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Emeka Duruigbo

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## ARTICLES

# COMMUNITY EQUITY PARTICIPATION IN AFRICAN PETROLEUM VENTURES: PATH TO ECONOMIC GROWTH?

EMEKA DURUIGBO\*

### INTRODUCTION

Africa is a continent that contains fifty-four countries and, in 2010, had an estimated population of more than 854 million people.<sup>1</sup> The upstream oil industry is pivotal to Africa's development. According to the 2012 BP Statistical Energy Survey, Africa had proven oil reserves of 132.4 billion barrels at the end of 2011 or 8.0% of the world's reserves.<sup>2</sup> In 2011, the region produced about 8,804 barrels of crude oil per day, 10.4% of the world's total and a negative change of 12.8% compared to 10,114 barrels of oil per day in 2010, primarily due to the turbulence in Libya during the early part of 2011.<sup>3</sup> In 2011, the downstream oil industry had a total refinery capacity of 3,317 barrels per day which represents 3.6% of the world's total.<sup>4</sup> The major refining centers are in Egypt, Algeria, South Africa, Nigeria, Libya, Morocco, and Kenya, in a decreasing magnitude of refining capacity as a percentage of total African capacity.<sup>5</sup> South Africa also has synfuels

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1. Duncan Kennedy, *African Poverty*, 87 WASH. L. REV. 205, 226 (2012) (listing Africa's 2010 population as 854,951,000); Anouk Zijlma, *Facts about Africa: Africa Facts - Fun Facts, Geography Facts, Travel Facts*, ABOUT.COM, <http://goafrica.about.com/od/africatraveltips/a/africafacts.htm> (last visited Feb. 22, 2013) (stating that South Sudan became the newest African country on July 9, 2011 and Africa has fifty-four countries and a few disputed territories).

2. BP STATISTICAL REVIEW OF WORLD ENERGY (June 2012) at 6, available at [http://www.bp.com/assets/bp\\_internet/globalbp/globalbp\\_uk\\_english/reports\\_and\\_publications/statistical\\_energy\\_review\\_2011/STAGING/local\\_assets/pdf/statistical\\_review\\_of\\_world\\_energy\\_full\\_report\\_2012.pdf](http://www.bp.com/assets/bp_internet/globalbp/globalbp_uk_english/reports_and_publications/statistical_energy_review_2011/STAGING/local_assets/pdf/statistical_review_of_world_energy_full_report_2012.pdf).

3. *Id.* at 1, 8.

4. *Id.* at 16.

5. See Oil Refining in Africa – Overview, MBENDI.COM, <http://www.mbendi.com/indy/oil/ogrf/af/p0005.htm> (last visited Mar. 4, 2013).

production.<sup>6</sup> At the end of 2011, Africa had 513.2 trillion cubic feet of proven natural gas reserves representing 7.0% of the world's total.<sup>7</sup> Africa produced 202.7 billion cubic meters of natural gas in 2011 which was a share of 6.2% of the world's total.<sup>8</sup> This number represents slightly more than a 5% decrease from 2010 and was primarily accounted for by a sharp decline in Libyan natural gas production.<sup>9</sup> Recent exploration activities on the east coast of Africa, including Mozambique, Uganda, Tanzania, and Kenya, have unearthed massive quantities of oil and gas.<sup>10</sup> Another remarkable fact is that Africa is a major source of petroleum imports for the United States and other developed economies.<sup>11</sup>

The flurry of activities following the new oil and gas discoveries has led to what some commentators refer to as the "Second Scramble for Africa."<sup>12</sup> It is not clear what the final result will look like. For Africans, the development of oil and gas is associated with significant personal safety and environmental risks. For investors in the oil and gas industry in Africa, there is a dire need to assure the safety not only of their financial investments, but of their personnel and physical assets as well. For the international community, there is a veritable interest in the security of supplies and conflict management. In March 2012, a natural resource-focused seminar held in Uganda posed a pertinent question: "How do we ensure that Africans benefit maximally, equita-

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6. See Oil Refining in South Africa – Synfuels, MBENDI.COM, <http://www.mbendi.com/indy/oilg/ogrf/af/sa/p0025.htm> (last visited Mar. 4, 2013) ("The use of synthesis technology to produce fuels is not widely practiced. However, in Africa an unusually large oil-from-coal synthesis industry has developed for fuels and chemicals due to the unique political history of South Africa.").

7. BP STATISTICAL REVIEW OF WORLD ENERGY, *supra* note 2, at 20.

8. *Id.* at 22.

9. *Id.*

10. See Africa: Recent Oil and Gas Discoveries Reveal Africa's Eastern Promise, ALLAFRICA.COM (Oct. 9, 2012), available at [http://allafrica.com/stories/201210091147.html?aa\\_source=acrdn-f0](http://allafrica.com/stories/201210091147.html?aa_source=acrdn-f0); Tom Bergin, *East Africa to Join World Gas Giants*, REUTERS, May 20, 2012, available at <http://www.reuters.com/article/2012/05/20/africa-gas-idUSL5E8GGIK620120520>.

11. See Elise Aiken, *Energy Justice: Achieving Stability in Oil-Producing African Nations*, 22 COLO. J. INT'L ENVTL. L. & POL'Y 293, 293 (2011) ("Currently, the United States imports fifteen percent of its oil from West Africa, mainly from Nigeria, Angola, Algeria, and Equatorial Guinea, and while overall crude imports declined in recent years because of the economic downturn, the percentage of oil imports from Africa is expected to increase steadily.") (citations omitted).

12. See Chris Nwachukwu Okeke, *The Second Scramble for Africa's Oil and Mineral Resources: Blessing or Curse?*, 42 INT'L LAW 193 (2008); Uche Ewelukwa Ofodile, *Trade, Empires, and Subjects—China-Africa Trade: A New Fair Trade Arrangement, or the Third Scramble for Africa?*, 41 VAND. J. TRANSNAT'L L. 505, 543 (2008); Dustin N. Sharp, *Requiem For A Pipe-dream: Oil, The World Bank, And The Need For Human Rights Assessments*, 25 EMORY INT'L L. REV. 379, 385 (2011) (noting Chinese and Indian interest in African oil and gas); *But see* Jędrzej George Frynas & Manuel Paulo, *A New Scramble For African Oil? Historical, Political, And Business Perspectives*, 106 AFR. AFF. 229 (2007) (cautioning against referring to the development as a scramble for Africa).

bly and sustainably from the continent's natural resource riches?"<sup>13</sup> While the seminar organizers and participants acknowledge that the question is not a new one, they recognize that satisfactory answers have been elusive.<sup>14</sup> At the same time, the need for effective policy prescriptions remains imperative. In the past few years, a number of energy policy models have been proposed or implemented in Africa. This article contributes to identifying solutions to the problems of misuse and mismanagement of Africa's resources by proposing the addition of community equity participation in petroleum ventures and a short list of viable policy options.

The need for this new approach is evident from the lacunae in the present policy framework and occasioned by significant impediments associated with many of the implemented or proposed policy options. One such problem is the absence of control or ownership rights. A collective criticism leveled at some of the initiatives aimed at favorable development outcomes, such as the Extractive Industries Transparency Initiative (EITI)<sup>15</sup>, is that these pro-development initiatives seek to focus on "flashpoint" or headline-grabbing corporate responsibility issues such as corruption, human rights abuse by security personnel and armed conflict, "but do not address the underlying root causes of community opposition to extractive industry projects, including communities' lack of control over their own destinies and the natural resources they consider their own."<sup>16</sup> Additionally, many ex-

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13. ICHUMILE GOADA, ET AL., *THE ROLE OF RESOURCES IN AFRICA'S FUTURE: TOWARDS A VISION FOR THE GOVERNANCE OF AFRICA'S NATURAL RESOURCES* (Mar. 13, 2012), [http://www.saiia.org.za/images/stories/research/garp/rpt\\_seminar\\_uganda\\_garn\\_13\\_march\\_2012.pdf](http://www.saiia.org.za/images/stories/research/garp/rpt_seminar_uganda_garn_13_march_2012.pdf).13.

14. *Id.* at 1-2.

15. For full information on the purpose and structure of the EITI, see Extractive Industries Transparency Initiative, <http://eiti.org/>. See also Eddie Rich & T. Negbalee Warner, *Addressing the Roots of Liberia's Conflict Through the Extractive Industries Transparency Initiative*, 42 ENVTL. L. REP. NEWS & ANALYSIS 10529, 10529 (2012) ("The Extractive Industries Transparency Initiative (EITI) sets a global standard for transparency in the management of oil, gas, and mining revenues. In many resource-rich countries, especially those that are recovering from civil war, opacity and silence have created mistrust and suspicion. Citizens often assume that the government and the extractive companies are in cahoots to keep the wealth for themselves, and companies sometimes feel that governments and citizens are ganging up on them to reset the rules and renegotiate contracts. The EITI has been held up as a shining example of how multi-stakeholder initiatives can address these kinds of challenges. But the initiative is still young, and much of this praise has been premature."). For a general critique of transparency as a tool for addressing natural resource mismanagement and promoting development, see Alexander Gillies & Antoine Heuty, *Does Transparency Work? The Challenges of Measurement and Effectiveness in Resource-Rich Countries*, 6 YALE J. INT'L AFF. 25, 26 (2011) ("Despite the widespread support for transparency and advances made in numerous resource-rich countries, assessments suggest that these gains have not triggered major economic or developmental transformations or any significant reductions in corruption.").

16. Lisa J. Laplante & Suzanne A. Spears, *Out of the Conflict Zone: The Case for Community Consent Processes in the Extractive Sector*, 11 YALE HUM. RTS. & DEV. L.J. 69, 83 (2008). Lisa J. Laplante & Suzanne A. Spears, *Out of the Conflict Zone: The Case for Community Consent Processes in the Extractive Sector*, 11 YALE HUM. RTS. & DEV. L.J. 69, 83 (2008).

isting or proposed policy options tend to focus on national or collective objectives, as opposed to individual needs and aspirations.<sup>17</sup> As one commentator has noted, “[t]hese efforts meet some needs of oil-producing African nations but do not address the needs of the people within these countries at a micro-level.”<sup>18</sup> The immediate needs of the individuals in African petroleum-producing countries need to be taken into account beyond infrastructure provision, anti-corruption campaigns, or general nation-building efforts.<sup>19</sup> Strengthening the economic and political position of the individual citizen ultimately fosters national stability and development.<sup>20</sup> Equity participation provides a framework for accomplishing these goals and addressing some of the inadequacies of alternative mechanisms.

Accordingly, this article proposes that indigenes of communities hosting oil and gas production should be afforded some economic rights and investment opportunities through a system of equity participation in exploration and production ventures. Communities would be integrated into joint ventures with energy companies and national governments. A joint venture is a business arrangement in which individuals and entities pool resources and efforts to create a product or provide some service and share in the risk and reward of their enterprise. Joint ventures have some features that are suitable for the goals advanced here. They often have a limited purpose, a single undertaking, a relatively short duration, and are ad hoc in nature.<sup>21</sup> Traditionally, joint ventures in the African oil and gas industry have been entered into between energy companies and national governments that act through state-owned oil corporations.<sup>22</sup> Under the present proposal, the traditional approach will be replaced by a tripartite joint venture approach involving the government, energy companies, and

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17. For an example of a proposal that targets individuals and their needs, see Todd Moss, *Oil-to-Cash: Fighting the Resource Curse Through Cash Transfers*, 6 YALE J. INT’L AFF. 43 (2011) (proposing that countries seeking to manage new resource wealth engaging in direct distribution of oil income to the citizens in the form of cash transfers).

18. Aiken, *supra* note 11, at 295.

19. *Id.* (proposing “using simple technologies to provide individuals access to energy without having to create a complete energy grid in each country.”).

20. *Id.* at 294-95.

21. 46 Am. Jur. 2d *Joint Ventures* § 1 (2006) (“Although no exact definition can be given of a joint venture, and the answer in each case depends upon the terms of the agreement, the acts of the parties, the nature of the undertaking, and other facts,[FN1] nevertheless, a joint venture has been generally defined as an association of two or more persons formed to carry out a single business enterprise for profit[FN2] for which purpose they combine their property, money, effects, skill, and knowledge.”) (citations omitted).

22. Mirian Kene Omalu, *Developments in Petroleum Exploration and Production Arrangements in Nigeria*, 14 OIL & GAS L. & TAX’N REV. 70, 70-71 (1996).

an entity representing community members. This entity may be a community-owned corporation ("COC").<sup>23</sup>

Petroleum legislation in African oil and gas producing countries, including emerging producers and their experienced counterparts grappling with the pitfalls of petroleum development, should aim for the institutionalization of these types of joint ventures backed by the appropriate legal form.<sup>24</sup> Pending such legislation, or in its absence, new entrants into the African oil and gas sector, notably Chinese and Indian companies, should consider offering that option to potential host communities as part of their license application. If this model takes root and is seen as successful, it will be replicated, obviating the need for legislation or spurring laws to formalize it.

This article is organized into six parts. Part I examines the strengths and weaknesses of certain innovative energy policy models recently implemented in Africa. These models are the Chad-Cameroon Pipeline Project's Revenue Management Plan designed by the World Bank and the Chinese infrastructure development and financing approach that is in play in such places as Angola, Congo, and Nigeria. Part II, in view of the limitations of existing and proposed energy policy approaches, introduces the notion of equity participation. This part discusses successful equity participation models, namely the Texas Relinquishment Act regime and the participation of South Africa's Bafokeng Nation in the production of platinum in its territory. Part III outlines a structure for implementing equity participation in host communities and suggests the creation of separate and special purpose vehicles that involves government agencies, energy companies, and community corporations. Part IV makes the case for community equity participation as a necessary and significant component of an effective policy strategy. The benefits of community equity participation, including the generation of social capital, facilitation of corporate social license, and entrenchment of a closer and accountable form of governance are closely examined. Part V considers potential objections to the proposal, including financing issues and the danger of disproportionate development. Part VI is the conclusion.

## I. INNOVATIVE ENERGY POLICY MODELS IN AFRICA

As a result of dissatisfaction and disenchantment with the existing approaches to managing Africa's rich natural resources, branding Af-

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23. See Barbara L. Bezdek, *To Attain "The Just Rewards of So Much Struggle": Local-Resident Equity Participation in Urban Revitalization*, 35 HOFSTRA L. REV. 37 (2006).

24. See *infra*, Part III.

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rica as an exemplar of the resource curse,<sup>25</sup> new approaches have been introduced or proposed. The Chad-Cameroon pipeline project was one of such experiments.<sup>26</sup> However, it has now been abandoned, leaving a trail of failures. The Chinese investment model is still being implemented in conjunction with the traditional State-centered approach.

#### A. *Shared Sovereignty Arrangement between Chad and the World Bank*

In the 1970's, a consortium of oil corporations, consisting of Chevron, Conoco, Exxon, and Royal Dutch/Shell, discovered oil in Chad. However, years of war and civil conflicts hindered further development of the sizeable petroleum reserves and in 1979, oil development was suspended.<sup>27</sup> After more than a decade, a reorganized consortium reactivated interest in Chad's oil. The consortium was re-shaped with the following members and their respective interests: Exxon (40%); Malaysia's Petroleum Nasional Berhad ("Petronas") (35%); and Chevron (25%).<sup>28</sup>

At its commencement, the \$3.7 billion Chad-Cameroon pipeline project was the biggest private sector investment in Africa.<sup>29</sup> One and one-half billion dollars was devoted to the extraction of oil from Chad's Doba Basin while \$2.2 billion was earmarked for 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 was 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 was 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.<sup>30</sup>

25. The resource curse is a phenomenon that exposes the inverse relationship between endowment with natural resources and social, political and economic development. See Paul Collier, *Laws and Codes for the Resource Curse*, 11 YALE HUM. RTS. & DEV. L.J. 9, 11 (2008); RICHARD M. AUTY, *SUSTAINING DEVELOPMENT IN MINERAL ECONOMIES: THE RESOURCE CURSE* THESIS 1-7 (1993).

26. *Chad-Cameroon Petroleum Dev. & Pipeline Project: Overview*, WORLD BANK (Dec. 2006), [http://www-wds.worldbank.org/external/default/WDSContentServer/WDS/IB/2007/09/19/000020953\\_20070919092837/Rendered/PDF/36569.pdf](http://www-wds.worldbank.org/external/default/WDSContentServer/WDS/IB/2007/09/19/000020953_20070919092837/Rendered/PDF/36569.pdf).

27. Benjamin C. Esty, *The Chad-Cameroon Petroleum Development and Pipeline Project (A)*, Harvard Business School Case Study (Jan. 16, 2003), 1.

28. *Id.* at 1-2.

29. See Emeka Duruigbo, *The World Bank, Multinational Oil Corporations, and the Resource Curse in Africa*, 26 U. PA. J. INT'L ECON. L. 1, 39 (2005).

30. *Id.*

As far as oil and gas projects are concerned, the Chad-Cameroon pipeline project was clearly an innovation.<sup>31</sup> The involvement of the host government, a preeminent development and international financial institution and a number of leading multinational energy corporations may not sound innovative, but the objective behind the collaboration and the level of involvement mark it out. The government of Chad and the World Bank (“Bank”) agreed to a plan that carved out an unprecedented role for the Bank to manage the revenue accruing from petroleum development.<sup>32</sup> Two major factors were behind the Bank’s decision to participate in the project. One factor was that the leader of the consortium, Exxon Mobil, seeking to get valuable political cover, insisted on the Bank’s involvement as a condition for proceeding with the investment.<sup>33</sup> The Bank was also persuaded to participate due to its belief that the project could be an engine for poverty alleviation – an important goal of the World Bank.<sup>34</sup> According to then President of the World Bank, James Wolfensohn, “the project provides the best and perhaps only opportunity for Chad to reduce the severe poverty of most of its population.”<sup>35</sup> To ensure that this objective was accomplished, the Bank conditioned its participation on the development of a revenue management plan that would allocate a significant amount of the project’s proceeds to socio-economic development, particularly the alleviation of poverty and investment in the critical sectors of health and education. The Bank was determined to counter the poor development experience of earlier oil producers.

The Revenue Management Plan (“RMP”) specified how oil revenues would be allocated and distributed. The government was given a very broad discretion on the expenditure of petroleum tax revenues. However, in relation to the direct revenues from the project, flowing from royalties and dividends, the government’s discretion was severely curtailed. The RMP provided that 10% of the direct revenues would be kept or held by the World Bank in a fund for future generations, and the rest would be deposited in a Special Revenue Account

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31. See LORENZO COTULA, HUMAN RIGHTS, NATURAL RESOURCE AND INVESTMENT LAW IN A GLOBALISED WORLD: SHADES OF GREY IN THE SHADOW OF THE LAW 106 (2012).

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

33. Korinna Horta, *Public-Private Partnership and Institutional Capture: The State, International Institutions, and Indigenous Peoples in Chad and Cameroon*, in THE POLITICS OF RESOURCE EXTRACTION: INDIGENOUS PEOPLES, MULTINATIONAL CORPORATIONS AND THE STATE 204, 209 (Suzana Sawyer & Edmund T. Gomez eds., 2012). Exxon Mobil’s insistence was based on the belief that the participation of the World Bank would provide the company with the needed cushion from political risk and insulation from critical non-governmental organizations (NGOs).

34. Esty, *supra* note 27, at 6.

35. *Id.* (citing Letter from James D. Wolfensohn to Honorable James P. McGovern, The United States House of Representatives, Washington, DC 20515, June 28, 1999).



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and distributed. Eighty percent would be dedicated to financing programs in five important sectors: education; health and social services; rural development; infrastructure; and environment and water resources. The government would keep 15% in its coffers to be spent on recurrent expenditure and outside any oversight. The remaining 5% would be devoted to the development of the oil-producing Doba region.<sup>36</sup>

The RMP went beyond revenue allocation and distribution to incorporate layers of oversight. A nine-member oversight committee, known as the Petroleum Revenue Oversight and Control Committee, was instituted to review the annual expenditure approved by the Bank and the government of Chad. The Committee's membership was drawn from the government and civil society and, members would be appointed for terms of three to five years. The Committee had a mandate to publish an annual review of the operations that were subject to external audit. The RMP was a binding instrument because the International Bank for Reconstruction and Development (IBRD) and European Investment Bank (EIB) tied the government's performance under the RMP to future lending by the World Bank. The World Bank also instituted an International Advisory Group (IAG) composed of eminent persons and designed to last for ten years.<sup>37</sup> However, the IAG only had an advisory role and its functions were limited.

Though instituted separately from, and prior to, the Chad-Cameroon pipeline project, the World Bank Inspection Panel represented an additional level of oversight for the project.<sup>38</sup> The Inspection Panel was established in 1993 by the Board of Executive Directors of the Bank to serve as an independent mechanism that would ensure that the Bank's operations were in consonance with its policies and procedures.<sup>39</sup> The primary objective behind the creation of the Panel was

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36. Republic of Chad, Law No. 001/PR/99 (Jan. 11, 1999), *translated in* IAN GARY & NIKKI REISCH, CATHOLIC RELIEF SERVS. & BANK INFO. CTR. CHAD'S OIL: MIRACLE OR MIRAGE?: FOLLOWING THE MONEY IN AFRICA'S NEWEST PETRO-STATE 98 (2005); Edmund Sanders, *Oil Promise Still a Dream*, L.A. TIMES (Jul. 9, 2006), <http://articles.latimes.com/2006/jul/09/business/fi-chadoil9>.

37. Press Release, World Bank, World Bank Appoints International Advisory Group on the Chad-Cameroon Petroleum Development and Pipeline Project (Feb. 21, 2001) *available at* <http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/AFRICAEXT/CHADEXTN/0,,contentMDK:20014994~menuPK:64282138~pagePK:41367~piPK:279616~theSitePK:349862,00.html>.

38. 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 issued by the panel).

39. See World Bank Inspection Panel, Investigation Report: Chad-Cameroon Petroleum and Pipeline Project (Loan No. 4558-CD); Petroleum Sector Management Capacity Building Project (Credit No. 3373-CD); and Management of the Petroleum Economy (Credit No. 3316-CD) at ii, *available at* <http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/ChadInvestigationReporFinal.pdf>.

to provide an opportunity for groups of citizens to present their concerns regarding Bank-financed activities that were considered harmful to them or their interests.<sup>40</sup> In 2001, while acting upon a request for inspection, the Panel undertook an inspection of the project and issued a report. The report called for reinforced monitoring of the project by the Bank to ensure the protection of human rights.<sup>41</sup>

In December 1999, the government of Chad passed a law incorporating the principal elements of the RMP, including procedures for audit and provisions relating to the establishment of an oversight committee.<sup>42</sup> In 2003, Chad started selling oil.<sup>43</sup> In November 2003, the sum of \$6.5 million in 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 RMP for approval.<sup>44</sup>

In October 2005, capitalizing on rising oil prices, the government of Chad announced that it was abandoning some of its commitments under the RMP and sought a review of the revenue management law.<sup>45</sup> Under a law signed by the president in January 2006, the government re-defined priority areas to include national security, in addition to health and education, to enable the government to beef up its military arsenal with a view to repelling rebel uprising in the eastern provinces bordering the already violence-prone Darfur region of Sudan.<sup>46</sup> The government also stated that it was abolishing the future generations' fund.<sup>47</sup> A disappointed World Bank was not favorably disposed to the changes, warning the government of Chad that it would view its renegeing on the agreement as a breach of the loan agreement.<sup>48</sup>

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40. *Id.*

41. *Id.*

42. See Stephen v. Arbogast, *Project Financing & Political Risk Mitigation: The Singular Case of the Chad-Cameroon Pipeline*, 4 TEX. J. OIL GAS & ENERGY L. 282-85 (2008-2009).

43. See Emily Wax, *Oil Wealth Trickles Into Chad, but Little Trickles Down Five Months After Opening of Pipeline to Cameroon, Locals Await Benefits and Crime Rate Rises*, Wash. Post, Mar. 13, 2004, A16 (reporting on the first few months of oil sales); See also United Nations Department of Public Information, *Oil Pipeline Opens for Business, 17 Africa Recovery* 24 (Oct. 2003) (describing the fiscal aspects of the oil pipeline).

44. *Id.* at A16.

45. Lydia Polgreen, *Chad Backs Out of Pledge to Use Oil Wealth to Reduce Poverty*, N.Y. TIMES, Dec. 3, 2005, at A15.

46. Lydia Polgreen, *World Bank Reaches Pact with Chad over Use of Oil Profits*, N.Y. TIMES, Jul. 15, 2006, at A8.

47. Paul Blustein, *Chad Pipeline Project Steeped in Controversy: World Bank Reconsiders Role as Nation looks at Altering Terms*, HOUS. CHRON., Dec. 28, 2005, <http://www.chron.com/business/energy/article/Chad-pipeline-project-steeped-in-controversy-1569643.php>.

48. Paul Blustein, *Chad's Hard-Line Stance Tests World Bank*, LATIN AM. HERALD TRIB., POST, Dec. 27, 2005, <http://laht.com/article.asp?CategoryId=12395&ArticleId=214701>. See generally, Chip Cummins, *Exxon Oil Fund Model Unravels in Chad*, WALL ST. J., Feb. 28, 2006, at A4; DAVID VOGEL, *THE PRIVATE REGULATION OF GLOBAL CORPORATE CONDUCT* 34-35

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In January 2006, because of Chad's breach of the agreement, the World Bank blocked its access to royalty payments and suspended \$124 million in loans.<sup>49</sup> With threats by the government of Chad to close oil wells if the hold on the accounts was not lifted, the Bank reached an interim deal with the government in April 2006.<sup>50</sup> Under the deal, the Bank agreed to resume loan disbursements and release more than \$100 million in overdue royalties to the Chadian government.<sup>51</sup> The Bank also yielded to the government's request to double the percentage of money it could spend without constraints.<sup>52</sup> Increasing the government's discretionary allocation by more than 100% also meant a drastic reduction of the poverty alleviation allocation.<sup>53</sup> In addition, the government wanted to spend some part of the reduced poverty reduction money on security.<sup>54</sup>

In July 2006, the Bank and the government of Chad reached a one-year deal, covering only 2007 revenues, which maintained the increase in discretionary revenues to the government and allotted 70% of all revenues from the project to poverty reduction.<sup>55</sup> The Bank's leverage was also somewhat strengthened. Unlike the previous arrangement under the RMP that did not include indirect revenues (namely taxes and custom duties), the July 2007 agreement included them, allowing the Bank to exercise oversight over both direct and indirect revenues.<sup>56</sup> Considering that indirect revenues were expected to represent a substantial portion of government revenues in the years ahead, this inclusion appeared to be significant.<sup>57</sup> Additionally, the government agreed to undertake an audit of the special petroleum revenue accounts in 2006 and cooperate with the World Bank and other stakeholders in strengthening the role of the Monitoring Com-

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(UNIVERSITY OF TORONTO, MUNK CENTRE FOR INTERNATIONAL STUDIES, WORKING PAPER No. V (2006), available at <http://www.kellogg.northwestern.edu/research/fordcenter/documents/10.03%20Vogel%20globalgov%20NW.pdf>.

49. David White, *World Bank in Deal with Chad*, FIN. TIMES EUROPE, Apr. 28, 2006, <http://www.ft.com/cms/s/0/dcff021c-d652-11da-8b3a-0000779e2340.html#axzz2OIPZZ6vW>.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Chad-Cameroon Pipeline Project Frequently Asked Questions*, WORLD BANK (Mar. 2007), <http://web.worldbank.org/WBSITE/EXTERNAL/EXTSITETOOLS/0,,contentMDK:20263700~menuPK:534320~pagePK:98400~piPK:98424~theSitePK:95474,00.html>.

56. Cathy Landry, *Chad Deal to Raise World Bank Influence: New Oil Production Accord Brings Clearer Revenue Framework*, 84 PLATTS OILGRAM NEWS 5, July 17, 2006; see John A. Gould & Matthew Winters, *An Obsolescing Bargain in Chad: Explaining Shifts in Leverage between the Government and the World Bank*, 9 BUSINESS & POLITICS, 2007, at 2, <http://www.bepress.com/bap/vol9/iss2/art4>.

57. Landry, *supra* note 56, at 5.

mittee.<sup>58</sup> The Doba region would continue to receive an allocation of 5% for local projects while revenues in excess of projections will be placed in a reserve stabilization fund for use in the future.<sup>59</sup> The agreement rejected the government's re-definition of the priority list to include security but included the government's addition of 'justice' to the list.<sup>60</sup> The July agreement built on the April interim deal and was designed to form the foundation for a more permanent agreement that would cover revenues in future years.<sup>61</sup> Notwithstanding the foregoing, the constraints on the RMP implementation did not abate considerably, prompting the World Bank to withdraw from the project in 2008.<sup>62</sup> An unperturbed Chadian government, buoyed by huge oil revenues and acting on feelers from the World Bank, paid off its loans to the Bank, ending what was left of the relationship.<sup>63</sup>

The Chad experiment did not live up to the high hopes that greeted its emergence. Among observers intimately familiar with the project, it is generally considered a failure.<sup>64</sup> Some of the reasons for the failure are structural. For instance, the Monitoring Committee was weak, by design, and the scope of its assignment was not a model of clarity. The Committee had a mandate to "verify," "authorize" and "oversee" expenditure of revenues, but the exact parameters of this mandate were unclear.<sup>65</sup> For example, there was a lack of clarity as to whether its monitoring function was limited to expenditure only or included revenue collection, management, and expenditure.<sup>66</sup> Critics noted early on in the process that the Monitoring Committee should be invested with subpoena powers to strengthen it and enhance its work.<sup>67</sup> The process of removing Monitoring Committee members was easy, creating an avenue to conveniently remove even competent members who fall out of favor with the government.<sup>68</sup> A stronger arrangement would have likely provided for the sharing of the powers of appointment and removal of Committee members between the government

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58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. Annalisa M. Leibold, *Aligning Incentives for Development: The World Bank and the Chad-Cameroon Oil Pipeline*, 36 *YALE J. INT'L L.* 167, 168 (2011) (stating that on September 9, 2008, the World Bank announced that it was withdrawing from the project).

63. *Id.* at 168 (stating that the World Bank required the loan repayment as part of its withdrawal terms).

64. See Sharp, *supra* note 12, at 380.

65. IAN GARY & TERRY LYNN KARL, *BOTTOM OF THE BARREL: AFRICA'S OIL BOOM AND THE POOR* 70 (Catholic Relief Services 2003).

66. *Id.*

67. Luc Lampriere et al., *Managing Oil Revenues in Chad: Legal Deficiencies and Institutional Weaknesses*, (Oct. 13, 1999) (unpublished manuscript, on file with Harvard Law School Human Rights Clinical Program).

68. See Gary and Karl, *supra* note 65, at 72.

and the external institution. Indeed, one commentator had predicted imminent failure of the project because of this imbalance of power, arguing that a necessary ingredient for success would be to provide for the appointment of members of the governing or supervisory board by an international organization.<sup>69</sup> Obviously, the government of Chad would have adamantly resisted efforts to further erode its powers, and the Bank was content to get any deal that was politically feasible.

Another major contributor to the failure of the experiment, apart from structural problems, is the absence of political will. The government of Chad lacked the political will to follow through with even the modest obligations that it agreed to undertake.<sup>70</sup> Again, this outcome could not have come as a complete surprise to those skeptics who harbour the belief that many unaccountable governments, such as the type in Chad, should not be counted upon to live up to their bargain and that institution-building should precede natural resource development.<sup>71</sup>

Nevertheless, one should not be in a haste to figuratively throw out the proverbial “baby with the bathwater.” The idea behind the Chad experiment was a noble one, with a determination on the part of the World Bank to reverse the ugly trajectory of resource abundance failing to benefit the majority of the citizens, as has been seen in a number of countries in Africa and elsewhere. While it did not achieve its loftier goals, a level of success was recorded.<sup>72</sup> Instead of discarding such collaborative, people-centered arrangements, we should continue to explore ways to make them better.<sup>73</sup> For instance, a more robust role for host communities should be incorporated into the arrangement instead of a top-down approach that relies on national leaders to propose and execute local projects.<sup>74</sup>

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69. James C. Owens, *Government Failure in Sub-Saharan Africa: The International Community's Options*, 43 VA. J. INT'L L. 1003, 1047-49 (2003).

70. Lampriere, et al, *supra* note 67, at 2, 5 (noting that success of the program depends on political will).

71. See generally Gary & Karl, *supra* note 65, at 68.

72. INDEP. EVALUATION GRP., THE WORLD BANK GROUP PROGRAM OF SUPPORT FOR THE CHAD-CAMEROON PETROLEUM DEVELOPMENT AND PIPELINE CONSTRUCTION, Report No. 50315 (2009) at 43, <http://siteresources.worldbank.org/INTOED/Resources/ChadCamReport.pdf>. (“If [oil was developed without World Bank involvement], the environmental and social provisions and the external monitoring arrangements would not have been as thorough as those under the program. Also, it is probable that the revenue allocations to the “priority sectors” would have been lower, and virtually certain that the support institutions such as the Collège and the advisory group would not have been put in place.”).

73. See generally Emeka Duruigbo, *Nunc Dimittis or Chief Cornerstone?: Evaluating Africa's International Norm-Development Experiment in the Chad-Cameroon Pipeline Project*, Presentation at Albany Law School's Africa and International Law Conference, Albany, New York (Apr. 14, 2012).

74. See Stefaan Smis & Stephen S. Kingah, *How the Government of Chad Can Meet Development Pledges to its People Without Breaching its Obligations with the World Bank and Mul-*

### B. *Chinese Investment Model*

The Chinese investment approach, in Africa's natural resource sector, links oil and gas licensing to a corresponding investment in domestic infrastructure.<sup>75</sup> This investment could take the form of railroads, airports, refineries, educational institutions, and health facilities. China's primary objective in adopting this approach is to secure the goodwill of African political leaders and make inroads into the African natural resources' industries.<sup>76</sup> Obviously, China realizes that it is a late entrant into an area in which rival interests are already well entrenched. Resorting to this method helps in creating a more conducive playing field, even if it does not succeed in levelling it. The Chinese approach of resource-backed infrastructure financing is not entirely unprecedented or unique.<sup>77</sup> Nevertheless, the Chinese approach is innovative in the sense that it represents a sharp departure from the approach of Western countries whose multinational corporations have, over the course of several decades, been at the forefront of Africa's oil development.<sup>78</sup> Professor Chris Okeke remarks that a salient point of divergence between the Chinese entrance into Africa and that of the United States and western European countries "is that China did not view itself as superior but rather as a partner."<sup>79</sup> Okeke continues: "Accordingly, China has successfully launched corporate partnerships with African governments. It has also promoted significant direct foreign investments."<sup>80</sup> Another scholar describes the Chinese approach and its distinguishing quality in the following words:

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*tinational Oil Companies*, 4 MANCHESTER J. INT'L ECON. L. 3 (2007); Macartan Humphreys, *Natural Resources, Conflict, and Conflict Resolution: Uncovering the Mechanisms*, 49 J. CONF. RES. 508, 512 & n. 13 (2005) (discussing skepticism of local chiefs in the Doba oil-producing region of Chad about oil revenues being actually spent in their region, despite formal provisions to that effect in the revenue management plan, and their resulting petition to oil corporations for direct compensation).

75. See Alexis Habiaryemye, CHINAFRIQUE, AFRICOM, and African Natural Resources: A Modern Scramble for Africa?, 12 WHITEHEAD J. DIP. & INT. REL. 79 (2011).

76. See Aiken, *supra* note 11, at 319; Daniel Abebe, *Not Just Doctrine: The True Motivation for Federal Incorporation and International Human Rights Litigation*, 29 MICH. J. INT'L L. 1, 34 (2007) (discussing China's effort at forging relationships with African leaders with a view to gaining access to some of the continent's natural resources).

77. See Suzanne Siu, *The Sovereign-Commercial Hybrid: Chinese Minerals for Infrastructure Financing in the Democratic Republic of the Congo*, 48 COLUM. J. TRANSNAT'L L. 599, 616 (2010).

78. Aiken, *supra* note 11, at 319 (stating that the United States and other Western countries have not had a significant involvement in infrastructural development as part of petroleum investment in African countries); See Siu, *supra* note 77, at 616-17 (arguing that "China's particularly effective use of resources for infrastructure financing, combined together with its multilateral engagement of recipient states, differentiates the Chinese approach from other forms of sovereign and commercial financing").

79. Okeke, *supra* note 12, at 198.

80. *Id.* (citation omitted).

The Chinese strategy of swapping large infrastructure projects for access to mineral resources also created a completely new feature in the resource market. By building much needed infrastructure in Africa, China has the advantage of acquiring African resources in exchange for undertaking development projects on African soil instead of sending oil revenues to foreign bank accounts.<sup>81</sup>

Some of these projects include the financing of huge infrastructure projects in Angola, in exchange for the country's oil, including the building of 215,000 housing units, restoration of 1,000 miles of highway and 1,665 miles of railroad, and the construction of a new international airport in the capital city of Luanda.<sup>82</sup> War-ravaged Angola also accelerated its reconstruction activities through three oil-backed loans from Beijing that commissioned Chinese companies to build roads, railways, hospitals, schools, and water systems.<sup>83</sup> Similar loan arrangements were undertaken with Nigeria to finance projects that use gas to generate electricity.<sup>84</sup> The China State Construction Engineering Company signed an agreement with the Nigerian National Petroleum Corporation in May 2006 to invest \$23 billion toward the construction of oil refineries and a petrochemical plant in Nigeria.<sup>85</sup> Teams from China are also building a hydropower project in the Republic of Congo, to be repaid in oil, while a similar project to be repaid in cocoa beans was embarked upon in Ghana.<sup>86</sup>

The core advantage of the Chinese approach is that it assures infrastructural development at a faster pace than would ordinarily be the case if left to national, state, or local governments in Africa.<sup>87</sup> Another advantage is that it provides the resource-owning countries with additional leverage in negotiations with Western oil companies, leading to appreciably higher bids for oil and gas licenses.<sup>88</sup> By raising the bar, the Chinese investors weaken the resistance of Western investors considerably and deprive them of one more excuse for underpricing the assets.

A major problem with the Chinese approach is that it could be mired in corruption.<sup>89</sup> Some instances of corrupt activities that have already surfaced include cases in Congo-Brazzaville where the coun-

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81. Habiyaemye, *supra* note 75, at 89.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. Because of corruption and related factors, public infrastructure projects are often left uncompleted or take considerable time to complete by the firms that won the contract.

88. Bashir Adigun, *China Offers Nigeria \$1.1B Loan for Rail, Airports*, ASSOCIATED PRESS (Sep. 12, 2012), [www.guardian.co.uk/world/feedarticle/10435206](http://www.guardian.co.uk/world/feedarticle/10435206).

89. See Pádraig Carmody, *The Scramble for Biofuels and Timber in Africa*, 12 WHITEHEAD J. DIP. & INT'L REL. 125, 131 (2011).

try's minister of forestry and environment is a major shareholder in a Chinese timber company operating there and the construction of a large house by the Chinese for a senior government official that manages large infrastructure projects in the country.<sup>90</sup> Considering that corruption is a major impediment to Africa's economic and political development, this concern cannot be glossed over.<sup>91</sup>

Critics note that Chinese investors would leave host African countries worse off because they do not make real contributions to the local economy. The Chinese are known to import workers and food items from China instead of using local talent and products.<sup>92</sup> China's lack of interest in internal political development in the importing countries or reckless disregard of human rights abuses in such places raises strong concerns.<sup>93</sup> By ignoring the misdeeds of these rulers and while providing them with alternative source of financing, China weakens efforts to hold the leaders accountable.<sup>94</sup> Ultimately, the citizens bear the brunt of the misrule and lack of needed political reforms while China profits in the form of access to desperately needed

90. *Id.*

91. See GLOBAL WITNESS, RIGGED? THE SCRAMBLE FOR AFRICA'S OIL, GAS AND MINERALS 2 (2012), available at <http://www.globalwitness.org/sites/default/files/library/RIGGED%20The%20Scramble%20for%20Africa%27s%20oil,%20gas%20and%20minerals%20.pdf> (stating that "corruption can prop up autocratic governments that keep their people in poverty while enriching elites and the international companies that are willing to do business with them.").

92. See e.g., Ruth Gordon, *The Environmental Implications of China's Engagement With Sub-Saharan Africa*, 42 ENVTL. L. REP. NEWS & ANALYSIS 11109, 11112 n. 38 (2012) ("It has been estimated that there are more than 700 Chinese enterprises in more than 50 countries, employing close to 80,000 Chinese workers in a broad variety of sectors, including light manufacturing, services, agroprocessing, apparel, and telecommunications. Africa has also been on the receiving end of, inter alia, low-cost Chinese motorcycles, electronic goods, and tee shirts."); James Kraska, *I.O. 2.0: Indian Ocean Security and the Law of the Sea*, 43 GEO. J. INT'L L. 433, 440 (2012) ("While China has long burnished its Third World solidarity with post-colonial regimes in Africa, the brashness of the new economic relationship between Africa and China can be grating to Africans. Anxious to deliver jobs to its population, China has exported 750,000 of its rural poor to Africa. Migrant Chinese workers have been brought to the continent, taking positions that otherwise would employ local workers.") (citations omitted); Peter K. Yu, *Sinic Trade Agreements*, 44 U.C. DAVIS L. REV. 953, 1015 n. 285 and accompanying text (2011); David Haroz, *China in Africa: Symbiosis or Exploitation?*, 35 FLETCHER F. WORLD AFF. 65, 78 (2011) ("Understandably, many Africans are wary of Chinese migrant labor, particularly as Chinese infrastructural loans require hiring a certain percentage of Chinese workers. Yet, given the relatively small number of Chinese laborers in Africa, their overall impact on African employment should not be exaggerated. Chinese-supported construction and manufacturing ventures also create jobs for Africans, which likely otherwise would not be available.").

93. See Alan O. Sykes, *Corporate Liability For Extraterritorial Torts Under The Alien Tort Statute and Beyond: An Economic Analysis*, 100 GEO. L.J. 2161, 2195-96 (2012) (discussing China's benefiting from the exit from Sudan of the Canadian energy company, Talisman, as a response to human rights allegations and litigation in the U.S. that the company eventually won).

94. Russell P. McAleavey, *Pressuring Sudan: The Prospect of an Oil-for-Food Program for Darfur*, 31 FORDHAM INT'L L.J. 1058, 1069 n.50 (2008) (referencing "increasing U.S. frustration with China's willingness to do business in countries United States is trying to pressure or isolate, such as Sudan, Equatorial Guinea, and Zimbabwe."); Patrick J. Keenan, *Financial Globalization and Human Rights*, 46 COLUM. J. TRANSNAT'L L. 509, 545 (2008).



oil.<sup>95</sup> Any meaningful energy policy in African countries should incorporate the Chinese approach of infrastructural development while discarding the unpalatable and problematic aspects.<sup>96</sup> The infrastructure development need not be structured as resource-backed financing. It may take the shape of preconditions for the grant of prospecting or production licenses<sup>97</sup> or as bonus payments that are due to the mineral owner (host country) regardless of whether oil and gas are produced by the energy company.<sup>98</sup>

The policy approaches discussed above, like many of the implemented or proposed policy options for Africa, are hobbled by an additional, significant impediment – the emphasis on national or collective good. Emphasizing national interest is not inherently bad because the individuals that make up the nation-state would ultimately benefit from it. However, national interest should not be at the expense of individual benefit, especially when such individual benefit is not inimical to the general welfare. Equity participation provides a link to meet individual needs and simultaneously contribute to national development in a manner that many of these other options do not.<sup>99</sup> The next part discusses this approach.

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95. Patrick J. Keenan, *Curse or Cure? China, Africa, and the Effects of Unconditioned Wealth*, 27 BERKELEY J. INT'L L. 84, 100 (2009) (“In the end, China’s willingness to fund the Angolan government without the kinds of transparency or accountability conditions that other international lenders would require is in China’s strategic interest because China is able to ensure access to oil for which it is desperate. The cost, however, is borne by the people of Angola. China’s assistance permitted the Angolan government to forego IMF assistance, which may have contributed to the development of useful governance norms and created an incentive for the Angolan government to change its behavior.”).

96. Uche Ewelukwa, *Trade, Empires and Subjects: China-Africa Trade: A New Fair Trade Arrangement or the Third Scramble For Africa?*, 41 VAND. J. TRANSNAT'L L. 505, 511 (2008) (“While there is much that Africa could gain from the relationship, African leaders and their constituents must guard against imperialism of any sort and shy away from arrangements that threaten sustainable development on the continent or undermine respect for human rights and dignity. Most importantly, African leaders must push past Beijing’s rhetoric of anti-hegemonism and develop clear policies to guide the continent’s engagement with China.”).

97. See GLOBAL WITNESS, *supra* note 91, at 23.

98. See JOHN S. LOWE, *OIL AND GAS LAW IN A NUTSHELL* 41 (5th ed. 2009) (defining an oil and gas bonus as “the right to any payments made to induce the signing of the lease”).

99. It is true that there are other proposed options, such as a “People’s Fund” and revenue distribution arrangements that have a similar goal, while being immune from the criticism about a lack of individual focus. However, they differ from equity participation in a significant respect. They propose the replacement of the current revenue model in oil-producing countries by distributing oil revenues directly to the people, instead of retaining them in national coffers and utilizing them for national programs. Regardless of the merit of such an idea, they are likely to be rejected outright by the political elites currently profiting from the status quo. Equity participation, on the other hand, does not seek to replace national revenues in that manner.

## II. THE EQUITY PARTICIPATION OPTION

## A. Conceptual Issues

Equity participation is deployed in diverse contexts, such as real estate financing and business investment.<sup>100</sup> It denotes the notion or practice of holding an ownership stake in an asset, business, or project. In energy infrastructure projects, it means that the equity participant is a partial owner in the venture. This partial ownership interest entitles the participant to participate in project decision-making and share in gains and losses flowing from the project. Obviously, the idea of equity participation is linked to the issue of ownership. In most parts of the world, ownership of oil and gas resources is vested in the government.<sup>101</sup> With the exception of Canada, the United States, and some old Spanish land grants in Colombia, individuals have no right to petroleum resources underneath their land.<sup>102</sup> A system of public ownership is premised on the belief that the government will utilize the state-owned resources for the common good.<sup>103</sup> Sadly, this belief has not proven true in many countries, particularly in Africa, as a small but powerful segment of the population pockets to itself the benefits of the people's patrimony.<sup>104</sup>

100. See e.g., J. Cary Barton & Robert E. Morrison, *Equity Participation Arrangements Between Institutional Lenders and Real Estate Developers*, 12 ST. MARY'S L.J. 929 (1981).

101. See Michele Ruta & Anthony J. Venables, *International Trade in Natural Resources: Practice and Policy*, WORLD TRADE ORGANIZATION, ECONOMIC RESEARCH AND STATISTICS DIVISION, STAFF WORKING PAPER ERSO-2012-07 (March 2012), at 1, available at [http://www.wto.org/english/res\\_e/reser\\_e/ersd201207\\_e.pdf](http://www.wto.org/english/res_e/reser_e/ersd201207_e.pdf) ("Subsoil assets are typically state-owned . . ."); Hurst Groves, *Offshore Oil and Gas Resources: Economics, Politics and the Rule of Law in the Nigeria-São Tomé é Príncipe Joint Development Zone*, 59 J. INT'L AFF. 81, 83 (2005) (referencing "the nearly universal principle that oil . . . [is] the property of the state . . .").

102. David Johnston, *How to Evaluate the Fiscal Terms of Oil Contracts*, in *ESCAPING THE RESOURCE CURSE* 53, 68 (Macartan Humphreys, Jeffrey D. Sachs & Joseph E. Stiglitz, eds., 2007) ("With the exception of the United States, Canada, and a very few old Spanish land grants in Colombia, mineral rights belong to the state."); Kenneth S. Culotta, *Recipe for a Tex-Mex Pipeline Project: Considerations in Permitting a Cross-Border Gas Transportation Project*, 39 TEX. INT'L L.J. 287, 306 (2004) (stating that "most oil and gas legal contracting regimes are based on state ownership of the resource *in situ*"); Jeffrey D. Sachs, *How to Handle the Macroeconomics of Oil Wealth*, in *Escaping the Resource Curse*, *supra* note 92, at 172, 180 (stating that "public ownership of hydrocarbon reserves is the norm"); Uisdean R. Vass & Adriana Lezcano, *The New Venezuelan Legal Regime for Natural Gas: A Hopeful New Beginning?*, 36 TEX. INT'L L.J. 99, 105 (2001) ("Outside the onshore United States, it is practically universal that governments own the rights to hydrocarbons in place in the reservoir . . ."). In reality, the system is one of public-private ownership in which both the government and individuals own natural resources. For instance, state and federal governments in the U.S. and Canada own oil and gas found on public lands. Thus, there is really no pure system of private ownership, where only private citizens own oil and gas *in situ*, a direct counterpart to exclusive ownership by the government prevalent in most of the world.

103. John Southalan, *What are the Implications of Human Rights for Minerals Taxation?*, 36 RES. POL. 214, 214-226 (2011); Groves, *supra* note 101.

104. Ndiva Kofele-Kale, *Patrimonicide: The International Economic Crime of Indigenous Spoliation*, 28 VAND. J. TRANSNAT'L L. 45 (1995).

As a result, there have been calls for the adoption of the alternative system that allows for private ownership.<sup>105</sup> It is likely that such calls will continue to meet with resistance and rejection by the politically-connected forces that benefit from the status quo. An equity participation approach represents a viable and politically-palatable middle course capable of bridging the gap between the competing systems of public and private ownership. Under equity participation, the government will continue to retain ownership of natural resources, but host communities and other surface owners will be allowed to participate in the available structures for exploiting the minerals. Such a system has been in place in Texas for almost a century under the Texas Relinquishment Act.<sup>106</sup>

### B. *Equity Participation in Texas*

While the United States permits private ownership of oil and gas *in situ*, without prejudice to government ownership of oil and gas on public lands and territorial waters, there are variations on how each state recognizes the right.<sup>107</sup> In states, like Texas and Arkansas that subscribe to the “ownership-in-place” theory, a landowner owns the oil and gas underneath his land.<sup>108</sup> In states like California and Wyoming that have adopted the “non-ownership” theory, the landowner’s right is not construed as ownership; instead, she has an exclusive right to explore and produce the oil and gas underlying her land.<sup>109</sup> How-

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105. See Emeka Duruigbo, *Realizing the People’s Right to Natural Resources*, 12 WHITEHEAD J. OF DIPL. & INT’L REL. 111 (2011).

106. TEX. NAT. RES. CODE ANN. §§ 52.171–52.189 (West 2011) (The Relinquishment Act of 1919 was repealed, but reenacted verbatim in 1977 as part of the Texas Natural Resources Code).

107. See EUGENE KUNTZ, A TREATISE ON THE LAW OF OIL AND GAS 60-1 (1987). “In the United States, private ownership of oil, gas, and other minerals has long been recognized. Ownership of land carries with it ownership of or the exclusive right to enjoy substances under the surface, and the state has no proprietary rights by virtue of its status as sovereign. The sovereign has only such proprietary rights as it might have reserved in the land upon patent or might have subsequently acquired. To the extent that there is a notion that society generally should benefit from the exploitation and depletion of natural resources, it is expressed by the imposition of severance taxes and by constitutional or statutory provisions requiring the state to reserve certain mineral rights upon disposing of public lands.” (citations omitted); CURTIS H. LINDLEY, A TREATISE ON THE AMERICAN LAW RELATING TO MINES AND MINERAL LANDS 43-44 (reprint ed. 1972).

108. Christopher Kulander, *Big Money vs. Grand Designs: Revisiting the Executive Right to Lease Oil & Gas Interests*, 42 TEX. TECH L. REV. 33, 73 (2009). Apart from Texas, other states that follow the ownership-in-place theory include Arkansas, Colorado, Kansas, Maryland, Michigan, Mississippi, Montana, New Mexico, North Dakota, Pennsylvania, Tennessee, Washington and West Virginia.

109. RICHARD C. MAXWELL, ET AL., OIL AND GAS: CASES AND MATERIALS, 23, 25 (8th ed. 2007); Theresa D. Poindexter, Comment, *Correlative Rights Doctrine, Not the Rule of Capture, Provides Correct Analysis for Resolving Hydraulic Fracturing Cases [Coastal Oil & Gas Corp. v. Garza Energy Trust]*, 268 S.W.3d 1 (Tex. 2008)], 48 WASHBURN L.J. 755, 781 (2009). Apart from

ever, regardless of the theory of ownership adopted, the landowner's rights in the oil and gas deposits are modified by the rule of capture.<sup>110</sup> Under the rule or law of capture, oil or gas belongs to the person that captures or produces it, even if the captured mineral migrated from the neighboring landowner's tract.<sup>111</sup> The Relinquishment Act regime can be considered a third variant—a system of shared “ownership” (or equity participation) between the State and the landowner.<sup>112</sup>

The application of the Relinquishment Act is limited to lands set aside by the State of Texas, for the support of public schools and asylums, and sold with a mineral classification or reservation between September 1, 1895 and June 29, 1931.<sup>113</sup> Most of these lands are in West Texas.<sup>114</sup> It also follows that any land originally sold within this thirty-six-year period without a mineral reservation or classification is not subject to the Relinquishment Act, thus leaving the landowners with ownership of the oil and gas underneath their land.<sup>115</sup>

The Relinquishment Act, as presently applied, confers on a surface owner the right to lease the minerals under his land as an agent of the State.<sup>116</sup> In return, the surface owner receives one-half of the lease benefits, including royalties, delay rentals, and bonuses, while the remaining half belongs to the State.<sup>117</sup> The State's portion of the com-

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California, other states that follow the nonownership or exclusive right-to-take theory include Alabama, Illinois, Indiana, Kentucky, Louisiana, New York, Ohio, Oklahoma and Wyoming.

110. Essentially, the two systems lead to the same result. See John G. Sprankling, *Owning the Center of the Earth*, UCLA L. REV. 979, 1009–10 (2008); JOHN S. LOWE, ET AL., CASES AND MATERIALS ON OIL AND GAS LAW 26 (5th ed. 2008) (stating that “the distinction in theories is largely one of terminology.”).

111. Christianson Hartman, *Is the Wind Mine to Give Away? Guidance for Testators Wishing to Transfer a Wind Interest*, 1 EST. PLAN. & COMM. PROP. L. J. 399, 410 (2009).

112. Patrick H. Martin, *Royalty Issues on Lands Owned by State or Local Governments*, 33B ROCKY MTN. MIN. L. INST. 5 (1993) (describing as unique, Texas' arrangement with regard to certain of its public land under the Relinquishment Act).

113. *Id.*; see also *Relinquishment Act Lease Brochure*, TEX. GEN. LAND OFF., (Oct. 2001), 103, [http://www.glo.texas.gov/what-we-do/energy-and-minerals/\\_documents/oil-gas/permitting-leasing/relinquishment-act-leasing/HROW\\_Tracts\\_Guidelines.pdf](http://www.glo.texas.gov/what-we-do/energy-and-minerals/_documents/oil-gas/permitting-leasing/relinquishment-act-leasing/HROW_Tracts_Guidelines.pdf); Kirk J. Bily, *Royalty on Take-or-Pay Payments and Related Consideration Accruing to Producers*, 27 HOUS. L. REV. 105, 123 (1990); James D. Shields, *Leasing Lands Subject to the Texas Relinquishment Act*, 13 ST. MARY'S L.J. 869, 869 (1982).

114. Patrick H. Martin, *Royalty Issues on Lands Owned by State or Local Governments*, 33B RMMLF-INST 5 (1993).

115. H. Philip (Flip) Whitworth, *Leasing and Operating State-Owned Lands for Oil and Gas Development*, 16 TEX. TECH. L. REV. 673, 682 (1985) (“If land was originally sold by the state during this 36-year period without a mineral reservation or classification, then the Relinquishment Act does not apply and the state has no interest in the oil and gas which may underlie these lands.”).

116. Hartman, *supra* note 111, at 1021; J.W. Adams, Jr., *Oil and Gas Leasing upon Texas State Lands*, 18 TEX. J. BUS. L. 20, 20 (1984).

117. TEX. NAT. RES. CODE ANN. § 52.172; see also *Cross v. Shell Oil Co.*, 144 Tex. 78, 188 S.W.2d 375 (1945), *conformed to* 189 S.W.2d 216.

pensation from an oil and gas lease must never fall below one-sixteenth royalty or less than ten cents per acre as delay rental.<sup>118</sup> The surface owner's financial participation is rationalized as compensation for services rendered as an agent and for the damage caused by the use of his or her surface for the production of the minerals.<sup>119</sup> Some commentators do not buy the rationale, viewing it as a "fiction" designed and deployed to mask the real justification, which is that the landowner is being given an interest in, and legally empowered to share in the benefit of, the oil underneath her land.<sup>120</sup>

The landowner's power does not include the power to perpetually alienate the mineral interest or convey a mineral fee since he does not have legal title to the minerals consistent with the maxim *nemo dat quod non habet*.<sup>121</sup> The landowner is free to alienate the interests by lease which ends after an ascertainable period of time or specified event. Besides, the landowner is within his rights to assign any benefits, e.g., royalties, under an existing lease to another person for the duration of the lease.<sup>122</sup> The statutory agency created under the Relinquishment Act is accompanied by a number of important duties. One of such duties is a duty to commence drilling an offset well within 100 days of discovering that a non-Relinquishment Act land located within 1,000 feet from the landowner's land is producing oil and gas in commercial quantities.<sup>123</sup> This duty is aimed at the prevention of loss of the State's oil and gas through drainage by adjoining or neighboring lands that are not subject to the Relinquishment Act and over which the State has no property interest. Failure of the landowner to drill a well to prevent the drainage may lead to the landowner losing benefits under any lease she might have entered into with respect to the land.<sup>124</sup>

The landowner's duty to lease Relinquishment Act land as the state's agent is a fiduciary duty.<sup>125</sup> As a fiduciary, the owner of the

118. TEX. NAT. RES. CODE ANN. § 52.172 (West 2011).

119. Stuart C. Hollimon, *Oil, Gas, and Mineral Law*, 43 Sw. L.J. 381, 406 (1989–1990).

120. See *Holt v. Giles*, 150 Tex. 351 (1951); *Norman v. Giles*, 148 Tex. 21, 26 (1949) ("Evidently as a result of these considerations the Legislature found it desirable to connect the surface owner more closely and less unprofitably with the development of the minerals and passed the Relinquishment Act in order to accomplish this purpose through empowering the surface owners to lease the oil and gas.").

121. *State v. Magnolia Petrol. Co.*, 173 S.W.2d 186, 190 (1943).

122. *Lemar v. Garner*, 121 Tex. 502, 505 (1932).

123. TEX. NAT. RES. CODE ANN. § 52.171 (West 2011).

124. See EDWARD K. ESPING, 55A TEX. JUR. 3D OIL & GAS § 338 (West 2011) ("The Relinquishment Act contemplates a continuing and perpetual leasing agency in the surface owner unless forfeited on the statutory ground of failure to drill offset wells, or perhaps on equitable grounds such as fraud or failure or inability to act.") (citations omitted).

125. Patrick H. Martin, *Unbundling the Executive Right: A Guide to Interpretation of the Power to Lease and Develop Oil and Gas Interests*, 37 NAT. RESOURCES J. 390, 391 (1997).

soil is obligated to act in the best interest of the state and must give full disclosure of any facts affecting the state's interest. Where a conflict arises between the interests of the State and surface owner, the owner is duty-bound to subordinate her interests to the State's interests.<sup>126</sup> Further, the landowner is prohibited from delegating her agency powers under the Act to another individual although a corporate owner may act through an agent to execute the lease.<sup>127</sup> The validity of any lease executed by the surface owner is conditioned upon the approval of the General Land Office (GLO). Accordingly, the landowner is under an obligation to file the lease with the GLO.<sup>128</sup>

### C. *Equity Participation in South Africa*

A notable equity participation model in Africa is that involving the Royal Bafokeng Nation in South Africa. The Royal Bafokeng Nation holds shares of Implats which is the company developing the substantial platinum reserves in the ethnic homeland.<sup>129</sup> The Royal Bafokeng Nation, a community of approximately 150,000 Setswana speaking people, holds and manages its commercial assets through Royal Bafokeng Holdings (Pty) Limited (RBH) which is the community's "primary investment vehicle."<sup>130</sup> RBH holds an aggregate stake of 13.2% in Implats which translates to more than 83 million shares.<sup>131</sup> Implats is the second largest platinum producer in the world and its flagship operation, Impala Platinum, mines land owned by the Royal Bafokeng Nation.<sup>132</sup> Because Implats has operations in a number of places, RBH's holdings in Implats give it exposure to more than just the local operation run by Impala but also to other interests held by Implats in other places in South Africa and in Zimbabwe.<sup>133</sup> Of added significance is the fact that RBH is the single largest shareholder in Implats with an investment that also represents RBH's single largest investment.<sup>134</sup> According to a recent newspaper report, "[t]he

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126. *Relinquishment Act Lease Brochure*, *supra* note 113, at 1.

127. *Id.*

128. *Id.*

129. Conrad Mugoya Bosire, *A Dry Udder in the Milk Season? Natural Resource Exploitation in Africa: Realising the Right to Economic Benefit to Host Communities* 45 (2009) (unpublished LL.M. Thesis, University of Pretoria).

130. *About Royal Bafokeng Holdings*, ROYAL BAFOKENG HOLDINGS (Nov. 2012), [http://www.bafokengholdings.com/m/files/rbh\\_factsheet\\_nov12.pdf](http://www.bafokengholdings.com/m/files/rbh_factsheet_nov12.pdf).

131. *Implats*, Royal Bafokeng Holdings (June 2010), [http://www.bafokengholdings.com/b/inv\\_min\\_implats.php](http://www.bafokengholdings.com/b/inv_min_implats.php); see also *Royal Bafokeng Holdings 2011 Integrated Review*, ROYAL BAFOKENG HOLDINGS (Apr. 2012) [http://www.bafokengholdings.com/a/files/RBH\\_annual\\_review\\_2011.pdf](http://www.bafokengholdings.com/a/files/RBH_annual_review_2011.pdf).

132. *Id.*

133. *Id.*

134. *Id.* RBH invests in other entities, apart from Implats. For example, RBH holds an aggregate stake of 56.9%, translating to 93.82 million shares, in Royal Bafokeng Platinum Ltd, a

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holding company's portfolio was valued at 25.1 billion rand (\$2.92 billion), according to its 2011 annual report. In 2010, it provided an 800 million rand (\$92.92 million) dividend to the Royal Bafokeng Nation, equal to about \$620 per person."<sup>135</sup>

### III. STRUCTURING COMMUNITY EQUITY PARTICIPATION

#### A. Options

Equity participation arrangements could take different forms based on the objectives sought to be achieved by the parties and constraints that they confront in the course of the undertaking. One option is the Texas Relinquishment model discussed above. It may also take the form of investing in the shares of an existing corporation involved in natural resource exploitation in the area. This latter option is the approach adopted by South Africa's Bafokeng Nation. The Bafokeng option may not be available to many communities hosting oil and gas production because the oil companies and their multinational parents might prefer to keep ownership within their respective corporate families.<sup>136</sup> The fact that the oil companies operate in many communities would also hamper allocation of stock in the companies to those communities. If they are dealing with a community or two, and the possibility of liquidating the company after operations cease in that community, it would be easier to allot shares to the community as part of the existing oil company.

Another equity participation option that is worthy of consideration is the creation of joint ventures involving the government, energy companies, and community corporations. This option is the focus of this article. The concept of joint venture has business origins but has been subjected to confusing treatment as jurists grapple with its true meaning.<sup>137</sup> Accordingly, joint ventures have been defined variously by different scholars and judges.<sup>138</sup> One scholar persuasively argues

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black-owned and controlled mid-tier platinum group metals producer. *See About Royal Bafokeng Holdings*, *supra* note 130.

135. Jon Herskovitz, *South Africa's "Richest Tribe" Offers Platinum Model*, REUTERS (Oct. 19, 2012), <http://www.reuters.com/article/2012/10/19/us-safrica-mines-bafokeng-idUSBRE89IIEF20121019>.

136. For instance, according to court filings in the Netherlands, all the stock of Shell Petroleum Development Company in Nigeria is owned by a subsidiary of the parent company, Royal/Dutch Shell, a British registered company. *Oguru, Efanga & Milieudedefensie v Royal Dutch Shell Plc & Shell Petroleum Dev. Co. Nigeria Ltd.*, No. 330891/ HA ZA 09-579 at 6. (2009). *But see* Bosire, *supra* note 129, at 50 (suggesting a legal requirement to impose a Bafokeng-like arrangement between multinational corporations and host communities in appropriate cases).

137. Talal Al-Emadi, *Joint Venture Contracts (JVCs) among Current Negotiated Petroleum Contracts: A Literature Review f JVCs Development, Concept and Elements*, 1 GEO. J. INT' LAW: THE SUMMIT 1, 2 (2010).

138. *Id.*; *see also* WILLIAM A. GREGORY, *THE LAW OF AGENCY AND PARTNERSHIP* 445 (3d ed. 2001) (stating that the joint venture, "known variously as joint adventure or joint enterprise,

that “it is not essential to have a water-tight definition” of the concept.<sup>139</sup> Attention should, instead, center on “the different legal forms a joint venture can take to best serve the interests of the parties.”<sup>140</sup>

Talal Al-Emadi presents a clear picture of the joint venture as follows:

The term joint venture as a form of business enterprise is clearly rooted in the early history of Egypt, Syria, Phoenicia and Babylonia. It originated ‘as a commercial or maritime enterprise used for trading purposes.’ As a legal concept, however, it is still considered a recent development. Historically, joint venture, or adventure as it was often called, was viewed by the law as a branch of partnership. However, the joint venture as a ‘separate concept’ with a similar relationship to partnership was first developed in the United States and Scotland. Some American courts, for instance, described the joint venture as ‘special’ or ‘limited’ or even ‘informal’ partnerships. . . . However, there is a general agreement that a joint venture is a strategic conglomerate between two or more otherwise unrelated enterprises or organizations engaging in a common undertaking with the hope of achieving a common goal. In other words, there are core elements that constitute a joint venture and distinguish joint ventures from other existing legal vehicles such as the partnership and corporation.<sup>141</sup>

Joint adventurers may adopt any legal form that suits their purpose, such as a general partnership, limited partnership, limited liability company, or corporation, or they may simply define their relationship under contract, as is the case with contractual joint ventures.<sup>142</sup> From these vehicles, one could also categorize the relationships as “incorporated joint ventures” or “unincorporated joint ventures.”<sup>143</sup>

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is difficult to describe adequately . . .”). American courts generally treat joint ventures as a species of partnership, characterized by a limited purpose and short duration. *See, e.g., Blue v. Rose*, 786 F.2d 349, 351 (8th Cir. 1986) (“There is no essential difference between a partnership and a joint venture; they are factual relationships between two or more persons who conduct a business enterprise together.”); *Paving Equipment of Carolina, Inc. v. Lake Providence*, 51 F.3d 267 (4th Cir. 1995) (“A joint venture is governed by the same law as a partnership. The main distinction between the two is that a joint venture is a temporary association for the purpose of a single undertaking, while a partnership envisions a continuing relationship among the parties.”). *Cf. Sandvick v. LaCrosse*, 747 N.W.2d 519 (N.D. 2008) (“A joint venture is similar to a partnership but is more limited in scope and duration, and principles of partnership law apply to the joint venture relationship”).

139. Al-Emadi, *supra* note 137, at 2.

140. *Id.*

141. *Id.* at 11-12.

142. Byron F. Egan, *Joint Venture Formation*, 44 TEXAS J. BUS. L. 129, 130 (2011) (“A joint venture may be structured as a corporation, partnership, limited liability company (“LLC”), trust, contractual arrangement, or any combination of such entities and arrangements.”); Al-Emadi, *supra* note 137, at 16.

143. Al-Emadi, *supra* note 137, at 16. While the term “unincorporated joint ventures” may include joint venture partnerships, it is not always the case. *See* Steve Potter et al., *Who’s On Top? A Comparison of Key Provisions of the Australian, Canadian, and U.S. Versions of Mining Joint Venture Agreements*, 56 RMMLF-INST 24-1 (2010), § 24.01 (“In Australia, most natural resource JVs are unincorporated. Although the term “unincorporated joint venture” has not been clearly defined, its wide commercial use has caused it to be recognized as an unincorpo-



### B. *Contractual Joint Ventures*

A contractual joint venture is founded on a contract and is not backed by any particular business form. Under this type of joint venture, the co-venturers co-own the project equipment and materials as well as the oil and gas production.<sup>144</sup> “This privilege is considered a fundamental advantage of contractual joint ventures when compared to joint venture corporations where shareholders do not have direct ownership.”<sup>145</sup> Regarding control, an operating committee (“OC”) controls and manages the activities of the joint venture. With the exception of exploration and exploitation operations, the operating committee is under the sole control of the operator (subject to the OC’s supervision). In terms of risk, the co-venturers are unlimitedly liable, and there is an equal distribution of liability because the parties are jointly and severally liable for the venture’s obligations.<sup>146</sup> This huge impediment that stems from the unincorporated nature of the contractual joint venture is avoided if the venture is structured as a corporation or limited liability company.<sup>147</sup> The feature of unlimited liability makes this a less attractive option for host communities.

### C. *Joint Venture Partnership*

The joint venture partnership shares with the contractual joint venture similar features of direct ownership and access to oil and gas production as well as project equipment and facilities.<sup>148</sup> They also share the same exposure to risk.<sup>149</sup> Some of the partners may avoid the risk if the business is formed as a limited partnership, instead of a general partnership.<sup>150</sup> However, this insulation is not without trade-offs. In a general partnership, partners have an equal right to management, whereas in a limited partnership, limited partners, in exchange for limited personal liability, do not exercise control of the business.<sup>151</sup> It should also be noted that while the default rule in general partnerships is that partners have equal footing in the management of the

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rated common undertaking of individuals to generate product with a view to sharing such product. [FN13] Unincorporated JVs are very much creatures of contract and, unlike partnerships or corporations, have no statutory framework that specifically regulates them, which is, of course, one of their advantages.” (Citation omitted).

144. Al-Emadi, *supra* note 137, at 19.

145. *Id.*

146. *Id.*

147. *Id.*

148. *See id.* at 665-66.

149. *Id.* at 666.

150. *Id.*

151. *Id.*; THOMAS LEE HAZEN & JERRY W. MARKHAM, CORPORATIONS AND OTHER BUSINESS ENTERPRISES: CASES AND MATERIALS 58 (3d. abridged ed. 2009).

partnership;<sup>152</sup> this rule is often contractually altered by the partners for ease of management.<sup>153</sup> “In practice, a management committee consisting of representatives of the co-venturers is responsible for running the business.”<sup>154</sup> The interest of minority partners is protected through a segregation and designation of “extraordinary” or “reserved” matters which may only be decided with the consent of all partners.<sup>155</sup> That way, the managing partners do not take very important decisions that are detrimental or burdensome to the minority partners without their involvement and approval.<sup>156</sup>

Another source of risk is that under partnership law, every general partner is an agent of the partnership.<sup>157</sup> As an agent, the partner can bind the partnership in the ordinary course of business, utilizing apparent authority, even when the partner’s actions were actually unauthorized by other partners, so long as the third party did not actually know or receive notification of this limitation or lack of actual authority.<sup>158</sup> This risk can be eliminated or severely curtailed by removing the agency powers of the partners not involved in management and making the removal as public as possible.<sup>159</sup>

#### D. Joint Venture Corporation

In a joint venture corporation, the parties’ ownership is “vested in the shares of the corporation and is in proportion to the capital contributed by each co-venturer.”<sup>160</sup> Accordingly, co-venturers neither own nor have direct access to the oil and gas production, the project equipment, and the project facilities.<sup>161</sup> Instead, the joint venture corporation, as a separate entity, independently owns these assets.<sup>162</sup> The

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152. See, e.g., REVISED UNIFORM PARTNERSHIP ACT § 401(f) (2012) (“Each partner has equal rights in the management and conduct of the partnership business.”).

153. Larry E. Ribstein, *Are Partners Fiduciaries?*, 2005 U. ILL. L. REV. 209, 240 (2005) (discussing “delegation of management to one or more partners coupled with passivity by the other partners.”).

154. Al-Emadi, *supra* note 137, at 666.

155. *Id.* See also REVISED UNIFORM PARTNERSHIP ACT § 401(j) (2012) (“An act outside the ordinary course of business of a partnership and an amendment to the partnership agreement may be undertaken only with the consent of all of the partners.”).

156. *Id.*

157. See Al-Emadi, *supra* note 137, at 666; REVISED UNIFORM PARTNERSHIP ACT § 301(1) (2012) (“Each partner is an agent of the partnership for the purpose of its business.”).

158. See REVISED UNIFORM PARTNERSHIP ACT § 301(1) (2012); see also Al-Emadi, *supra* note 137, at 666-67.

159. For instance, the Revised Uniform Partnership Act enables a partnership to file a “Statement of Partnership Authority” which outlines a partner’s authority or any limitation on a partner’s authority. REVISED UNIFORM PARTNERSHIP ACT § 303(a)(2) (2012); JESSE H. CHOPPER ET AL., *CASES AND MATERIALS ON CORPORATIONS* 702 (5th ed. 2000).

160. Al-Emadi, *supra* note 137, at 664.

161. *Id.*

162. *Id.*

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co-venturers, as shareholders, share in the proceeds of the production.<sup>163</sup> The control and management of the joint venture's affairs and business reside in the board of directors ("BOD"), which in turn appoints the executive management to undertake the day-to-day operations of the venture, under the BOD's supervision.<sup>164</sup> The import of this structure is that shareholders have no direct role in the management and operation of the venture. Nevertheless, the shareholders elect the members of the BOD, and are free to cast the vote for themselves to sit on the board. Voting is usually *pro rata*, i.e. based on the proportion of share ownership.<sup>165</sup>

In practical terms, not much would change in terms of the control exercised by the oil companies and national governments as compared to the status quo, as the arrangement can be structured to give them the percentage of shares that assures a continuation of management and operational control. The communities are not completely short-changed as they may also be afforded an opportunity, through the community corporation, to elect one or more members of the BOD, especially if the venture utilizes cumulative voting.<sup>166</sup> A core and attractive attribute of the corporation is the notion of limited liability, which eschews personal liability and limits the liability of the investors to their investment in the enterprise.<sup>167</sup> The joint venture corporation itself, however, retains unlimited liability for its obligations.<sup>168</sup> Moreover, the supposed advantage of limited liability to shareholders may also be exaggerated as in practice creditors may insist on "personal" guarantees from the shareholders.<sup>169</sup> In addition, "the joint venture corporation may very well recover contributions from the shareholders in order to pay off its obligations."<sup>170</sup>

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163. *Id.*

164. *Id.* See also JEFFREY D. BAUMAN, CORPORATIONS LAW AND POLICY: MATERIALS AND PROBLEMS 297-298 (7th ed. 2010).

165. See Bauman, *supra* note 164, at 337 (stating that "a shareholder is limited in the number of votes she may cast for any given director to the number of shares she owns."); Al-Emadi, *supra* note 137, at 664.

166. See CHOPER ET AL., *supra* note 159, at 597 ("Cumulative voting is a system of voting for the election of directors that is intended to give minority shareholders representation on the board by allowing them concentrate their votes on a limited number of nominees.")

167. See ROBERT A. RAGAZZO & DOUGLAS K., CLOSELY HELD BUSINESS ORGANIZATIONS: CASES, MATERIALS, AND PROBLEMS 276 (1st ed. 2006) ("Perhaps the most important difference between partnerships and corporations involves liability to the outside world for the obligations of the business. All partners are personally liable for a general partnership's obligations. . . . Shareholders of a corporation enjoy limited liability - i.e., a shareholder's losses are limited to the value of his investment. . . . It is the chief reason that investors select the corporation over the partnership form.")

168. Al-Emadi, *supra* note 137, at 665.

169. See Thomas K. Cheng, *Form and Substance of The Doctrine of Piercing the Corporate Veil*, 80 Miss. L.J. 497, 512 (2010); Al-Emadi, *supra* note 137, at 665.

170. Al-Emadi, *supra* note 137, at 665 (citation omitted). There may be a concern that involuntary creditors, such as victims of pollution, may not receive adequate protection if the corpo-

### E. *Suitable Option*

This Article recommends that host communities opt for corporations or limited liability companies as the legal vehicle for executing the joint venture. Each participating community should set up a community-owned corporation (COC) to be its instrument of participation in the joint enterprise. Community members would be the only shareholders of the COCs.<sup>171</sup> COCs would declare dividends on the profits on a regular basis. Shareholders might be able to hypothecate<sup>172</sup> their shares or borrow against the right to dividends. However, to avoid a hijack of the COCs, share transfer restrictions may be instituted. These restrictions may not prohibit transfers outright as that would render the restrictions void as against public policy, but they may impose reasonable conditions on transfer, such as first option rights, right of first refusal and buy-sell provisions.<sup>173</sup> Obviously, details of the COCs' features, specially tailored to serve their unique purpose, will need to be worked out, including internal governance structure, extent of shareholder empowerment and dispute resolution mechanisms. Useful lessons may be drawn from the Alaska Native Corporations established at the regional and village levels under the Alaska Native Claims Settlement Act.<sup>174</sup> The purposes intended to be accomplished by the Alaska Native Corporations are particularly pertinent to the present proposal.<sup>175</sup>

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rate form is adopted, as opposed to unincorporated joint ventures. In reality, the concern may be overblown. Tort victims will continue to be entitled to whatever available remedy and recovery opportunity under the current scheme of things, if the energy company, government or community ever wishes to continue in business.

171. A similar structure was adopted by Alaska Native Corporations. For useful references to the corporations, see *infra* note 163.

172. See BLACK'S LAW DICTIONARY, 811 (9th ed. 2009) ("The pledging of something as security without delivery of title or possession.").

173. See Ragazzo & Moll, *supra* note 167, at 370-71 (listing and discussing types of share transfer restrictions). See also Elizabeth Barrett Ristroph, *Alaska Tribes' Melting Subsistence Rights*, 1 ARIZ. J. ENVTL. L. & POL'Y 47, 80 (2010) (stating that no regional Native Corporation in Alaska has amended its articles of incorporation to permit stock transfer to non-Natives).

174. For useful discussions of the Alaska Native Corporations, see Eric C. Chaffee, *Business Organizations and Tribal Self-Determination: A Critical Reexamination of the Alaska Native Claims Settlement Act*, 25 ALASKA L. REV. 107 (2008); Natalie Landreth & Moira Smith, *Voting Rights in Alaska: 1982-2006*, 17 S. CAL. REV. L. & SOC. JUST. 79, 83-84 (2007); Linda O. Smiddy, *Responding To Professor Janda—The U.S. Experience: The Alaska Native Claims Settlement Act (ANCSA) Regional Corporation As a Form of Social Enterprise*, 30 VT. L. REV. 823 (2006) (contrasting some Alaskan and Canadian native corporations); Gigi Berardi, *The Alaska Native Claims Settlement Act (ANCSA)—Whose Settlement Was It? An Overview of Salient Issues*, 25 J. LAND RESOURCES & ENVTL. L. 131 (2005).

175. See Smiddy, *supra* note 174, at 843 (stating that "the required use of the business corporation was intended to accomplish three purposes: to engage in economic activity; to use the fruits of that activity to improve the social well-being of Natives; and to promote the economic assimilation of Natives into the larger economy . . .") (citation omitted).

The government may “carry” the COCs in the first few years of participation in the joint venture, after which they can stand on their own and make proportionate financial contributions to the joint venture.<sup>176</sup> When that happens, it would also free money for the national government to invest in other sectors of the economy or segments of the society. This new arrangement is likely to accelerate economic development on a number of fronts. Tackling the concentration of wealth in the government is almost *conditio sine qua non* to addressing corruption, which itself is a major drag on economic growth. Conversely, wealth de-concentration and re-distribution to the private citizens will foster entrepreneurial pursuits through capital formation. Beyond economic gains, the emergent middle class will drive and sustain political progress. As historians and political scientists would argue, a vibrant middle class is essential to the emergence or at least sustenance of democracy. In essence, there are numerous benefits to equity participation, as Part IV amplifies.

#### IV. THE CASE FOR HOST COMMUNITY EQUITY PARTICIPATION

##### A. *Local Economic Development*

The Bafokeng nation represents a rare example of a South African community that has benefited appreciably from mining operations in its territory.<sup>177</sup> Some commentators capture the Bafokeng experience in the following words:

The Royal Bafokeng Nation in South Africa is, however, an example of how a community used the royalties received from platinum mining companies on its land to ensure local development and empowerment of community members. The Royal Bafokeng Administration ensured service delivery to the community which should have been the responsibility of government. R2 billion was spent on infrastructural development over a period of ten years, which included the ‘provision of 50 public schools, 10 clinics, two bulk water treatment plants and 17

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176. Professor John Lowe describes what happens when a party chooses to be carried as follows:

Electing to be carried means that the other owners will advance costs of drilling and completion, but the carried party will receive only a royalty on production until the parties advancing the costs have recovered some multiple of their investment, after which the carried party will “back in” to a share of the working interest in addition to or in place of the royalty.

Lowe, *supra* note 98, at 30. See also *id.* at 50 (stating that in some variants of carried interests, the agreement could provide that the person being carried “will receive none of the proceeds of the production until the parties who put up the money to “carry” the interest receive some multiple of the costs they have expended for the carried interest; usually the multiple ranges from 100% to 500%.”) (emphasis added).

177. Lee Godden et al., *Accommodating Interests in Resource Extraction: Indigenous Peoples, Local Communities and the Role of Law in Economic and Social Sustainability*, 26 J. ENERGY & NAT. RESOURCES L. 1, 12 (2008).

reservoirs supplying water to the villages'. Although infrastructure is built and provided by the Royal Bafokeng Administration, it is managed by government. Other infrastructure includes the roads, electricity, sewage systems, water provision and a sports centre while social uplifting includes the provision of bursaries for tertiary education and the establishment of small and medium-sized businesses within the community. The nation receives approximately R180 million per year from royalties and other commercial ventures. However, these ventures are undertaken by the community itself and are not inspired or provided for by mining companies. It is the community itself that ensures that the royalties are used to ensure the uplifting of the Royal Bafokeng Nation.<sup>178</sup>

The Bafokeng story illustrates that when a community receives royalties or dividends in substantial amounts, it stands a good chance of successfully deploying them for local social and economic development. Alaska Native Corporations have also adopted a similar approach of contributing to both economic development and advancement of social welfare, including the provision of employment for community members and scholarships to pursue educational opportunities.<sup>179</sup>

### B. *Wealth Retention*

Local and national economic development is also likely to be aided by the fact that equity participation will translate into greater retention of wealth in the domestic economy instead of transfers to offshore accounts by national elite and international investors. Professor Duncan Kennedy has persuasively argued in a recent paper that Africa's poor people are trapped in poverty, not necessarily because of the combination of the poverty in the countries in which they live and absence of adequate foreign aid from developed countries.<sup>180</sup> Instead, the poor remain poor because they "are embedded in national and international political economies that predictably direct economic surpluses away from local reinvestment that might improve their situation through development."<sup>181</sup> Kennedy places the blame at the feet of domestic elites who "appropriate a large share of the surplus from extractive industries, after the foreign share."<sup>182</sup> He notes that "the

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178. Henk Kloppers & Willemien du Plessis, *Corporate Social Responsibility, Legislative Reforms and Mining in South Africa*, 26 J. ENERGY & NAT. RESOURCES L. 91, 114 (2008) (citation omitted).

179. See Smiddy, *supra* note 174, at 838-841 (noting that some of the corporations have explicitly declared their dual economic and social welfare mandates and have pursued them actively).

180. Kennedy, *supra* note 1, at 220.

181. *Id.*

182. *Id.* at 212.

different groups that appropriate most of the surplus the economy generates have very limited incentive to invest their part in the kinds of enterprise that could over time generate poverty-reducing development.”<sup>183</sup> At the end of the day, poverty subsists in Africa because “the extremely poor do not have the resources but those who do have other things to do with their money.”<sup>184</sup>

Equity participation can help in addressing the problem and re-dressing this anomaly by advancing domestic wealth retention. The poor that are disenfranchised and marginalized by the current system can be brought into the wealth-sharing circle. At the same time, those newly-empowered will keep the bulk of the money within the local economy since they lack the means or the need to siphon the funds abroad.

### C. *Increased Income*

A very attractive feature of equity participation is that it enables the equity holders to share in the upside potential of the business.<sup>185</sup> Accordingly, there is a good chance for communities to earn more money from equity participation than from a fixed income arrangement or government allocation of funds that remain static or experience modest increments from year to year.<sup>186</sup> With the extra funds earned in boom years, the COCs may even extend their tentacles to other ventures, for instance, investing in non-oil sectors of the economy. The opportunity provided by the corporate vehicle makes such investments possible in the first place.<sup>187</sup> A COC may also establish investment arms that handle its investment and diversification goals, while it concentrates on its core mission of participating in the joint venture. The importance of outside investments cannot be overemphasized as they would ensure that a COC is able to pay dividends

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183. *Id.*

184. *Id.*

185. Henry Simon Bloch, *Financial Strategy For Developing Nations—Afterthoughts To The Amsterdam Panel*, 69 COLUM. L. REV. 797, 803 (1969) (“The great advantage of equity participation is that it permits participation in the increased value of the business.”).

186. See Meredith R. Conway, *With or Without You: Debt and Equity and Continuity of Interest*, 15 STAN. J.L. BUS. & FIN. 261, 289 (2010) (“The traditional label of equity applies to an instrument held by a shareholder in a corporation, which bears the risk of the corporation but also reaps the rewards—greater risk for potentially greater reward. Conversely, the traditional debt holder is typically given more of a guarantee in his instrument and more protection that he will be paid back. Further, the debt holder typically receives a fixed return on his investment. However, less risk often comes at the cost of limited opportunity to share in the growth of the corporation.”) (citations omitted).

187. Indeed, community members may form corporations to invest in various enterprises directly or indirectly, without the existence of a joint venture as advocated here. But the availability of the corporation at the time additional revenues roll in can only help their investment planning.

even in a down year, in which the oil business has not been profitable.<sup>188</sup>

#### D. *Personal Capital*

Another economic benefit of equity participation is that it can contribute to the development of credit markets. The COCs will pay regular dividends to community members. These dividends could provide an engine for human development and for entrepreneurial activity in the area and beyond.<sup>189</sup> The dividend distribution will provide eligible citizens with a steady stream of income and serve as enormous source of capital for business start-ups and additional capitalization for existing businesses.<sup>190</sup> The COCs would also provide each adult community member with shares that, subject to some restrictions, may be transferable and tradable, providing them with another source of capital.<sup>191</sup> In addition, the dividend entitlement can serve as seed money giving people access to credit. The shares can also be used as collateral to borrow against. In Africa, as with many developing regions, lack of access to credit is a major hindrance on entrepreneurship and development.<sup>192</sup> As borrowing becomes an important part of the economic fabric, it will have the salutary effects of stimulating small business, stimulating the growth of credit markets, stimulating financial development, and entrenching laws of contract, commerce, and property.<sup>193</sup>

#### E. *Social Capital*

There are different types of capital, such as human capital, financial capital and social capital, with varying degrees of utility and accessibility. Social capital is one of those concepts that are not susceptible to

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188. See Travis G. Buchanan, *One Company, Two Worlds: The Case for Alaska Native Corporations*, 27 ALASKA L. REV. 297, 332 (2010) (discussing the strategy of Alaska Native corporations to diversifying investments to ensure that dividends continue to go out to the shareholders even if the corporation has a down year).

189. See Karol Boudreaux, *From Curse to Cure*, TCS DAILY (Oct. 19, 2004, 12:00 AM), [http://www.ideasinactiontv.com/tcs\\_daily/2004/10/from-curse-to-cure.html](http://www.ideasinactiontv.com/tcs_daily/2004/10/from-curse-to-cure.html) (proposing a Nigerian People's Fund whose "dividends could provide an engine for human development and for entrepreneurial activity in Nigeria.").

190. See Jenny J. Yang, *Small Business, Rising Giant: Policies and Costs Of Section 8(A) Contracting Preferences For Alaska Native Corporations*, 23 ALASKA L. REV. 315, 344-45 (2006) (reporting dividend distributions by Alaska Native Corporations to community members amounting to thousands of dollars to the average shareholder, which were sufficient to purchase a vehicle or make a down payment on a house).

191. See Boudreaux, *supra* note 189 ("Nigerians might also be given tradable shares in the Fund's unreserved account, providing them with another source of capital.").

192. See Thomas I. Palley, *Combating the Natural Resource Curse with Citizen Revenue Distribution Funds: Oil and the Case of Iraq*, FOREIGN POLICY IN FOCUS 4 (Dec. 2003).

193. *Id.*



an easy definition.<sup>194</sup> Nonetheless, this Article embraces Robert Putnam's definition of social capital as consisting of "social networks and the associated norms of reciprocity and trustworthiness."<sup>195</sup> Social capital is an important ingredient for economic and political development.<sup>196</sup> As one scholar has observed,

current wisdom suggests that social capital is, in fact, a productive asset that when present, enhances investment in physical and human capital. If this is true, then social capital will be particularly important in emerging neighborhoods—those neighborhoods that have historically been disadvantaged but that possess key assets and are poised for development.<sup>197</sup>

Social capital positively affects wealth formation because with that kind of capital, access to bank financing is enhanced and the recipients of the loans can deploy them to build income-generating enterprises.<sup>198</sup>

Equity participation is favorably disposed toward social capital because it can significantly contribute to strengthening the social fabric in oil-producing areas. The economic and political opportunities created by equity participation would encourage young productive community members, who would otherwise be prone to leaving the communities and seeking opportunities elsewhere, to stay at home.<sup>199</sup> In other words, it will create residential lock-in, leading to the strengthening of social capital in the form of neighborly relationships.<sup>200</sup> Professor Robert Ellickson argues that a nation's rate of residential mobility "is an underappreciated measure of the well-being of a populace."<sup>201</sup> He further observes:

Policies that foster freedom to move can benefit the members of a relocating household in myriad ways. Moving to a different permanent home may enable a person to secure, for example, a better job, a more congenial set of housemates, and a dwelling with more suitable

194. Lisa J. Servon, *The Value of Social Capital in Emerging Communities* at 3 (The New Sch. Univ., Cmty. Dev. Research Ctr., WORKING Paper No. 2002-005, 2002) ("Social capital is a slippery concept to define; it has come to mean different things to different people.").

195. Quoted in Robert C. Ellickson, *Legal Sources of Residential Lock-ins: Why French Households Move Half as Often as U.S. Households*, 2012 U. ILL. L. REV. 373, 399 (2012).

196. See *id.* at 399 n. 142 ("Social capital may be valued not only because it leads to better economic and social outcomes such as greater prosperity and less crime, but also because it can stimulate feelings of self-esteem and solidarity that are valued for their own sake.").

197. Servon, *supra* note 194.

198. See Olivier De Schutter, *The Green Rush: The Global Race for Farmland and the Rights of Land Users*, 52 HARV. INT'L L.J. 503, 531 (2011).

199. The issue of brain drain is not unique to the host communities in Africa. See Merrill F. Hoopengardner, *Nontraditional Venture Capital: An Economic Development Strategy For Alaska*, 20 ALASKA L. REV. 357, 360 (2003) (discussing the brain drain of oil-rich Alaska's brightest young citizens, which raises concerns about the state's economic future).

200. Ellickson, *supra* note 195, at 374.

201. *Id.*

attributes. The freedom of a household to exit from a jurisdiction also helps to discipline governments and enable Tiebout-style specialization among them. It is surprising, then, that civil libertarians seldom exalt the freedom to move. Perhaps they have been all but silent because residential mobility can have a downside as well. Household moves may cause. . . the “creative destruction” of informal relationships among neighbors – a seemingly valuable form of social capital.<sup>202</sup>

The longer the period of residence, the more likely the residents’ rootedness will translate into civic engagement, including involvement in schools, community services and local politics.<sup>203</sup> On the other hand, mobility is negatively associated with the accumulation of social capital as “a person who expects to move soon is likely, all else equal, to devote less effort to developing local social capital.”<sup>204</sup>

#### F. *Alignment of Interests*

Holding an equity stake could help assure the alignment of interests between parties on opposite sides of a commercial relationship.<sup>205</sup> For instance, where corporate managers own equity interests in the corporation they manage, instead of salary as the sole or vastly dominant form of compensation, their interests and those of the firm and its other shareholders would tend to converge.<sup>206</sup> Thus, they are likely to take a closer interest in the firm’s growth beyond their time of depar-

202. *Id.* (citations omitted).

203. *Id.* at 402 n. 157 and accompanying text.

204. *Id.* at 402 (citation omitted).

205. See e.g., M. Todd Henderson, *Insider Trading and CEO Pay*, 64 VAND. L. REV. 505, 508 (2011) (“Firms compensate executives with equity in the firm in order to reduce agency costs.”). For a related, but different, explanation, see Andrew C.W. Lund, *Compensation as Signaling*, 64 FLA. L. REV. 591, 631 (2012) (discussing how incumbent managers’ personal financial investment in the company signals to private equity firms that the company is likely to continue to be profitable and therefore a worthy target for acquisition).

206. See Jesse M. Fried, *Share Repurchases, Equity Issuances, and the Optimal Design of Executive Pay*, 89 TEX. L. REV. 1113, 1113 (2011) (“The purpose of equity compensation is to better align executives’ interests with those of the firm’s shareholders.”) (citation omitted); Jesse M. Fried & Mira Ganor, *Agency Costs of Venture Capitalist Control in Startups*, 81 N.Y.U. L. REV. 967, 1010 (2006) (stating that “equity compensation aligns the interests of employees with those of shareholders.”); Francine J. Lipman, *Incentive Stock Options and the Alternative Minimum Tax: The Worst of Times*, 39 HARV. J. ON LEGIS. 337, 345 (2002) (quoting Congressional position that giving an option to the “management of a business to have a proprietary interest in its successful operation [would] provide an important incentive to expand and improve the profit position of the companies involved.”) (alteration in original); Randall S. Thomas & Kenneth J. Martin, *The Effect of Shareholder Proposals on Executive Compensation*, 67 U. CIN. L. REV. 1021, 1031 n.40 (1999):

[T]he conflict between managers and shareholders interests can be mitigated through the use of incentive compensation packages which align the incentives of managers with those of shareholders. Stock options can be used to provide managers with an equity interest in the corporation. As executives’ level of stock ownership increases, they will bear a greater percentage of the costs of any deviations from the standard of profit maximization. In this situation, self-interest will lead managers to act in shareholders’ best interests.

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ture.<sup>207</sup> While this good intention may be abused,<sup>208</sup> there is much to be said in favor of the idea that those who have “skin in the game” would be more vested in its success.<sup>209</sup> On the other hand, a misalignment of interests may have a deleterious effect on the goals of at least one of the parties to the transaction.<sup>210</sup> This alignment of interests also confers the coveted social license (discussed in the next section) that is almost indispensable to successful development of minerals.

### G. Social License

One irksome impediment to foreign direct investment in Africa is resistance of host communities to the foreign investor’s mission.<sup>211</sup>

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Kevin J. Murphy, *Corporate Performance and Managerial Remuneration: An Empirical Analysis*, 7 J. ACCTG & ECON. 11 (1985); Michael C Jensen & Kevin J. Murphy, *Performance Pay and Top-Management Incentives*, 98 J. POL. ECON. 225 (1990); Patricia M. Dechow and Richard G. Sloan, *Executive Incentives and the Horizon Problem: An Empirical Investigation*, 14 J. ACCTG & ECON. 51 (1991).

207. See David F. Larcker & Brian Tayan, *Pledge (and Hedge) Allegiance to the Company* 1 (Oct. 11, 2010) (ROCK CENTER FOR CORPORATE GOVERNANCE AT STANFORD UNIVERSITY: CLOSER LOOK SERIES: TOPICS, ISSUES AND CONTROVERSIES IN CORPORATE GOVERNANCE NO. CGRP-11), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1690746##](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1690746##) (“Companies include equity in a compensation package to align the interests of management with those of shareholders. If the executive performs well, both shareholders and the executive will profit; if the executive performs poorly, s/he will suffer financially along with shareholders. In this way, equity compensation is expected to encourage a focus on long-term value creation.”); Anup Agrawal & Charles R. Knoeber, *Firm Performance and Mechanisms to Control Agency Problems Between Managers and Shareholders*, 31 J. FIN. & QUANTITATIVE ANALYSIS 377 (1996) (stating that agency costs may be reduced through increased holding of shares by managers).

208. Managers might manipulate the situation to their advantage and neutralize the risk of equity holding, for instance, by hedging their risks or by boosting the value of the stock prior to their departure and cashing in on their investments. See Eli Ofek & David Yermack, *Taking Stock: Equity-Based Compensation and the Evolution of Managerial Ownership*, 55 J. FIN. 1367 (2000) (discussing the practice of hedging the risk of equity-based compensation by managers); see also Sanjai Bhagat & Roberta Romano, *Reforming Executive Compensation: Focusing and Committing to the Long-term*, 26 YALE J. ON REG. 359 (2009).

209. See Stephen Bainbridge, *The USA’s Creditworthiness*, PROFESSORBAINBRIDGE.COM (Jan. 13, 2011 12:02 PM) <http://www.professorbainbridge.com/2011/01/the-usas-creditworthiness.html> (“I always lean towards trusting folks with skin in the game.”).

210. For a discussion of the negative impact of misalignment of interests, albeit in the different context of investment fund management, see Simon Wong, *Tackling the Root Causes of Shareholder Passivity and Short-Termism*, THE HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE AND FINANCIAL REGULATION (Jan. 31, 2010, 9:41 AM) <http://blogs.law.harvard.edu/corpgov/2010/01/31/tackling-the-root-causes-of-shareholder-passivity-and-short-termism>.

211. It should be stated that this situation is not unique to Africa. See generally Kurt Strasser, *Business Environmentalism: Good Works and Greenwash*, 42 ENVTL. L. REP. NEWS & ANALYSIS 10216, 10221-22 (2012); LeRoy C. Paddock, *Beyond Deterrence: Compliance and Enforcement in the Context of Sustainable Development*, 42 ENVTL. L. REP. NEWS & ANALYSIS 10622, 10626 (2012); Bernardo Tobar, *Investment Protection and the Rise of Sovereign Powers*, 2011 NO. 3 RMMLF-INST PAPER NO. 1A (discussing corporate social license in Ecuador); Kevin Fox, *Development and Application of Stakeholder and Community Relations Policies in the Development of a New Mining Project in Argentina*, 2009 NO. 1 RMMLF-INST PAPER NO. 2A.

There have been eruptions of violence in response to negative outcomes of foreign investment.<sup>212</sup> The resulting state of insecurity has imperiled extant projects and threatened the emergence of fresh investments. This problem is particularly pertinent to, or especially evident in, the extractive industries of oil, gas and hard minerals such as coal, copper, silver, gold and diamonds.<sup>213</sup> Investors face the constraint that while they may have scaled all the legal hurdles and satisfied all the regulatory requirements to operate, they still lack one of the most important ingredients for business success – the acceptance of the community in which the operations are based. Scholars, advocates and policy makers at national and international levels have started weighing in on this issue of the ‘social license’ to operate.<sup>214</sup>

Social license entails the presence of host community goodwill and favorable disposition or receptivity to proposed or on-going projects in its domain or vicinity.<sup>215</sup> The issue of social license would be appreciably addressed through community equity participation in energy infrastructure projects. Equity participation introduces sufficient structures for enduring political and economic development in the region and country at large. It also satisfies the lack of a sense of ownership that, as earlier mentioned, is at the root of the problem.<sup>216</sup> When the state of Texas faced a major social license problem almost a century ago, it responded with an equity participation approach that continues to be effective to this day.<sup>217</sup> Accordingly, this Article

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212. Jorge Paz Durini, *Social License in Developing Countries*, 54 ROCKY MTN. MIN. L. INST. 25-1 (2008).

213. See Carole Ramsay, *Corporate Social Responsibility as Economic and Infrastructural Development: Economic Development for Protection of Investment Profit and Personnel*, 57 ROCKY MTN. MIN. L. INST. 17B-1 (2011).

214. See, e.g., SPECIAL REPRESENTATIVE OF THE SECRETARY-GENERAL ON THE ISSUE OF HUMAN RIGHTS AND TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES, PROTECT, RESPECT AND REMEDY: A FRAMEWORK FOR BUSINESS AND HUMAN RIGHTS, ¶ 54, U.N. Doc. A/HRC/8/5 (April 7, 2008); Joo-Young Lee & Paul Hunt, *Human Rights Responsibilities of Pharmaceutical Companies in Relation to Access to Medicines*, 40 J.L. MED. & ETHICS 220, 224-25 (2012).

215. See Neil Gunningham et al., *Social License and Environmental Protection: Why Businesses Go Beyond Compliance*, 29 LAW & SOC. INQUIRY 307, 307 (2004) (stating that corporate social license “governs the extent to which a corporation is constrained to meet societal expectations and avoid activities that societies (or influential elements within them) deem unacceptable, whether or not those expectations are embodied in law.”).

216. *Id.* at 320 n.16 and accompanying text.

217. Whitworth, *supra* note 115, at 680-81.

Leasing of the mineral classified lands was made difficult, however, by the severance of the surface and mineral estates. Open warfare nearly erupted on such lands between producers (the state’s lessees) and the surface owners. These surface owners were understandably reluctant to allow oil and gas producers to conduct operations on their property without receiving appropriate compensation. To alleviate this problem, the legislature passed the Relinquishment Act of 1919.

See also Terry I. Cross, *Why Texas Titles Are Different*, 4 ROCKY MTN. MIN. L. INST., PAPER 16 (Sept. 13–14, 2007), at 9 (quoting judicial recitation of the hostile state of affairs at time of

recommends that African governments and energy companies operating on the continent focus on the issue from an equity participation standpoint.

There is hardly any question that the integration of communities into the energy economy is crucial to the peaceful and successful development of the minerals.<sup>218</sup> Instead of working tirelessly to sabotage oil installations, including pipelines and manifolds, integrated communities would work to protect and maintain them.<sup>219</sup> As some commentators observe, “[t]he most likely option to end the menace is to integrate the communities into the oil economy, so that they will have proprietary interest in the protection of oil installations.”<sup>220</sup> Equity participation presents an effective integration approach.

#### H. Energy Security

One commentator has noted quite accurately that “energy security is a term often used but infrequently defined.”<sup>221</sup> Energy security may simply be defined as the presence of “an energy supply that meets or exceeds demand, is reliable, and is provided at a reasonable cost.”<sup>222</sup>

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enactment of the statute); Patrick H. Martin, *Royalty Issues on Lands Owned by State or Local Governments*, 33B ROCKY MTN. MIN. L. INST. 5 (1993) (recounting the threat of armed conflict between lessees and surface owners that was at the genesis of the enactment, and noting that the state passed the act to accommodate the landowners).

218. Diana Klein & Ulrike Joras, *Natural Resources and Peacebuilding: The Role of the Private Sector*, 42 ENVTL. L. REP. 10511, 10515 (2012); Siri Aas Rustad et al., *Building or Spoiling Peace? Lessons from the Management of High-Value Natural Resources*, 42 ENVTL. L. REP. 10546, 10562 (2012) (“[W]here local populations have been excluded from formal contract negotiations, firms bear the burden of seeking a ‘social license to operate’ from local communities or risk long-term challenges to their operations . . . company-community relations may thus become central to preventing and alleviating local grievances.”).

219. George K. Foster, *Foreign Investment and Indigenous Peoples: Options for Promoting Equilibrium Between Economic Development and Indigenous Rights*, 33 MICH. J. INT’L L. 627, 689 (2012) (referencing the point that absence of social license could lead to sabotage of installations or operations).

220. Ibaba Samuel Ibaba & John C. Olumati, *Sabotage Induced Oil Spillages and Human Rights Violation in Nigeria’s Niger Delta*, 11 J. SUST. DEV. AFR. 51, 62 (2009), available at [http://www.jsd-africa.com/Jsda/V12NO2\\_Winter2009\\_B/Pdf/Sabotage%20Spillages%20and%20Human%20Rights%20-%20reviewed.pdf](http://www.jsd-africa.com/Jsda/V12NO2_Winter2009_B/Pdf/Sabotage%20Spillages%20and%20Human%20Rights%20-%20reviewed.pdf).

221. Erica Downs, Brookings Foreign Policy Studies Energy Security Series: China, The Brookings Institute (Dec. 2006), available at <http://www.brookings.edu/~media/Files/rc/reports/2006/12china.pdf>.

222. Dennis J. Hough, Jr., *World Trade Organization Agreements and Principles as a Vehicle for the Attainment of Energy Security*, 9 RICH. J. GLOBAL L. & BUS. 199, 202 (2010); Gawdat Bahgat, *Redefining Energy Security in the Persian Gulf*, 31 FLETCHER F. WORLD AFF. 215, 216 (2007) (“Energy security refers to sustainable and reliable energy supplies at reasonable prices. Growing global interdependence on the energy market, however, argues for a more nuanced definition that takes into account the following complex array of factors.”). The United States Energy Association provides a more complex definition as follows:

Energy security is a multi-faceted issue. In its most fundamental sense, energy security is assured when the nation can deliver energy economically, reliably, environmentally soundly and safely, and in quantities sufficient to support our growing economy and defense needs.

The United Nations adds an impact component in its definition.<sup>223</sup> It is hard to fail to notice “the growing salience of energy security on the global agenda.”<sup>224</sup> One component of a country’s energy security strategy is the diversification of supply sources.<sup>225</sup> In the absence of social license or the presence of development inequity, supply disruptions are virtually inevitable.<sup>226</sup> Every country has a national interest in uninterrupted flow of energy products even when interruption is only happening in countries far removed from it or its source of imports, because disruption in one area affects the rest of the world. Oil is a global commodity.<sup>227</sup> By addressing these root issues, equity participation fosters global energy security.

### I. *Anti-corruption Initiative*

In several ways, equity participation will confront the legendary corruption that has plagued Africa’s oil-rich countries, and that is aptly paraded as a veritable impediment to economic, social and political progress.<sup>228</sup> First, equity participation will reduce the amount of

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To do so requires policies that support expansion of all elements of the energy supply and delivery infrastructure, with sufficient storage and generating reserves, diversity and redundancy, to meet the demands of economic growth.

Justin W. Evans, *A New Energy Paradigm for the Twenty-First Century: China, Russia, and America’s Triangular Security Strategy*, 39 IND. L. REV. 627, 627–28 (2006) (quoting U.S. ENERGY ASS’N, NAT’L ENERGY SECURITY POST 9/11, at 7 (2002)). Indeed, it should be pointed out that “energy security is a term often used but infrequently defined.” Downs, *supra* note 221, at 13.

223. UNITED NATIONS DEV. PROGRAMME, WORLD ENERGY ASSESSMENT: OVERVIEW 2004 UPDATE 42 (2004), [http://www.undp.org/energy/does/WEAOU\\_full.pdf](http://www.undp.org/energy/does/WEAOU_full.pdf) (“Energy security is a term that applies to the availability of energy at all times in various forms, in sufficient quantities, and at affordable prices, without unacceptable or irreversible impact on the environment.”).

224. Maya Jegen, *Two Paths to Energy Security: The EU and NAFTA*, 66 INT’L J. 73, 73 (2010–2011).

225. Daniel Yergin, *Ensuring Energy Security*, FOREIGN AFF., Mar./Apr. 2006, at 75–76 (“Experience has shown that to maintain energy security countries must abide by several principles. The first and most familiar is what Churchill urged more than 90 years ago: diversification of supply.”) available at [http://www.un.org/ga/61/second/daniel\\_yergin\\_energysecurity.pdf](http://www.un.org/ga/61/second/daniel_yergin_energysecurity.pdf); Bahgat, *supra* note 222, at 217 (“Security of supplies can be enhanced by an overall geological diversification of supply. In other words, the development of several producing regions leads to more stability in international oil markets. Thus, increasing supplies from Russia, the Caspian Sea, West Africa, and other regions would reduce the vulnerability associated with overdependence on any one region.”).

226. See, e.g., Yergin, *supra* note 225, at 70 (stating that “scattered attacks on some oil facilities reduced exports from Nigeria, which is a major supplier to the United States.”); J. Shola Omotola, “Liberation Movements” and Rising Violence in the Niger Delta: *The New Contentious Site of Oil and Environmental Politics*, 33 STUD. CONFLICT & TERRORISM 36, 38–39 (2010).

227. See *Oil Prices at Nine Month High After Iran Dispute*, THE INDEPENDENT, Feb. 20, 2012, <http://www.independent.co.uk/news/business/news/oil-prices-at-nine-month-high-after-iran-dispute-7220892.html> (stating that oil prices to nearly a 9-month high in Asia after Iran announced on February 19, 2012 that it had suspended crude oil sales to Britain on France).

228. See e.g., Okechukwu Oko, *Subverting the Scourge of Corruption in Nigeria: A Reform Prospectus*, 34 N.Y.U. J. INT’L L. & POL. 397, 400–01 (2002) (“Official corruption possesses such corrosive potential that, if unchecked, it ultimately will destroy Nigeria. Corruption retards eco-

money available for looting by federal and state officials.<sup>229</sup> The greater the involvement of the government in the petroleum industry, the higher the chances of resources being siphoned by corrupt officials who know that the state apparatus is not well-developed to police such a vast economic space. Even in better-run societies, opportunists exploit loopholes in government-mandated programs to enrich themselves.<sup>230</sup> Reducing the money available for squandering by a few will redound to the good of the majority of the population, as resources are decentralized and the circle of beneficiaries is expanded.

Anecdotally, there is evidence that even those who have little compunction about stealing public funds make a distinction and create a wall of demarcation when it comes to money belonging to their towns and villages. Apparently, they are quite aware that since they have possessions within the community, their neighbors can extract their proverbial pound of flesh, using means like ostracism and vandalism that may not be available to the police and prosecutors. Many public officials also care about their reputation among those that know them best and among whom they expect to retire when they complete their government assignments. Community members that turn a blind eye to, or even celebrate the corrupt practices of their relatives in government, are often intolerant of such tendencies when exhibited closer to home. Accordingly, money transferred from public coffers into the community purse is likely to find a safer home, thereby cutting corruption from the root.<sup>231</sup>

Corruption thrives in an atmosphere of unaccountability. Scholars have surmised that a government closer to the people is likely to be more effective and accountable.<sup>232</sup> One of Africa's rare economic and political success stories is Botswana which, despite having a considerable endowment of diamonds, seems to have largely escaped the natural resource curse.<sup>233</sup> Botswana's success has been explained partly as

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conomic growth, distorts economic and political programs, undermines efforts to create viable economic and political institutions, devalues the quality of human life, discourages foreign investment, and undermines the prospects of a durable social order in Nigeria.") (citations omitted).

229. See Palley, *supra* note 192, at 1.

230. See Ryan Tracy & Ben Lefebvre, *Fraud Fears Put a Chill in Fuel Program*, WALL ST. J., Aug. 2, 2012, at A5 (describing how participants were gaming a government-mandated program aimed at jumpstarting new alternative diesel fuels industry by directing refiners to purchase credits from small producers who would be out-competed by bigger rivals).

231. This point does not suggest that community corruption is non-existent; the point is that it pales in comparison to corruption by government officials.

232. See OSBORNE M. REYNOLDS, JR., *LOCAL GOVERNMENT LAW* 1-2 (2d ed. 2001) (stating that "it has always been recognized that many functions can best be provided at the community level, where the government is not a distant, dimly perceived entity, but is close to – and can be kept responsive to – its constituents.").

233. Amelia Cook & Jeremy Sarkin, *Is Botswana the Miracle of Africa? Democracy, the Rule of Law, and Human Rights Versus Economic Development*, 19 *TRANSNAT'L L. & CONTEMP.*

resulting from the integration of traditional community institutions into modern governance.<sup>234</sup> During colonial rule, some of these institutions were destroyed or emasculated in many other countries in Africa.<sup>235</sup> The British colonial government retained such institutions in Botswana to facilitate governance.<sup>236</sup> This development has turned out to the advantage of the country.<sup>237</sup> To the extent that equity participation introduces or enhances community governance, it will promote accountability and displace corruption in the management of oil revenues.

### J. *Democracy Development*

Increased and dispersed wealth will lead to the creation of a viable middle class, which some scholars view as an important ingredient for the emergence or sustenance of democracy.<sup>238</sup> When people are poor, they lack the means, and perhaps also the desire, to agitate for democracy, preferring to focus on how to satisfy their basic human needs for food, clothing and shelter.<sup>239</sup> Autocratic regimes thrive in such environments and would prefer to keep the people destitute and desolate. Accordingly, poverty has been viewed “as an incubator of dictatorships.”<sup>240</sup> Contrariwise, when people have moved beyond concerns about basic needs, especially facilitated by a good education, they

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PROBS. 453, 455 (2010) (“Achievements such as Botswana’s noteworthy economic growth, political stability, and regular elections often eclipse issues like human rights, which remain on the periphery of most analyses of Botswana.”).

234. Nancy Birdsall & Arvind Subramanian, *Saving Iraq From Its Oil*, FOREIGN AFF., Jul./Aug. 2004, at 83.

235. *Id.*

236. *Id.*

237. *Id.*

238. BARRINGTON MOORE, JR., SOCIAL ORIGINS OF DICTATORSHIP AND DEMOCRACY: LORD AND PEASANT IN THE MAKING OF THE MODERN WORLD 413–32 (1966); Gabriel Ardant, *Financial Policy and Economic Infrastructure of Modern States and Nations*, THE FORMATION OF NATIONAL STATES IN WESTERN EUROPE 164, 231–32 (Charles Tilly ed., 1975) (discussing the bourgeoisie’s desire in nineteenth century France to participate in representative assemblies). See also Seymour Martin Lipset, *Some Social Requisites of Democracy: Economic Development and Political Legitimacy*, 53 AM. POL. SCI. REV. 69, 69 (1959), <http://costa.wustl.edu/teaching/IntroComp/Reading/Lipset1959.pdf>; Adam Przeworski & Fernando Limongi, *Modernization: Theories and Facts*, 49 WORLD POL. 155, 155 (1997).

239. Richard Klein, *Cultural Relativism, Economic Development and International Human Rights in the Asian Context*, 9 Touro INT’L L. J. 1, 10 n.22 (2001) (restating the full-belly thesis that “until one’s belly is full, one can’t engage in the luxury of worrying about political rights.”). It bears mentioning that this notion is exploitable by political leaders who claim to accord priority to economic development and use that as an excuse to suppress citizens’ civil and political rights. See generally Rhoda E. Howard-Hassmann, *The Full-Belly Thesis: Should Economic Rights Take Priority over Civil and Political Rights? Evidence from Sub-Saharan Africa*, 5 HUM. RTS. Q. 467, 469 (1983).

240. Eric Blumenson, *Economic Rights As Group Rights*, 15 U. PA. J. L. & SOC. CHANGE 87, 94 (2011).



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transition into demanding recognition and respect for their civil and political rights.

In addition, replacing or diminishing government dominance of natural resource ownership will provide a fertile environment for the gestation of political institutions. The government will tax citizen earnings from the equity investment and the citizens will in turn demand accountability from those extracting and spending the tax revenue.<sup>241</sup> As Nobel Economics Laureate Vernon Smith has remarked, a central question that many societies needs to tackle is “whether the people control government through voting and taxes or the government controls the people through a monopoly of natural resources.”<sup>242</sup>

Moreover, equity participation gives the community members a stake in their natural resource endowments. Similarly to taxation, when people have a stake in their country’s assets and resources, they scrutinize the activities of public officials and insist on accountability from them.<sup>243</sup> Stake holding’s importance cannot be overstated because it can serve the same purpose as taxation by propelling citizen participation in governance.<sup>244</sup> As earlier mentioned, taxation often precedes a demand for representation because an alert citizenry understands that it has a stake in its money and the use to which it is put. The same inclination and motivation would drive stakeholders to be vigilant over assets held in their name and from which they derive income.<sup>245</sup> A sense of vigilance is a critical seed for the emergence and sustenance of democracy. Finally, the corporations will aid community political development through the increased organizational skills that community members will develop as they grapple with the intricacies of organizing a significant portion of their life around the corporations.<sup>246</sup>

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241. Terry Lynn Karl, *Oil-Led Development: Social, Political and Economic Consequences*, 4 THE ENCYCLOPEDIA OF ENERGY 661 (2004); See, e.g., TERRY LYNN KARL, THE PARADOX OF PLENTY: OIL BOOMS AND PETRO-STATES 202 (1997) (citing Venezuela’s and Iran’s decreased reliance on domestic tax revenue as immunizing government officials from accountability to the public).

242. Vernon L. Smith, *The Iraqi People’s Fund*, WALL ST. J., Dec. 22, 2003, at A14.

243. 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. & COMM. REG. 121, 191 (2004).

244. For a discussion of the benefits of stakeholding, see Bruce Ackerman & Anne Alstott, *Your Stake in America*, 41 ARIZ. L. REV. 249, 260-61 (1999).

245. *Id.*

246. See Berardi, *supra* note 174, at 137 (referencing the argument about enhancement of organizational skills and political development in the context of the Alaska Native corporations).

## V. POTENTIAL OBJECTIONS

A. *Disruption of Existing Structure*

One likely objection is that the proposed arrangement will disrupt the existing structure that seems to serve energy investors well. Creating a multiplicity of entities, apart from the attendant disruption, also adds to the cost of doing business.<sup>247</sup> It may be that at the early stages, the new arrangement would be expensive but after initial design, other ventures would simply adopt and adapt the original structure, instead of reinventing the wheel. Besides, the expected gains for all and sundry, including the extractive industry and governments, in terms of the benefits outlined in the preceding part certainly offset and justify the additional expense.

B. *Risk of Loss*

Equity participation exposes equity holders to considerable risk.<sup>248</sup> It could be argued that it is in the better interest of host communities to be guaranteed a certain amount of money annually than to be exposed to the risk of not receiving any money if the venture posts a loss in any given year.<sup>249</sup> Obviously, host communities would have to carefully weigh the potential downsides of opting for an equity stake, considering that in the investment world, risk and reward flow together.<sup>250</sup> In any case, on this point equity participation is not worse

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247. Policies that add to the cost of doing business are generally frowned upon, more so as the costs get passed on to consumers or negatively affect hiring. For a sampling of criticisms of legislative initiatives, judicial positions and executive programs on that ground that they increase the cost of doing business, see Charles K. Whitehead, *The Goldilocks Approach: Financial Risk And Staged Regulation*, 97 CORNELL L. REV. 1267, 1287 (2012) (stating that opponents of a proposed financial transaction tax “note that a new tax will impact market makers by increasing their cost of doing business, in addition to affecting noise traders and speculators.”); Irina Oberman, *Maintaining the Clear and Convincing Evidence Standard for Patent Invalidation Challenges in Microsoft Corp. v. i4i Limited Partnership*, 131 S. Ct. 2238 (2011), 35 HARV. J.L. & PUB. POL’Y 439, 450 (2012) (“The Court’s opinion also will increase the costs of doing business and thwart innovation.”); Andrew Brady Spalding, *The Irony Of International Business Law: U.S. Progressivism and China’s New Laissez-Faire*, 59 UCLA L. REV. 354, 354 (2011) (“Empirical research in political science and economics demonstrates that because the U.S. regime increases the costs of doing business in emerging markets, U.S. companies tend to invest less.”).

248. David E. Brown, Jr. et al., *Strategic Alliances: Why, How, and What to Watch For*, 3 N.C. BANKING INST. 57, 76 (1999) (“There are significant risks related to an equity participation arrangement. The participants can experience a complete loss of their investment.”).

249. See Stephen Colt, *Alaska Natives and the “New Harpoon”: Economic Performance of the ANCSA Regional Corporations*, 25 J. LAND, RESOURCES & ENVTL. L. 155, 167 (2005) (stating that Alaska Native Corporations established for the benefit of native Americans in Alaska on the average posted losses for many years).

250. See Chaffee, *supra* note 174, at 143 (“When a corporation fails to perform, the related Alaska Native community suffers. . . the poor performance of many of the Native corporations has done more to threaten Alaska Native communities than help them.”). On the other hand, many of the Alaska Native corporations have overcome the days of adversity and become prosperous over the years. See Gavin Kentch, *A Corporate Culture? The Environmental Justice Chal-*

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than some other options, like profit-sharing, in so far as they all depend on the availability of profit before any distribution is made to the communities.

### C. Cultural Conflict

A corporation is an institution alien to the way of life in many a local community hosting oil and gas operations.<sup>251</sup> As a result, there may be questions about the compatibility of corporate norms and decision-making process with traditional practices.<sup>252</sup> Writing about Alaska Native Corporations, one commentator notes that the proxy system utilized in corporate voting “has been criticized for being confusing, advantageous to the incumbent Board, and antithetical to a traditional culture of consensus-based decision-making.”<sup>253</sup> In addition, a corporation’s focus is profit-making for its shareholders, while community ethos often privileges the public good over private benefit.<sup>254</sup>

Moreover, community members are likely to lack the necessary level of knowledge and sophistication in business matters required to function as active shareholders or constitute the board of directors and senior management of the COCs.<sup>255</sup> One solution is for the government to include in the process of establishing these new joint ventures, some funding for counseling on business and financial matters. The funds would be used to organize information sessions on shareholder rights and responsibilities, including the process of passing resolutions, amendment of by-laws and articles of incorporation, and election of directors.<sup>256</sup> The funds should also go toward providing members of the board of directors and senior management with some

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*lenges of The Alaska Native Claims Settlement Act*, 81 Miss. L.J. 813, 818 (2012) (“After this rocky beginning, however, the corporations have been more successful.”); Daniel K. Oakes, *Inching Toward Balance: Reaching Proper Reform of The Alaska Native Corporations’ 8(a) Contracting Preferences*, 40 PUB. CONT. L.J. 777, 787 (2011) (attributing the prosperity partly to preferences, which some consider an unfair advantage, that was given to the Alaska Native corporations in the public contracting process).

251. This problem surfaced in Alaska when Native Communities were required to set up native corporations to hold land and manage some settlement funds. See Chaffee, *supra* note 174, at 132 (“The corporate form, however, is difficult to reconcile with traditional Alaska Native culture.”); Kentch, *supra* note 250, at 822 (stating that the corporate form’s “appositeness to Native culture can justly be questioned . . .”).

252. See Smiddy, *supra* note 174, at 843 (referencing the point that the social values that the corporation embodies are antithetical to the social values of traditional cultures that evolved from participation of Native communities in hunting, fishing and gathering).

253. Kentch, *supra* note 250, at 823 (citation omitted).

254. See Chaffee, *supra* note 174, at 133.

255. Kentch, *supra* note 250, at 818 (stating that Alaska Native corporations experienced poor financial performance in their first twenty years of existence partly because some of the Native leaders did not fit in comfortably in their new roles as corporate executives).

256. See Chaffee, *supra* note 174, at 152.

form of training on “basic business topics, including accounting, finance, management, and marketing. They should also receive extensive training regarding their fiduciary duties and the unique obligations that they have in representing a [host] community.”<sup>257</sup> The ability of host communities to adapt into this new situation will be a crucial factor in the success of this arrangement.<sup>258</sup>

#### D. Corporate Takeover

The notion of transferable shares in the community corporations is fraught with one built-in danger: the possibility of a hijack of the corporation by investors who are from outside the community.<sup>259</sup> Cash-strapped citizens may be persuaded to sell their shares for a pittance to investors within and outside the community.<sup>260</sup> At a minimum, these outside investors may not identify with the interest of the community and may not have a vested interest in the development of the community or generally sympathize with the broad goals of community equity participation.<sup>261</sup> A more sinister prediction would be that these investors could have a direct and hidden agenda of undermining communal wellbeing from the outset. In any event, it could lead to the creation of an oligarchy as highly valuable assets get concentrated in the hands of a handful of individuals. “This movement from one form of wealth concentration (on political leaders) to another form of

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257. *Id.*

258. See Buchanan, *supra* note 188, at 299-301. Professor Linda Smiddy discusses the adaptation of the corporation system to fit into Native life as follows:

Thus, although the NANA Regional Corporation is, by law, a for-profit business corporation, its form has been adjusted to serve both the economic and social benefit objectives of the ANCSA and the Corporation. The modified governance structure provides a bridge between the world of Western capitalism, with its attendant values, and the culture of the Natives in the NANA region, for whose benefit it was created. Like its Makivik counterpart in Canada, the NANA Regional Corporation discussed above created a hybrid structure adapting traditional corporate forms to Native cultural traditions. In Makivik’s case, the principal corporation was a not-for-profit company. Here, in contrast, the Native regional companies are business corporations. In both instances, however, the traditional legal form was transformed. To the external world, NANA is a business corporation; but with respect to its internal dealings, it has designed a decision-making form to reflect the values of the culture it represents.

Smiddy, *supra* note 174, at 852 (citations omitted).

259. See Chaffee, *supra* note 174, at 142 (expressing similar concerns with Alaska Native corporations and stating that the law “allows for takeovers of Alaska Native corporations by non-Natives.”)

260. There may be other reasons for sale, besides immediate need for cash. See, e.g., Yuliya Mitrofanskaya, *Privatization as an International Phenomenon: Kazakhstan*, 14 AM. U. INT’L L. REV. 1399, 1415 (1999).

261. See Smiddy, *supra* note 174, at 836 (“Over time, share alienation could eliminate the ownership interests of the Act’s intended beneficiaries and thus completely separate them from the land.”); Chaffee, *supra* note 174, at 142 (“Upon the sale of stock, Alaska Natives would be left with no interest in institutions that were supposed to be created for their long-term benefit.”) (citation omitted).

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wealth concentration (on oligarchs) may not be in the best interest of the country. It may also breed resentment, affect social trust needed for economic growth, and fuel antipathy toward other proposals aimed at economic growth.”<sup>262</sup>

A possible remedy is to introduce an effective mechanism of share transfer restrictions that, for instance, places a moratorium on transfer of shares for decades.<sup>263</sup> While this may elicit objections from ardent proponents of free enterprise, it is quite likely that the restrictions will withstand strict scrutiny.<sup>264</sup> Alaska Native Corporations employed such strategy.<sup>265</sup> Nevertheless, even if valid, such restrictions confront formidable objections. Analyzing the issue in the context of the Alaska Native Corporations, whose enabling legislation initially prohibited alienation of shares for at least twenty years,<sup>266</sup> Professor Stephen Colt contends:

This prohibition removed the threat of takeover as a powerful discipline mechanism and eliminated the actual takeover as a corrective mechanism. Finance theory suggests that with no takeover threat and no information feedback from a market in shares, shareholders would be forced to monitor their corporation’s performance in costlier and less effective ways. The inability to sell shares blocks individuals’ attempts to diversify, which creates an artificial demand for corporate diversification and may stifle productive but risky investment. It also

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262. Emeka Duruigbo, *Permanent Sovereignty and Peoples’ Ownership of Natural Resources in International Law*, 38 GEO. WASH. INT’L L. REV. 33, 77 (2006) (citations omitted); see also Bernard Black et al., *Russian Privatization and Corporate Governance: What Went Wrong?*, 52 STAN. L. REV. 1731 (2000) (discussing how the pitfalls of Russian privatization had such an effect); AMY CHUA, *WORLD ON FIRE: HOW EXPORTING FREE MARKET DEMOCRACY BREEDS ETHNIC HATRED AND GLOBAL INSTABILITY* (2003) (discussing the dangers of wealth transfer or concentration in the hands of a few individuals or a minority ethnic or religious group).

263. A provision in the by-laws, shareholder agreement or articles of incorporation restricting transferability may be rejected by the court if it imposes an absolute restraint on transfer. See *F.H.T., Inc. v. Feuerhelm*, 211 Neb. 860, 320 N.W.2d 772, 776 (1982) (holding that the agreement in question “constitutes a reasonable restraint on the power to transfer those shares held by the contracting parties and covered by the terms of the agreement, and . . . does not impose an absolute restriction on the alienability of the stock.”).

264. Emeka Duruigbo, *Stimulating Long-Term Shareholding*, 33 CARDOZO L. REV. 1733, 1791 (2012) (stating that a ten-year restriction on transfer of shares will likely meet the reasonableness requirement for the validity of such restrictions); F. Hodge O’Neal, *Restrictions on Transfer of Stock in Closely Held Corporations: Planning and Drafting*, 65 HARV.L.REV. 773 (1952) (rationalizing restrictions on free transferability of shares in closely-held corporations); *Tu-Vu Drive-In Corp. v. Ashkins*, 61 Cal.2d 283, 391 P.2d 828 (1964) (upholding a share transfer restriction as necessary for the protection of a corporation and its shareholders and precluding unwanted intrusions by outsiders).

265. See Buchanan, *supra* note 188, at 332 (stating that Alaska Native corporations “cannot issue stock as needed or even alienate shares freely.”).

266. Later legislation amended the provision to make the initial restriction on alienability of stock in Alaska Native Corporations permanent unless a Native corporation’s shareholders voted to lift the restriction. See *id.* at 301.

creates problems for shareholders with immediate cash needs—a condition that certainly applied to many poor Alaska Natives.<sup>267</sup>

In a nutshell, Professor Colt notes that “[t]he shareholders’ inability to use ‘exit’ as a discipline mechanism clearly gives management, employees, and outside parasites more leeway to pursue their rent-seeking objectives, including shirking, empire-building, or nepotism.”<sup>268</sup>

While the points above are well taken, the absence of unqualified exit is not necessarily a minus, as it could impel the activation of the mechanism of voice.<sup>269</sup> Voice denotes shareholder engagement with corporate management to shape corporate policy.<sup>270</sup> Voice fosters inter-constituency cooperation within the corporation, with shareholders working with corporate managers to fix what is wrong instead of withdrawing at the slightest disaffection or disagreement with corporate direction.<sup>271</sup> Many commentators believe that voice can be more beneficial to the corporation than exit.<sup>272</sup>

### E. *Unintended Social Consequences*

Equity participation may also introduce and solidify some unintended and undesirable social consequences in the local communities where it is implemented. Major lifestyle changes are likely to result from putting large, unearned, sums of money in the hands of the people. Some people will fail to invest their money properly, choosing instead to use the income to fuel a life of conspicuous consumption in an unhealthy manner. Cases of crime, alcoholism and other social

267. See Colt, *supra* note 249, at 158 (citations omitted).

268. *Id.* at 167 (citations omitted).

269. On the exit-voice phenomena, see ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES* (1970). A slightly different articulation of the concepts presents exit and voice as “variants of the same phenomenon,” rather than as alternate phenomena. See Andrew E. Taslitz, *Judging Jena’s D.A.: The Prosecutor and Racial Esteem*, 44 HARV. C.R.-C.L. L. REV. 393, 428-29 (2009) (“A buyer having a real choice among a range of viable alternatives and the freedom to exit one potential deal for a better one gives the buyer some measure of voice.”); SARAH MAXWELL, *THE PRICE IS WRONG: UNDERSTANDING WHAT MAKES A PRICE SEEM FAIR AND THE TRUE COST OF UNFAIR PRICING* 76 (2008) (“Having a choice gives the consumers voice by allowing them to express their opinion. They are not being forced to buy at one pre-set price or do without.”).

270. J. H. H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403, 2411 (1991) (“Exit is the mechanism of organizational abandonment in the face of unsatisfactory performance. Voice is the mechanism of intraorganizational correction and recuperation.”).

271. For an extensive discussion of the value of voice in a close corporation context, see Benjamin Means, *A Voice-Based Framework for Evaluating Claims of Minority Shareholder Oppression in the Close Corporation*, 97 GEO. L.J. 1207, 1229-38 (2009).

272. See e.g. Peter C. Konstant, *Exit, Voice and Loyalty in the Course of Corporate Governance and Counsel’s Changing Role*, 28 J. SOCIO-ECON. 203 (1999). This result is not limited to corporations, but extends to other economic, or even political, institutions. See Petros C. Mavroidis, *Book Review: Lexcalibur: the House That Joe Built*, 38 COLUM. J. TRANSNAT’L L. 669, 670 (2000) (discussing how the virtual absence of opportunity to exit by member states led to the amplification of voice and helped in the building of post-World War II Europe).

vices are likely to rise.<sup>273</sup> One example that is hard to forget is that of the Samson Cree of Alberta, Canada who received more than \$2 billion from the 1970s oil booms.<sup>274</sup> The Cree introduced a dividend program entitling each adult Cree to a dividend of about \$40,000.<sup>275</sup> Regrettably, the good fortune bred a string of sad stories as a significant portion of the dividend money was squandered on personal consumption, with concomitant high levels of alcoholism and death and little improvement in the material well-being of the community.<sup>276</sup> A counter-argument is that it would be an exercise in excessive paternalism to deprive communities of this option, simply because others believe their residents are ill-equipped to make smart life choices.<sup>277</sup>

#### F. *Diversion of Public Resources*

African countries generally lack good social infrastructure, state-of-the-art medical facilities, and effective police outfits. In light of that, it may be apposite to place emphasis and concentrate public resources on the erection of durable physical infrastructure, adequate political institutions, and social investment by public authorities, before any serious attention is given to any form of wealth transfer to the citizens. Accordingly, equity participation may be assailed for diverting needed funds from building vital public facilities and needed social spending for sound functioning of any society. The Alaska Permanent Fund, which pays annual dividends to Alaska residents, has come under criticism on that score, as the state has occasionally grappled with employee lay-offs and uncomfortable budget cuts that might have been avoidable if it had retained the funds that were returned to the residents as dividend payments.<sup>278</sup> The point about infrastructural development and public investment generally is well taken, especially in African countries that need them badly. Yet, there is scant reason to believe that if equity participation is not introduced, currently available resources would be devoted to these noble ends. After all, there is hardly any public revenue allocated to equity participation today, yet these investments are virtually non-existent. Besides, equity participation does not necessarily divert resources devoted to public infrastructure. It simply re-allocates the portion of public revenue that is

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273. SVETLANA TSALIK, *CASPIAN OIL WINDFALLS: WHO WILL BENEFIT?* 47 (2003).

274. *Id.*

275. *Id.*

276. *Id.*

277. See Michael J. Sandel, *Socratic Temptations*, (reviewing JEFFREY ABRAMSON, *MINERVA'S OWL: THE TRADITION OF WESTERN POLITICAL THOUGHT* (2009)) 89 *TEX. L. REV.* 687, 694-95 (2011) (discussing John Stuart Mill's influential critique of paternalism); James Gordley, *Morality and Contract: the Question of Paternalism*, 48 *WM. & MARY L. REV.* 1733, 1754-55 (2007) (offering a critique of paternalism).

278. See Tsalik, *supra* note 273, at 25.

devoted to community development at the moment, and often deployed inefficiently or lost through corruption at the corporate, community and government levels.

### G. *Financial Constraints*

In an earlier article, I discussed this challenge in the following words:

One major issue that would need to be addressed is the source of funding for community investment in these projects. Natural gas [and oil] development projects are capital intensive, and it is unlikely that communities would be able to mobilize the needed financial resources to acquire a reasonable stake in these ventures. One suggestion is that the federal government should advance non-recourse or limited recourse loans to the communities for investing in the projects. These loans will be paid back from the projects themselves, and communities would be under limited or no obligation to repay if the projects fail. In the long run, communities would be encouraged to seek independent means of financing their investment, including sourcing for private commercial borrowing and seeking the assistance of international development and financial institutions.<sup>279</sup>

There is good reason to believe that such projects will attract the interest of lenders. In the context of project finance, lenders routinely advance loans that would be paid back from the projects themselves.<sup>280</sup>

### H. *Political Challenges*

Perhaps the biggest obstacle to the tangible manifestation of equity participation is the anticipated opposition of a corrupt, self-interested and power-hungry political elite that would not be excited about losing control of any contents of the public coffers. This problem is exacerbated by the existence of the minority-majority dichotomy in some places where the natural resources (and primary beneficiaries of equity participation) are located in areas with minority ethnic groups while political power is held by the majority ethnic groups.<sup>281</sup> Moreover, concerns that successful equity participation experiments could entail disparate development outcomes for the oil-producing areas and the rest of the country could also heighten the political tensions. The saving grace here may be the fact that equity participation is rela-

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279. Emeka Duruigbo, *The Global Energy Challenge and Nigeria's Emergence as a Major Gas Power: Promise, Peril or Paradox of Plenty?*, 21 *GEO. INT'L ENVTL. L. REV.* 395, 448-49 (2009) (citations omitted) (hereinafter Duruigbo, *Global Energy*).

280. Loïc Conan, *The Trans-Saharan Gas Pipeline: An Overview of the Threats to Its Success and the Means to Prevent Its Failure*, 31 *UTAH ENVTL. L. REV.* 205, 218 (2011).

281. See Cyril I. Obi, *Oil and the Minority Question*, in *THE NATIONAL QUESTION IN NIGERIA* 100 (Abubakar Momoh & Said Adejumbi eds., 2002).



tively benign compared to other more radical proposals like 50 per cent allocation to oil producing regions,<sup>282</sup> total distribution of oil revenues directly to the citizens<sup>283</sup> or complete private ownership of mineral resources.<sup>284</sup>

## VI. CONCLUSION

It is a virtually incontestable fact that oil and gas development has not been accompanied by elevated economic and political development in many petroleum-producing countries, especially in Africa. Reacting to the resulting economic inequity and social inequality, citizens in oil-producing communities have started fighting back for a more just development paradigm. This Article has argued that community members should be afforded some economic rights and investment opportunities through a system of equity participation in exploration and production ventures. Thus, instead of joint ventures between the national government and energy companies, we would have a modified joint venture system involving the government, energy companies and community-owned corporations (“COCs”). Community members will be the only shareholders of the COC. COCs would declare dividends on the profits on a regular basis. Shareholders may be able to use shares as collateral for needed personal loans or borrow against their right to dividends. However, to avoid a hijack of the COCs, share transfer restrictions may be put in place.

The government may “carry” the COCs in the first few years of participation in the joint venture, after which they can independently and sustainably make proportionate financial contributions to the joint venture. The government can then devote the freed money to other sectors of the economy or segments of the society. This new arrangement would propel economic development on a number of fronts. It would reduce growth-stifling corruption by tackling the concentration of wealth in the government. De-concentrating and re-distributing oil wealth to the private citizens will foster entrepreneurial pursuits through capital formation. Apart from economic gains, the emergent middle class will drive and sustain political progress. A vi-

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282. See Duruigbo, *Global Energy*, *supra* note 279, at 445 n. 410 (and accompanying text) (discussing a rejection of an increased derivation proposal by a national political reforms conference in Nigeria).

283. See Moss, *supra* note 17; Palley, *supra* note 192; Xavier Sala-i-Martin & Arvind Subramanian, Addressing the Natural Resource Curse: An Illustration from Nigeria (IMF Working Paper No. WP/03/139, 2003).

284. For example, the Nigerian Bar Association has proposed the elimination of public ownership of oil and gas resources and its replacement with private or communal ownership. See Duruigbo, *People's Right*, *supra* note 105 (analyzing the private ownership proposal).

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brant middle class is usually a major contributor to the emergence or at least sustenance of democracy.

Equity participation will also provide a sense of ownership to community members in the oil and gas industry, which would curtail any propensity for destruction of exploration assets or disruption of production, giving much-needed breathing room to the government and energy companies. The benefits will reverberate internationally in terms of enhanced global energy security and stability.