

ARTICLES

THE WORLD BANK, MULTINATIONAL OIL CORPORATIONS, AND THE RESOURCE CURSE IN AFRICA

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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."¹

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¹ Emmy B. Simmons, *Linking Trade and Sustainable Development: Keynote Ad-*

1. INTRODUCTION

The story of oil and gas development in Africa is a very sad one. From earlier developers like Nigeria to the newest entrants such as Equatorial Guinea, petroleum production has generated a great sense of unease. Huge revenues from royalties and oil exports flow into government coffers and pad the pockets of public officials and their cronies. Multinational oil corporations have also been major beneficiaries.² The only losers seem to be the citizens of these countries, in particular, members of oil producing communities, who bear the brunt of the discovery and exploitation of oil while missing out on the benefits.

There is little doubt that Africa's oil and gas producers epitomize the "resource curse" phenomenon—a counter-intuitive, inverse association between economic growth and endowment with natural resources.³ Resource-rich countries, almost without exception, are riddled with multifarious and nefarious social, economic, and political problems. Stories of extreme poverty, environmental degradation, human rights abuses, authoritarianism, civil conflicts, and wars are rife. Over the years, scholars in development economics and political science have devoted considerable attention to this issue.

Recently, 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 hope is to ensure that these projects do not suffer the same plight as their older counterparts, while reversing the curse where it already exists.⁴

Certainly a paradigm shift is warranted, and the importance of pragmatic solutions cannot be overemphasized.⁵ The thesis being

dress, 18 AM. U. INT'L L. REV. 1271, 1292 (2003).

² See Antony Goldman, *Who Benefits from Africa's Oil?*, BBC NEWS, Mar. 9, 2004 (noting that while oil-producing countries are among the poorest in the world, companies producing the oil seem to benefit), available at <http://news.bbc.co.uk/2/hi/africa/3542901.stm>.

³ See RICHARD M. AUTY, *SUSTAINING DEVELOPMENT IN MINERAL ECONOMIES: THE RESOURCE CURSE THESIS 1-7* (1993) (discussing the resource curse thesis).

⁴ See Paul Stevens, *Resource Impact - Curse or Blessing?*, 13 CENTRE FOR ENERGY, PETROLEUM & MINERAL L. & POL'Y INTERNET J. 1, 14 (Mar. 25, 2003) (discussing the distinction between a "blessing" and a "curse" and how countries securing oil revenues can avoid the "curse"), at <http://www.dundee.ac.uk/cepmlp/journal/html/vol13/vol13-14.html>.

⁵ See XAVIER SALA-I-MARTIN & ARVIND SUBRAMANIAN, *ADDRESSING THE NAT-*

propounded here is that, notwithstanding the fact that the results in African oil exporters suggest the presence of a resource curse, these countries are not necessarily cursed by their resources. What they have been beset with is a curse of leadership. Leaders representing different regime types and periods of time have shown similar traits in misgoverning their people and misusing their resources. They have also not introduced the right kind of management structures to ensure the use of these resources in a way that benefits their citizens. There seems to be a growing recognition that for meaningful changes to occur, the structure of resource management in these countries needs to undergo some fundamental changes. Two key ideas that illustrate this thinking, and that have been generating a lot of interest of late, are information disclosure and what this Article refers to as "trust funds." Trust funds aim to create a transparent and more beneficial process of managing and monitoring oil revenues, a departure from the corrupt and unaccountable arrangements that currently characterize oil and gas development in Africa. Information disclosure, exemplified by the Extractive Industries Transparency Initiative (the "EITI") and the Publish What You Pay (the "PWYP") Campaign, promotes the publishing of corporate payments to governments and calls on governments to disclose their oil receipts. The object is to ensure that oil revenues are fully accounted for and properly utilized.

Both ideas incorporate a leading role for multinational corporations ("MNCs") and international financial institutions, notably the World Bank Group.⁶ This Article takes an interdisciplinary approach drawing on economics, law, and political science to evaluate these ideas with a view to ascertaining their ability to avert or reverse the curse.

In addition, this Article will look at the major impediments to implementing these ideas in Africa, the most prominent of which are state sovereignty and the absence of corporate regulation in international law. To counter such impediments, this Article advo-

URAL RESOURCE CURSE: AN ILLUSTRATION FROM NIGERIA 2 (Nat'l Bureau of Econ. Research, Working Paper No. 9804, 2003) (proffering one such idea that involves directly distributing the oil revenues to the public), available at <http://papers.nber.org/papers/w9804.pdf>.

⁶ The International Monetary Fund ("IMF") has also been involved in seeking ways to address the resource curse, especially in Africa. See, e.g., MENACHEM KATZ ET AL., *LIFTING THE OIL CURSE: IMPROVING PETROLEUM REVENUE MANAGEMENT IN SUB-SAHARAN AFRICA* (2004) (discussing macroeconomic and oil sector policy, and governance issues of seven oil-producing countries of Africa).

cates a restructuring of international law in two major areas: redefinition of the notion of sovereignty and a clearer articulation of the position of MNCs in international law.

This Article is organized into seven major sections. Section 2 focuses on the resource curse generally. Subsection 2.1 thereof is a theoretical discussion of the resource curse thesis that surveys the current literature on the phenomenon. Subsection 2.2 looks at ideas advanced by economists and political scientists on the causes of the resource curse. Subsection 2.3 examines the role of institutions as an independent or explanatory variable for the low level of growth in resource-rich countries.

Section 3 discusses the resource curse in Africa, focusing primarily on African countries that produce or export oil in significant quantities. Occasional references are made to African countries involved in the production and export of other resources such as copper and diamonds.

Section 4 looks at the World Bank Group and MNCs. MNCs have been implicated in a number of practices linked to the resource curse, such as conflicts and civil wars. The World Bank Group has played a key role in oil and gas projects across the globe. This Section discusses the World Bank and MNCs in light of their growing interest in addressing the resource curse.

Section 5 examines two of the ideas being presented as a cure for the resource curse, namely national trust funds and information disclosure. The examination of national trust funds will be in the context of a recent application of the idea in Africa—the Chad-Cameroon Oil Pipeline Project. The trust fund established under this project is analyzed and its strengths and weaknesses are highlighted. Disclosure of corporate payments to governments as a valuable tool for preventing or reversing the resource curse is also discussed. Two prominent efforts in that regard—the EITI and the PWYP Campaign—will be closely examined. The availability of information regarding payments made by corporations to mineral-producing countries will promote transparency and help the cause of public accountability.

As useful as these two ideas may be, strong impediments such as state sovereignty and the absence of real regulation of MNCs present formidable challenges to their implementation in Africa. In the absence of a governing structure to which all MNCs are subject, those who decide to be uncooperative may gain a competitive advantage over those who choose to conform to higher standards such as transparency in their transactions. This serves as a deter-

rent to the latter group of companies, as the situation on the ground already indicates. In the case of sovereignty, where government officials are not enamored of efforts to constrain their unaccountable practices, they usually resort to sovereignty as a convenient excuse.⁷ The perplexing question that emerges is what the next line of action should be where there is a misalignment between the interests of the people and the harmful wishes of a sovereignty-hugging political clan. Section 6 discusses corporate regulation in international law and the concept of sovereignty.

Section 7 discusses the role the World Bank and MNCs can play in further addressing the resource curse in the face of—or regardless of—the identified obstacles. One useful mechanism is sub-national or local trust funds instituted and funded by these entities. The need for local trust funds to serve as veritable complements to national trust funds, or as viable alternatives where national trust funds are infeasible due to political and practical constraints, cannot be overemphasized. Section 8 is the conclusion.

2. THE RESOURCE CURSE PHENOMENON

2.1. Concept

One of the most puzzling and perplexing discoveries of modern scholarship is a paradoxical phenomenon referred to as the resource curse.⁸ The resource curse thesis posits that there exists a negative relationship between endowment with natural resources and social and economic development. Countries that have deposits of natural resources in abundant quantities have exhibited a gnawing tendency to perform worse than those not similarly endowed on virtually every social and economic indicator.⁹

Jeffrey Sachs and Andrew Warner note that this paradox “has

⁷ See Arvind Ganesan, *Some Transparency, No Accountability: The Use of Oil Revenue in Angola and Its Impact on Human Rights*, 16 HUM. RTS. WATCH 1, 48-51 (Jan. 2004) (detailing how the Angolan government rebuffed efforts by the IMF to reconcile the country’s oil-backed loans with information in the external debt database on the basis of infringement on national sovereignty), available at <http://www.hrw.org/reports/2004/angola0104/angola0104.pdf>.

⁸ Alan Heston, *Crusades and Jihads: A Long-run Economic Perspective*, 588 ANNALS AM. ACAD. POL. & SOC. SCI. 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.”).

⁹ See generally ALAN GELB & ASSOCIATES, *OIL WINDFALLS: BLESSING OR CURSE? passim* (1988) (studying the impact of oil windfalls on countries with different economic and social attributes).

been a constant motif of economic history.”¹⁰ 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 fourteenth century Arab philosopher Ibn Khaldun in which he identifies the fifth stage of the ‘state’ as one of waste and squandering.”¹¹ In the 17th century, although Spain had silver and gold flowing in abundance from the colonies, it still had a weak economy compared with the Netherlands, which was resource poor.¹² The 19th and 20th centuries saw the rise of the Swiss and Japanese economies while resource-rich Russia lagged behind.¹³ In more recent times, resource-poor 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.¹⁴

This sad development, while a ubiquitous feature in many resource-rich economies, is particularly evident in the petroleum-producing countries. Terry Lynn Karl provides the following description of what she refers to as oil’s “paradox of plenty”:

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 grow 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. Their infant mortality, malnutrition, and life expectancy at birth is worse than in non-oil/mineral dependent countries of the

¹⁰ JEFFREY D. SACHS & ANDREW M. WARNER, NATURAL RESOURCE ABUNDANCE AND ECONOMIC GROWTH 2 (Harv. Inst. for Int'l Dev., Development Discussion Paper No. 517a, 1995).

¹¹ Stevens, *supra* note 4, at 5.

¹² SACHS & WARNER, *supra* note 10, at 2

¹³ *Id.*

¹⁴ *Id.* at 2-3.

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.¹⁵

Although doubts have been raised about the existence of this phenomenon,¹⁶ the evidence supporting the prevalence of the resource curse seems to be strong.¹⁷ Empirical evidence provides some of the strongest support. An analysis of the impact of mineral and other resource exports on GDP in ninety-seven countries from 1971-1989 showed the inverse relationship between resource abundance and rapid economic growth. Likewise, scholars have shown a link between higher mineral and oil dependence and a high level of poverty, disproportionate military expenditures by governments, and a higher level of authoritarianism. Corruption is higher and the probability of civil-war is also greater in countries dependent on oil and minerals.¹⁸

It should be noted that the existence of the resource curse is not

¹⁵ Terry Lynn Karl, *The Oil Trap*, TRANSPARENCY INT'L Q. NEWSL. (Transparency Int'l, Berlin, Germany), Sept. 2003, at 1, available at <http://www.Transparency.org/newsletters/2003.3/tiq-sept2003.pdf>.

¹⁶ See Graham A. Davis, *Learning to Love the Dutch Disease: Evidence from the Mineral Economies*, 23 WORLD DEV. 1765, 1776 (1995) (suggesting that "the resource curse is, if anything, the exception rather than the rule").

¹⁷ See KYM ANDERSON, ARE RESOURCE-ABUNDANT ECONOMIES DISADVANTAGED? 3 (Ctr. for Int'l Econ. Studies 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."), available at <http://www.adelaide.edu.au/cies/sp9703.pdf>.

¹⁸ THOMAS I. PALLEY, COMBATING THE NATURAL RESOURCE CURSE WITH CITIZEN REVENUE DISTRIBUTION FUNDS: OIL AND THE CASE OF IRAQ 3 (Foreign Policy in Focus, FPIF Special Report, Dec. 2003), available at <http://www.fpif.org/pdf/papers/SRordf2003.pdf>.

a law cast in stone, as countries can take initiatives to check it.¹⁹ Yet the extent of its existence presents sufficient cause for pause and bewilderment. First, it appears to cut across virtually every barrier. Countries that have little or nothing in common ethnically, geographically, culturally, or politically still seem to face the same predicament.²⁰ Second, it is counter-intuitive.²¹ Both common sense and economic theory present bases to believe that more resources should be a blessing, not a curse.²² 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.²³ 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."²⁴

In decades past, some prominent economic theorists stridently argued that low growth in developing countries may 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 may be able to overcome this predicament by attracting foreign companies to exploit these resources. Money generated from a growing extractive sector would then be used in the construction of needed infrastructure and in the establishment of secondary industries and diversification.²⁵ In a similar vein, the "big

¹⁹ See Richard M. Auty, *Industrial Policy Reform in Six Large Newly Industrializing Countries: The Resource Curse Thesis*, 22 *WORLD DEV.* 11, 24 (1994) (explaining that resource-rich countries can combat the resource curse with good industrialization policy choices).

²⁰ TERRY LYNN KARL, *THE PARADOX OF PLENTY: OIL BOOMS AND PETRO-STATES*, at xv-xvi (1997).

²¹ See ERLING RØED LARSEN, *ARE RICH COUNTRIES IMMUNE TO THE RESOURCE CURSE? EVIDENCE FROM NORWAY'S MANAGEMENT OF ITS OIL RICHES 1* (Statistics Norway, Discussion Paper No. 362, 2003) (stating that "[g]rowth studies show, counter to intuition, that the discovery of a natural resource may be a curse rather than a blessing since resource-rich countries grow slower than others"), available at <http://www.ssb.no/publikasjoner/DP/pdf/dp362.pdf>.

²² See Stevens, *supra* note 4, at 3 (explaining that some countries have managed to avoid the "resource curse" and because of their success, can consider large revenues from natural resources to be a "blessing").

²³ MARIA SARRAF & MOORTAZA JIWANJI, *BEATING THE RESOURCE CURSE: THE CASE OF BOTSWANA 3* (World Bank Env't Dep't, Environmental Economics Series Paper No. 83, 2001).

²⁴ *Id.* at 1.

²⁵ MICHAEL ROSS, *EXTRACTIVE SECTORS AND THE POOR 6* (Oxfam America, Research Paper, Oct. 2001), available at <http://www.oxfamamerica.org/newsand>

push" theory of economic development made the case that what developing countries needed was to expand demand in large measures to provide the needed encouragement for private corporations to make an investment in industrialization.²⁶ 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 proven to be the case. Poor countries with 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.²⁷ Petroleum and other resources contributed immensely to the emergence of United States, Canada and Australia as strong economies.²⁸ Coal and hydrocarbons deposits played a fundamental role in the success of the Industrial Revolution.²⁹ 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.³⁰ Botswana has catapulted itself from one of the poorest countries at independence in 1965 to an upper income society through its diamond mines.³¹

Karl, however, rejects the argument that the energy-influenced development of yesteryear 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

publications/publications/research_reports/art2635.html/pdfs/eireport.pdf.

²⁶ *Id.*

²⁷ Gavin Wright & Jesse Czelusta, *Exorcizing the Resource Curse: Minerals as a Knowledge Industry, Past and Present* (July 2002) (unpublished manuscript, on file with author).

²⁸ *See generally id.* (describing the effect that petroleum and other resources had on the respective economies of the United States, Canada, and Australia).

²⁹ JEFFREY D. SACHS, *TROPICAL UNDERDEVELOPMENT* 18 (Nat'l Bureau of Econ. Research, Working Paper No. 8119, 2001).

³⁰ SAVE THE CHILDREN, *LIFTING THE RESOURCE CURSE: EXTRACTIVE INDUSTRY, CHILDREN AND GOVERNANCE* 8 (2003), available at http://www.savethechildren.org.uk/temp/scuk/cache/cmsattach/18_EITI.pdf.

³¹ *Id.* at 9.

in the late 19th and early 20th centuries in the United States, Canada and Australia" because in those successful earlier experiences, the contribution of mining to the overall economic input was quite small, as opposed to the domineering position it occupies today in the economies of oil-exporting nations.³² It should be noted, however, that resource-based economic growth and a bad press have been companions for centuries now,³³ a fact that tends to weaken Karl's assertion. In the 18th 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 encouragement³⁴

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 socioeconomic 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."³⁵ 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: increasing oil wealth either reduces or evaporates the democratization effect. Michael Ross contends that a

³² Terry Lynn Karl, *Oil-Led Development: Social, Political and Economic Consequences*, in 4 *ENCYCLOPEDIA OF ENERGY* 661, 662 (Cutler J. Cleveland ed., 2004).

³³ Wright & Czelusta, *supra* note 27, at 2.

³⁴ ADAM SMITH, 2 *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* 562 (R.H. Campbell et al. eds., 1981) (1776), *quoted in* Wright & Czelusta, *supra* note 27, at 2.

³⁵ ROSS, *supra* note 25, at 5.

component of the resource curse is that “oil and mineral wealth tends to make states less democratic.”³⁶

A recent study disputes the conclusion that oil wealth is more closely linked with nonviability of regimes and political instability. The countercontention, 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.”³⁷

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 has helped undermine the stability of authoritarian regimes, such as that of the Iranian Shah, who fell in 1979.³⁸ In Venezuela, the presence of oil may have played a major role in democratizing the country.³⁹

Furthermore, if the abundant flow of oil revenues or external rents works against democracy, the converse claim may also hold: The absence of massive flows of oil, or other external rents may help or accelerate democratization. However, steep declines in oil revenues and lower receipts of strategic rents have not always been accompanied by a weakening of authoritarian institutions or entrenchment of democracy, especially in the Middle East.⁴⁰ In some cases, instead of oil wealth undermining regime viability, it may actually enhance its durability.⁴¹ This can be explained on the ground that while oil wealth weakens state institutions, under certain conditions, it also can be a vehicle for constructing viable re-

³⁶ Michael L. Ross, *Does Oil Hinder Democracy?*, 53 *WORLD POL.* 325, 328 (2001).

³⁷ Benjamin Smith, *Oil Wealth and Regime Survival in the Developing World, 1960-1999*, 48 *AM. J. POL. SCI.* 232 (2004).

³⁸ Gary C. Gambill, *Explaining the Arab Democracy Deficit: Part I*, 5 *MIDDLE E. INTELLIGENCE BULL.* ¶ 37 (Feb.-Mar. 2003) (“According to some studies of Iran’s 1979 revolution, oil wealth undermined the stability of the Shah’s regime by fueling rapid socio-economic change.”), at http://www.meib.org/articles/0302_me.htm.

³⁹ See *id.* (“[S]ome have argued that oil wealth contributed to democratization in Venezuela.”).

⁴⁰ See *id.* (arguing that “had exogenous rent been a central foundation of authoritarian governance in the Arab world, democratization would have advanced much further than it has”).

⁴¹ See Smith, *supra* note 37, at 232 (proposing that oil wealth has generally increased the durability of regimes and that repression does not account for this puzzling effect).

gime coalitions and vibrant state institutions that prove useful in maintaining the rule of leaders when they face the kinds of crises that undercut other governments.⁴²

Finally, in view 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, lack of resources has not hindered resource-poor countries from rising to enviable heights in the arenas of economic growth and social development. It can actually be argued that not having resources freed these 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 have been able to make their way toward rapid growth. Yet this explanation, while plausible, does not solve the paradox.

2.2. *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 both generally and as applied to specific countries. This prompted Hausmann and Rigobon to observe: “[t]he concern that natural resource wealth may somehow be inmiserating [sic] 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.”⁴³

A variety of variables may account for the resource curse. Existing explanations can be categorized into three broad areas—social, economic, and political.⁴⁴

⁴² Benjamin Smith, *The Wrong Kind of Crisis: Why Oil Booms and Busts Don't Lead to Democratic Transition 2* (n.d.) (unpublished manuscript, on file with author).

⁴³ RICARDO HAUSMANN & ROBERTO RIGOBON, AN ALTERNATIVE INTERPRETATION OF THE 'RESOURCE CURSE': THEORY AND IMPLICATIONS 1 (Nat'l Bureau of Econ. Research, Working Paper No. 9424, 2002) (footnotes omitted), available at <http://www.nber.org/papers/w9424.pdf>.

⁴⁴ See Michael L. Ross, *The Political Economy of the Resource Curse*, 51 *WORLD POL.* 297, 298 (1999) (discussing theories of the resource curse), available at <http://www.polisci.ucla.edu/faculty/ross/paper.pdf>. Ross, however, categorizes what I refer to here as the “social explanation” under the political science rubric of “cognitive explanations.” I do not reject the validity of this categorization, but believe that “cognitive explanations” are better suited for public actors, while “social explanation” should be used for cases that cover the whole of society.

2.2.1. *Social Explanation*

The social explanation is anchored by the premise that laziness is concomitant with 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."⁴⁵

The aphorism, "necessity is the mother of invention," could well explain 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 in the past, a number of countries have used 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.

2.2.2. *Economic Explanations*

Four major economic explanations for the negative correlation between resource wealth and economic growth have been identified: "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.'"⁴⁶

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 that when there is a decline in the terms of trade for primary commodities, the result may be a resource curse.⁴⁷ However, the terms of trade effect, while "statistically robust at the global level, . . . is still elusive at the case-study level."⁴⁸

The argument pertaining to the 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

⁴⁵ JEAN BODIN, *SIX BOOKS OF A COMMONWEALTH* 5 (M. J. Tooley ed. & trans., 1967).

⁴⁶ Ross, *supra* note 44, at 298.

⁴⁷ *Id.* at 303 ("[I]t may seem that a decline in the terms of trade for primary commodities can account for much of the resource curse.").

⁴⁸ *Id.* at 304.

into something negative for the commodity exporters. Scholars contend that this instability should actually lead to higher economic growth by promoting unusually high levels of private investment, which exporters use as a way of protecting themselves against future price shocks.⁴⁹ "Yet even studies that find [that export instability] retards growth have so far been unable to link export instability to the resource curse."⁵⁰

The resource curse is also attributable to the fact that commodity exports "generate little growth in other sectors of the economy . . ."⁵¹ To solve this linkage problem, states have taken action to nationalize their mineral and petroleum industries and have adopted strong measures to capture the economic rents that MNCs were repatriating to their home countries.⁵² Yet the resource curse persists in these countries.

The Dutch Disease, which owes its origin to the experience of the Netherlands with the discovery of North Sea natural gas in the 1960s, has two elements in its technical form.⁵³ According to economists, the first element is the spending effect. Natural resource booms tend to lead to appreciation in the 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 nontradeable sectors. Both of these elements combine to render the non-boom-tradeable sector (e.g., manufacturing and agriculture) less or non-competitive and to effectively crowd out previously productive sectors. Nigerian scholar Pat Utomi links the problems of the Nigerian economy to the 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 an end to this progress and, with consistent growth in oil revenues since 1999, Nigeria's economy has been in the doldrums.⁵⁴

⁴⁹ *Id.* (citing ODIN KNUDSEN & ANDREW PARNES, TRADE INSTABILITY AND ECONOMIC DEVELOPMENT (1975)).

⁵⁰ *Id.*

⁵¹ *Id.* at 305.

⁵² *Id.*

⁵³ The general form associates the term with every conceivable malady occasioned by resource abundance.

⁵⁴ See Pat Utomi, *Managing the Curse of Oil*, THE GUARDIAN, Nov. 24, 2003 (arguing that Nigeria is worse off after 1999 than ever before), available at <http://www.waado.org/NigerDelta/Essays/Utomi-Oil.html>.

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. States have a range of options to offset its impact, if they consider the necessary course of action to take.⁵⁵ 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.”⁵⁶

2.2.3. *Political Explanations*

Political scientists have also advanced a number of theories as to the underlying causes of the resource curse, and they fall into three principal categories: cognitive explanations, societal explanations, and statist explanations.⁵⁷

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 society favor policies that impede growth. Statist explanations state 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 countries that receive on a regular basis substantial amounts of external rent.”⁵⁸ External rents are “rentals paid by foreign individuals, concerns or governments to individuals, concerns or governments of a given country.”⁵⁹ 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 them. Based on this conceptualization, Mahdavy includes oil revenues received by governments of oil exporting countries in the definition of external

⁵⁵ See Ross, *supra* note 44, at 305 (“More recent research suggests, however, that [Dutch Disease] is less common in developing states than originally thought, and that governments can usually offset its impact, should they feel it necessary.”).

⁵⁶ *Id.* at 307.

⁵⁷ *Id.* at 308.

⁵⁸ H. Mahdavy, *The Patterns 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).

⁵⁹ *Id.*

rents.⁶⁰ Karl concurs that in general, "oil rents produce a rentier state."⁶¹

Mahdavy's definition of a rentier state has generally been accepted and adopted by other writers.⁶² Hazem Beblawi and Giacomo Luciani, while supporting Mahdavy's idea of the rentier state, rejected its underlying meaning.⁶³ 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 economy" of which the rentier state is a subset.⁶⁴

According to Beblawi, there are four key features that are *conditio sine qua non* for the characterization of a state as rentier.⁶⁵ First, there must be a dominance of rent situations in the economy.⁶⁶ Second, the rent must originate from foreign sources or sources

⁶⁰ *Id.* at 428-29.

⁶¹ Karl, *supra* note 32, at 663.

⁶² See, e.g., *id.* at 661 (defining a rentier state as "a state that lives from externally generated rents rather than from the surplus 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"); Jonathan Symons, NGOs in International Organizations: Searching for Legitimacy in Global Governance 15 (unpublished paper presented to the Australasian Political Studies Association Conference, University of Tasmania, Hobart, Sept. 29-Oct. 1, 2003) (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."); available at <http://www.utas.edu.au/government/APSA/JSymonsfinal.pdf>; ISAM AL KHAFAJI, SOCIAL SCIENCE RESEARCH COUNCIL, IN SEARCH OF LEGITIMACY: THE POST-RENTIER IRAQI STATE, at para. 50 (defining the rentier state "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"), available at <http://conconflicts.ssrc.org/iraq/khafaji> (last visited Jan. 26, 2005).

⁶³ Hazem Beblawi & Giacomo Luciani, *Introduction*, in 2 THE RENTIER STATE 1, 11 (Hazem Beblawi & Giacomo Luciani eds., 1987) ("A rentier state is then a subsystem associated with a rentier economy"); see also DOUGLAS A. YATES, THE RENTIER STATE IN AFRICA: OIL RENT DEPENDENCY AND NEOCOLONIALISM IN THE REPUBLIC OF GABON 13 (1996) (explaining that Beblawi and Luciani "prefer instead to define the concept of a 'rentier economy' of which rent plays a major role, and in which that rent is external to the economy").

⁶⁴ YATES, *supra* note 63.

⁶⁵ Hazem Beblawi, *The Rentier State in the Arab World*, in THE RENTIER STATE, *supra* note 63, at 49, 51-52.

⁶⁶ *Id.*

that are external to the economy.⁶⁷ This excludes domestic rents, even if they come in substantial and domineering numbers. Third, only a tiny minority may participate in generating the rent.⁶⁸ 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., income from tourism) predominate. Fourth, the major recipient of the external rent in the economy must be the government.⁶⁹

Luciani's emphasis, on the other hand, is on the origins or "sources" of the state revenue (that is, external versus internal) and less on the nature or "structure" of the revenue (that is, rent versus taxes).⁷⁰ Luciani sees state autonomy—the freedom that rent provides the state from the need to extract income from the internal or domestic economy—as a major impact of the rentier economy.⁷¹

Where a government has no need for taxes from their citizens, citizens lose the incentive to demand accountability of those who spend the tax revenues.⁷² The wealth of information that is generated by a vibrant tax bureaucracy is also lost, which means the loss of a vital tool for social and economic planning.⁷³ 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 can eventually tax.⁷⁴ Karl, in what has been described as "the most

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*; see YATES, *supra* note 63, at 14 ("[T]he government must be the principal recipient of the external rent in the economy.").

⁷⁰ Giacomo Luciani, *Allocation vs. Production States: A Theoretical Framework*, in THE RENTIER STATE, *supra* note 63, at 63, 68-69 ("[I]t is essential that the income of the state not only be in the nature of a rent, but also be earned abroad . . .").

⁷¹ *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 63, at 14-15 ("The key feature of a rentier state according to Luciani is that external rent liberates the state from the need to extract income from the domestic economy.").

⁷² See KARL, *supra* note 20, at 172 ("[I]t was not surprising that the petro-state failed to develop a trained cadre who could design tax systems . . .").

⁷³ *Id.* at 91 (explaining how dependence on oil taxation caused the Venezuelan government to miss the opportunity to build a national administrative structure).

⁷⁴ IMF Says Nigeria's Natural Resources is a Curse, THE PUNCH, Apr. 1, 2004 (citing the views of Xavier Sala-I-Martin), available at <http://www.punchng.com/business/article03/040401>.

ambitious comparative analysis of rentier states,"⁷⁵ 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.⁷⁶

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.⁷⁷

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."⁷⁸

2.3. *The Role of Institutions*

Apart from the social, economic, and political explanations discussed above, institutions have been presented as a potential explanation for the resource curse.⁷⁹ A 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."⁸⁰ Good institutions are believed to make all

⁷⁵ Smith, *supra* note 37, at 233.

⁷⁶ KARL, *supra* note 20, at 7.

⁷⁷ Smith, *supra* note 37, at 233; see also Jacques Delacroix, *The Distributive State in the World System*, 15 *STUD. COMP. INT'L DEV.*, Fall 1980, at 3, 11-14 (describing the emergence of the distributive state).

⁷⁸ YOUNKYOON KIM, *THE RESOURCE CURSE IN A POST-COMMUNIST REGIME: RUSSIA IN COMPARATIVE PERSPECTIVE* 3 (2003).

⁷⁹ Ross, *supra* note 44, at 310.

⁸⁰ DOUGLASS C. NORTH, *INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE* 3 (1990).

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”⁸¹ 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, [and] social and political institutions that mitigate risk and manage social conflicts.”⁸²

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.”⁸³ On the other hand, if the right institutions are put in place, resources can actually constitute a blessing.⁸⁴

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.⁸⁵

⁸¹ Daron Acemoglu et al., *The Colonial Origins of Comparative Development: An Empirical Investigation*, 91 AM. ECON. REV. 1369, 1370 n.3 (2001).

⁸² DANI RODRIK, INSTITUTIONS FOR HIGH-QUALITY GROWTH: WHAT THEY ARE AND HOW TO ACQUIRE THEM 2 (Nat’l Bureau of Econ. Research, Working Paper No. 7540, 2000).

⁸³ Ross, *supra* note 44, at 298.

⁸⁴ HALVOR MEHLUM ET AL., INSTITUTIONS AND THE RESOURCE CURSE 13 (Dep’t of Econ., Univ. of Oslo, Memorandum No. 29/2002, 2002), available at <http://www.oekonomi.uio.no/memo/memopdf/memo2902.pdf>.

⁸⁵ DAMIAN BRINDLEY, DISEASE, INSTITUTIONS AND ECONOMIC DEVELOPMENT 10 (Sch. of Econ., Univ. of N.S.W., Working Paper Series No. 2003/7, 2003), available at <http://www.docs.fce.unsw.edu.au/economics/research/workingpapers/2003>

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.⁸⁶

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."⁸⁷ They further state that after controlling for institutions, the impact of measures of geography on incomes are "at best weak."⁸⁸ A similar conclusion is made in relation to trade, the direct effects of which are considered insignificant.⁸⁹

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"⁹⁰ and contend that "[w]aste and corruption from oil rather than Dutch Disease has been responsible for [Nigeria's] poor long run economic performance."⁹¹

Rodrik and others also raise a crucial point about the contribution of resources to the deficiency or the poor quality of institutions. Their position is that geographical factors, including natural resource endowments, "have a strong indirect effect [on incomes] by influencing the quality of institutions."⁹² 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 causes deterioration in institutions.⁹³ The Sachs-

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⁸⁶ *Id.*

⁸⁷ DANI RODRIK ET AL., INSTITUTIONS RULE: THE PRIMACY OF INSTITUTIONS OVER GEOGRAPHY AND INTEGRATION IN ECONOMIC DEVELOPMENT, abstract (Nat'l Bureau of Econ. Research, Working Paper No. 9305, 2002).

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ SALA-I-MARTIN & SUBRAMANIAN, *supra* note 5, at 2.

⁹¹ *Id.*, abstract.

⁹² RODRIK ET AL., *supra* note 87, abstract.

⁹³ See MEHLUM, *supra* note 84, at 14 (stating that because Sachs and Warner "dismiss one rent-seeking mechanism by showing that there is at most a weak impact of resource abundance on institutional quality . . . resource abundance does not cause a deterioration of institutions"); see also JEFFREY D. SACHS,

Warner position is believed to enjoy lesser empirical support.⁹⁴

3. THE RESOURCE CURSE IN AFRICA

The resource curse in Africa is not limited to the oil and gas sector. This fact is illustrated by the famous remarks of former Zambian President, Kenneth Kaunda: "We are in part to blame,

INSTITUTIONS DON'T RULE: DIRECT EFFECTS OF GEOGRAPHY ON PER CAPITA INCOME 2 (Nat'l Bureau of Econ. Research, Working Paper No. 9490, 2003) (questioning the conclusions of Acemoglu et al., Easterly and Levine, and Rodrik et al., and noting that:

[M]any 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").

⁹⁴ See OLA OLSSON, GEOGRAPHY AND INSTITUTIONS: A REVIEW OF PLAUSIBLE AND IMPLAUSIBLE LINKAGES (Dep't of Econ., Goteborg Univ., Working Papers in Economics No. 106, 2003), available at <http://www.handels.gu.se/epc/archive/00002978/01/gunwpe0106.pdf>.

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 [sic] the rules that societies live by. Most of the major research efforts during the last two or three years have focussed [sic] on this connection and has [sic] shown that it appears to be the one that has the greatest empirical support.

Id. at 2 (citations omitted); see also DARON ACEMOGLU ET AL., REVERSAL OF FORTUNE: GEOGRAPHY AND INSTITUTIONS IN THE MAKING OF THE MODERN WORLD INCOME DISTRIBUTION (Nat'l Bureau of Econ. Research, Working Paper No. 8460, 2001) (hypothesizing that institutional reversal, not geographic factors, account for decrease in societal wealth); WILLIAM EASTERLY & ROSS LEVINE, TROPICS, GERMS AND CROPS: HOW ENDOWMENTS INFLUENCE ECONOMIC DEVELOPMENT (Nat'l Bureau of Econ. Research, Working Paper No. 9106, 2002) (finding evidence that tropics, germs, and crops affect development through institutions); Acemoglu et al., *supra* note 81 (comparing the European development of institutions, and the effects of institutions on income per capita, to Africa). However, Brindley rejects the views of Acemoglu, Rodrik, and others while offering 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 85, at 2.

but this is the curse of being born with a copper spoon in our mouths."⁹⁵

However, African oil exporters present the most fitting illustration and telling confirmation of the resource curse. A closer look at many of the oil producing countries reveals some of the basic symptoms of the resource curse in varying degrees. There is a reasonable apprehension that this malady, absent an effective remedy, will extend to the newer entrants in the oil industry. As some commentators have observed, "Africa's older oil exporters—Nigeria, Gabon and Angola—confirm this trend while newer exporters, such as Equatorial Guinea, seem about to embark on the same course."⁹⁶

Nigeria is the largest oil producing nation in Africa,⁹⁷ the sixth largest oil producer in the world,⁹⁸ the fifth largest producer in the Organization of the Petroleum Exporting Countries ("OPEC"),⁹⁹ and the fifth largest supplier of oil to the United States.¹⁰⁰ 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 seventy percent of Nigeria's population live below the World Bank's and the United Nations' ("U.N.") designated poverty line—subsisting on less than one dollar per day.¹⁰¹ Ironically, the rural communities which produce about seventy-five percent of Nigeria's petroleum are among the poorest in the nation.

The socio-economic and political predicament of Nigeria is

⁹⁵ Ross, *supra* note 44, at 297.

⁹⁶ IAN GARY & TERRY LYNN KARL, *BOTTOM OF THE BARREL: AFRICA'S OIL BOOM AND THE POOR* 77 (2003).

⁹⁷ See *Famine as Government Policy*, CHI. TRIB., Apr. 2, 2004, § 1, at 20 ("[Angola] is the second largest producer of oil in Africa after Nigeria . . .").

⁹⁸ Jonathan Power, *Nigeria Struggles Against the Curse of Oil*, INT'L HERALD TRIB., Jan. 8, 2004, at 6.

⁹⁹ ORGANIZATION OF THE PETROLEUM EXPORTING COUNTRIES ("OPEC"), OPEC ANN. STAT. BULL. 2003, at 13, available at <http://www.opec.org/Publications/AB/pdf/AB002003.pdf>.

¹⁰⁰ Mark Mazzetti, *Pax Americana*, U.S. NEWS & WORLD REP., Oct. 6, 2003, at 37; see also Dep't of Energy, *Country Analysis Briefs: Nigeria* ("Nigeria . . . was the 5th largest supplier of crude oil to the United States in 2003."), available at <http://www.eia.doe.gov/emeu/cabs/nigeria.html>.

¹⁰¹ HUMAN RIGHTS WATCH, *RIVERS AND BLOOD: GUNS, OIL AND POWER IN NIGERIA'S RIVERS STATE* 6 (2005), available at <http://hrw.org/backgrounder/af-rica/nigeria0205/nigeria0205.pdf>; Allan H. Meltzer, *The World Bank One Year After: The Commission's Report to Congress*, 8 CEPMLP INTERNET J. 14, ¶ 2 (May 7, 2001), at <http://www.dundee.ac.uk/cepmlp/journal/html/vol8/article8-14.html>.

breathhtaking in its misery considering that Nigeria is estimated to have earned up to \$320 billion from crude oil exports between 1970 and 1999,¹⁰² enough to be able to improve the economic situation of the people and address the lingering issues at the core of conflicts and crises within the country. The rate at which poverty is growing among the 123 million Nigerians is alarming. According to the Federal Office of Statistics in Nigeria, poverty has increased from twenty-eight percent of the population in 1980, to forty-six percent in 1985, to sixty-six percent in 1996.¹⁰³ It seems paradoxical that in a country so rich in oil reserves, whose production accounts for ninety percent of the country's income, that its development and infrastructure could be so poor. According to the World Bank, "Nigeria has been characterised as a country of 'poverty amid plenty.'"¹⁰⁴

Oil production in Nigeria is primarily a joint venture between 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.¹⁰⁵ While these entities have profited handsomely from the extraction business, the remainder of the 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 from

¹⁰² Integrated Regional Information Networks, U.N. Office for the Coordination of Humanitarian Affairs, *Nigeria: Focus on the Scourge of Poverty* (June 11, 2002), available at <http://www.irinnews.org/report.asp?ReportID=28258>.

¹⁰³ See *id.* (stating that surveys conducted by Nigeria's Federal Office of Statistics indicate that while twenty-eight percent of Nigerians lived in poverty in 1980, the level of poverty increased substantially over the years, with sixty-six percent of Nigerians living in poverty, subsisting on less than \$1.40 a day, in 1996).

¹⁰⁴ Bello Umar & Hamza Kankiya, *Beyond the Poverty Alleviation Programmes: Toward a New Framework for Managing Natural Resources in Nigeria 2* (unpublished paper presented at the Conference on Tropical and Subtropical Agricultural and Natural Resource Management ("Deutscher Tropentag"), Berlin, Oct. 5-7, 2004), available at <http://www.tropentag.de/2004/abstracts/full/100.pdf>.

¹⁰⁵ 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 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 as a share in the crude oil 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).

human rights abuse.

Gabon has been producing oil since the late 1960s. Despite the oil wealth that has poured into government coffers for over thirty years, Gabon is still unable to provide a decent standard of living for its small population of 1.3 million people. Gabon has experienced economic stagnation¹⁰⁶ and is said to suffer from the Dutch Disease.¹⁰⁷ The country's dictatorial ruler, Omar Bongo, has been in power since 1968 and is known for his lavish spending.¹⁰⁸ Plagued by corruption and heavily burdened with foreign debt, the government has a dismal poverty reduction record.¹⁰⁹

Angola and Congo-Brazzaville not only "show the same problems as the older producers," but also have the additional burden of long drawn-out civil wars.¹¹⁰ Although Angola's oil reserves increased four-fold in the 1990s alone and overall oil production has been considerable, the country's level of poverty has hardly improved. The country ranks low on the U.N. Human Development Index,¹¹¹ and its average life expectancy of forty-five years is thirty percent lower than that of most developing countries. The level of corruption is amazing. According to the International Monetary Fund ("IMF"), billions of dollars went missing from the country's coffers between 1997 and 2002.¹¹² To worsen matters, the government continues to take out loans backed by its oil reserves, thereby further endangering its fiscal position.¹¹³ These loans generally have not been used for the benefit of the country, but rather to enrich the country's political leaders. In early 2002, a magistrate in Switzerland, upon sensing some irregularities, froze more than \$700 million in bank deposits that had been linked to oil-backed

¹⁰⁶ See YATES, *supra* note 63 (laying out a definition for a "rentier" state and discussing its economic troubles).

¹⁰⁷ GARY & KARL, *supra* note 96, at 29.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 30.

¹¹⁰ *Id.* at 31.

¹¹¹ See HUMAN DEVELOPMENT REPORTS, HUMAN DEVELOPMENT INDICATORS 142 (2004) (ranking Angola 166th out of 177 countries), available at http://hdr.undp.org/reports/global/2004/pdf/hdr04_HDI.pdf.

¹¹² See Ganesan, *supra* note 7, at 33 ("The IMF concluded that from 1997-2002, the Angolan government could not account for about U.S. \$4.2 billion in expenditures . . .").

¹¹³ See GARY & KARL, *supra* note 96, at 33 ("In 1999, the IMF estimated that oil-backed debt was estimated at 33 percent of Angola's total external debt, now thought to be over \$11 billion.").

loans.¹¹⁴

In Congo-Brazzaville, the government is reportedly too closely tied to the leading oil company, Elf Aquitaine (now part of Total-FinaElf), to bargain effectively to the benefit of its citizens. Because of this, the government has not been able to jump-start its development. The country has a huge amount of oil-backed debt, and poverty is growing.¹¹⁵ More than seventy percent of the population of this resource-rich country lives on less than one dollar per day and half do not have access to clean water.¹¹⁶

Equatorial Guinea seems to be following the dangerous example of its neighbors. The President is currently consolidating power and concentrating it in himself and his relatives. Newly acquired wealth is being used to support authoritarian rule in the country. "According to human rights organizations and international observers, the country has a history marked by extreme levels of repression, human rights violations, rigged elections and little transparency or accountability."¹¹⁷ Fiscal mismanagement and corruption are the order of the day. The increases in government revenue have not been accompanied by any "appreciable improvement in [the] lives of most citizens of the country."¹¹⁸

Observers have also expressed concern about Sao Tome, an emerging oil-producing country; in July 2003, a coup attempt against the government of President Fradique de Menezes was linked to expected oil revenues.¹¹⁹

4. THE WORLD BANK, MULTINATIONAL OIL CORPORATIONS, AND AFRICA'S RESOURCE CURSE

This Section discusses the World Bank and MNCs, and their contributions to the perpetration, perpetuation, and amelioration of the resource curse, particularly in Africa.

¹¹⁴ Ganesan, *supra* note 7, at 50-51 (discussing the circumstances surrounding the judge's decision).

¹¹⁵ See GARY & KARL, *supra* note 96, at 34-38 (discussing Congo-Brazzaville's myriad problems).

¹¹⁶ *Id.* at 37.

¹¹⁷ *Id.* at 39.

¹¹⁸ *Id.* at 41.

¹¹⁹ Nicholas Shaxson, *Pain or Gain? Crunch Time Looms for Sao Tome Oil*, REUTERS, Dec. 23, 2003 ("No one was hurt, but the putsch revealed a streak of anger at the government for signing what the coup plotters regarded as flawed exploration contracts.").

4.1. The World Bank

The International Bank for Reconstruction and Development (the "IBRD"),¹²⁰ the International Development Association (the "IDA"),¹²¹ the International Finance Corporation (the "IFC"),¹²² the International Center for the Settlement of Investment Disputes (the "ICSID"),¹²³ and the Multilateral Investment Guarantee Agency (the "MIGA")¹²⁴ compose the World Bank Group. Within the World Bank Group, the World Bank comprises the IBRD and the IDA, while the IFC, ICSID, and MIGA are affiliates of the World Bank. A more restrictive categorization reserves the name "World Bank" for the IBRD only.

When the IBRD was established in 1944, its mission was to reconstruct the war-torn economies of Europe after the Second World War. Over time, and especially after the introduction of the Marshall Plan in 1947, the World Bank Group's purposes shifted to (and now center on) "the promotion of economic growth, investment and stability in less-developed countries ["LDCs"], and the improvement of living and working standards in those countries."¹²⁵

According to Ibrahim Shihata, former Vice President and General Counsel of the World Bank, the purposes of the World Bank

¹²⁰ See Articles of Agreement of the International Bank for Reconstruction and Development, Dec. 27, 1945, 60 Stat. 1440, 2 U.N.T.S. 134, amended as 16 U.S.T. 1942, 606 U.N.T.S. 294 (Dec. 17, 1965) (establishing the International Bank for Reconstruction and Development (the "IBRD")).

¹²¹ See Articles of Agreement of the International Development Association, Jan. 26, 1960, 11 U.S.T. 2284, 439 U.N.T.S. 249 (establishing the International Development Association (the "IDA")).

¹²² See Articles of Agreement of the International Finance Corporation, May 25, 1955, 7 U.S.T. 2197, 264 U.N.T.S. 117 (entered into force July 20, 1956) (establishing the International Finance Corporation (the "IFC")).

¹²³ See Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 (entered into force Oct. 14, 1966) (establishing the International Center for the Settlement of Investment Disputes (the "ICSID")).

¹²⁴ See Convention Establishing the Multilateral Investment Guarantee Agency, Oct. 11, 1985, T.I.A.S. No. 12089, 1508 U.N.T.S. 99 (establishing the Multilateral Investment Guarantee Agency (the "MIGA")), available at <http://www.miga.org/screens/about/convent/convent.htm>.

¹²⁵ Mark E. Wadzyk, *Is It Appropriate for the World Bank to Promote Democratic Standards in a Borrower Country?*, 17 WIS. INT'L L.J. 553, 553 (1999); see also Halim Moris, *The World Bank and Human Rights: Indispensable Partnership or Mismatched Alliance?*, 4 ILSA J. INT'L & COMP. L. 173, 178-79 (1997) (tracing the evolution of the World Bank).

include alleviating poverty¹²⁶ and fulfilling such basic needs as clean water, education, healthcare, housing, and environmental protection.¹²⁷ While the IBRD's sphere of influence extends to middle-income countries,¹²⁸ the IDA concentrates on providing subsidized loans (known as "credits"), technical assistance, and policy advice to the least-developed states,¹²⁹ some of whom are unable to attract the attention of, or obtain favorable borrowing terms from, the international financial markets. Indeed, the World Bank is "one of the world's largest sources of funding for the developing world."¹³⁰

The IFC provides debt and equity financing for private-sector projects in developing countries. The MIGA insures private investors against noncommercial risks in politically volatile environments, while the ICSID settles investment disputes between private investors and their host states.

The World Bank Group has been involved for a considerable period of time in oil, gas, and mining projects in different parts of the world. Since 1992, the Bank has approved \$18.5 billion for oil, gas, and coal projects in twenty-five developing countries, including Bolivia, Brazil, Bosnia, Guatemala, Russia, Trinidad and Tobago.¹³¹

Its involvement in some of these projects has resulted in strong criticisms against the World Bank's participation. The Bank, particularly the IFC, is seen as being profit-driven when it ventures into such lucrative sectors as oil and gas financing, which assures

¹²⁶ Poverty alleviation became a major guiding principle for the Bank under President McNamara. See JOSEPH E. STIGLITZ, *GLOBALIZATION AND ITS DISCONTENTS* 13 (2002) ("Touched by the poverty that he saw throughout the Third World, McNamara had redirected the Bank's effort at its elimination . . .").

¹²⁷ Ibrahim F.I. Shihata, *The World Bank and Human Rights: An Analysis of the Legal Issues and the Record of Achievements*, 17 DENV. J. INT'L L. & POL'Y 39, 40 (1988).

¹²⁸ Middle-income countries are countries with per capita income of less than \$5,185 a year. "Seventy-five percent of the world's poorest people . . . live in these countries . . ." WORLD BANK GROUP, *WORKING FOR A WORLD FREE OF POVERTY* 18 (2003).

¹²⁹ Least-developed countries are countries with annual per capita income of \$875 or less. See *id.* at 19 (discussing the World Bank's lending policies).

¹³⁰ *Id.* at 1.

¹³¹ See Heather Turcotte, *Slippery Security: National, International and Global Security Issues within Petroleum Production*, 1 ALTERNATIVES: TURKISH J. INT'L REL. 109, 133 (2002) (detailing the extent of the World Bank's involvement in funding for oil production), available at <http://www.alternativesjournal.net/volume1/number4/heatherpdf.pdf>.

better returns on investment.¹³² The Bank has also been excoriated for ignoring human rights and environmental concerns surrounding some projects or the host countries for these projects, thereby exacerbating the already bad situation or undermining any improvement from the Bank's participation.

In response to some of these criticisms, the Bank instituted an Extractive Industries Review in 2001.¹³³ The Review, chaired by Dr. Emil Salim, former Minister of Environment of Indonesia, submitted its final report entitled *Striking a Better Balance* in January 2004.¹³⁴ It recommended, among other things, that the World Bank should phase out oil investments by 2008 and concentrate on investments aimed at developing renewable energy resources, emissions-reducing projects, and clean energy technology.¹³⁵ The African Mineral and Energy Ministers and a group of investment banks have voiced strong objections to the recommendations.¹³⁶ The World Bank is unlikely to endorse most of these recommendations.

4.2. Multinational Corporations

The term MNC is sometimes used interchangeably with such other terms as transnational corporation ("TNC") and multinational enterprise ("MNE").¹³⁷ Different definitions of the term ex-

¹³² See *id.* at 130 (arguing that the Bank involved itself in money-making policies even if it didn't primarily benefit communities).

¹³³ See Extractive Industries Review ("EIR"), *What is the EIR?* (explaining that the aim of the group is "to produce a set of recommendations that will guide the involvement of the World Bank Group in the oil, gas, and mining sectors"), at <http://www.eireview.org> (last visited Feb. 4, 2005).

¹³⁴ See Letter from Dr. Emil Salim to James D. Wolfensohn, President, World Bank Group (Jan. 12, 2004) (on file with author).

¹³⁵ See WORLD BANK GROUP, *STRIKING A BETTER BALANCE—THE WORLD BANK GROUP AND EXTRACTIVE INDUSTRIES: THE FINAL REPORT OF THE EXTRACTIVE INDUSTRIES REVIEW* (Sept. 17, 2004) (outlining the World Bank's future involvement in the extractive industries), available at <http://www.worldbank.org/ogmc/files/finaleirmanagementresponseexecsum.pdf>.

¹³⁶ See Nicole Itano, *Proposal to Limit Oil and Coal Projects Draws Fire*, N.Y. TIMES, Mar. 24, 2004, at W1 (discussing objections to the World Bank's recommendations to limit oil and coal projects to protect the environment); Demetri Sevastopulo, *Banks Contest Ban Proposed for Coal and Oil Extraction*, FIN. TIMES, Apr. 5, 2004, at 6 (detailing a request by twenty-one banks, which comprise the so-called Equator banks, who do not want the World Bank to adhere to the Extraction Industries Review recommendations).

¹³⁷ This portion of the Article draws heavily from EMEKA A. DURUIGBO, *MULTINATIONAL CORPORATIONS AND INTERNATIONAL LAW: ACCOUNTABILITY AND COMPLIANCE ISSUES IN THE PETROLEUM INDUSTRY* (2003), particularly the introduc-

ist.¹³⁸ Peter Muchlinski explains that economists define an MNC as an entity that “owns (in whole or in part), controls and manages income generating assets in more than one country.”¹³⁹ To Phillip Blumberg, they are affiliated corporations that are incorporated in different jurisdictions but are conducting a common enterprise under common control.¹⁴⁰ However, as with many other concepts that do not lend themselves to an easy definition, no universally accepted definition of MNCs exists.¹⁴¹ For the purposes of this Article, MNCs are defined as large corporations that have business operations in one or more countries apart from the country of their incorporation either directly or through subsidiaries and affiliates.

For decades, MNCs, as well as state-run oil corporations, have dominated world oil development.¹⁴² Almost since the inception of commercial oil production in 1859 in Pennsylvania,¹⁴³ through the period after the two World Wars, and even up to present times, the overarching role of MNCs in this area has been an ever-present feature.¹⁴⁴

tory chapter and chapter 4.

¹³⁸ For a variety of definitions of the terms MNC, TNC and MNE, see David Weissbrodt & Muria Kruger, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises With Regard to Human Rights*, 97 AM. J. INT'L L. 901, 907-09 (2003).

¹³⁹ PETER MUCHLINSKI, *MULTINATIONAL ENTERPRISES AND THE LAW* 12 (1995).

¹⁴⁰ PHILLIP I. BLUMBERG, *THE MULTINATIONAL CHALLENGE TO CORPORATION LAW: THE SEARCH FOR A NEW CORPORATE PERSONALITY* vii (1993).

¹⁴¹ See WILLIAM MEADE FLETCHER ET AL., *FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS* § 8296.10 (perm ed., rev. vol. 2002); see also Alejo Jose G. Sison, *When Multinational Corporations Act as Governments: The Mobil Corporation Experience*, in *PERSPECTIVES ON CORPORATE CITIZENSHIP* 166, 166 (Jorg Andriof & Malcolm McIntosh eds., 2001) (“Strangely, there is no agreed definition for a ‘multinational corporation.’”).

¹⁴² MICHELLE LEIGHTON ET AL., *BEYOND GOOD DEEDS: CASE STUDIES AND A NEW POLICY AGENDA FOR CORPORATE ACCOUNTABILITY* 26-27 (2002), available at <http://www.n-h-i.org/Publications/Publications.html>.

¹⁴³ The origin of the petroleum industry is generally associated with Colonel E. Drake’s discovery of petroleum in Titusville, Pennsylvania in 1859. Zhiguo Gao, *Public Participation in Mining and Petroleum in Asia and the Pacific: The Ok Tedi Case and its Implications*, in *HUMAN RIGHTS IN NATURAL RESOURCE DEVELOPMENT: PUBLIC PARTICIPATION IN THE SUSTAINABLE DEVELOPMENT OF MINING AND ENERGY RESOURCES* 679, 679 n.1 (Donald N. Zillman et al. eds., 2002).

¹⁴⁴ See LEIGHTON ET AL., *supra* note 142, at 27-28 (detailing the power of Standard Oil before its dissolution in 1911, the strategic partnerships negotiated by the governments of France, the United Kingdom, and the United States to gain access to Middle East oil reserves, the post-World War II dominance of the “Seven Sisters” (Exxon, Mobil, Standard Oil of California, Texaco, Gulf, British Petroleum, and Royal Dutch/Shell), the formation of OPEC, and the emergence of smaller and independent oil companies operating in different parts of the world).

MNCs are key actors and players of consequence in the international field today, and it would be impossible to speak of international trade and investment without them.¹⁴⁵ MNCs in the oil and gas sector particularly stand out. According to the United Nations Conference on Trade and Development ("UNCTAD") in its World Investment Report 2002, ExxonMobil (the world's largest oil company), Royal Dutch/Shell, BP, ChevronTexaco, and TotalFina Elf are among the world's top twenty-five MNCs in terms of foreign assets.¹⁴⁶

While this species of corporate entities has been experiencing a steady growth in size, power, and influence,¹⁴⁷ its phenomenal growth¹⁴⁸ has come with immense social, environmental, and economic costs to humanity. Thus, while due credit is given to the positive contributions of MNCs in such areas as job creation¹⁴⁹ and new technologies,¹⁵⁰ there has been growing concern regarding the

¹⁴⁵ *Id.* at 2-3.

¹⁴⁶ Actually, the oil corporations mentioned above fall within the top twenty. UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, WORLD INVESTMENT REPORT 2002: TRANSNATIONAL CORPORATIONS AND EXPORT COMPETITIVENESS [hereinafter UNCTAD Report], at 86 tbl IV.1, available at http://www.unctad.org/en/docs/wir2002_en.pdf (last visited Feb. 4, 2005).

¹⁴⁷ LEIGHTON, *supra* note 142 at 3; see also Shira Pridan-Frank, *Human-Genomics: A Challenge to the Rules of the Game of International Law*, 40 COLUM. J. TRANSNAT'L L. 619, 661 (2002) ("In recent decades, the power and influence of private commercial companies have grown, in light of the expansion of international trade and globalization.").

¹⁴⁸ In 2002, there were about 65,000 multinational corporations, and they had up to 850,000 foreign affiliates around the world. UNCTAD Report, *supra* note 146, at 14. While in 1990, foreign affiliates accounted for about twenty-four million employees, that number rose dramatically to fifty-four million in 2001. *Id.* at 4 tbl. I.1. They also recorded sales amounting to \$19 trillion which was more than twice as high as world exports in 2001; in 1990, both were roughly equal. *Id.* Further, over the same period, the stock of outward foreign direct investment increased from \$1.7 trillion to \$6.6 trillion. *Id.* Foreign affiliates of MNCs currently account for one-tenth of world GDP and one-third of world exports. *Id.* at 14.

¹⁴⁹ Job creation internationally has added to the power and influence of MNCs. See Scott Greathead, *The Multinational and the "New Stakeholder": Examining the Business Case for Human Rights*, 35 VAND. J. TRANSNAT'L L. 719, 722 (2002) (arguing that the government of China is more likely to give greater attention and regard to the opinion of the CEOs of multinational corporations who have tens of thousands of Chinese workers in their employ, than the views of the President of the United States from whom they may not expect much both politically and practically).

¹⁵⁰ See Thomas Donaldson, *Can Multinationals Stage a Universal Morality Play?* 81 BUS. & SOC'Y REV. 51, 52 (1992) ("Third World representatives increasingly acknowledge the role multinationals play as a conduit of technological know-how to host cultures, and most have adopted a pro-multinational position . . .").

negative impact of economic globalization.

The major oil corporations operate in African countries and a number of them have been implicated in or associated with human rights violations,¹⁵¹ environmental pollution and degradation,¹⁵² escalation of poverty conditions,¹⁵³ and an increase in social vices in their host communities.¹⁵⁴ MNCs have also been accused of adopting a philosophy and attitude with the African governments with which they do business that favors detachment from the way states manage resources and corruption. According to the President of Sao Tome, Fradique de Menezes, this is a significant contributor to the malaise that pervades these countries.¹⁵⁵

¹⁵¹ See, e.g., HUMAN RIGHTS AND THE OIL INDUSTRY (Asbjørn Eide et al. eds., 2000) (describing the role and policies of transnational corporations with respect to human rights); see also Terry Collingsworth, *The Key Human Rights Challenge: Developing Enforcement Mechanisms*, 15 HARV. HUM. RTS. J. 183 (2002) (describing mechanisms to enforce violations of the law of nations).

¹⁵² See *The Social and Economic Rights Action Center for Economic and Social Rights v. Nigeria*, Comm. No. 155/96, African Commission on Human and Peoples' Rights, Annual Activity Report, Annex V (2001) (detailing how the operations of oil corporations have caused environmental degradation and health problems), available at <http://www1.umn.edu/humanrts/africa/comcases/155-966.html>. For an example outside the African continent, see JUDITH KIMERLING ET AL., *AMAZON CRUDE* (Susan S. Henriksen ed., 1991).

¹⁵³ See EMEKA DURUIGBO, *OIL DEVELOPMENT IN NIGERIA: A CRITICAL INVESTIGATION OF CHEVRON CORPORATION'S PERFORMANCE IN THE NIGER RIVER DELTA* (2001) (discussing Chevron's record of accountability within Nigeria's oil development), available at http://www.n-h-i.org/Publications/Pubs_pdf/Nigeria_CorpAccount.pdf.

¹⁵⁴ Such vices include prostitution and criminal activities by youths who can not find gainful employment. See HENRY CLARK ET AL., *OIL FOR NOTHING: MULTINATIONAL CORPORATIONS, ENVIRONMENTAL DESTRUCTION, DEATH AND IMPUNITY IN THE NIGER DELTA* (2000) (summarizing the terrible record of environmental destruction and human rights violations in the oil-producing regions of Nigeria), available at <http://www.essentialaction.org/shell/report>.

¹⁵⁵ Fradique de Menezes, *Oiling the Desire for Sao Tome Unity*, AFRICA ANALYSIS, Dec. 2003, at 19.

Oil development . . . cannot be a one-way street, paved with 'take the money and run' asphalt. I know that many petroleum companies say that they are not responsible for the well-being of the countries in which they operate and all-but one--refuse to publish what they pay. Another multinational mantra is that oil companies are not responsible for how the money they pay is used. If a country's ruler asks them to deposit money in a Swiss bank account they do as they are told. If they are aware that their payments are being misused they nod and wink and turn away while blaming it all on 'those foolish and corrupt Africans.' But in order for someone to be corrupt, there must be a corrupter. Corruption also thrives in secrecy. But it withers when exposed to the scrutiny of the public and careful professional oversight.

4.3. Growing Interest?

Both the World Bank and multinational oil corporations operating in Africa have begun to pay more attention to the resource curse, if not in practice, at least in rhetoric. In its first Corporate Responsibility Report released in 2003, ChevronTexaco stated:

Some countries and regions have been described as suffering from the so-called "resource curse," a term economists use to describe locations with abundant natural resources that are prone to perform worse on economic and social development indicators than more resource-poor countries. ChevronTexaco is concerned about this issue. In our view, addressing fundamental issues related to poverty and health is a critical stepping stone to being able to help find solutions to the range of other complex social, economic and environmental issues where we operate.¹⁵⁶

The World Bank has noted in relation to the resource curse or paradox of plenty¹⁵⁷:

Unfortunately, in certain cases, neither investment nor oil revenues have been able to guarantee economic growth or poverty reduction. Thus, the presence of major oil and gas industries has been associated with a variety of negative social and environmental outcomes. The so-called "Paradox of Plenty," where resource development fails to generate the sustainable benefits expected, is one of the most urgent challenges [at the local and national levels].¹⁵⁸

Id.

¹⁵⁶ CHEVRONTEXACO, 2002 CHEVRONTEXACO CORPORATE RESPONSIBILITY REPORT 9, available at http://www.chevrontexaco.com/cr_report/2002/docs/complete_report.pdf (last visited Feb. 20, 2005).

¹⁵⁷ The terms "resource curse" and "paradox of plenty" are sometimes used interchangeably. See Scott Pegg, *Globalization and Natural-Resource Conflicts*, 56 NAVAL WAR C. REV. 82 (describing the paradox of plenty), available at <http://www.nwc.navy.mil/press/Review/2003/Autumn/pdfs/art5-a03.pdf> (last visited Feb. 21, 2005).

¹⁵⁸ WORLD BANK GROUP, OIL AND GAS SECTOR ISSUES AND POLICY: SOCIAL AND ECONOMIC IMPACT, available at <http://www2.ifc.org/ogmc/wbogpolicysocioeconomic.htm> (last visited Feb. 4, 2005).

This phenomenon is again given clear recognition in the World Bank's World Development Report for 2003. The Bank appears to have adopted the view, long resisted by some economists, that natural resource abundance has a considerably negative effect on the development of vital state institutions.¹⁵⁹

In recent times, the Bank and oil MNCs have stepped in to play a more active role in stemming the tide of the resource curse.¹⁶⁰ This new posture is clearly illustrated by their efforts in designing a revenue management plan (the "RMP") under the Chad-Cameroon Oil Pipeline Project and some support for efforts to improve transparency and accountability through information disclosure. Indeed, oil trust funds and information disclosure (prominent examples of which are the EITI and the PWYP Campaign) are attracting a great deal of attention as useful tools for addressing the resource curse in Africa. The next Section discusses these mechanisms.

5. ADDRESSING THE RESOURCE CURSE: NATIONAL TRUST FUNDS AND INFORMATION DISCLOSURE

The primary thesis presented in this work is that although African oil producers manifest the symptoms of the resource curse, oil is not necessarily a curse to Africans or any group of people. Instead, the major curse bedeviling African oil exporters is the curse of leadership. A successive crop of self-centered leaders, through corruption and ineptitude, has misgoverned the continent,

¹⁵⁹ The report directly looks at the resource curse phenomenon:

[T]he question of whether oil and minerals hinder the emergence of democratic institutions has been tested empirically and found to hold for a panel of 113 countries between 1971 and 1997 Data on real per capita GDP show that developing countries with few natural resources grew 2-3 times faster between 1960 and 1990 than natural resource-abundant countries Where norms and rules are weak, greater endowments of natural resources lead to worse economic performance in the long run, compared with countries that have smaller resource endowments. Existing institutions are eroded, and the emergence of new institutions is hampered.

WORLD BANK, WORLD DEVELOPMENT REPORT 2003, at 149-50 (2003), available at http://econ.worldbank.org/files/17957_WDR_2003_chp_7_web.pdf; see also GARY & KARL, *supra* note 96 at 18 (discussing how countries that are dependent on oil exports are over time the most economically troubled, the most authoritarian, and the most conflict-prone states in the world).

¹⁶⁰ See ROSS, *supra* note 25, at 17 ("To their credit, the World Bank Group, and a set of international mining firms, have begun to look for ways to reduce the social and environmental costs of oil and mineral projects in developing states.").

mismanaged resources, and not made any serious efforts to set the right policies or introduce the type of structures that are pivotal to ensuring the proper utilization of these natural resource endowments.¹⁶¹ Even economists have come to appreciate the role of government policy as an intervening variable. From their collection of empirical studies, Peter Neary and Sweder van Wijnbergen came to the important conclusion that "a country's economic performance following a resource boom depends to a considerable extent on the policies followed by its government,"¹⁶² noting that "even small economies have considerable influence over their own economic performance."¹⁶³

Thus, despite some strong arguments to the contrary,¹⁶⁴ there is hardly anything deterministic about where these oil-exporting countries have ended. Rather, agency may have played a leading role.¹⁶⁵

The central argument here is that oil and other resources are not the problem; a lot depends on the use to which they have been put.¹⁶⁶ One example that substantiates this point is the role of resources in civil wars and conflicts. Civil wars and conflicts have been viewed as a component of the resource curse, alongside poor economic growth and authoritarianism.¹⁶⁷ A closer examination suggests that resources have played both good and bad roles in this arena, showing that the problem is not necessarily with the resources.¹⁶⁸ What human beings do with their natural endowments

¹⁶¹ In Botswana, which has not only been blessed with stellar leadership, but where these leaders have adopted the right approach and policies toward resource management, there is a stark contrast to the woeful results in other resource-rich African countries. See SAVE THE CHILDREN, *supra* note 30, at 8 (praising Botswana's approach to its mineral resources).

¹⁶² NATURAL RESOURCES AND THE MACROECONOMY 11 (J. Peter Neary & Sweder van Wijnbergen eds., 1986), *cited in* Ross, *supra* note 44, at 307.

¹⁶³ *Id.*

¹⁶⁴ See Smith, *supra* note 37, at 243 (stating that a major deficiency of scholarship in this area is that scholars have conceptualized oil "as a structural variable willfully exerting its own effects" while "underplay[ing] the importance of agency and timing").

¹⁶⁵ See *id.* ("[R]egimes may well have avoided the substitution of oil for statecraft . . .").

¹⁶⁶ See Ross, *supra* note 36, at 357 ("There is nothing inevitable about the resource curse: states like Malaysia, Chile, and Botswana have done relatively well despite their oil and mineral wealth.").

¹⁶⁷ *Id.* at 328.

¹⁶⁸ See Michael Ross, How Do Natural Resources Influence Civil War? Evidence from 13 Cases (June 11, 2003) (unpublished manuscript, on file with the

accounts for much of the outcome. Thus, efforts need to be concentrated on devising ways of using these resources for good, not evil. Two prominent arrangements along those lines are oil trusts and information disclosure.

5.1. National Trust Funds

5.1.1. The Concept of Trust Funds¹⁶⁹

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 (beneficiary or beneficiaries).¹⁷⁰ Oil trust funds are institutions in which the trust assets consist of oil revenues placed under the control of a board of trustees for the benefit of members of an oil-producing area.¹⁷¹

The genesis of the trust institution in Anglo-American law is still the subject of intense disputation.¹⁷² While some accounts

Department of Political Science, University of California, Los Angeles) (discussing different arguments on how resources could play a role in the onset, duration, and intensity of civil wars and conflicts and also presenting converse arguments).

¹⁶⁹ See generally Emeka Duruigbo, *Managing Oil Revenues for Socio-Economic Development in Nigeria: The Case for Community-Based Trust Funds*, 30 N.C. J. INT'L L. & COM. REG. 121, 168 (2004).

¹⁷⁰ Marianne Guerin-McManus, *Conservation Trust Funds*, 20 UCLA J. ENVTL. L. & POL'Y 1, 2 (2001). Keeton provides the classic definition of a trust as follows:

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 beneficiaries) or for some object permitted by law, in such a way that the real benefit of the property accrues, not to the trustees, but to the beneficiaries or other objects of the trust.

L. A. SHERIDAN & GEORGE W. KEETON, *THE LAW OF TRUSTS* 2 (11th ed. 1983); see also DAVID J. HAYTON, UNDERHILL AND HAYTON: *LAW RELATING TO TRUSTS AND TRUSTEES* 3 (15th ed. 1995) ("A trust is an equitable obligation binding a [trustee] to deal with property over which he has control . . . for the benefit of [beneficiaries] . . .").

¹⁷¹ See Barry Spergel, *Trust Funds in Common Law Countries*, in INTERAGENCY PLANNING GROUP ON ENVIRONMENTAL FUNDS: *THE IPG HANDBOOK ON ENVIRONMENTAL FUNDS* 25 (2000) (defining a trust fund as "a legal structure by which money or other property is held, invested, and spent by a board of trustees or board of directors exclusively for a specific charitable purpose, as defined in a charter or deed of trust"), available at http://www.geocities.com/shores_system/ef/ef_handbook.html. See generally Duruigbo, *supra* note 169, at 169.

¹⁷² Spergel, *supra* note 171, at 26. It should be emphasized that the trust institution is not the exclusive preserve of Western and Islamic legal systems. In cen-

trace the origin to the English *use* or Middle Eastern/Islamic Law's *waqf*, others locate it in Roman *fideicommissum*.¹⁷³ Some scholars have also propounded the Germanic theory arguing that the trust owes its origins to the Salic *salmannus*.¹⁷⁴ 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.¹⁷⁵

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*. The use of the trust institution as a vehicle for property management is a practice that has seen better days. It may also be emphasized, however, that the mismanagement of resources is not a necessary condition for establishing a trust.¹⁷⁶ A trust fund can be utilized to accomplish an assortment

turies past, up until modern times, African societies have been able to devise trust-like institutions to address particular needs such as the management of family or communal property. In *Amodu Tijani v. Secretary of Southern Nigeria*, Viscount Haldane stated:

[T]he 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 as such holds the land for the use of the community or family.

2 A.C. 399, 404 (1921). See also W.C. Ekow Daniels, *Some Principles of the Law of Trusts in West Africa*, 6 J. AFR. L. 164 (1962) (discussing the existence of trusts or trust-like institutions in Nigeria, Ghana, and Sierra Leone). See generally Duruigbo, *supra* note 169, at 169, 171.

¹⁷³ Avisheh Avini, Comment, *The Origins of the Modern English Trust Revisited*, 70 TUL. L. REV. 1139, 1148 (1996).

¹⁷⁴ Monica M. Gaudiosi, Comment, *The Influence of the Islamic Law of Waqf on the Development of the Trust in England: The Case of Merton College*, 136 U. PA. L. REV. 1231, 1242-43 (1988).

¹⁷⁵ Guerin-McManus, *supra* note 170, at 5; Duruigbo, *supra* note 169, at 169.

¹⁷⁶ See *Tito v. Waddell* (No. 2), 3 All E.R. 129 (Ch. 1977) (Eng.) (involving 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 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) (describing the International Monetary Fund's effect on international trust law as a trustee of the Trust Fund of the International Monetary Fund).

of purposes such as natural resource conservation,¹⁷⁷ environmental protection,¹⁷⁸ and community development.¹⁷⁹

The notion of trusts is emerging as an important part of petroleum policy discourse.¹⁸⁰ Some scholars see institutions 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.¹⁸¹ 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 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

¹⁷⁷ Guerin-McManus, *supra* note 170.

¹⁷⁸ Peter H. Sand, *Trusts for the Earth: New International Financial Mechanisms for Sustainable Development*, in *SUSTAINABLE DEVELOPMENT AND INTERNATIONAL LAW* 167 (Winfried Lang ed., 1995).

¹⁷⁹ Kyle W. Danish, *International Environmental Law and the "Bottom-Up" Approach: A Review of the Desertification Convention*, 3 *IND. J. GLOBAL LEGAL STUD.* 133, 169 n.162 (1995). See generally Duruigbo, *supra* note 169, at 170-71.

¹⁸⁰ See Duruigbo, *supra* note 169, at 169-70 (stating that "[I]ately, trust funds have been attracting attention in academic and policy circles as pragmatic tools for addressing the unfortunate predicament generally manifesting in entities blessed with natural resources, especially oil.")

¹⁸¹ Stephen D. Krasner, *Troubled Societies, Outlaw States, and Gradations of Sovereignty* 41 (July 20, 2002) (unpublished manuscript, on file with author).

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.¹⁸²

The above proposal bears close resemblance to the arrangement devised by international financial and corporate oil interests in collaboration with the governments of Chad and Cameroon to manage and monitor Chad's oil revenues.¹⁸³ The RMP established under the Chad-Cameroon Pipeline Project is discussed in the following part.

5.1.2. *Chad Revenue Management Plan*

5.1.2.1. *Chad-Cameroon Oil Pipeline Project*

Oil was first discovered in Chad in the 1970s by a consortium of oil corporations that included Chevron, Conoco, Exxon, and Royal Dutch/Shell,¹⁸⁴ 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 reignited interest in Chad's oil. The consortium conducted studies on the feasibility of developing the oil and transporting it via Cameroon.¹⁸⁵ 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 forty percent for Exxon, thirty-five percent

¹⁸² *Id.*

¹⁸³ See also SAVE THE CHILDREN, *supra* note 30, at 11 (describing the Chad Oil Pipeline Project's revenue management arrangement as an oil trust fund).

¹⁸⁴ Benjamin C. Esty, *The Chad-Cameroon Petroleum Development and Pipeline Project (A)*, Harvard Business School, Case Study No. 9-202-010 (Jan. 16, 2003), at 1.

¹⁸⁵ *Id.*

for Petronas, and twenty-five percent for Chevron.¹⁸⁶

The \$3.7 billion Chad-Cameroon pipeline project is the biggest private sector investment in Africa. One and one-half billion dollars 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 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. ExxonMobil 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 nongovernmental 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.¹⁸⁷ According to the World 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."¹⁸⁸ The World Bank did not seem to have any illusions about the landmines that it would have to 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 World Bank expressed the belief that challenges such as this are of

¹⁸⁶ *Id.* at 1-2.

¹⁸⁷ *Id.* at 6.

¹⁸⁸ *See id.* at 6 (quoting Letter from James D. Wolfensohn, to Honorable James P. McGovern, U.S. House of Representatives (June 28, 1999)).

the type that are incumbent on and required of a development institution of the caliber of the World Bank.¹⁸⁹

The Chad-Cameroon Oil Pipeline Project, especially from the time of the invitation to the World Bank, was mired in controversy. Public interest groups, among others, complained about the human rights-abusing government of Chad, the potential impact of the project on the environment,¹⁹⁰ and the displacement of indigenous peoples.¹⁹¹ The World Bank sought to address these concerns and, as a condition for its participation, insisted on a RMP that would ensure that the proceeds of oil development were used for socioeconomic development. The environmental and other aspects of the project are outside the scope of this work.¹⁹² The focus here is on the RMP and its potential 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.

5.1.2.2. *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

¹⁸⁹ *Id.*

¹⁹⁰ ENVIRONMENTAL DEFENSE FUND, THE CHAD-CAMEROON OIL AND PIPELINE PROJECT: PUTTING PEOPLE AND THE ENVIRONMENT AT RISK (Sept. 1999), available at http://www.environmentaldefense.org/documents/728_ChadCameroon_pipeline.pdf.

[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. *Esty, supra* note 184, at 9.

¹⁹¹ See Norimitsu Onishi, *Pygmies Wonder if Oil Pipeline Will Ease Their Poverty*, N.Y. TIMES, July 10, 2000, at A3 (noting that public interest groups are working to ensure Pygmies are compensated for the impact of an oil pipeline to be built through the Central African rain forest).

¹⁹² For more on the environmental implications and criticisms, see LIABILITY FOR ENVIRONMENTAL DAMAGE AND THE WORLD BANK'S CHAD-CAMEROON OIL AND PIPELINE PROJECT (Serger A. Bronkhorst ed., 2000).

revenues.”¹⁹³ This approach to utilizing oil revenues will be under the RMP.

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.¹⁹⁴ 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.¹⁹⁵

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 sixteen percent 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 percent of the money will be kept in international financial institutions as a fund for future generations. Eighty-five percent of the remaining ninety percent will be deposited in local commercial banks and is dedicated to the financing of programs in five important sectors namely, education, health and social ser-

¹⁹³ GARY & KARL, *supra* note 96, at 60.

¹⁹⁴ See Esty, *supra* note 184, at 8 (detailing the elements of the RMP).

¹⁹⁵ *Id.*

VICES, rural development, infrastructure, and environment and water resources. The remaining fifteen percent 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 nine 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 (a nongovernmental organization ("NGO") and a 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.¹⁹⁶ The World Bank Inspection Panel also represents a level of oversight for the whole project.¹⁹⁷

The Chadian government passed a law in December 1998 incorporating the principal elements of the RMP, including procedures for audit and provisions relating to the establishment of an oversight committee, the Oil Revenues Control and Monitoring Board (Revenue Management College).¹⁹⁸ It is still too early to say how this management plan will turn out. Chad only started selling

¹⁹⁶ INT'L ADVISORY GROUP FOR THE CHAD-CAMEROON PETROLEUM DEV. AND PIPELINE PROJECT ("IAG"), WORK PLAN OF THE INTERNATIONAL ADVISORY GROUP 7-8 (July 30, 2001), at http://www.worldbank.org/afr/ccproj/project/iag_wp_july302001.pdf.

¹⁹⁷ See 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) (describing a report on the Chad-Cameroon Project issued by the panel).

¹⁹⁸ See WORLD BANK, PROJECT APPRAISAL DOCUMENT: CHAD-CAMEROON PETROLEUM DEVELOPMENT AND PIPELINE PROJECT 101-04 (Apr. 13, 2000) (providing a translation of Chad's law on oil revenue management), available at http://www-wds.worldbank.org/servlet/WDS_IBank_Servlet?pcont=details&eid=000094946_00102111244720.

oil in October 2003.¹⁹⁹ In November 2003, the sum of \$6.5 million, 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.²⁰⁰

Arrangements such as this have the basic ingredients to 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.²⁰¹

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. 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 RMP and the law that was essentially imposed on the Chadian authorities is, at best, a first step in that direction.²⁰²

According to a report authored by Luc Lampiere and others at Harvard Law School's Human Rights Program, the law "repre-

¹⁹⁹ See, e.g., Emily Wax, *Oil Wealth Trickles Into Chad, but Little Trickles Down*, WASH. POST, Mar. 13, 2004, at A16 (reporting on the first few months of oil sales); see also *Oil Pipeline Opens for Business*, 17 AFR. RECOVERY 24 (2003) (describing the fiscal aspects of the oil pipeline).

²⁰⁰ Wax, *supra* note 199, at A16.

²⁰¹ Krasner, *supra* note 181, at 41.

²⁰² ENVTL. DEF. FUND, *supra* note 190, at 5.

sents 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.²⁰³ The absence of a clear distribution formula among the designated priority sectors could also present problems because revenues are disproportionately allocated to one sector to the disadvantage of others.²⁰⁴ It could be counterargued, 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.²⁰⁵

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.²⁰⁶ They point to the fact that the government spent four million dollars out of a twenty-five million dollar signature bonus on arms purchases.²⁰⁷ 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 RMP in this instance, this situation was 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.²⁰⁸

Another aspect of the RMP that has invited criticism is the

²⁰³ 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.

²⁰⁴ 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) (relating the details of the Revenue Management Law).

²⁰⁵ *Id.*

²⁰⁶ GARY & KARL, *supra* note 96, at 68.

²⁰⁷ *Id.* The Chadian government's 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) (noting the earlier failure of the World Bank to monitor Chad's oil expenditures).

²⁰⁸ *Id.* at 69.

Monitoring Committee. The mandate of the Committee looks murky.²⁰⁹ 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.²¹⁰ 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.²¹¹ 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.

The RMP is also assailed for not providing for stabilization or sterilization funds to serve as a buffer against oil shocks and control the influx of money in such excessive amounts as to lead to inflation and the Dutch Disease.²¹² This is particularly important because Chad will be receiving money far in excess of the fifteen dollar per barrel projections as oil prices have skyrocketed, hitting almost the forty dollar per barrel mark in March 2004 and over fifty dollars later that year.²¹³

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.²¹⁴ A counterargument 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

²⁰⁹ *Id.* at 70.

²¹⁰ Lampriere, *supra* note 203.

²¹¹ GARY & KARL, *supra* note 96, at 72 (discussing Chad's removal of Amine Ben Bark from his post on the Bank for Central African States, which caused him to lose his post as the president of the Revenue Oversight Committee).

²¹² *Id.*

²¹³ See Mark Niquette et al., *Gasoline 101: A Primer on High Prices*, COLUMBUS DISPATCH, Mar. 28, 2004, at 1H ("The price of oil per barrel has risen from \$30 in November to \$38 in recent days.").

²¹⁴ GARY & KARL, *supra* note 96, at 70.

him to run for a third term in office.²¹⁵ 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 RMP 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 macroeconomic policies.²¹⁶

It is instructive to note that none of the criticisms seem to suggest that it is not a 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.

5.2. Information Disclosure

5.2.1. The Concept of Information Disclosure

Over the years, the disclosure of information has been viewed as a veritable means of accomplishing certain policy goals.²¹⁷ Laws requiring the dissemination and availability of information have been used to promote public health, environmental protection, and similar issues.²¹⁸

Information disclosure is particularly attractive where there is a strong resistance to regulation or where the political will to do so is non-existent. Because information disclosure may be able to achieve the same goals as command and control regulation, it is sometimes considered a form of regulation.²¹⁹ This fact has not won it the endearment of those opposed to regulation. On the

²¹⁵ Wax, *supra* note 199, at A16.

²¹⁶ See GARY & KARL, *supra* note 96, at 70 (“[A]s the World Bank’s Inspection Panel noted, the successful ‘translation of oil revenues into equitable, effective economic development and poverty reduction extends well beyond budget allocations and the auditing and control of public expenditure.’ It also requires effective democratic institutions.” (footnote omitted)).

²¹⁷ See JAMES SALZMAN & BARTON H. THOMPSON, JR., ENVIRONMENTAL LAW AND POLICY 46 (2003) (“[P]articularly in the case of pollution, requirements to collect and disseminate information have led to significant change in the behavior of regulated parties, even in the absence of overt prescriptive regulation.”).

²¹⁸ See generally, JOHN D. ECHEVERRIA & JULIE B. KAPLAN, POISONOUS PROCEDURAL “REFORM”: IN DEFENSE OF ENVIRONMENTAL RIGHT TO KNOW (2002), available at <http://www.law.georgetown.edu/gelpi/papers/poisonpaper.pdf>.

²¹⁹ See, e.g., William M. Sage, *Regulating Through Information: Disclosure Laws and American Health Care*, 99 COLUM. L. REV. 1701 (1999) (suggesting disclosure as a means of regulation).

other hand, it enjoys strong approbation from the pro-regulation camp, which sees it as a less cumbersome means to an identified end.

Information disclosure as a policy tool has been utilized at both domestic and international levels. Companies and governments have been required to report on their emissions,²²⁰ discharges into the oceans or compliance with international regulations,²²¹ and the composition of their products with particular emphasis on toxicity.²²² At the moment, there is an ongoing right-to-know campaign to change California law and require corporations doing business abroad to report on their health, labor, safety, and environmental practices.²²³ A similar drive has been embarked upon to draft an international treaty along those lines.²²⁴

A general benefit of information disclosure is the promotion of transparency and accountability. Proceeding on the dictum that "sunshine is a disinfectant"²²⁵ it ensures that nefarious practices done in the dark are exposed, thereby discouraging such conduct and equipping or empowering the society to react in a manner that it deems appropriate.

Information disclosure is also viewed from the entitlement perspective by which it is seen as the right of the people to know or have access to information about matters that pertain to them. In essence, proponents believe that there is a right to information at

²²⁰ ECHEVERRIA & KAPLAN, *supra* note 218, at 3-4.

²²¹ See Emeka Duruigbo, *International Relations, Economics and Compliance with International Law: Harnessing Common Resources to Protect the Environment and Solve Global Problems*, 31 CAL. W. INT'L L.J. 177 (2001) (examining the international relations theory in relation to "ship-source oil pollution control" and discussing the economic effect of treaty implementation).

²²² See Clifford Rechtschaffen, *How to Reduce Lead Exposures with One Simple Statute: The Experience of Proposition 65*, 29 ENVTL. L. REP. 10581 (1999) (discussing California's Proposition 65, which has been successful in reducing public exposure to lead).

²²³ See California Right to Know Project, at <http://www.crtkcalifornia.org> (last visited Feb. 25, 2005).

²²⁴ See EarthRights Int'l, International Right to Know Campaign, at <http://www.earthrights.org/irtk.index.shtml> (last visited Feb. 25, 2005).

²²⁵ LOUIS D. BRANDEIS, *OTHER PEOPLE'S MONEY* 92 (1914) ("Sunshine is said to be the best of disinfectants; electric light the most efficient policeman."). See also Mary Graham, *Is Sunshine the Best Disinfectant? The Promise and Problems of Environmental Disclosure*, BROOKINGS REV., Spring 2002, at 18 (exploring applicability of Louis D. Brandeis's statement that "[p]ublicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants" (alteration in original)).

the domestic²²⁶ and international levels.²²⁷ This right is independent of whether people benefit from the notion of information disclosure or not. It is against the backdrop of these major benefits and this reasoning that information disclosure initiatives have recently emerged to confront the problems of oil development.

5.2.2. *Extractive Industries Transparency Initiative and Publish What You Pay Campaign*

At the World Summit on Sustainable Development in Johannesburg in September 2002, the Prime Minister of the United Kingdom, Tony Blair, announced the EITI. The objective is the increase of transparency at two levels: corporate and governmental. Thus, it seeks to enhance transparency of payments made by companies to governments and government-linked entities and of revenues accruing to the host country governments.²²⁸ The EITI anchors the justification for this initiative on the inability of mineral wealth over the years to bring benefits to people in the mineral-producing countries:

Revenues from oil, gas and mining companies, in the form of taxes, royalties, signature bonuses and other payments should be an important engine for economic growth and social development in developing and transition countries. However, the lack of accountability and transparency in these revenues can exacerbate poor governance and lead to corruption, conflict and poverty.²²⁹

The EITI therefore seeks to replace the "lose-lose" situation that is currently the case in which the various stakeholders are disadvantaged in one form or another with a mutually beneficial arrangement for all concerned. Ordinary citizens are being deprived of the gains of their patrimony and MNCs are (sometimes undeservedly) accused of being complicit with corruption and thus

²²⁶ See Clifford Rechtschaffen, *The Warning Game: Evaluating Warnings Under California's Proposition 65*, 23 *ECOLOGY L.Q.* 303, 319 (1996) ("The statutory preamble likewise declares the people's right 'to be informed'").

²²⁷ Ganesan, *supra* note 7, at 60.

²²⁸ DEP'T FOR INT'L DEV. (UNITED KINGDOM), *EXTRACTIVE INDUSTRIES TRANSPARENCY INITIATIVE* [hereinafter EITI], at <http://www.dfid.gov.uk/pubs/files/eiticorescript.pdf> (last visited Feb. 25, 2005).

²²⁹ *Id.*

hurting their investment standing and public image, while governments are sometimes shortchanged by MNCs. Moreover, taxpayers in the North are left with little or no option but to contribute aid to these countries even though their problems are caused by their leaders' mismanagement of resources. The international community also loses because these oil-producing states' problems could disrupt the world energy supply.²³⁰

The EITI could help in ensuring that citizens are empowered to demand accountability from their governments and thus benefit more from their natural resources, as governments constrained by the disclosure of their revenues become more responsible. The improved climate would also be valuable in attracting additional investments from which governments would benefit. The EITI is also set to favor "responsible [oil] companies" who will have the benefit of "a more level playing field, a more predictable business environment, and better prospects for energy security."²³¹ The decision to concentrate the initiative on the extractive sectors was based on the understanding that "there is a close correlation between the countries rich in natural resources and the countries with high levels of poverty."²³²

The EITI is a voluntary initiative and this has been a source of criticism.²³³ While voluntary or non-binding and unenforceable arrangements have their merits, they are also riddled with inadequacies.²³⁴ Advantages of voluntary mechanisms include greater chances of eliciting support²³⁵ and better prospects for real compliance with rules that flows from an internalization of the same.²³⁶

²³⁰ See GLOBAL WITNESS, GLOBAL WITNESS STATEMENT TO THE EXTRACTIVE INDUSTRIES TRANSPARENCY INITIATIVE 1, available at <http://www.globalwitness.org/reports/download.php/00101.pdf> (summarizing problems with the status quo) (last visited Feb. 25, 2005).

²³¹ EITI, *supra* note 228, at 1.

²³² *Id.*

²³³ See GLOBAL WITNESS, *supra* note 230, at 1 (expressing concern that "the voluntary approach explicitly proposed by the EITI will not work in those countries where it is most needed").

²³⁴ For an extensive discussion of the limits and utilities of voluntary arrangements, see DURUIGBO, *supra* note 137, at 121-36 (reviewing the strengths and weaknesses of corporate codes of conduct).

²³⁵ See JOHN M. KLINE, INTERNATIONAL CODES AND MULTINATIONAL BUSINESS: SETTING GUIDELINES FOR INTERNATIONAL BUSINESS OPERATIONS 46 (1985) ("[For example,] acceptance of the voluntary mode [was] essential to secure participation in the [UNCTAD Code on Restrictive Business Practices] by most Western governments as well as the acquiescence of many corporations.").

²³⁶ For a discussion of the concept of internalization of norms, see Harold

Most importantly, voluntary arrangements can form the bedrock for future binding mechanisms or public initiatives at the domestic and international levels.²³⁷ On the other hand, disadvantages abound. For instance, they create opportunities for the thriving of a free rider situation in which those who are not making the necessary efforts to reform their practices nevertheless share in the benefits provided by the progress made by their peers.²³⁸ Therefore the abundance of potential for excessive opportunism should call for binding mechanisms or institutions.²³⁹

The problem of a competitive disadvantage that flows from voluntary disclosure prompted TotalFinaElf to state that it would only disclose payments if other corporations did the same.²⁴⁰ Voluntary arrangements are also prone—some would say doomed—to ineffectiveness due to the absence of independent monitoring or enforcement mechanisms.²⁴¹ Nevertheless the EITI has attracted support from a broad range of entities including the World Bank Group,²⁴² the IMF,²⁴³ the government of Nigeria, and a host of non-

Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, at 2645-58 (1997) (reviewing ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* (1995) and THOMAS M. FRANCK, *FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS* (1995)). For further discussion, see also Oona A. Hathaway, *Do Human Rights Treaties Make A Difference?*, 111 YALE L.J. 1935, 1960-62 (2002) (discussing the role of the transnational legal process in encouraging compliance with human rights treaties even when compliance appears to be against a state's self-interest).

²³⁷ The history of regulation amply illustrates that voluntary initiatives have often preceded mandatory rules, especially when those non-binding initiatives could not live up to their billing, leading society to clamor for stricter regulations. Robert J. Liubicic, *Corporate Codes of Conduct and Product Labeling Schemes: The Limits and Possibilities of Promoting International Labor Rights Through Private Initiatives*, 30 LAW & POL'Y INT'L BUS. 111, 157 (1998); Lance Compa & Tashia Hinchliffe-Darricarrère, *Enforcing International Labor Rights Through Corporate Codes of Conduct*, 33 COLUM. J. TRANSNAT'L L. 663, 687 (1995); Steven R. Salbu, *True Codes Versus Voluntary Codes of Ethics in International Markets: Towards the Preservation of Colloquy in Emerging Global Communities*, 15 U. PA. J. INT'L BUS. L. 327, 353-69 (1994).

²³⁸ DURUIGBO, *supra* note 137, at 129-30.

²³⁹ See Jeffrey L. Dunoff & Joel P. Trachtman, *Economic Analysis of International Law*, 24 YALE J. INT'L L. 1, 41 (1999) ("Asset specificity . . . gives rise to potential opportunism. In turn, this gives rise to the need for binding mechanisms or institutions . . .").

²⁴⁰ GARY & KARL, *supra* note 96, at 96 n.55.

²⁴¹ See Laura Ho et al., *(Dis)Assembling Rights of Women Workers Along the Global Assembly Line: Human Rights and the Garment Industry*, 31 HARV. C.R.-C.L. L. REV. 383, 401-05 (1996) (detailing the three types of voluntary codes of conduct in the garment industry).

²⁴² Press Release, World Bank Group, WBG Endorses Extractive Industries Transparency Initiative (Dec. 9, 2003) [hereinafter WBG Endorses EITI], at

governmental organizations.²⁴⁴

The PWYP Campaign, launched in June 2002 by the international financier and philanthropist George Soros, the Open Society Institute, and the international NGO Global Witness, is similar to the EITI. One crucial difference between the EITI and the PWYP is that while the EITI is comfortable with disclosure of aggregate payments made by all the resource companies operating in a country to the government, the PWYP insists on disclosure of disaggregated payments.

Perhaps the most significant point of divergence is that the PWYP calls for mandatory disclosure of information. The PWYP believes that voluntary disclosure has not been effective because more responsible companies are afraid of being undercut by their less scrupulous competitors. As a matter of fact, when BP went ahead to disclose payments made to the Angolan government, it found itself in troubled waters with the government and its competitors. The PWYP campaign therefore urges the governments of the highly industrialized nations ("G7") to impose a requirement on MNCs to disclose what they pay to their host governments. Stock market regulators would be made to require resource companies to disclose such payments as a condition of being listed.²⁴⁵

One of the major problems faced by the mandatory disclosure requirements is the sanctity of contracts principle, a cardinal principle in Anglo-American jurisprudence and international business transactions.²⁴⁶ Moreover, it excludes corporations that are not

<http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:20143509~menuPK:34463~pagePK:64003015~piPK:64003012~theSitePK:4607,00.html>.

²⁴³ See Horst Kohler, Remarks at Conference for the Tenth Anniversary of the Introduction of the Tenge, Nov. 14, 2003 (transcript available through the Federal News Service) ("The IMF supports the U.K.-led Extractive Industries Transparency Initiative . . .").

²⁴⁴ The Nigerian government also supports the Publish What You Pay Campaign. See Press Release, Transparency International, Nigeria Takes the Lead on Oil Industry Revenue Transparency (Nov. 7, 2003) ("[President Obasanjo] stated his support for the principles of the NGO-led campaign Publish What You Pay . . ."), at http://www.transparency.org/pressreleases_archive/2003/2003.11.07.nigeria_oil_industry_revenue.html; see also HUMAN RIGHTS WATCH, THE WARRI CRISIS: FUELING VIOLENCE 21 (2003) ("In November 2003, President Obasanjo announced that the Nigerian government would publish budgets . . . in line with the international 'Publish What You Pay' campaign . . ."), at <http://www.hrw.org/reports/2003/nigeria1103/nigeria1103.pdf>.

²⁴⁵ Thomas I. Palley, *Publish What You Pay: Confronting Corruption and the Natural Resource Curse*, OPEN SOC'Y INST., July 1, 2003, at http://www.soros.org/initiatives/washington/articles_publications/articles/publishpay_20030304.

²⁴⁶ See Margarita T. B. Coale, *Stabilization Clauses in International Petroleum*

listed on the stock market (including large state-owned oil corporations), a feature that enables the excluded entities to evade the same obligations it assiduously seeks to impose. This lacuna is huge. Further, like many initiatives that are birthed in the developed world, requirements of information disclosure have not escaped accusations that they are laced with racial undertones or anchored in resistance to imperialism. Other measures, such as the EITI and trust funds, imposed by external bodies are also open to this criticism.

However, the major impediments to implementation of information disclosure and strong national trust funds are the absence of international corporate regulation and the concept of state sovereignty.

6. MAJOR IMPEDIMENTS TO IMPLEMENTING NATIONAL TRUST FUNDS AND INFORMATION DISCLOSURE

The importance of information disclosure can hardly be overstated. For MNCs, it could mean a reduction in exposure to business risks. Investing in troubled countries comes with a reputational disadvantage. Investors are beginning to worry that such bad association with a company's name or brand could harm their investments. Besides, conflicts and other problems with which some of these countries have been identified are considered inimical to business. One way companies can extricate themselves from this tangled web is through disclosure of their payments. This would establish in the minds of the public that the companies are not responsible for the mismanagement of the huge revenues that accrue to governments.²⁴⁷

A necessary corollary of corporate exoneration from the misuse

Transactions, 30 DENV. J. INT'L L. & POL'Y 217, 234 (2002) (citing a case where a stabilization clause in a petroleum contract was justified by the general principle of the sanctity of contract). See generally DAVID H. PARRY, *THE SANCTITY OF CONTRACTS IN ENGLISH LAW* 1 (1959) (exploring conceptions of the law of contracts).

²⁴⁷ As a group of European investors that represents up to \$650 billion put it, in calling on companies to promote greater transparency in their revenue payments: "This is a significant business risk, making companies vulnerable to accusations of complicity in corrupt behavior, impairing their local and global, license to operate, rendering them vulnerable to local conflict and in security, and possibly compromising their long-term commercial prospects in these markets." Press Release, Co-operative Insurance Society, Investors Call for Greater Transparency for Extractive Companies, ¶ 2 (May 19, 2003), at <http://www.cispressooffice.co.uk/servlet/Satellite?cid=1053329505221&pagename=Smile/NCView&cpid=1054307309197&c=Page>.

of oil revenues is a positive perception by the public, which is likely to benefit the oil corporations. There may be a division of opinion as to whether a good corporate image or public opinion confers commercial benefits. However, hardly anyone thinks that a good image is a detriment. Indeed, there is a very strong basis for the belief that companies enjoying positive public opinion are likely to have better economic performance.²⁴⁸ It is no wonder that corporations spend a lot of money on public relations campaigns to burnish their images.²⁴⁹ Subscribing to information disclosure could even provide better protection for corporate reputation than other avenues and mechanisms that companies have adopted to achieve the same objective such as codes of conduct and corporate philanthropy.²⁵⁰

Some commentators have also observed that the publication of monies paid to local governments could be to the advantage of companies that face incessant demands for local benefits.²⁵¹ This is premised on the fact that with the knowledge that the governments are receiving vast sums of money from the oil corporations, members of the host communities would give the corporations breathing space and turn their attention to their errant local government authorities.²⁵²

It stands to reason therefore that information disclosure will also provide benefits to local communities. It will give a needed fillip and arsenal to civil society groups and local citizens, allowing them to focus more aggressively on how the disclosed payments are being managed by their political leaders.²⁵³ This could even

²⁴⁸ See, e.g., *Brand New Day*, *ECONOMIST*, June 19-25, 1993, at 70-71 (stating that the global economy has entered "the era of the corporate image" in which "consumers will increasingly make purchases on the basis of a firm's whole role in society: how it treats employees, shareholders, and local neighbourhoods"); see also Geoffrey Heal, *The Bottom Line to a Social Conscience*, *FIN. TIMES*, July 2, 2001, *Mastering Investment (Magazine)*, at 2 (noting the increasing "use of consumer buying power to attain social goals"); Sankar Sen & C.B. Bhattacharya, *Does Doing Good Always Lead to Doing Better? Consumer Reactions to Corporate Social Responsibility*, 38 *J. MKTG. RES.* 225 (2001) (exploring when corporate social responsibility initiatives work).

²⁴⁹ See Tom J. Brown & Peter A. Dacin, *The Company and the Product: Corporate Associations and Consumer Product Responses*, 61 *J. MKTG.* 68 (1997) (examining the effects of corporate associations on product responses).

²⁵⁰ GARY & KARL, *supra* note 96, at 50-52.

²⁵¹ *Id.* at 6.

²⁵² *Id.*

²⁵³ See *id.* at 53 (describing the benefits of mandatory disclosure of oil company payments).

lead to a reduction in conflicts among the various stakeholders as the lack of information and the mismanagement that flows from it certainly play a role in engendering strife in oil-producing areas.

Joseph Stiglitz has noted that transparency in information relating to the revenues received by the government and fiscal accounting standards is essential to improving natural resource management and increasing wealth, since without that transparency governments are lulled into a false sense of wealth that prompts them to make bad policy decisions. In addition:

Even more important is information about what the government receives for oil or other natural resources, how this compares with what other countries are receiving, and how the government uses the funds it receives from the sale of natural resources. Governments should recognize that even in more developed countries major oil companies have tried to minimize their royalty payments by under-reporting the effective price of oil and over-reporting their costs. It was only through hard research that such evasion was detected, for instance, in the State of Alaska, and it was only through even harder prosecution that the oil companies finally agreed to pay the more than a billion dollars that they had avoided paying the state.

Companies have strong incentives to maximize profits and the opacity that surrounds oil contracts and payments can lead to abuse.²⁵⁴

Based on these perceived benefits, there is no doubt that scholars and campaigners will continue to try to convince oil-producing developing countries in Africa and other places to embrace the concept. One is left to wonder why this is not yet national policy in most of these countries. The reality is that the governments would have to evaluate what danger it poses to them before they consider what benefits it holds for their country. A similar question or situation arises with national trust funds.

²⁵⁴ Joseph E. Stiglitz, *Foreword* to SVETLANA TSALIK, *CASPIAN OIL WINDFALLS: WHO WILL BENEFIT?*, at xi, xii (2003), available at http://www.soros.org/initiatives/cep/articles_publications/publications/caspianoilwindfalls_20030514/full_report.pdf.

The Chad-Cameroon Oil Pipeline Project is being credited with providing a model that is so useful that expectations are high about the possibility of its replication. 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.²⁵⁵

This is likely to be the route recommended for the new oil producers in Africa and perhaps even the older oil exporters. One World Bank Group official has remarked: "This is going to be the model for every single project of this type world wide."²⁵⁶ 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 citizens. But the reality is that sovereignty and the absence of corporate regulation are strong impediments to implementing the type of arrangement that critics have proposed. This part discusses these two impediments.

6.1. *Sovereignty*

In its simplest form, sovereignty²⁵⁷ refers to "the power of

²⁵⁵ GARY & KARL, *supra* note 96, at 73. Some commentators, however, are not so enthusiastic, perceiving weaknesses in the structure of projects that would make it easier for the government to out-manuever the World Bank and the oil corporations at such a point that withdrawal from the country would be virtually impossible. See James C. Owens, Note, *Government Failure in Sub-Saharan Africa: The International Community's Options*, 43 VA. J. INT'L L. 1003, 1044-49 (2003) (advocating an alternative arrangement in which an international supervisory body would be entrusted with the control, allocation and management of revenues accruing to developing countries from international projects).

²⁵⁶ GARY & KARL, *supra* note 96, at 60 (quoting Mohamedu Diop, Central Africa Resident Representative of the IFC).

²⁵⁷ For interesting and stimulating discussions on sovereignty, see generally STATE, SOVEREIGNTY, AND INTERNATIONAL GOVERNANCE (Gerard Kreijen et al. eds., 2002); STEPHEN D. KRASNER, *SOVEREIGNTY: ORGANIZED HYPOCRISY* (1999).

states to regulate their internal affairs without foreign interference."²⁵⁸ Sovereignty is at the foundation of international law,²⁵⁹ 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.²⁶⁰ One of the earliest leading authorities on sovereignty and statehood, Jean Bodin, viewed sovereignty as being the absolute domain of the state, "not limited either in power, or in function, or in length of time."²⁶¹ 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 control of any other power, so as to be annulled at the pleasure of any other human will."²⁶² The United Nations Charter provides for and protects the notion of sovereignty.²⁶³

The principle of sovereignty has a number of corollaries, including the sovereign equality of States and the principle of nonintervention.²⁶⁴ The Swiss jurist Emmerich de Vattel elaborated on and emphasized the sovereign equality of states, noting: "A dwarf is as much a man as a giant; a small republic is no less a sovereign state than the most powerful kingdom."²⁶⁵ Vattel did not mince

²⁵⁸ 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, 1187 (1985) ("[S]overeign states possess complete authority within their respective national spheres.") (emphasis in original).

²⁵⁹ The International Court of Justice declared in *Case Concerning Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27) that "the whole of international law" is anchored upon the "fundamental principle of State sovereignty." *Id.* at 133. See also Elizabeth E. Ruddick, Note, *The Continuing Constraint of Sovereignty: International Law, International Protection, and the Internally Displaced*, 77 B.U. L. REV. 429, 429-30 (1997) (discussing the prominence of sovereignty in the United Nations Charter).

²⁶⁰ See Jianming Shen, *National Sovereignty and Human Rights in a Positive Law Context*, 26 BROOK. J. INT'L L. 417, 419-28 (2000) (discussing the history of the principle of state sovereignty).

²⁶¹ 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 258, at 117-21 (discussing the evolution of the principle of state sovereignty in the context of international commercial law).

²⁶² HUGO GROTIUS, THE RIGHTS OF WAR AND PEACE 62 (A. C. Campbell trans., Hyperion Reprint ed., Hyperion Press 1979) (1901); see also Shrewsbury, *supra* note 258, at 117-18 (quoting Grotius).

²⁶³ See U.N. CHARTER art. 2, para. 1 ("The Organization is based on the principle of the sovereign equality of all its Members.").

²⁶⁴ Shen, *supra* note 260, at 419-20.

²⁶⁵ EMMERICH DE VATTEL, THE LAW OF NATIONS OR PRINCIPLES OF THE LAW OF

words about the importance of sovereignty: "Of all the rights that can belong to a nation, sovereignty is, doubtless, the most precious and that which other nations ought most scrupulously to respect."²⁶⁶ Moreover, although there is a traditional association of the principle of nonintervention with the Peace of Westphalia, there was no explicit articulation of the concept until one hundred years later in 1758 when Vattel published his *Le Droits des Gens, ou, Principes de la Loi Naturelle, Appliqués à la Conduite & Aux Affaires des Nations & des Souverains*.²⁶⁷ The prohibition of interference and intervention provided for in Article 2.7 of the U.N. Charter is one of the most important corollaries of sovereignty.²⁶⁸

Sovereignty is a useful concept in protecting smaller nations from mightier powers. However, problems arise where a state has failed, is abusive, or is weak. Such states are unable to provide for the needs of the citizens and sometimes aggressively work against the citizens' interests through anti-people policies and practices. At the same time, these states are enabled to shield themselves with the concept of sovereignty or its corollaries. In such a situation, the ability of external entities like the World Bank to compel these states to adopt policies is severely curtailed. Additionally, in the case of the World Bank, based on its Articles of Agreement, there is a reluctance to interfere in the political activities of borrower countries.²⁶⁹ A towering challenge is how to decouple the present conception of sovereignty from the entity of government.

In recent times, there has been a progressive movement toward curtailing the reach of sovereignty for the purposes of humanitarian intervention. The International Commission on Intervention and State Sovereignty, a number of eminent scholars that convened in Canada in 2001, came up with an important report on the place of the principles of sovereignty and non-intervention in today's world. These international luminaries representing a cross-section of the globe reasoned that there is a "responsibility to protect" attach to states to protect the lives and liberty of their nationals, and where states are unable to do so owing to state failure or the out-

NATURE APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS (C. Fenwick trans., 1916) (1758).

²⁶⁶ *Id.*

²⁶⁷ Krasner, *supra* note 181, at 45 n.2.

²⁶⁸ Shen, *supra* note 260, at 423.

²⁶⁹ See generally Korinna Horta, *Rhetoric and Reality: Human Rights and the World Bank*, 15 HARV. HUM. RTS. J. 227 (2002) (noting the limits of the World Bank's mandate).

break of war or hostilities, the responsibility devolves to the international community.²⁷⁰ Thus, the Commission essentially challenges the traditional understanding of sovereignty.²⁷¹

A similar extension or redefinition of the concept of sovereignty has been proposed in the context of international security.²⁷² Lee Feinstein and Anne-Marie Slaughter state that the duty has three essential features, namely control of the proliferation of weapons of mass destruction and the people who possess them; emphasis on prevention; and collective exercise of the duty through a global or regional organization.²⁷³

The chances of an extension of this emerging idea of legitimate intervention to other areas, such as where a state has been unable to provide for the citizens due to the profligacy and irresponsibility of the leaders, are remote. Yet, in the foreseeable future, it is not a stretch to begin to imagine that the contours of sovereignty would experience a continuous chipping away—slowly, but steadily—to the extent where national leaders would not be able to hide under it to dehumanize their citizens. In that sense, sovereignty would once again begin to serve its proper purpose as a tool for the people's protection and benefit.²⁷⁴ Indeed, Vattel argued that "national sovereignty belonged originally and essentially to the people collectively. Nations could subsequently cede sovereignty to a senate or to a single person, but only to the common good of all citizens."²⁷⁵

When governments begin to act as though state sovereignty is

²⁷⁰ INT'L COMM'N ON INTERVENTION AND STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT (2001) [hereinafter ICISS].

²⁷¹ Lee Feinstein & Anne-Marie Slaughter, *A Duty to Prevent*, 83 FOREIGN AFF. 136, 140 (2004). 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." ICISS, *supra* note 270, at xi.

²⁷² Feinstein & Slaughter, *supra* note 271.

²⁷³ *Id.* at 137.

²⁷⁴ Some scholars assert that this shift has already begun, with greater emphasis on "sovereignty of the people" than on "sovereignty for the benefit of the nation-state." 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) ("We might do well to relegate the term sovereignty to the shelf of history.").

²⁷⁵ Mortimer Sellers, *Republican Principles in International Law*, 11 CONN. J. INT'L L. 403, 410 (1996).

their personal property and that they can use the powers attached to or inherent in sovereignty to work against the common good of the citizens, it is incumbent on the international community and international institutions like the World Bank to insist on promoting the interest of the people or refrain from doing business with the renegade governments.²⁷⁶ This could amount to an informal contraction or re-definition of the notion of sovereignty.

The World Bank could be said to have taken some steps in that regard with the Chad-Cameroon Oil Pipeline Project. It would appear that the revenue management arrangements encroached on Chad's sovereignty.²⁷⁷ 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.²⁷⁸

If the World Bank really hopes to address the resource curse in new and old oil-producing African States, it should be prepared for a policy that makes it clear to some of the authoritarian or self-centered leaders that the interests of the people should be paramount. This would include accepting strengthened national trust funds and support for mandatory disclosure of information on oil receipts. The World Bank is already working with the government of Sao Tome on managing expected oil revenue and saving for the

²⁷⁶ See 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).

²⁷⁷ Krasner sees the arrangements as a case of shared sovereignty, although in "watered down form." Krasner, *supra* note 181, at 34.

²⁷⁸ Peter Rosenblum, *Pipeline Politics in Chad*, 99 CURRENT HIST., 195, 199 (2000).

future.²⁷⁹ It is expected that these strong principles will form a part of the arrangement that the Bank comes up with.

6.2. *Absence of Corporate Regulation in International Law*

International law has been described as the law governing States in their relation with one another.²⁸⁰ The States-centric, traditional view of international law confers on States the status of subjects of international law to the exclusion of all other entities that interact on the international plane.²⁸¹ The past few decades have witnessed an encroachment into this turf that used to be the exclusive preserve of nation-states. Other entities, namely international organizations²⁸² and individuals (to a limited extent)²⁸³ have been recognized as possessing international legal personality and thus subjects of international law.²⁸⁴ The same can hardly be said of MNCs, notwithstanding their enormous influence in the domestic and international planes that has continued to grow over the years.²⁸⁵ The international legal system, instead, has left the regulation of these behemoths to municipal authorities²⁸⁶ with the attendant unsatisfactory consequences.²⁸⁷

²⁷⁹ Shaxson, *supra* note 119.

²⁸⁰ J. L. BRIERLY, *LAW OF NATIONS* 1 (Humphrey Waldock ed., 6th ed. 1963) (defining international law as "the body of rules and principles of action which are binding upon civilized states in their relations with one another").

²⁸¹ See, e.g., Jonathan I. Charney, *Transnational Corporations and Developing Public International Law*, 1983 DUKE L.J. 748, 753 ("The only subjects of international law are nation-states."); Daniel C. K. Chow, *Limiting Erie in a New Age of International Law: Toward a Federal Common Law of International Choice of Law*, 74 IOWA L. REV. 165, 193 n.145 (1988) (defining transnational corporations); Sigmund Timberg, *An International Trade Tribunal: A Step Forward Short of Surrender of Sovereignty*, 33 GEO. L.J. 373, 394-98 (1945) (reviewing the status of private parties).

²⁸² See *Reparation for Injuries Suffered in the Service of the United Nations*, 1949 I.C.J. 174, 178-79 (Apr. 11) (advising that the United Nations be a subject falling under international law).

²⁸³ L. OPPENHEIM, *INTERNATIONAL LAW* § 290 (H. Lauterpacht ed., 8th ed. 1955).

²⁸⁴ Hersch Lauterpacht, *The Subjects of the Law of Nations*, 64 LAW Q. REV. 97, 117-19 (1948).

²⁸⁵ See M. SORNARAJAH, *THE INTERNATIONAL LAW ON FOREIGN INVESTMENT* 55 (1994) (analyzing risk in foreign investment); IGNAZ SEIDL-HOHENVELDERN, *CORPORATIONS IN AND UNDER INTERNATIONAL LAW* 1 (1987) (discussing the effect of international law).

²⁸⁶ For a general discussion on this subject, see WOLFGANG FRIEDMANN, *THE CHANGING STRUCTURE OF INTERNATIONAL LAW* (1964).

²⁸⁷ See Saman Zia-Zarifi, *Suing Multinational Corporations in the U.S. For Violating International Law*, 4 UCLA J. INT'L L. & FOREIGN AFF. 81, 84-86 (1999) (describ-

Regulation of MNCs in international law has not been realized mainly because such regulation would necessarily import their unambiguous recognition as entities in possession of international legal personality. There is still a huge debate as to whether corporations, especially MNCs, are international legal persons.²⁸⁸

In the absence of an international regulatory structure for MNCs that are generally not amenable to legal control in their host countries,²⁸⁹ it is hard to elicit their cooperation on some of these issues. In particular, the determination of a corporation to go by higher standards will be derailed once there is a realization that others can successfully avoid playing by those rules. Corporate regulation in international law is an idea worthy of serious consideration, especially as it will seek to harmonize the multifarious rules with which corporations are expected to comply. Even if mandatory rules are created under the PWYP Campaign, compelling corporations to disclose their payments, there will still be other aspects of corporate life or endeavor that affect people and the environment over which clamor for corporate control will continue. A universal regulatory structure at the international level will serve the purpose better.

It will also eliminate the problem of competitive advantage which less scrupulous firms will have over more conscientious ones. For instance, if some corporations choose to bulk the trend

ing the ineffectiveness due to lack of effective international regulation).

²⁸⁸ For the view that corporations have now been imbued with international legal personality, see Elihu Lauterpacht, *International Law and Private Foreign Investment*, 4 IND. J. GLOBAL LEGAL STUD. 259, 272-76 (1997); Michael Reiterer, Book Review, 81 AM. J. INT'L L. 970, 970-74 (1987) (reviewing RUTH DONNER, *THE REGULATION OF NATIONALITY IN INTERNATIONAL LAW* (1983)); Chow, *supra* note 281. For a contrary view, see IAN BROWNLE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 67 (6th ed. 2003); LOUIS HENKIN ET AL., *INTERNATIONAL LAW: CASES AND MATERIALS* 368-69 (4th ed. 2001); Peter Malanczuk, *Recent Publications: The New Public Order*, 26 YALE J. INT'L L. 527, 547 (2001). For the jurisprudence of the Permanent Court of International Justice and the International Court of Justice, see Case Concerning the Payment of Various Serbian Loans Issued in France (*Fr. v. Serb.*), 1929 P.C.I.J. (ser. A) No. 20/21, at 41 (July 12) and Anglo-Iranian Oil Company Case (*U.K. v. Iran*), 1952 I.C.J. 93 (July 22).

²⁸⁹ See Surya Deva, *Human Rights Violations by Multinational Corporations and International Law: Where from Here?* 19 CONN. J. INT'L L. 1, 2 n.5 (2003) ("In many situations, states, especially developing ones, can be weaker than MNCs in terms of both economic and legal capacity."); see also Nicola Jagers, *The Legal Status of the Multinational Corporation under International Law*, in *HUMAN RIGHTS STANDARDS AND THE RESPONSIBILITY OF TRANSNATIONAL CORPORATIONS* 259, 259-60 (Michael K. Addo ed., 1999) ("[MNCs] have acquired a great amount of power [O]f the biggest concentrations of wealth in the world, 51% are owned by MNCs and 49% by states.").

and "race to the bottom" on these issues, there is hardly any opportunity or forum for legal recourse against them. Given that such an action can yield sizeable financial benefits, the incentives to adopt that approach are huge. However, if there were an international legal arrangement binding on corporations, every major corporation would be required to be a part of it. Certain business principles, including transparency and anti-corruption initiatives, will be part of that arrangement. Corporations that do not abide by the principles can be sanctioned before a competent judicial organ recognized by the international arrangement. This organ does not necessarily have to be one tribunal situated somewhere far from those who suffer the most from wrongful corporate behavior. Instead, domestic judicial institutions in different parts of the world can be empowered and deployed to hear claims against the recalcitrant corporations.²⁹⁰

In addition, the existence of binding international legal obligations from which corporations cannot easily get away would strengthen their hands in negotiations and discussions with governments that are inclined to take a different path. In essence, if the government sees that a company is constrained to abide by international obligations to disclose payments, it will be hard pressed to accede to it. At least, it will not be so inclined to brand the corporation as an enemy, as the government of Angola essentially did when BP made public the signature bonuses it paid to the government.²⁹¹

The lack of international regulation of the sort envisaged here will remain a strong impediment to the realization of the objectives of the transparency campaigns and the efforts to get corporations

²⁹⁰ This would be similar to the practice under the Alien Tort Statute (also known as the Alien Tort Claims Act) in the United States where rules agreed upon by the international community are utilized in the domestic setting to hold corporations accountable for their actions that breach international law, even when such conduct occurred outside the United States. For a rich body of commentary on the Alien Tort Statute from divergent perspectives, see THE ALIEN TORT CLAIMS ACT: AN ANALYTICAL ANTHOLOGY (Ralph G. Steinhardt & Anthony D'Amato eds., 1999); GARY CLYDE HUFFBAUER & NICHOLAS K. MITROKOSTAS, AWAKENING MONSTER: THE ALIEN TORT STATUTE OF 1789 (2003); Emeka Duruigbo, *The Economic Cost of Alien Tort Litigation: A Response to Awakening Monster: The Alien Tort Statute of 1789*, 14 MINN. J. GLOBAL TRADE 1 (2004).

²⁹¹ David Ivanovich, *Oil Giants Say Disclosure Won't Work Everywhere*, HOUS. CHRON., June 18, 2003, Business Section, at 1. For a further discussion on the importance of, and impediments to, corporate regulation in international law, see DURUIGBO, *supra* note 137, at 200-08.

to play a greater role in addressing the resource curse.²⁹²

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.

7. LOCAL TRUST FUNDS

National trust funds have their advantages. They provide avenues for transparently and accountably managing public assets and ensuring that governments free more money for national development. However, they have their limitations when it comes to addressing some local issues.²⁹³ Where national officials are opposed to their establishment, this option may be foreclosed. This does 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 begins to diminish.²⁹⁴ 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.²⁹⁵ For bigger and “richer” states, it is even a tougher battle. As an experienced World Bank lawyer remarked to the Author and others, “Who’s going to tell Nigeria what to do?”²⁹⁶

²⁹² A set of “Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights” was recently approved by the United Nations Sub-Commission on the Promotion and Protection of Human Rights. U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003). It has been hailed as “the first nonvoluntary initiative accepted at the international level” to govern the activities of MNCs and other business entities. Weissbrodt & Kruger, *supra* note 138, at 913-14. The legal status of the norms is, however, open to doubt. Professor David Weissbrodt, who chaired the committee that drafted the norms, states that they are soft law. Yet, he believes that that they impose obligations and differ from previous voluntary initiatives. It will be interesting to see what happens if any MNC does not abide by their dictates.

²⁹³ JEDREJ GEORG FRYNAS, *OIL IN NIGERIA: CONFLICT AND LITIGATION BETWEEN OIL COMPANIES AND VILLAGE COMMUNITIES* 52 (2000).

²⁹⁴ GARY & KARL, *supra* note 96; *see also* Duruigbo, *supra* note 169, at 183-84.

²⁹⁵ A recent report by Global Witness accused several leaders in Africa 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, D.C. under his own name.

²⁹⁶ Here, Nigeria can stand in for any large or rich country. See Ganesan, *supra* note 7, for a discussion on how even Angola has proven less amenable to control or direction away from the corrupt and anti-people route embarked on by the government.

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.²⁹⁷

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 because 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 they get mismanaged. Asking governments to surrender to an extent their management of resources, while expecting 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.

Local community members will play a key role in running these funds by electing most of the trustees and keeping an eye on their activities. In view of the fact that governmental involvement has been a part of the problem of mismanagement, the role of the government will be minimal; for instance, it can have a representative on the board of trustees. Governmental participation will ensure that the government does not oppose the constitution of the trusts or refuse to contribute to their funding.²⁹⁸ 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 ex-

²⁹⁷ For an extensive discussion of community-based trust funds, see Durigbo, *supra* note 169.

²⁹⁸ *Id.* at 184-85.

ternal consequences of oil development, and how they can turn such compensation into an enduring source of income.²⁹⁹

It is heartening to note that preliminary discussions and correspondence between the Author and representatives of corporations, communities, financial and development institutions and non-governmental organizations indicate that they are amenable to putting of this idea into operation.³⁰⁰

8. CONCLUSION

Oil production, contrary to legitimate expectations and economic theory, has not been largely beneficial to many 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.³⁰¹ They include promotion of revenue transparency by oil corporations and oil-exporting governments. This form of information disclosure, exemplified by the EITI³⁰² and the PWYP Campaign,³⁰³ 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, 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.³⁰⁴ Funds controlled by a trust

²⁹⁹ TSALIK, *supra* note 254, at 64.

³⁰⁰ See Duruigbo, *supra* note 169.

³⁰¹ See Karl, *supra* note 32, at 16.

³⁰² EITI, *supra* note 228; see also WBG Endorses EITI, *supra* note 242.

³⁰³ See Palley, *supra* note 245, at 92.

³⁰⁴ Utomi, *supra* note 54, at 25.

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.³⁰⁵ 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.³⁰⁶

Revenue distribution arrangements are also being promoted.³⁰⁷ 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.³⁰⁸ The need for reform of government institutions cannot be overemphasized. Accordingly, scholars have been focusing on the importance of transparency in governance, democratization and reforms of taxation and the civil service.³⁰⁹

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.³¹⁰ 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

³⁰⁵ Krasner, *supra* note 181, at 41.

³⁰⁶ See LEONARD WANTCHEKON, WHY DO RESOURCE ABUNDANT COUNTRIES HAVE AUTHORITARIAN GOVERNMENTS? 21 (Yale Univ. Leitner Ctr., Working Paper No. 99-12, 1999) (discussing the independent organization which manages profits from Alaska's natural resource development).

³⁰⁷ *Id.* (proposing the Alaskan model).

³⁰⁸ See SALA-I-MARTIN & SUBRAMANIAN, *supra* note 5, at 3; PALLEY, *supra* note 18, at 12.

³⁰⁹ See Karl, *supra* note 32, at 16 (describing the process of Russian tax reform); see also Pauline Jones Luong & Erika Weinthal, *Contra Coercion: Russian Tax Reform, Exogenous Shocks, and Negotiated Institutional Change*, 98 AM. POL. SCI. REV. 139 (2004).

³¹⁰ See Ricky Lam & Leonard Wantchekon, Political Dutch Disease 17 (unpublished paper presented at the N.E. U. Dev. Consortium Conference, Montreal, Oct. 1-3, 2004), available at http://www.hec.ca/neudc2004/fp/wantchekon_leonard_avril_16.pdf.

the argument that the resource curse is associated with state ownership, this argument calls for privatization.³¹¹

This work has closely examined two of these proposals, namely national oil trusts and information disclosure arrangements. It has evaluated them and noted 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. Corporate regulation in international law is also of critical importance. 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 local trust funds as a complement or alternative to national trust funds. The World Bank and MNCs can play an important role in this regard.

³¹¹ See Pauline Jones Luong & Erika Weinthal, *Energy Wealth and Tax Reform in Russia and Kazakhstan*, 27 *RESOURCES POL'Y* 215 (2001) (discussing possible solutions to the resource curse); Luong & Weinthal, *supra* note 62, at 28.