and organizations dedicated to the advancement of democracy, social justice, poverty alleviation, conflict prevention, and international cooperation for these ends are rebelling against political and bureaucratic corruption. A few decades ago, a great many scholars, aid officials, and international investors viewed corruption as a transitory and inevitable concomitant of the processes of economic and political development, or “nation building.” Some argued that corruption actually had positive effects, in lubricating the wheels of a turgid bureaucracy and in binding diverse individuals and groups to the nation’s government and politics through the distribution of “patronage.” Others recognized the net costs and inefficiencies of corruption, but wrote them off as the “cost of doing business” or rationalized them as a price of transition to a modern, better-educated society that would no longer tolerate them. The era of excusing, rationalizing, and looking the other way is, fortunately, over.

Larry Diamond, *Building a System of Comprehensive Accountability to Control Corruption*, Paper Presented to the Seminar on Democratic Consolidation: the International Context and the Mexican Experience, Sponsored by the Federal Electoral Institute of Mexico, Mexico City, February 18-20, 2003.

<sup>437</sup> USAID/Nigeria, *supra* note 417, at 22 (stating that “[c]orruption is deeply entrenched at all levels of Nigerian life . . .”).

<sup>438</sup> FRYNAS, *supra* note 49, at 53.

<sup>439</sup> *Id.*

(presidential politics) that has absolutely nothing to do with improving the conditions of the people in the oil-producing areas.

Equally disturbing are allegations that corporate officials seek to profit personally from their companies' community development funds. This is believed to take place through the inflation of project costs, award of contracts to cronies and the kind of contractors who would kick back some of the contract money to the officials and outright pocketing of some of the funds allocated for contracts.

At the community level, corruption has been checked to an extent through a de-emphasis on community grants. Yet, avenues for corruption persist. Companies have control over the award of security contracts, which usually go to community members. This aspect has been associated with corruption and conflicts.<sup>440</sup> Compensation paid for land or property acquisition or environmental damage has also been prone to corruption. More importantly, even in cases of direct funding, there have been stories of community leaders trying to cut deals with contractors to abandon their projects before completion. The community leader would be prepared to endorse that the project has been completed while the contractor gives a substantial portion of the contract fee to the community leader.<sup>441</sup>

Although this could hold enormous benefits for the contractor, community leader and (to an extent) the oil companies (since the community leaders would not trouble them at least for a while), it portends tremendous harm to the communities in general. They miss out on the community development projects and this could lead to renewed agitation from other members of the community, resulting in more problems for the companies and

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440 Dimieari Von Kemedi, *Community Conflicts in the Niger Delta: Petro-Weapon or Policy Failure?* WP 03-12, Institute of International Studies, University of California, Berkeley, 2003.

441 Information gathered from discussing with Nigerians involved in the oil industry.

government. Sadly, even the community leaders may profit from this renewed round of restiveness, as the companies may be compelled to cough out additional funds for community development.

The oil companies suggest that they frown at corruption at the community leadership level, but this corrosive problem persists.<sup>442</sup> Shell states that it “is guided by social structures in place and will work with leaders recognized by the communities. Our business principles guide relationships and conduct of business with community leaders and does not support corruption in any form.”<sup>443</sup>

With the minimal level of transparency that exists at the governmental, corporate and community levels, it is hardly surprising that oil-producing communities remain mired in poverty and squalor. The importance of devising revenue management institutions that would emphasize transparency and accountability cannot be overemphasized. With records of transactions being open to the public and monitoring provided by credible, independent groups, there is the possibility of improving the fortunes of the people in oil-producing communities. It will be a great idea to increase allocation of revenues from companies and government for CD, but if these monies continue to be siphoned to private bank accounts, there is little hope of improving the plight of the people and environment in the oil-producing areas of Nigeria.

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442 See ChevronTexaco, Response to Questions, supra note 379.

443 Shell Nigeria, Response to Questions, supra note 370.

## **B. Public Participation in Decision-Making**

There is no precise definition of public participation in decision-making.<sup>444</sup> However, the growing importance of this concept at the domestic and international levels cannot be gainsaid. This is particularly so in the natural resources arena.<sup>445</sup> Public participation is of significance in three broad areas: on issues relating to the environment; regarding the development of resources (such as oil, gas and mining projects); and in the socio-economic development of communities.

The Rio Declaration of 1992 clearly endorsed public participation when it states in Principle 10 that “[e]nvironmental issues are best handled with the participation of all concerned citizens, at the relevant level” adding that at “[a]t the national level, each individual shall have . . . the opportunity to participate in decision-making processes.”<sup>446</sup> The 1998 Aarhus Convention (which came into force in 2001), perhaps the most far-reaching and influential treaty on this subject, has detailed provisions on access to information, public participation in decision-making and access to justice.<sup>447</sup> With regard

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444 George (Rock) Pring & Susan Y. Noe, *The Emerging International Law of Public Participation Affecting Global Mining, Energy, and Resources Development*, in *Human Rights And Natural Resource Development* 11, 15 (Zillman, Lucas & Pring, eds., 2002); Nancy Perkins Spyke, *Public Participation in Environmental Decision Making at the New Millenium: Structuring New Spheres of Public Influence*, 26 *B.C. Env'tl. Aff. L. R. ev.* 263, 266 (1999); Norman Wengert, *Citizen Participation: Practice in Search of a Theory*, 16 *Nat. Resources J.* 23 (1976).

445 See Donald N. Zillman, *Introduction to Public Participation in the Twenty-first Century*, in *Human Rights And Natural Resource Development* 1, 1 (Zillman, Lucas & Pring, eds., 2002) (stating that the “growth of public participation in major natural resource decisions is one of the signal developments of the last years of the Twentieth Century”); Barry Barton, *Underlying Concepts and Theoretical Issues in Public Participation in Resources Development*, in *Human Rights And Natural Resource Development*, id at 77 (stating that “[i]n the last twenty-five years, public participation has become more significant in energy and natural resources development, and in environmental management generally”). Sometimes, public participation is used to incorporate three inter-related concepts: access to information, public participation in decision-making and access to justice.

446 Rio Declaration on the Environment and Development, June 13, 1992, princ. 10, adopted by the UN Conference on Environment and Development (UNCED) at Rio de Janeiro. UN Doc. A/CONF.151/26 (vol. 1) (1992); 31 *I.L.M.* 874 (1992).

447 UN Economic Commission for Europe (UN/ECE) Convention on Access to Information, Public Participaition in Decision-Making, and Access to Justice in Environmental Matters, June 25, 1998, UN Doc. ECE/CEP/43 (1998) (entered into force Oct. 30, 2001), available at

to public participation in decision-making, it provides for public involvement in decisions relating to mining projects, energy sector facilities (such as refineries, large power plants, and nuclear plants), metals production and processing facilities and other development activities.<sup>448</sup> There are also provisions for participation in environmental decision-making processes.<sup>449</sup> International financial institutions such as the World Bank have also embraced all the aspects of public participation, implementing policies providing for them.<sup>450</sup>

Not everybody is enamored of public participation and the concept certainly has some drawbacks. Critics contend that it is expensive and time consuming and that community members, often allowing their emotional attachments to hold sway, are not in the best position to make some of these important and technical decisions.<sup>451</sup> Besides, some of what is called public participation is actually participation by members from the upper stratum of the socio-economic scale and these participation and views of the elite should not be taken as those of the majority of the population who for some reason or the other do not get to participate.<sup>452</sup> One scholar captures the prevailing cynicism in some quarters in the following words: “A composite list of what is expected of citizen participation is staggering, for participation appears to be akin to the snake oil of ancient vendors. It is supposed to cure whatever is ailing the body politic at the moment.”<sup>453</sup>

Nevertheless, there are a number of advantages that are derivable from public participation. First of all, a decision is likely to get better if it is made with adequate

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<http://www.unece.org/env/pp/treatytext.htm>.

448 Id. Annex I.

449 Id. Art. 6 (2).

450 See Pring & Noe, *supra* note 444, at 52-55.

451 Id. at 25.

452 Id.

453 Mary Grisez Kweit & Robert W. Kweit, *Implementing Citizen Participation In A Bureaucratic Society* 36 (1981). See also Pring & Noe, *supra* note 444, at 23.

consideration of the perspectives of those who will live with the consequences thereof.<sup>454</sup> Public participation also engenders a sense of empowerment in those who participate, strengthen local communities and other groups, promotes conflict reduction among competing interests, facilitates the accountability of public officials, makes it easier for the public to accept the decisions arrived at, and imbues the decisions reached with greater legitimacy.<sup>455</sup> The decisions reached are also more likely to reflect the needs of the local communities and of public values. They also have chances of a better quality substantively<sup>456</sup> although this is highly debatable.<sup>457</sup>

Public participation will be particularly useful in the context of socio-economic development of Nigerian oil-producing communities where feelings of alienation pervade the community atmosphere and lead to frosty relations between the community members on one hand and community leadership, oil corporations, and government on the other. Involving local communities (i.e. both the leadership and the ordinary citizens) in development activities will comport with the right to development. This right is believed to incorporate a recognition that “peoples have the right to determine their model of development.”<sup>458</sup> The Human Rights Council of Australia, while contending that participation is a component of the right to development noted that “people should have control over the direction of the development process, rather than simply being consulted

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454 See Michael R. Anderson, *Human Rights Approaches to Environmental Protection: An Overview*, in *Human Rights Approaches To Environmental Protection* 1, 9 (Alan E. Boyle & Michael R. Anderson eds., 1996) (stating: “If the people who make the decisions are the same as those who pay for and live by the consequences of the decisions, then we go a long way toward protecting the environment.”) See also Pring & Noe, *supra* note 444, at 24.

455 *Id.* at 22.

456 *Id.* For an additional discussion on the rationale and criticisms of public participation, see Barton, *supra* note 445, at 99-109.

457 A study conducted in the United States did not confirm that environmental public participation actually resulted in better decisions. See J. Clarence Davies, *Environmental ADR and Public Participation*, 34 *VAL. U. L. REV.* 389, 393 (2000). See also Pring & Noe, *supra* note 442, at 23.

458 Anne Orford, *Globalisation and the Right to Development*, in *People’s Rights* 139 (P. Alston, ed., 2001) (cited in Ebeku, *supra* note 314, at 204).

about projects and policies that have already been decided upon.”<sup>459</sup> The case for allowing people in oil-producing communities to be masters of their own fate when it comes to the utilization of oil revenues cannot be overemphasized. It is imperative to cultivate a sense of ownership in the people - that they own or at least have a stake in these resources, instead of handouts being thrown at them. That may be the only way to satisfy them, assuage their feelings and check the restiveness in the oil-producing communities. Most importantly, that may point the way to real development in these communities.

#### **IV. CONCLUSION**

Over the years, the Nigerian government and oil corporations operating in Nigeria have introduced measures to ameliorate the negative social, economic, and environmental impact of oil and gas development and to enhance the quality of life in the oil-producing communities. Some of these measures are certainly commendable. But a lot of failures have been recorded and the situation on the ground clearly suggests that there is still a lot of room for improvement. Two factors identified for this unsatisfactory situation are corruption that pervades every sphere of life in Nigeria and the absence of real public participation (beyond consultation) of the oil-producing communities. An arrangement that incorporates the notion of transparency, accountability, and a sense of ownership in the communities would go a long way in accomplishing that. One such arrangement is a community-based oil trust fund, discussed in the next chapter.

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<sup>459</sup> Ebeku, *supra* note 314, at 204 (quoting a publication of the Human Rights Council of Australia Inc. (1995) at 118-21).

## **CHAPTER 5**

### **ADDRESSING THE RESOURCE CURSE THROUGH TRUST FUNDS**

#### **INTRODUCTION**

Interest in addressing the resource curse, particularly in African oil-producing countries, is growing. One of the proposals for avoiding, mitigating or reversing the resource curse in these countries is a trust-like arrangement for managing oil revenues. This chapter discusses the most prominent example of this namely, the Revenue Management Plan (RMP) under the Chad-Cameroon Oil Pipeline Project.

Considering that there may be obstacles that may inhibit or limit the replication or application of such a concept in Nigeria, including Nigeria's size and protection of the notion of sovereignty, this chapter also considers and promotes the idea of local trust funds. Local trust funds are also favored because they can focus on the needs of the local communities that produce oil - the subject of this study. The local trust funds will draw some relevant features of the Chad-Cameroon arrangement. These features include an independent management board, monitoring mechanisms, allocation of resources to some key sectors and international oversight.

This chapter is organized into four major parts. Part I discusses the concept of trust funds. The trust institution is one that is well known in both Nigerian customary law and Anglo-American jurisprudence as a tool for managing property usually belonging to other people. Part II focuses on the Chad-Cameroon revenue management arrangement, examining its salient features and analyzing them. This part also briefly considers the impediments to its transferability and applicability in the

Nigerian context. Part III examines the concept of community-based trust funds as an alternative for Nigeria. These trust funds can supplement the work of the Niger Delta Development Commission (NDDC) while avoiding some of its pitfalls, most prominent of which is the absence of real community ownership and participation. Part IV is the conclusion.

## I. THE CONCEPT OF TRUST FUNDS

A trust is an arrangement in law in which legal ownership and management responsibilities over an asset (*res*) are placed in the hands of a person or persons (trustee or trustees) on behalf of and for the benefit of another person or persons (beneficiaries).<sup>460</sup>

Keeton defines it in the following words:

A trust is the relationship which arises wherever a person called the trustee is compelled in equity to hold property, whether real or personal, and whether by legal or equitable title, for the benefit of some persons (of whom he may be one and who are termed *cestuis que trust*) or for some object permitted by law, in such a way that the real benefit of the property accrues, not to the trustee, but to the beneficiaries or other objects of the trust.<sup>461</sup>

In the case of oil trust funds, the revenue (or a part thereof) derived from oil exploration and production constitute the trust assets which a board of trustees is empowered to manage for the benefit of the general population.

The genesis of the trust institution in Anglo-American law is still the subject of intense disputation.<sup>462</sup> While some accounts trace the origin to the English Use or Middle

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460 See Marianne Guerin-McManus, *Conservation Trust Funds*, 20 UCLA J. ENVTL. L. & POL'Y 1 (2001).

461 KEETON, LAW OF TRUSTS 3 (1963).

462 Guerin-McManus, *supra* note 460, at 3-5.

Eastern/Islamic Law's waqf, others locate it in Roman fideicommissum.<sup>463</sup> Some scholars have also propounded the Germanic theory arguing that the trust owes its origins to the Salic salmannus.<sup>464</sup> Notwithstanding the account that one chooses to accept, there seems to be a consensus that trusts - old and new - have generally arisen where the existing legal mechanisms for accomplishing particular objectives, especially the holding of property, have been limited by their inadequacy.<sup>465</sup>

With the inadequacies surrounding the management of public properties (including natural resources), the importance of trust funds cannot be overemphasized. The emphasis of such trusts is the control and use of revenues or donor funds, grants or other funds that form the trust *res*. This is not entirely a new phenomenon nor is the creation of a trust totally dependent on the mismanagement of resources.<sup>466</sup> A trust fund can be used to accomplish a variety of purposes including conservation of natural resources,<sup>467</sup> protection of the environment,<sup>468</sup> and development of communities.<sup>469</sup>

It is important to emphasize that the trust institution is not the exclusive preserve of Western and Islamic legal systems.<sup>470</sup> In centuries past, up till the modern times, African societies have been able to devise trust-like institutions to address particular

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463 Avisheh Avini, *Comment, The Origins of the Modern English Trust Revisited*, 70 TUL. L. REV. 1139, 1148 (1996).

464 See Monica M. Gaudiosi, *Comment, The Influence of the Islamic Law of Waqf on the Development of the Trust in England*, 136 U. PA. L. REV. 1231, 1242-43 (1988).

465 Guerin-McManus, *supra* note 460, at 5.

466 See *Tito and others v. Waddel and others* (No. 2) [1977] 3 All ER 129 (which involved royalties from the sale of phosphates and whether the Crown was trustee of the funds for the inhabitants of an island colony in the Western Pacific). See also Sir Joseph Gold, *Trust Funds in International Law: The Contribution of the International Monetary Fund to a Code of Principles*, 72 AM. J. INT'L L. 856 (1978).

467 Guerin-McManus, *supra* note 460.

468 Peter H. Sand, *Trusts for the Earth*, in SUSTAINABLE DEVELOPMENT AND INTERNATIONAL LAW 167 (W. Lang ed., 1995).

469 Kyle W. Danish, *International Environmental Law and The "Bottom-Up" Approach: A Review of The Desertification Convention*, 3 IND. J. GLOBAL LEG. STUD. 133, 169 n.162 (1995).

470 See W.C. Daniels, J. AFR. L. 164 (1962). See also, J.O. FABUNMI, *EQUITY AND TRUSTS IN NIGERIA* 137, 144 (1986).

needs, such as the management of family or communal property.<sup>471</sup> In *Amodu Tijani v. Secretary of Southern Nigeria*,<sup>472</sup> Viscount Haldane stated:

The notion of individual ownership is quite foreign to native ideas. Land belongs to the community, the village or the family, never to the individual. All the members of the community, village, or family have an equal right to the land, but in every case the Chief or Headman of the community or village, or head of the family, has charge of the land, and in loose mode of speech is sometimes called the owner. He is to some extent in the position of a trustee and such holds the land for the use of the community or family.<sup>473</sup>

In *Ozomah v. Ozomah*, the court held that the head of the family, known in Asaba (a town in Nigeria) custom as Diokpa, who took over the management of a brother's property at his death, was trustee of the property where the deceased kinsman died without a son who was *sui juris*. The Diokpa is therefore accountable to the *cestui que trust* at such a point that the beneficiary-son comes of (legal) age and demands a return of the property.<sup>474</sup>

Graham-Paul J., in *Balogun v. Balogun*,<sup>475</sup> provided further justification for the trustee analogy in relation to the position of the head of the family on the premise that the family head:

. . . is in charge and control of the family property; he collects the revenue of the family property; he has to make certain disbursements out of the family revenue for family purposes, upkeep of the family property, funeral, marriage and baptism ceremonial expenses of the members of the family often involving the entertainment of strangers, litigations on behalf of the family, maintenance of indigent members of the family, education of children.<sup>476</sup>

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471 T.O. ELIAS, NIGERIAN LAND LAW 78 (4th ed. 1971).

472 2 A.C. 399 (1921).

473 *Id.* at 404.

474 M.N.L.R. 88 (1965/66). Cited in J.D. BAKIBINGA, LAW OF TRUSTS IN NIGERIA 5 (1989). See also ADIGUN, CASES & TEXTS ON EQUITY, TRUSTS AND ADMINISTRATION OF ESTATES 277 (1987).

475 2 W.A.C.A. 290 (1935).

476 *Id.* at 299. See also BAKIBINGA, *supra* note 474, at 2-6.

It should be noted, however, that while under Anglo-American law, legal ownership of the property resides in the trustee, under Nigerian customary, the person in the position of trust is not the owner, as the property belongs to the family or community as a whole.<sup>477</sup> Nevertheless, the trustee's duty of management of common property for the general benefit is analogous to the Anglo-America trust. More important, it makes the Nigerian customary version well-suited to the arrangement being proposed here since the essence of the proposed trust funds is the proper management of assets belonging to the people by those holding a fiduciary position.<sup>478</sup>

Lately, trust funds have been attracting attention in scholarly circles. Some scholars see such funds as being particularly important in the petroleum industry where oil trusts can provide an effective check on rent-seeking activity, improve domestic governance in oil-producing countries and avoid, mitigate or reverse the resource curse.<sup>479</sup> Such an arrangement would involve the World Bank and multinational oil corporations and will in effect amount to a sharing of the oil producing State's sovereignty. According

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477 See S.N. CHINWUBA OBI, MODERN FAMILY LAW IN SOUTHERN NIGERIA 56-57 (1966). See also A. A. UTUAMA, NIGERIAN LAW OF REAL PROPERTY 7 (1989).

Although the headman of the community in the exercise of his powers, is sometimes described as a trustee. . . he is not, strictly speaking, a trustee in the English sense. Unlike the trustee in the conventional sense, the title to the communal land is not vested in him. The title remains vested in the community as a corporate entity. The institution of communal land lacks, therefore, the division into legal and equitable ownership which is the fundamental principle of trust property. In strict legal terms, the application of [the] trusteeship analogy to the head of the community is inaccurate. In spite of this misnomer, our courts continued in the past to describe the chief or the headman of the community as trustee, particularly wherever his duty to account was called into question and his liability was determined.

Id. Citations omitted.

478 M.G. YAKUBU, LAND LAW IN NIGERIA 61 (1985) (noting that while the trustee in Nigerian customary law is not a trustee in the strict sense of English law, he still owes duties of a fiduciary nature to the members of the community, including duty to account and duty of loyalty, which constrains him to avoid conflicts of interest.) For further discussion of trusts from the English and Nigerian contexts, see GILBERT KODILINYE, AN INTRODUCTION TO EQUITY IN NIGERIA (1975).

479 Krasner, *supra* note 247, at 41.

to Stephen Krasner:

Oil has been a curse for the developing countries in which it has been located leading to less democracy and lower rates of growth. Oil concentrates resources in the hands of the state. The road to wealth and power for any ambitious individual leads through the offices of the central government, not through individual enterprise or productive economic activity. Oil wealth makes it possible for the state to buy off dissenters, and to build military machines that can be used to repress those who cannot be bought off. Only a few political entities, such as Alaska and Norway, have been able to use oil wealth wisely. Domestic governance in oil rich developing countries could be enhanced by creating oil trusts. The board of directors of such trusts would be composed of national and non-national actors. For instance, national directors could be appointed by the country's parliament or head of state and non-national figures by the World Bank. All oil revenues would be paid into an escrow account in a foreign bank. All transfers from the account would have to be approved by the board of directors of the trust. There might be commitment to using these revenues for specific activities such as health care and education. The trust would monitor the use of the funds after they had been transferred to the national government.<sup>480</sup>

The above proposal bears close resemblance to the oil management and monitoring arrangement under the Chad-Cameroon Pipeline Project.<sup>481</sup> The Revenue Management Plan established under that project is discussed in the following section.

## **II. CHAD REVENUE MANAGEMENT PLAN**

### **A. Chad-Cameroon Oil Pipeline Project**

Oil was first discovered in Chad in the 1970s by a consortium of oil corporations that

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480 Id.

481 See also Save the Children, *Lifting the Resource Curse: Extractive Industry, Children and Governance* 11 (2003) (describing the Chad Oil Pipeline Project's revenue management arrangement as an oil trust fund).

included Chevron, Conoco, Exxon and Royal Dutch/Shell,<sup>482</sup> but years of war and civil conflicts prevented further development of the oil fields. In the midst of the ensuing frustration, Conoco left and Chevron sold its interests to Elf Aquitaine.

Almost one and one-half decades after the suspension of oil field development in 1979, a reorganized consortium re-ignited interest in Chad's oil. The consortium conducted studies on the feasibility of developing the oil and transporting it via Cameroon.<sup>483</sup> Two members of the consortium eventually withdrew, citing as their reason, concerns about the economic viability of the project since oil was then selling at \$10 per barrel. Six months after their departure, two new members - Malaysia's Petroleum Nasional Berhad (Petronas) and Chevron - joined the consortium and the stake holding stood at 40% for Exxon, 35% for Petronas and 25% for Chevron.<sup>484</sup>

The 3.7 billion dollar Chad-Cameroon pipeline project is the biggest private sector investment in Africa. \$1.5 billion is devoted to the extraction of oil from Chad's Doba Basin while \$2.2 billion will take care of the transportation aspect via a 670-mile (1,070 km) pipeline that passes through Cameroon. Project partners formed an unincorporated joint venture known as the Upstream Consortium to own and finance the exploration component. The Chad portion of the pipeline will be owned by Tchad Oil Transportation Company (TOTCO). TOTCO is an incorporated joint venture between the Upstream Consortium and the Government of Chad. The Cameroon portion of the pipeline will be under the ownership of Cameroon Oil Transportation Company (COTCO), an entity incorporated as a joint venture between the governments of Chad

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482 Benjamin C. Esty, *The Chad-Cameroon Petroleum Development and Pipeline Project (A)*, Harvard Business School 9-202-010 (Rev. Jan. 16, 2003) at 1.

483 *Id.* at 1.

484 *Id.* at 1-2.

and Cameroon and the Upstream Consortium. Total revenues expected from the project would be \$13.7 billion. Projections from the investment were based on the assumption that the fields will produce 883 million barrels of oil that can be sold. Average expected price is \$15 per barrel.

The World Bank was invited to participate in the project. Exxon Mobil had stated that it would only go ahead with the project with the World Bank's involvement. This would provide the company with the needed cushion from political risk and insulation from criticisms from non-governmental organizations (NGOs). In June 2000, the Board of Executive Directors of the World Bank voted to participate in the project. The World Bank adduced as the reasons for its participation, the project's commercial viability and alleviation of poverty in Chad, one of the poorest countries on earth.<sup>485</sup> According to the Bank's President, James Wolfensohn, "the project provides the best, and perhaps only opportunity for Chad to reduce the severe poverty of most of its population."<sup>486</sup> The Bank did not seem to have any illusions about the extent of the obstacles it would face. Thus, the President noted that as has been the case in many countries, it will be a tremendous challenge to translate Chad's oil revenues into services that would be directly beneficial to the poor. But the Bank expressed the belief that challenges such as this are of the type that are incumbent on and required of a development institution of the caliber of the World Bank.<sup>487</sup>

The Chad Cameroon Oil Pipeline Project, especially from the time of the invitation to the World Bank, was mired in controversy. Public interest groups,

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485 See *id.* at 6.

486 Letter from James D. Wolfensohn to Honorable James P. McGovern, The United States House of Representatives, Washington, DC 20515, June 28, 1999 (cited in *Esty*, *supra* note 482, at 6).

487 *Id.*

particularly in Africa and the United States complained, among others, about the human rights-abusing government of Chad, the potential impact of the project on the environment<sup>488</sup> and displacement of indigenous peoples.<sup>489</sup> The World Bank sought to address these concerns and, as a condition for its participation, insisted on a Revenue Management Plan (RMP) that would ensure that the proceeds of oil development were used for socio-economic development. The environmental and other aspects of the project are outside the scope of this paper.<sup>490</sup> The focus here is on the revenue management plan and its potentials to avoid the problems associated with oil exploration, production and export and fulfill the designers' aspirations of meeting the social and economic needs of the people of Chad.

## **B. Features of the Revenue Management Plan**

According to Ian Gary and Terry Karl, “[t]he Chad-Cameroon Oil and Pipeline Project is the most significant, and most closely watched experiment designed to change the pattern of the “oil curse” and promote poverty reduction through targeted use of oil revenues.”<sup>491</sup>

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488 Environmental Defense Fund, *The Chad Cameroon Oil and Pipeline Project: Putting People and the Environment at Risk* (Sept. 1999).

The World Bank's involvement . . . sets a disturbing precedent of public support for oil development which experience and analysis show has detrimental social and environmental impacts with few development benefits . . . . The project as currently designed has little chance of delivering the claimed benefits to sustainable development while carrying major risks of irreparable environmental and social disruption.

Id. at 3. Other leading environmental groups such as the Friends of the Earth, the Sierra Club, and the Rainforest Action Network also vehemently opposed the project because of the potential damage to the environment. See Esty, *supra* note 23, at 9.

489 See N. Onishi, *Pygmies Wonder if Oil Pipeline Will Ease Their Poverty*, N.Y. TIMES, July 10, 2000, at A3.

490 For more on the environmental implications and criticisms, see SERGE A. BRONKHORST, *LIABILITY FOR ENVIRONMENTAL DAMAGE AND THE WORLD BANK'S CHAD-CAMEROON OIL AND PIPELINE PROJECT* (2000).

491 Ian Gary and Terry Lynn Karl, *Bottom of the Barrel: Africa's Oil Boom and the Poor* 60 (2003).

This approach to utilizing oil revenues will be under the revenue management plan.

The RMP was the fruit of the World Bank's efforts at ensuring that the attendant dangers of a large influx of oil revenues - economic distortion, corruption and waste - did not manifest themselves in Chad as has been the case in many other oil producing countries.<sup>492</sup> Chad is expected to receive \$1.8 billion in the form of royalties, income taxes, and dividends. This is an enormous amount of money for a country that has been cash-strapped for years. According to World Bank's President Wolfensohn:

Natural resource "booms" are difficult to manage. This is why our knowledge of other countries' experience has been crucial to designing the project. In Chad, in particular, we want to make certain that the country's new wealth will be invested for the well-being of all Chadians. With our help, the Chad Government has developed a revenue management program that targets oil revenues to key development sectors that are at the heart of its poverty alleviation strategy.<sup>493</sup>

The RMP contains specifications on the allocation and distribution of the expected revenue. In the course of the first ten years of production, that is, between 2004 and 2013, income taxes will constitute 16% of total revenues to Chad and the rest will come from royalties and dividends. The government is given discretion on how to spend the revenues from income taxes subject to the limitation that they be used for general development purposes. The government has less liberty when it comes to royalties and dividends. A Special Revenue Account is created in which they would be deposited. A distribution formula has also been specified. Ten per cent of the money will be kept in international financial institutions as a fund for future generations. Eighty-five per cent of the remaining 90% will be deposited in local commercial banks and is dedicated to the financing of programs in five important sectors namely, education, health and social

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492 Esty, *supra* note 482, at 8.

493 See *id.* at 8.

services, rural development, infrastructure, and environment and water resources. The remaining 15% would be devoted to the development of the oil-producing Doba region.

The RMP provides for several layers of oversight. It is incumbent on the World Bank and the government of Chad to approve an annual expenditure but a 9-member oversight committee has the responsibility to review it. Of the committee's nine members, seven represent the government while two represent the civil society (an NGO and trade union). The committee members are appointed for terms of three to five years. The committee will annually publish a review of those operations that are subject to external audit.

The World Bank has extensive powers and leverage regarding monitoring of the full program and review of all expenditures. The RMP is given teeth by the fact that the World Bank insisted that its implementation is a contractual obligation under the loans that the IBRD and European Investment Bank (EIB) were proposing and tied the performance of the government under the RMP to future lending by the World Bank.

The World Bank has also instituted an International Advisory Group. The Group is composed of eminent persons and is slated to be in existence for ten years.<sup>494</sup> The World Bank Inspection Panel also represents a level of oversight for the whole project.<sup>495</sup>

The Chadian government passed a law in December 1998 incorporating the principal elements of the revenue management plan, including procedures for audit and provisions relating to the establishment of an oversight committee, the Oil Revenues

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494 World Bank, The Chad-Cameroon Development and Pipeline Project, Draft Terms of Reference - International Advisory Group on the Chad Cameroon Oil Pipeline Projects.

495 Genoveva Hernandez Uriz, *The Application of the World Bank Standards to the Oil Industry: Can the World Bank Group Promote Corporate Responsibility?* 28 BROOK. J. INT'L L. 77, 120 (2002).

Control and Monitoring Board (Revenue Management College).<sup>496</sup> It is still too early to say how this management plan will turn out. Chad only started selling oil in October 2003.<sup>497</sup> In November 2003, the sum of \$6.5 million being receipts from the first sale of crude oil was deposited into the account and in December 2003, the government approved its first budget including oil revenue and submitted it to the Revenue Management College.<sup>498</sup>

Arrangements such as this have the basic ingredients that make them potentially beneficial. One of the principal benefits, as Krasner observed, is that oil trusts could be used to enhance domestic governance in those developing countries that are rich in petroleum so long as they involve a high level of shared sovereignty in which national governments and external actors like the World Bank share key powers on how the oil revenues are managed.<sup>499</sup>

A trust fund could also help in building the basic foundation of a democratic society. It establishes a link between the citizen-beneficiaries and the authority structures, giving the citizens a stake in the natural resource and making them keep an eye on how the government utilizes the money belonging to them. This sense of ownership exists in developed societies through “taxation with representation.” Reduction of the corrosive problem of corruption and the promotion of transparency and accountability are also some of the advantages that such funds can bring.

Nevertheless, the funds need to be properly structured to be able to do that.

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496 Oil Revenue Management Law, translated in WORLD BANK, CHAD-CAMEROON: PETROLEUM DEVELOPMENT AND PIPELINE PROJECT, PROJECT APPRAISAL DOCUMENT (Apr. 20, 2000).

497 Emily Wax, *Oil Wealth Trickles Into Chad, but Little Trickles Down Five Months After Opening of Pipeline to Cameroon, Locals Await Benefits and Crime Rate Rises*, WASH. POST, Mar. 13, 2003, at A16. See also *Oil Pipeline Opens for Business*, 17: 3 AFRICA RECOVERY (United Nations Department of Public Information, 24 (Oct. 2003).

498 Id.

499 Krasner, *supra* note 247, at 41.

Chad's RMP is not perfect and has been subjected to severe criticisms. Some see it as not going far enough. Peter Rosenblum, attacked the efforts as being at a rudimentary stage:

Oil will not lead to development in Chad without real participation, real transparency, and real oversight, none of which currently exists. The proposed revenue management plan and the law that was essentially imposed on the Chadian authorities is, at best, a first step in that direction.<sup>500</sup>

According to a report authored by Luc Lampiere and others at the Harvard Law School's Human Rights Program, the law "represents a remarkable breakthrough in linking private investment, development and human rights" but its chances of success are infinitesimally low unless it is accompanied by the will of the political leaders or the confidence of the citizens.<sup>501</sup> At the moment, both qualities seem to be sorely missing.

The absence of a clear distribution formula among the designated priority sectors could also present problems as revenues are disproportionately allocated to one sector to the disadvantage of others.<sup>502</sup> It could be counter argued, however, that a measure of flexibility is warranted and that micromanaging should be discouraged, but the problem is that political leaders can take advantage of it to favor their choice projects or benefit their areas, a line of action that could fuel tensions in a country enmeshed in power struggles and ethnic divisions.<sup>503</sup>

Critics also think that a weakness of the Chad management plan is that there does not appear to be sufficient evidence to establish the belief that the government will follow its dictates.<sup>504</sup> They point to the fact that the government spent \$4 million out of a \$25

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500 Peter Rosenblum, (quoted in Environmental Defense Fund, *supra* note 488, at 5.

501 Luc Lampriere et al., *Managing Oil Revenues in Chad: Legal Deficiencies and Institutional Weaknesses*, Human Rights Clinical Program, Harvard Law School (October 13, 1999) at 2, 5.

502 Genoveva Hernandez Uriz, *To Lend or Not To Lend: Oil, Human Rights, and the World Bank's Internal Contradictions*, 14 HARV. HUM. RTS. J. 197, 223 (2001).

503 *Id.*

504 Gary & Karl, *supra* note 491, at 68.

million signature bonus on arms purchase.<sup>505</sup> The problem with this criticism is that while it would have been preferable for the government to spend the money on more worthwhile projects or follow the revenue management plan in this instance, signature bonuses such as this were not covered by the governing law. So, the government can hardly be fairly accused of not following a law that was inapplicable to its action.

Another bone of contention is that significant revenues from oil are still outside the scope of the RMP. Moreover, the arrangement does not cover all the oil fields in the country. These loopholes could defeat the whole purpose of ensuring proper and transparent management of funds.<sup>506</sup>

Another aspect of the RMP that has invited criticism is the Monitoring Committee. The mandate of the Committee looks murky.<sup>507</sup> The Committee is also viewed as not sufficiently strong, which could militate against the effective discharge of its duties. For instance, it has been suggested that giving the Monitoring Committee subpoena powers would strengthen it and enhance its work.<sup>508</sup> The process of removing Monitoring Committee members is also easy, making it possible to conveniently remove even competent members who fall out of favor with the government.<sup>509</sup> The representatives of the Civil Society are also not required to be accountable to their constituency and could turn around to work against the interests of those they are supposed to represent. A possible solution would be to give powers of election and recall to NGOs and labor groups over their representatives.

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505 Id. This action embarrassed the World Bank. See Dana L. Clark, *The World Bank and Human Rights: The Need for Greater Accountability*, 15 HARV. HUM. RTS. J. 205, 210 n.17 (2002).

506 Gary & Karl, *supra* note 491, at 69.

507 Id. at 71.

508 Lampiere, et al., *supra* note 501.

509 Gary & Karl, *supra* note 491, at 72.

The RMP is also assailed for not providing for stabilization or sterilization funds to serve as buffer against oil shocks and control the influx of money in such excessive amounts as to lead to inflation and the Dutch Disease.<sup>510</sup> This is particularly important because Chad will be receiving money far in excess of the \$15 a barrel projections, as oil prices have skyrocketed, hitting almost the \$40 a barrel mark in March 2004.<sup>511</sup>

The revenue management law is also considered inadequate because it can be changed by presidential decree. Critics argue that a change permissible only through an Act of Parliament would better ensure that the arrangement is not subject to the whims and caprices of the president.<sup>512</sup> A counter argument is that even if the law only stipulates for amendment via the parliamentary process, an unaccountable president would still find ways to manipulate things and effect changes. The Constitution is without doubt the fundamental legal and political instrument in the land and usually very hard to amend. Yet, Chadian President Idris Derby is currently working to see that the Constitution is amended to enable him run for a third term in office.<sup>513</sup> At the same time, the president has appointed his brother-in-law to head the Central Bank, thus giving him a seat in the Revenue Management College. Issues such as these are not things that any revenue management plan or trust fund would be expected to address. Such funds, as the World Bank has pointed out, are not a substitute for the development of appropriate democratic institutions and macro-economic policies.<sup>514</sup>

It is instructive to note that none of the criticisms seem to suggest that it is not a

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510 See Id.

511 See Mark Niquette, et al., *Gasoline 101: A primer on high prices*, THE COLUMBUS DISPATCH, Mar. 28, 2004 at 01H (“The price of oil per barrel has risen from \$30 in November to \$38 in recent days.”).

512 Id.

513 Wax, *supra* note 497.

514 See Gary & Karl, *supra* note 491, at 70.

good idea to use this kind of arrangement for the equitable distribution and proper management of resources. The important thing is to devise such arrangements in a way that avoids factors that could lead to their ineffectiveness.

An important thing to note about the RMP is the possibility of replicating it in other countries of the world. According to some commentators:

The World Bank effort on the Chad-Cameroon project is an innovative experiment, in the context of past development failures based on oil, and elements of the project could possibly be replicated elsewhere. Chad's Revenue Management Law and the Revenue Oversight Committee are novel institutions that could play a useful role if properly supported, and they could be adapted for other country contexts. The World Bank's Independent Advisory Group, with a strengthened mandate, could prove useful in other high profile, high-risk projects.<sup>515</sup>

It is likely to be the route recommended for the new oil producers in Africa and perhaps even the older oil exporters such as Nigeria. One official of the World Bank Group has remarked: "This is going to be the model for every single project of this type world wide."<sup>516</sup> In view of the criticisms leveled against the Chad-Cameroon Oil Pipeline Project, such replication will be expected to incorporate changes that are tougher on governments, while favoring the citizens.

The reality, however, is that such a recommendation is likely to encounter strong resistance in some countries including Nigeria, mainly because of sovereignty concerns.

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515 Id. at 73. Some commentators are skeptical, however, viewing the project as not properly structured to withstand the political games that might be played by the government of Chad when it believes that it would be too late for the World Bank and oil corporations to withdraw. See James C. Owens, Note, *Government Failure in Sub-Saharan Africa: The International Community's Options*, 43 VA. J. INT'L L. 1003, 1046-1048 (2003) (calling instead for the creation of an international supervisory body that would be responsible for controlling and allocating the revenues accruing to developing States from international projects.)

516 Gary and Karl, *supra* note 491, at 60 (quoting Mohamedu Diop, Central Africa Resident Representative of the International Finance Corporation).

In its simplest form, sovereignty<sup>517</sup> refers to “the power of states to regulate their internal affairs without foreign interference.”<sup>518</sup> Sovereignty is at the foundation of international law,<sup>519</sup> especially with its connection to the Peace of Westphalia of 1648, which is widely regarded as giving birth to the nation-state and international law.<sup>520</sup> One of the earliest leading authorities on sovereignty and statehood, Jean Bodin viewed sovereignty as being within the absolute domain of the State, “not limited either in power, or in function, or in length of time.”<sup>521</sup> Hugo Grotius, widely regarded as the father of international law conceived of the concept in absolutist terms, writing that sovereignty was “not subject to the controul of any other power, so as to be annulled at the pleasure of any other human will.”<sup>522</sup> The United Nations Charter provides for and protects the notion of sovereignty.<sup>523</sup>

The principle of sovereignty has a number of corollaries, including the sovereign equality of States and the principle of nonintervention.<sup>524</sup> The prohibition of interference and intervention provided for in Article 2.7 of the UN Charter is one of the most important corollaries of sovereignty.<sup>525</sup>

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517 For interesting and stimulating discussions on sovereignty, see STATE, SOVEREIGNTY, AND INTERNATIONAL GOVERNANCE (Gerald Kreijen et al. eds., 2002); STEPHEN D. KRASNER, SOVEREIGNTY: ORGANIZED HYPOCRISY (1999).

518 Stephen M. Shrewsbury, *September 11th and the Single European Sky: Developing Concepts of Airspace Sovereignty*, 68 J. AIR L. & COM. 115, 115 (2003). See also Richard L. O’Meara, *Note, Applying the Critical Jurisprudence of International Law to the Case Concerning Military and Paramilitary Activities in and against Nicaragua*, 71 VA. L. REV. 1183, 1186-87 (1985).

519 The International Court of Justice declared in the Nicaragua Case (1986 I.C.J., at 133) that “the whole of international law” is anchored upon the “fundamental principle of sovereignty.” See also Elizabeth E. Ruddick, *Note, The Continuing Constraint on Sovereignty: International Law, International Protection and the Internally Displaced*, 77 B.U.L. REV. 429 (1997).

520 See Jianming Shen, *National Sovereignty and Human Rights in a Positive Law Context*, 26 BROOK. J. INT’L L. 417, 419-21 (2000).

521 JEAN BODIN, ON SOVEREIGNTY: FOUR CHAPTERS FROM THE SIX BOOKS OF THE COMMONWEALTH 3 (Julian H. Franklin ed. & trans. Cambridge Univ. Press 1992 (1583)). See also Shrewsbury, *supra* note 518, at 117.

522 HUGO GROTIUS, THE RIGHTS OF WAR AND PEACE 62 (A.C. Campbell trans., M. Walter Dunne ed. 1901) (1625). See also Shrewsbury, *supra* note 518, at 118.

523 UN CHARTER, art. 2, para. 1.

524 Shen, *supra* note 520, at 419-20.

525 *Id.* at 420.

It would appear that the revenue management arrangements encroached on Chad's sovereignty.<sup>526</sup> Peter Rosenblum highlights this point:

At the core is a challenge to the sovereignty of undemocratic rulers . . . Previously, no one would have interfered in the relations between an oil company and an African state. He who ruled the state controlled its resources . . . There is still hope of a delicate balance, where the World Bank strengthens loan conditions that reinforce the democratic process in Chad and enable the Chadian people to better determine how their resources should be spent. That would still threaten the sovereignty of leaders, but would also empower the people.<sup>527</sup>

Unless, the international community comes up with effective ideas to control the exercise of sovereignty against the common good or primarily for the benefit of government officials, it is hard to imagine the Chad-like arrangement being replicated in Nigeria.<sup>528</sup> In view of that, an additional tool that is worthy of consideration as a complement or alternative to national trust funds is the institution of sub-national or local trust funds.

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<sup>526</sup> Krasner sees it as a case of shared sovereignty, although in "watered down form." Krasner, *supra* note 247, at 34.

<sup>527</sup> Peter Rosenblum, *Pipeline Politics in Chad*, *Current History*, 195, 199 (May 2000).

<sup>528</sup> In the past, sovereignty has been encroached upon through such devices as conditionalities attached to loans and aid by international lenders and development institutions. In more recent times, there has been a progressive movement toward articulating a legitimate basis under international law to challenge the traditional notions of sovereignty where the State has failed, is abusive or is weak. See Lee Feinstein & Anne-Marie Slaughter, *A Duty to Prevent*, 83:1 *FOREIGN AFF.* 136, 140 (Jan/Feb. 2004). INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY [ICISS], *THE RESPONSIBILITY TO PROTECT* (International Development Research Centre, 2001). According to the Commission, "where a population is suffering serious harm as a result of internal war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt or avert it, the principle of nonintervention yields to the international responsibility to protect." For the contention that a shift has already begun with greater emphasis on "sovereignty of the people" than on "sovereignty for the benefit of the nation-state." See Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 *AM. J. INT'L L.* 46 (1992). As a matter of fact, some scholars call for the abrogation of the concept of sovereignty entirely. See LOUIS HENKIN, *INTERNATIONAL LAW: POLITICS AND VALUES* 10 (1995). See also John H. Jackson, *Sovereignty-Modern: A New Approach to an Outdated Concept*, 97 *AM. J. INT'L L.* 782, 800-02 (2003) (recognizing that the traditional concepts of sovereignty are dissolving and proposing a role for international institutions in managing the transition and the future effects).

### III. LOCAL TRUST FUNDS

#### A. Case for and General Features of Local Trust Funds

National trust funds have their advantages. They aid transparency and accountability and ensure that governments free more money for national development. They obviously cannot be a complete panacea, and I do not think anyone is arguing along those lines. Sometimes, however, the assumption is that if corruption and other vices were addressed at the national level, then the citizens regardless of where they were, would all benefit. The problem is that corruption also thrives at the local level.<sup>529</sup> Thus, money earmarked for local resource communities often do not get to the people for whom it was meant.<sup>530</sup>

Besides, in some cases, governments may be reluctant to set up national trust funds. Chad was constrained, convinced and perhaps compelled to accept the World Bank's demands because it is a little, poor country that did not have so many alternative sources of funding. Where oil-producing States can have recourse to financing from private commercial lenders and international institutions by, for instance, borrowing against their oil wealth, the possibility of instituting a Chad-like arrangement begin to diminish.<sup>531</sup> Thus, although Equatorial Guinea is a small country, with a population of about 500,000, it may still flex its muscles because it has already come by huge sums of money.<sup>532</sup> For bigger and "richer" states, it is even a tougher battle. As an experienced World Bank lawyer remarked to the present researcher and others, "Who's going to tell

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529 FRYNAS, *supra* note 49, at 52.

530 *Id.*

531 Gary & Karl, *supra* note 491.

532 A recent report by Global Witness accused several leaders in African and elsewhere of looting their own treasuries. Among them is Equatorial Guinea's Teodoro Obiang who calls oil revenues a "state secret" and is accused of keeping oil companies' payments (running into hundreds of millions of dollars) in a bank in Washington DC under his own name.

Nigeria what to do?”<sup>533</sup> The transaction costs involved in administering gigantic funds may also make such arrangements unproductive. Moreover, in bigger countries, it is quite doubtful that a national fund will be able to address the needs of all the people. Smaller arrangements will be more manageable and may prove more effective. Thus, community-based trust funds are a useful option.

The World Bank and MNCs could jointly play a role in setting up these funds as a way of managing local oil revenues and corporate community development funds in a transparent manner. This is a positive gesture that does not place the sort of obligations that governments would oppose, where only corporate and other non-government funds are involved. Even where the trust incorporates public resources, the governments already spend money on some of these issues; only that they get mismanaged. Asking governments to surrender to an extent their management of oil revenues, while expected to meet the opposition of those who profit from the present corrupt schemes, may not be as threatening as the kind of national schemes to which governments may object.

The local trust funds proposed here will directly confront and address the inadequacies of the existing community development arrangements in some places. The opacity surrounding the current approaches to community development has allowed corruption to take root and cuts across different facets including community leaders and

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533 Here, Nigeria can stand in for any large or rich country. Even Angola has proven less amenable to control or direction away from the corrupt and anti-people route embarked on by the government. See Human Rights Watch, *Angola: Some Transparency, No Accountability: The Use of Oil Revenue in Angola and its Impact on Human Rights* 51 (2004) (detailing how the Angolan government rebuffed efforts by the International Monetary Fund (IMF) to reconcile the country’s oil-backed loans with information in the external debt database on the basis of infringement on national sovereignty.)

corporate executives.<sup>534</sup> There are also speculations about inflated figures by oil companies on social expenditures to gain some tax and other advantages.<sup>535</sup>

Effective community-based trust funds in Africa may have to marginalize the government in view of the high level of governmental inefficiency and ineptitude in many parts of Africa.<sup>536</sup> A government representative may be part of the Governing Board, as this may be crucial in securing the government's support or funding for such an arrangement, but the government should not run it. Even in countries with more efficient governments, a local trust fund can dispense with governmental involvement or management. An example of a community-based trust fund run independent of the government is the Nunavut Trust of Canada. Svetlana Tsalik describes the fund and its attraction as follows:

Unlike government-run oil funds, the Nunavut Trust is a community-managed fund. It has earned strong returns while maintaining accountability to its constituents and serves as a good example for [other] underdeveloped oil-producing regions. . . . The Trust also demonstrates how these communities can be compensated for the negative external consequences of oil development, and how they can turn such compensation into an enduring source of income.<sup>537</sup>

A salient feature of the trust funds envisaged here is the recognition and respect of the principle of public participation in environmental and developmental decision-making. Under Nigerian customary law, communal property is usually managed by those in a position of trust with the active participation of other community members who are

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534 See FRYNAS, *supra* note 49, at 52 (stating that "there are some indications that a significant proportion of the oil companies' community budget was misappropriated by oil company staff, local contractors and chiefs") Citation omitted. See also Dimieari Von Kemedi, *Community Conflicts in the Niger Delta: Petro-Weapon or Policy Failure*, WP 03-12, Berkeley Workshop on Environmental Politics, Working Papers (Institute of International Studies, University of California, Berkeley, 2003).

535 FRYNAS, *supra* note 49, at 52.

536 See Okechukwu Ibeanu, *Oiling the Friction: Environmental Conflict Management in the Niger Delta, Nigeria*, 6 ENVIRONMENTAL CHANGE & SECURITY PROJECT REPORT 19, 32 (2000).

537 SVETLANA TSALIK, *CASPIAN OIL WINDFALLS: WHO WILL BENEFIT* 46 (2003).

co-owners of the property.<sup>538</sup> The idea that the people in resource-rich communities or those affected negatively by resource utilization should play a part in the formulation and implementation of policies and decisions that have an impact on them is one that is growing in importance<sup>539</sup> from both environmental<sup>540</sup> and developmental perspectives.<sup>541</sup> The right to development is believed to incorporate a recognition of the notion that “peoples have the right to determine their model of development.”<sup>542</sup> The Human Rights Council of Australia while contending that participation is a component of the right to development noted that “people should have control over the direction of the development process, rather than simply being consulted about projects and policies that have already been decided upon.”<sup>543</sup>

The trust funds being proposed here will involve the participation of community members in electing the trustees of the fund. These trustees, through a management organ and in close consultation with the respective communities, will design projects that are beneficial to the people. Some of these communities have traditional economies built on

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538 YAKUBU, *supra* note 478, at 63.

[E]very member of the community has the right to take part directly or indirectly in the management of the community land. The participation is direct where a member takes an active part in making decisions and in consultations on community land. It is indirect where he only takes part in selecting the Chief and other elders or councillors. It has been held that the requirement of consultation is a requirement of law and not just a matter of convenience by the Chief or elders to be observed or disregarded.

Citation omitted.

539 See Human Rights In Natural Resource Development: Public Participation In The Sustainable Development Of Mining And Energy Resources (Donal N. Zillman, et al. eds. 2002).

540 See Linda C. Reif, *International Environmental and Human Rights Law: The Role of Soft Law in the Evolution of Procedural Rights to Information, Participation in Decisionmaking, and Access to Domestic Remedies in Environmental Matters*, in TRILATERAL PERSPECTIVES ON INTERNATIONAL LEGAL ISSUES: RELEVANCE TO DOMESTIC LAW AND POLICY 73 (M. Young & Y. Iwasawa eds., 1996).

541 See Ebeku, *supra* note 314, at 203 (2003).

542 Anne Orford, Globalisation and the Right to Development, in PEOPLE’S RIGHTS 139 (P. Alston, ed., 2001). See also Ebeku, *supra* note 314, at 204.

543 Ebeku, *supra* note 314, at 204 (quoting a publication of the Human Rights Council of Australia Inc. (1995) at 118-21).

fishing and farming. Healthcare is addressed through traditional medicines extracted from the forests. Oil and gas development has essentially wiped these sources of revenue and medication. Labor migration to oil-producing areas has also led to inflation in many oil-producing communities. Prostitution has become a common practice.<sup>544</sup>

What the communities need is an alternative economic base and adequate institutions (modern hospitals, schools, etc) to replace what has been destroyed by the oil industry. Instead of individual companies making minor investments in the communities, but without adequate resources to undertake huge projects without it being too burdensome on them, trust funds can be a repository of huge funds (from oil companies and development institutions) that can build industrial centers that would generate employment. In this instance, a variance of what economists refer to as “coordination benefits” by which people find that it is in their greater interest to work together than going it alone can come into play.<sup>545</sup>

## **B. Key Features of Proposed Trust Funds**

### ***i) Legal Structure***

The trust funds should have a separate legal personality, be self-governing institutions and possess a credible governance structure.<sup>546</sup> They may be created by Deeds of Trust or chartered by the government.

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544 See generally, Patrick D. Okonmah, *Right to Clean Environment: The Case for the People of Oil-Producing Communities in the Nigerian Delta*, 41 J. AFR. L. 43, 53-60 (1997). For social and economic problems in Chad including the increasing incidence of crimes and prostitution, see Wax, *supra* note 38.

545 This is akin to prisoner’s dilemma and game theory. For a discussion of coordination benefits, see Cary Coglianese, *Globalization and the Design of International Institutions*, in GOVERNANCE IN A GLOBALIZING WORLD 297, 298-300 (Joseph S. Nye Jr. & John D. Donahue eds., 2000).

546 Most of the ideas in this section are drawn from Guerin-McManus, *supra* note 460 and sources cited therein. I have also adapted some of the applicable features of the Chad RMP.

**ii) Financial Structure**

This could take the form of an endowment, revolving fund or sinking fund. Revolving funds can have new assets added periodically (possibly, yearly and through special taxes and contributions, for example). This makes them the preferred option that this work recommends for oil-producing communities in Nigeria. Likely sources of funding would be the oil companies, which could contribute a certain percentage of their annual profits. Development agencies could also be useful in providing additional funds. As progress is made, the government could also become a financial contributor.

**iii) Governance Structure:**

The trust funds will have a governing body that is widely representative of the diversity in the community. There should be a board of trustees (“Board”) on which will be represented interests that cut across all stakeholders including the government, community, industry and NGOs. The recommended approach in this work is that community members to elect their representatives. This will give them a sense of belonging and promote accountability of community leaders. The Board will be the legal owners of the funds and should determine, with the active participation of community members, priority areas where the funds would be spent. The Board will give general directions to the Management unit on implementation of those ideas.

**iv) Management Unit**

This unit will be responsible for numerous functions, including the preparation of annual work plans and budgets, the development of implementing systems for processing of grant proposals and implementation of project activities, the development of strategies for

capacity-building and the institution of systems for financial accountability. The management unit will also report to the board of trustees on program and project implementation and play a key role in developing strategies for fundraising.

v) ***Monitoring Unit***

A unit within the trust will be responsible for monitoring the expenditures of the trust funds and those of other institutions such as the NDDC to ensure that funds are being properly utilized for the benefit of the community (area) and in compliance with the governing rules. The monitoring unit should publish regular reports and should make its activities open. Documents in its possession should be accessible to the public at their offices, on the internet and upon request.

vi) ***International Oversight Group***

This group will consist of representatives of credible domestic and international NGOs, scholars and (former) political leaders who will ensure that the major units (Board, Management, and Monitoring) are performing their functions. They should operate independently and their findings should always be made public.

vii) ***Location of Trusts and Assets***

A trust fund and its assets could be located domestically or abroad. A domestic trust with domestic asset management is the preferred choice in this work, because it has a greater potential to build domestic capacity in trust and financial management and promote a sense of local ownership of the trust.

The process of establishing a trust fund should commence with a feasibility study. The object of the feasibility study would be to answer a number of important questions,

the most salient of which center around the workability of the trust fund concept in the target community, the availability of alternatives and the presence of a legal and financial framework in the host country to provide needed support for the trust. The process of preparing or conducting the feasibility study should involve consultations with stakeholder representatives, government representatives, scientists, conservationists, economists, lawyers, business representatives and community leaders. The assignment that this group will execute includes determining the needs of the target community, the primary and wider objectives that the trust fund seeks to accomplish, and the kind of development projects that it will finance.

### **C. Benefits of Local Trust Funds**

#### ***i) Proper Management of Oil Revenues***

A trust fund will play a key role in ensuring that revenues are properly managed. With an elected Board of Trustees accountable to the community members and a management unit that is carefully chosen, the chances of a prudent and beneficial application of community funds are enhanced.

In managing oil revenues, the community-based trust funds will not become a replacement for the NDDC. However, it has some features that commend it as a better alternative to the NDDC in some aspects. First of all, it will utilize a bottom-up approach to management, not a top-down (or rhetorically bottom-up) approach favored by the government. One of the problems faced by the NDDC, especially at the initial stage, was the absence of acceptance by the communities who were supposed to benefit from the projects. In a particular incident recounted by the NDDC Chairman himself, community

members attacked a contractor and forced him to abandon a construction project in the community.<sup>547</sup> Where real participation exists and the people truly “own” the projects, as is likely to be the case with community-owned and community-run trust funds, such problems are not likely to be encountered.

On the other hand, there are certain things that trust funds of this (small) stature may not be able to accomplish, but which a big development agency like NDDC can handle with ease. One example is attracting investors into the area and collaborating to start giant industrial outfits. Some projects also cut across communities or inure for the benefit of many such as roads and bridges. NDDC can continue to exercise responsibility over those common areas. Further, some communities may not be disposed toward the idea of trust funds or incapable of managing their funds at the moment due to intra-community crisis or leadership struggles and may opt for continued management by NDDC.

*ii) Monitoring of Resource Flows to Communities*

A trust fund can function as a monitoring mechanism.<sup>548</sup> It can monitor the flow of oil revenues into the oil-producing communities. Information gathered from such monitoring could be used to assess the performance of those entrusted with managing the funds. The presence of monitoring could also deter corruption and waste as managers know that they would be called to account.

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547 Newswatch Interview, *supra* note 332.

548 See, e.g., Michael B. Gerrard, *Demons and Angels in Hazardous Waste Regulation: Are Justice, Efficiency, and Democracy Reconcilable?* 92 NW. U.L. REV. 706, 747 (1998); Scott Hitch, *Losing the Elephant Wars: CITES and the “Ivory Ban,”* 27 GA. J. INT’L & COMP. L. 167, 182 (1998).

Monitoring may also be augmented by oversight provided by external bodies. A hallmark of the local trust funds being proposed would be transparency guaranteed through an oversight mechanism involving domestic and international NGOs, external auditors and international financial and development institutions.

**iii) *Democracy-Building***

Trust funds can also serve as a veritable foundation for building democratic structures in other areas of political governance. It could promote a culture of democracy by facilitating the active participation of community members in establishing a local governance structure for resource allocation and utilization. Such participation, while commencing with oil-related matters, is expected to extend to, and permeate, other aspects of community life and become an entrenched feature in the governance of these communities.

Local trust funds can also build democracy by reducing or eliminating corruption through a transparent and accountable approach to management. In a report released in April 2004, Freedom House identified corruption and a weak judiciary as the principal impediments to democratic development<sup>549</sup>.

Successful trust funds will give community members a sense of ownership of development projects. Local trust funds will provide an economic base for communities, leading to less violence and conflicts, thereby removing obstacles to democratization. The Niger Delta has been plagued by violence among communities and between communities on one side and corporations and the government on the other. Community members have sought to disrupt elections or oppose the operations of NDDC and others.

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549 FREEDOM HOUSE, COUNTRIES AT THE CROSS ROADS (2004) available at <http://www.freedomhouse.org/research/crossroads/cac.htm>

Much of this violence partly owes its genesis and sustenance to perceptions about the mismanagement of oil revenues.

Local trust funds will also promote democracy through stakeholding. A community-based trust fund will give communities a stake in the funds, leading them to monitor more closely how the money is spent. Political history suggests that where people had a stake in the public revenue that consisted of their taxes, they had an incentive to demand for representation to accompany the taxation.<sup>550</sup> A community-based trust fund will give the people a stake in the funds, leading them to keep an eye on how the money is spent.

Moreover, community-based trust funds can aid democratization through group formation. They will help reduce the stronghold of the government on oil revenues, thereby helping to de-concentrate and redistribute wealth in the oil-producing areas. The rise of democracy in Europe and America has been traced to the emergence of an independent bourgeoisie.<sup>551</sup> Because of their independence from the state, this group was able to serve as a check on public officials and hold them accountable. With the concentration of the wealth in the government, the emergence of such a group in Nigeria in general and in the oil-producing areas in particular, has been frustrated. Reducing the strong hold of the government on oil revenues through trust funds will lead to a de-concentration and redistribution of wealth, emergence of a vibrant middle class that would be independent of the state and ultimately lead to democracy in these areas and the entire country.

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550 FISCAL CRISES, LIBERTY, AND REPRESENTATIVE GOVERNMENT, 1450-1789 (Philip T. Hoffman & Kathryn Norberg eds.1994), THE FORMATION OF NATIONAL STATES IN WESTERN EUROPE (Charles Tilly ed. 1975), Robert Bates & Da-Hsiang Donald Lien, *A Note on Taxation, Development, and Representative Government*, 14 POLITICS AND SOCIETY (1985).

551 See BARRINGTON MOORE, SOCIAL ORIGINS OF DICTATORSHIP AND DEMOCRACY (1966).

*iv) Other Benefits*

The trust funds may adopt some of the features of the Alaska Permanent Fund and thus be able to invest or participate in national and international capital markets and distribute the profits from such investments to community members. Like the Grameen Bank, it should incorporate the extension of micro-credit, especially to local women, as part of its core practices.<sup>552</sup> The trust funds should also be able to go into land conservation and play a key role in preserving and restoring areas of communal heritage.<sup>553</sup>

**D. Prospects for Local Trust Funds**

Preliminary discussions and correspondence between the present researcher and representatives of corporations, communities, financial and development institutions and non-governmental organizations indicate that they are amenable to the operationalizing of this idea.<sup>554</sup> Reasons for support range from its public participatory approach to its being anchored on transparency and accountability. According to Tony Ile, an estate valuer and community activist in Rivers State, a major oil-producing state:

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552 For information on the bank, see <http://www.grameen-info.org/>. Last visited Apr. 17, 2004.

553 This could be done through easements or other appropriate legal arrangements. On land trusts and easements, see Barton H. Thompson, *Non-Profit Land Trusts & Conservation Easements*, Stanford Law School (June 25, 2002) (On file with the author.).

554 See also Kemedi, *supra* note 534. Kemedi leads an NGO in Nigeria known as Our Niger Delta.

There are several sources of funds for community development in Nigeria, especially oil-producing communities. The issue is not how much will be spent and on what projects. The real issue is who makes decisions over the money that accrues to the communities. In determining the real social power of communities over their resources and environment, communities must have a platform to articulate their needs, negotiate their demands with Government and companies, participate actively in the development process and exercise control over financial resources that are meant for them. There is no better way to achieve this than through the Community Development Trust Fund. The CDTF will enable local communities to understand and participate in decision-making process over funds and projects according to needs of stakeholders in the community. The CDTF enforces on each community a process of accountability based on actual performance. In a democracy nurtured by the will of the people, the CDTF becomes a platform for sustaining community visions and development plans in order to achieve social peace based on justice and equity. We need the CDTF.<sup>555</sup>

In a response to the questionnaire I prepared in the course of this project to enable me gather information about oil company activities in the oil-producing communities, ChevronTexaco stated with regard to my trust funds proposal:

[It] [l]ooks like a good arrangement. . . . The Trust Fund should be run devoid of political posturing and focused on the people who would benefit. The managers ought to be accountable to an external audit system that includes international monitors.<sup>556</sup>

Royal/Dutch Shell's Nigeria affiliate also welcomed the proposal, although with a hint of caution and skepticism:

This model will work where there is honesty and transparency. But intra play of power, and dominance by a group or class can derail the good objectives. In a community environment where culture and power dictates and overrides decisions by the majority, success cannot be assured all times. Every (new) mechanism or model has to be tested, noting also the location specific impact. . . . While some communities will welcome a Trust Fund properly established and managed, others will demand direct access to the funds to "do it their way". All depends on the power structure at play at any particular time.<sup>557</sup>

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555 Via Email from Chizor Wisom Dike, May 1, 2004 (on file with Researcher).

556 ChevronTexaco (Nigeria), Response to Questions, supra note 379.

557 Shell Nigeria Exploration Company, Response to Questions, supra note 370.

There is a possibility that the support of the oil companies for this idea is not deep-rooted and that they might want to exploit the proposal for public relations gains. But it is also true that oil companies are not well-served by the current scheme of things and may be willing to jump into the bandwagon of reforms such as the concept of trust funds to improve oil revenue management.

This arrangement reflects a most needed change in architecture<sup>558</sup> that will hopefully interact and affect the social norms and other modes of regulation at the corporate and community levels.<sup>559</sup> With enhanced economic development, community members would reduce the pressure that they bring to bear on the forests, from which they collect wood as fuel. Besides, constant agitation, tensions and conflicts (as well as the human rights abuses that accompany them in the hands of the police or military) would be reduced as people see themselves moving up in the social ladder. Thus, trust funds can in one instrument address not only traditional social and economic issues, but also human rights and environmental problems in the communities.

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558 The idea of a structure or architecture as a useful form of achieving policy objectives dates at least as far back as Karl Llewelyn. See *Law & Society: Readings In The Social Study Of Law* (Stewart Macaulay, Lawrence M. Friedman, John Stookey, eds., 1995):

Karl Llewellyn, the famous legal theorist, who died in 1962, liked to talk about the highway “cloverleaf.” This, of course, is a method of structuring entrance to and exit from a major highway or freeway. Legislatures could pass laws regulating or prohibiting left turns across busy lanes of oncoming traffic. However, these laws require police and traffic courts to enforce them. The cloverleaf is more effective. The roadway or ramp sharply turns off the main highway to the right, and then turns to cross over the road on a bridge, or under it through a tunnel. If the lanes of the main highway are separated by a fence or ditch, it is almost impossible to make an illegal left turn. Also, highway engineers can force drivers to slow from superhighway speeds by the way they bank the cloverleaf. The socially desired behavior – slowing down – becomes far easier than deviance for the typical motorist.

Id. at 444.

559 For an excellent discussion of the modes of regulations namely, law, architecture, markets and social norms, see Lawrence Lessig, *Code, And Oher Laws Of Cyberspace* (1999); Lawrence Lessig, *The Law of the Horse: What Cyberspace Might Teach*, 113 *Harv. L. Rev.* 501 (1999).

#### IV. CONCLUSION

Oil production, contrary to legitimate expectations and economic theory, has not been largely beneficial to countries blessed with the natural resource. This problem is particularly acute in Africa. Scholars in economics and political science have tried to explain the resource curse, attributing it to a number of factors. As more African countries make a foray into oil development, there is the concern that they may go the way of their predecessors. It is imperative therefore to design arrangements that will help address this problem in both old and new producers.

One of the ideas that have been generating interest as panaceas to the resource curse is the institution of oil trust funds. Funds controlled by a trust or trust-like institution are viewed as particularly important in the petroleum industry where oil trusts can provide an effective check on rent-seeking activity, improve domestic governance in oil-producing countries and avoid, mitigate or reverse the resource curse.<sup>560</sup>

This chapter has examined the idea of trust funds, particularly from the context of the Chad-Cameroon Oil Pipeline Project. While the Chad arrangement has some features that commend it, some of which are adopted here, it appears not to be a feasible arrangement for Nigeria owing to Nigeria's size and sovereignty. Thus, a case is made for local trust funds, which will help oil-producing communities take control of their destinies and ensure an equitable management of their oil revenues.

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<sup>560</sup> Krasner, *supra* note 247, at 41.

## CHAPTER 6

### CONCLUSIONS AND RECOMMENDATIONS

Oil production in Nigeria started in the late 1950s. Since then, the country has earned enormous amount of revenue from oil. Lately, Nigeria has taken steps to develop and sell its natural gas resource. However, the significant revenue earned from oil has not had an appreciable impact on the lives of many Nigerians. The situation of people in Nigeria's oil-producing communities is even worse. They have had to face numerous social, economic and environmental consequences flowing from oil and gas development over the years. The government of Nigeria, which legally and exclusively owns all the oil resources in the country, and the multinational corporations in charge of the oil development, have introduced some initiatives aimed at addressing some of these problems and ensuring that oil-producing communities reap positive benefits from their natural resource endowments. These measures, however, have met with minimal success and the need for new thinking in this area cannot be overemphasized.

Interestingly, Nigeria is not alone in this predicament. Virtually every oil-dependent country has experienced serious economic, political and social problems notwithstanding their huge resource endowments. Economists refer to this phenomenon as the resource curse and there is a growing interest to address this problem in different parts of the globe. This work has reviewed this development with a view to making recommendations for progress in the oil-producing communities of Nigeria.

Chapter 1 of this thesis presented an overview of Nigeria and its petroleum industry, including contractual arrangements and laws that regulate the industry. It provided a helpful background to the discussions that follow in the other chapters.

Chapter 2 discussed the resource curse phenomenon by reviewing the relevant literature on the concept, the causes of the curse and proposals that have been advanced for redressing it.

In Chapter 3, the focus was on the application of the resource curse thesis to Nigeria, demonstrating the various forms in which the curse has manifested in Nigeria at both the national and local levels. Chapter 4 examined the various initiatives embarked on by the Nigerian government and oil corporations to address the negative impact of oil and gas production and ensure that benefits accrue to oil-producing communities. Chapter 5 proceeds on the assumption that the initiatives discussed in chapter 4 are not sufficient and need to be supplemented. Thus, it examined one of the prominent proposals for addressing the resource curse, namely oil trust funds as exemplified by the Chad-Cameroon Oil Pipeline project's Revenue Management Plan. After considering constraints to the application of the Chad model to Nigeria, the chapter advocates the idea of community-based trust funds.

A number of recommendations are necessary to ensure that oil-producing communities move from their present state to a better future. There is the need for the Nigerian government officials at the national, state and local levels to commit additional resources to enforcing environmental laws and promoting development. Public awareness campaigns also need to be launched to equip the people to fight for their rights.

The work of the Niger Delta Development Commission (NDDC) should be strengthened so that the agency can live up to the expectations of the people and avoid the pitfalls of its predecessors. NDDC should maintain an apolitical posture instead of

dabbling into partisan politics in any way, shape or form. NDDC should also embark on meaningful public participation that truly emphasizes a bottom-up approach.

However, the work of the NDDC will not adequately address some of the pressing needs of the communities, particularly in the sense of having control over their resources or revenues flowing from them. It is imperative, therefore, to introduce community-based trust funds that are run by community members for their own benefit. These funds would not be a replacement for the NDDC but should be able to address each community's unique needs. The trust funds would be governed by trustees elected by the people. Transparency and accountability should define the trust funds' operations. Credible monitoring and oversight mechanisms should be incorporated into the instrument creating the trust. Apart from serving as a financing mechanism, these trust funds will help community members develop a culture of democracy that will prove useful in other aspects of community and national life.