Managing Oil Revenues for Socio-Economic Development in Nigeria: The Case for Community-Based Trust Funds

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Managing Oil Revenues for Socio-Economic Development in Nigeria: The Case for Community-Based Trust Funds

Emeka Duruigbo*

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I'm seeing soldiers, bandits, actually coming to take away this stuff [crude oil] and develop their own home while pretending to be running Nigeria. Oil has brought nothing but disaster to our people.¹

I. Introduction

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

This article focuses on the role that both the Nigerian government and oil corporations have played to ameliorate the plight of oil producing communities, which have more directly borne the brunt of oil and gas development than any other part of Nigeria. The government's approach has been two-pronged: corrective, attempting to repair the damage done by oil and gas development and progressive, providing opportunities for people in these communities to share in the benefits of petroleum production after a trial that was widely condemned for not meeting basic due process requirements. Newshour: Nigerian Execution (PBS television broadcast, Nov. 10, 1995), available at http://www.pbs.org/newshour/bb/africa/africa_11-10b.html.

The "resource curse" is a paradoxical situation in which there exists an inverse relationship between endowment with natural resources and economic growth. See Richard M. Auty, Sustaining Development in Mineral Economies: The Resource Curse Thesis (1993). See also Alan Gelb, Oil Windfalls: Blessing Or Curse? (1988) (stating that for countries who export oil, it is ordinary to see an inverse relationship between oil exploration and subsequent growth and development); Menachem Katz, et al., Lifting The Oil Curse: Improving Petroleum Revenue Management in Sub-Saharan Africa (International Monetary Fund 2004) (stating that macroeconomics, oil sector policies, and governance issues may be related to the inverse relationship between domestic oil production and subsequent domestic growth in African nations).


See, e.g., Emanuel U. Nnadozie, Oil and Socioeconomic Crisis in Nigeria 1 (1995) (discussing the people of Egbema in southeastern Nigeria); Ikein, supra note 3, at 26, 131.
exploration and extraction.\(^6\)

The two major vehicles by which the Nigerian government has manifested its intention in the past decade are the Oil Mineral Producing Areas Development Commission (OMPADEC) and the Niger Delta Development Commission (NDDC); both of which were established by federal legislation.\(^7\) OMPADEC was severely criticized, leading to its disbandment.\(^8\) While the NDDC has received its share of scathing attacks, it still remains in existence.\(^9\)

In addition to governmental efforts, the oil corporations operating in Nigeria have instituted private financing initiatives to develop their host communities.\(^10\) Oil corporations have embarked on a number of community assistance and development projects ranging from scholarships to construction of roads and buildings.\(^11\) They have also started extending loans for micro-enterprises and support for agricultural projects.\(^12\) Corporate efforts have also involved public-private partnerships with development agencies including the United Nations Development Programme (UNDP) and the United States Agency for International Development (USAID).\(^13\)

This article presents a critical appraisal of the public and private initiatives to cushion the negative effects of oil and gas production and ensure the development of these communities. Although this work uses Nigeria as a framework for this discussion, its ramifications and relevance extend beyond one single country and may be beneficial to people in other resource-rich countries.

This article is organized into seven parts including the Introduction (Part I) and Conclusion (Part VII). Part II centers on the social, economic and environmental impact of oil and gas development in Nigeria's oil-producing communities. Part III focuses on the public initiatives introduced to address the negative

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\(^6\) See infra Part III.

\(^7\) See id.

\(^8\) Kybeyinje & Nezianya, supra note 4.

\(^9\) See infra Part III.D.

\(^10\) See infra Part IV.

\(^11\) Id.

\(^12\) Id.

\(^13\) Id.
effects of oil production. Of particular importance are the practices under the now defunct OMPADEC, discussed in section A of this part, and the nascent NDDC, discussed in section C. Sections B and D of this part present a critical appraisal of the public initiatives, concluding that OMPADEC was ineffective and that the NDDC offers solutions with mixed results.

Part IV examines corporate approaches to community development in the oil-producing communities of Nigeria. It presents a general discussion of the various activities of the major oil-producing companies in Nigeria. Particular attention is paid to the approaches adopted by Royal Dutch/Shell and ChevronTexaco. These two companies were selected because they are two of the largest oil companies in Nigeria. They have also had a long presence in Nigeria. Both of these factors suggest they have had the opportunity and the capacity to either be a huge blessing to, or inflict maximum damage on, the environment and lives of people in these communities. In addition, these two companies have been at the center of the greatest controversies concerning oil production in Nigeria. Both companies are currently the subjects of two separate lawsuits in the United States regarding their operations in Nigeria. The discussion here includes a detailed description and evaluation of the corporate initiatives. Like the various public initiatives, this article argues that the efforts of the oil companies have not been very effective.

A number of factors account for the dismal performance of public and private actors in Nigeria. The most prominent factors appear to be the corruption present at all levels of Nigerian life and the absence of meaningful participation of the public in the


15 FRYNAS, supra note 4, at 249-52.

16 Shell was sued in New York and the lawsuit is still pending. See Wiwa v. Royal/Dutch Shell, 226 F.3d 88 (2d. Cir. 2000), cert denied, 532 U.S. 941 (2001) (holding that Nigerian émigrés' suit, brought under the Alien Tort Claims Act, alleging that Shell participated in human rights violations against them in retaliation for their political opposition to its oil exploration activities in Nigeria should not be dismissed for forum non conveniens). A lawsuit is also pending against Chevron in California. See Bowoto v. Chevron, 312 F. Supp. 2d 1229 (2004) (holding that ChevronTexaco can face trial in the U.S. for the alleged human rights abuses of its subsidiary in Nigeria).
formulation and implementation of these policies and projects. Part V focuses on these two factors. To see tangible and enduring improvements, there is a dire need to stamp out corruption or minimize its influence. Public participation, which has gained ascendancy in the international arena as an important component of sustainable development, also deserves greater attention than is presently the case in Nigeria. It is critical to ensure that community members have a stake in these programs and are allowed to take their destiny in their own hands. The challenge is to design a framework for institutional arrangements that take these factors into consideration.

Part VI looks at an example of an institutional arrangement: community-based trust funds. Trust funds can be utilized at the local level as financing mechanisms and management tools to ensure the proper allocation and utilization of oil revenues and enhance socio-economic development. Part VII concludes that community-based trust funds could be a solution to ensure the effective management of oil revenues in Nigerian oil-producing communities. It is important to point out that this work focuses on governmental and corporate financing initiatives for community development. It does not address other options available to or utilized by community members to seek redress for the negative impact of oil production, such as tort litigation, political negotiations, and extra-legal measures.

II. Economic, Environmental and Social Impact of Oil and Gas Development in Nigeria

A. Economic Effects

Since at least the 1970s, the Nigerian economy has been dominated by oil. Natural gas, a later entrant in the economic equation, is fast becoming a major contributor to the Nigerian economy. In 1966, the contribution of petroleum exploration and

17 See infra Part V.
18 See infra Part VI.
production to total Nigerian GNP was 1.7% and the contribution to GDP was 3.0%. In that same year, 33% of Nigeria’s total exports was crude oil which, although a significant increase from the 0.8% in 1958, was not a majority of total exports. By the early 1990s, the role of oil in the Nigerian economy was markedly different. Petroleum production accounted for more than 90% of foreign receipts, 70% of budgetary revenues, and 25% of the GDP. Today, Nigeria produces over two million barrels of oil per day. This increase in production, coupled with the rising price of crude oil, has resulted in a huge revenue stream for the oil industry.

Despite this increase in revenue, the economic situation in Nigeria presents a sad picture and the level of poverty is astounding. Nigeria is an example of the resource curse in action. Xavier Sala-i-Martin and Arvind Subramanian have identified the salient features of the resource curse in Nigeria in the following words:

Nigeria has been a disastrous development experience. On just about every conceivable metric, Nigeria’s performance since independence has been dismal. In purchasing power parity terms, Nigeria’s per capita GDP was US$1,113 in 1970 and is estimated to have remained at US$1,084 in 2000. The latter figure places Nigeria amongst the 15 poorest nations in the world for which such data is available. Nigeria, unfortunately, fares much worse on measures of poverty and income distribution. Between 1970 and 2000, the poverty rate, measured as the share of the population subsisting on less than US$1 per day increased from close to 36% to just under 70% . . . . This translates to an increase in the number of poor

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24 Encyclopedia: Economy of Nigeria, supra note 19.

from about... 19 million in 1970 to a staggering... 90 million in 2000.... Similarly, the income distribution has deteriorated very sharply.... Whereas in 1970 the top 2% and the bottom 17% of the population earned the same total amount of income, in 2000 the top 2% had the same income as the bottom 55%.

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

Crops are destroyed when oil leaks occur from high-pressure pipelines. Oil leaks also adversely affect artificial fish ponds used for fish farming, economically valuable trees, and other income-generating assets. Even a small oil leak can wipe out a family’s annual income.

Pollution from oil production compels many members of oil-producing communities to spend money on items they would have

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30 See Owabukeruye, supra note 28.


32 See Owabukeruye, supra note 28.
received nearly free of charge. For instance, in Eket, a town in oil-producing Akwa-Ibom State, the operations of Exxon Mobil have resulted in the loss of fish populations along the coast. Community members, unable to afford houseboat engines and trawlers to venture into the high seas, are left with little option but to buy fish from commercial fishermen. Therefore, not only does the local population lose the earning potential of the fishing industry, it also is forced to incur expenses that were not the norm before the advent of oil production in the area.

Community members are not protected by the Nigerian Constitution or other federal legislation, including the Petroleum Act, that vest all mineral resources in the country in the federal government. Additionally, the Land Use Act of 1978 limits the level of compensation community members receive when oil is discovered on their lands. It is hard to calculate the economic benefits that community members would have received from the land absent oil production and the extent of the resulting hardship in the event of forced transfer of the property to the government.

33 See Clark et al., supra note 29.
34 Akwa-Ibom was created in 1987 in the southeast section of Nigeria. See Akwa-Ibom State, at http://www.nigeria.gov/ng/states/akwaibom.htm (last visited Sept. 7, 2004). This state spans about 4,350 square miles and its population approximates 2.5 million. Id. Eket is considered a city of “significant” size in Akwa-Ibom. Id.
35 See Clark et al., supra note 29.
36 Id.
37 Id. For an extensive discussion of the numerous negative effects of oil production on oil communities in Nigeria, see IKEIN, supra note 3.
40 Section 44(3) of the 1999 Nigerian Constitution provides that “the entire property in and control of all minerals, mineral oils and natural gas in under or upon any land in Nigeria or in, under or upon the territorial waters and the Exclusive Economic Zone of Nigeria shall vest in the Government of the Federation and shall be managed in such manner as may be prescribed by the National Assembly.” NIG. CONST., ch. IV, § 44(3) (1999), available at http://www.nigeria-law.org/ConstitutionOfTheFederalRepublicOfNigeria.htm.
41 Land Use Act, vol. XI ch. 202 (1990) (Nig.).
42 Id.
B. Environmental Impact of Oil Production

Another set of problems plaguing oil-producing communities are the environmental consequences flowing from oil and gas development.\textsuperscript{43} The Niger Delta area, which produces the bulk of Nigeria’s oil, is characterized by its rich biodiversity.\textsuperscript{44} It is the world’s third largest wetland, after Holland and Mississippi.\textsuperscript{45} While a number of environmental problems in the oil producing communities are not necessarily attributable to oil production, Nigeria’s foray into this industry has been accompanied by massive devastation of the environment in these communities.\textsuperscript{46} This has largely been due to gas flaring and oil spills.\textsuperscript{47}

Nigeria flares, or burns, more than 76% of gas associated with oil.\textsuperscript{48} This is significant, considering that the worldwide average of gas flares is 4%.\textsuperscript{49} Apart from the economically inefficient nature of this practice (enormous revenues that would have accrued from monetizing the gas are essentially forfeited), there are huge environmental consequences.\textsuperscript{50} One of these consequences is acid rain, which has stunted the growth of crops, contaminated drinking water, and corroded the corrugated iron roofing in these communities.\textsuperscript{51} During a visit of the Senate Committee on the NDDC to oil-producing communities in his

\textsuperscript{43} See Clark et al., supra note 29.


\textsuperscript{47} Id.


\textsuperscript{50} Raufu, supra note 48.

\textsuperscript{51} Clark et al., supra note 29. The alternative to iron roofing is to use asbestos, which is more expensive and less safe. Id.
state, the deputy governor of Imo State, Mr. Ebere Udeagu, stated:

Gas flaring by oil companies in the oil producing communities has terribly devastated a substantial portion of farm lands leaving the streams polluted. These areas have been turned into ghettos and swamps with the indigenes becoming destitute in their fatherland. Their source of livelihood which is farming and fishing have been closed as the streams have lost life in it, the lands are no longer fertile.  

The flares, which burn twenty four hours a day, also serve to deprive community members of the natural distinction between night and day, and frustrate hunters by altering the lifestyles of local wildlife. Gas flaring also contributes to global warming. The gas released during flares is predominantly methane, which has more global warming potential than carbon dioxide.

Another major source of environmental pollution in these communities is the incidence of oil spills. Spills have become a basic feature of life in the oil producing communities, occurring from onsite leaks, pipeline ruptures, loading, offloading and transportation of crude oil. Spills pollute creeks, ponds and rivers, destroying sources of drinking water in communities that generally lack alternative, portable sources of water, and killing fish that people harvest for consumption and sale.  

In 1997, samples of water used for drinking and washing were taken from Ogoniland for analysis in the United States.

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53 Clark et al., supra note 29.

54 Manby, supra note 46.

55 Id.


57 Id.

58 Id.


60 Owabukeruyele, supra note 28.
Interestingly, the water was taken from a portion of the community that had been free from oil production for four years.\textsuperscript{61} Yet, despite the passage of time, results showed that the sample contained a hydrocarbon level of 18 ppm (parts per million), 360 times higher than the amount permitted for drinking water in Europe.\textsuperscript{62}

This problem is exacerbated by the fact that clean up is hardly undertaken on time, if at all.\textsuperscript{63} A recent CIA Report indicated that the Niger Delta has suffered the equivalent of ten Alaskan Exxon Valdez oil spills, yet there has been little clean up.\textsuperscript{64} Old, rusty pipelines used beyond their intended lifetime also contribute to causing and worsening this situation at the same time.\textsuperscript{65}

\textbf{C. Social Consequences of Petroleum Development}

Apart from the economic and environmental impact of oil and gas development discussed in the preceding sections, some social problems have also been associated with oil.\textsuperscript{66} The social consequences of petroleum development have taken varied forms in Nigeria. Some of the consequences are locally concentrated, while others have a broader, national impact.\textsuperscript{67}

\textit{1. Migration of Labor to Oil Producing Communities}

One social problem accompanying oil production is the migration of labor to oil producing areas and the exodus of productive members from non-oil producing communities.\textsuperscript{68} Migration strains the local oil-producing communities' economies,
leading to inflation and higher housing costs. Resentment also brews when community members perceive the non-indigenes as encroaching on their territories to take away their jobs. In addition, some of the men that migrate to these communities leave their families behind. This puts a strain on family life as wives, often with little financial support, are saddled with the onerous responsibility of raising the children.

2. Unemployment

With the destruction of traditional economies of fishing and farming, unemployment is bound to rise. Community members who have survived and thrived on this type of economy suddenly find themselves without gainful employment and thus unable to provide for the basic needs of their families. Young men and women needing jobs look to the oil industry, but oil is an enclave industry and only employs a few people with highly specialized skills. Some community members lack these skills and even those who have the requisite skills have not always been successful in securing the well-paying oil industry jobs.

3. Prostitution

Prostitution is another offshoot of petroleum development. Some young women who cannot find decent employment, or whose families cannot afford the costs of higher education, resort to selling their bodies to make ends meet. Some women, lured by the false promise of easy money from the wealthy Nigerian and expatriate oil workers, see sex work as a legitimate means of reaping the benefits of oil production.

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70 Id.
71 Okoko, supra note 68, at 376.
72 Id.
73 Clark et al., supra note 29.
74 See IKe OKONTA & ORONTO DOUGLAS, WHERE VULTURES FEAST 29 (2001).
75 STEVE AZAIKI, INEQUITIES IN NIGERIAN POLITICS 150-52 (2003).
76 Clark et al., supra note 29.
77 Id.
78 Id.
4. Social Conflict

Numerous social conflicts attributable to oil production have become the norm in these communities.\(^79\) These conflicts take the forms of intra-community battles, inter-community conflicts, corporate-community conflicts, and community-government conflicts.\(^80\) Community members resort to violence as a way of airing their grievances. For example, in April 2004, two American workers employed by a contractor to ChevronTexaco and five Nigerians were killed while visiting a ChevronTexaco oil production facility that had been abandoned in 2003 when armed militants attacked their boat with heavy gunfire.\(^81\) Sometimes violence is an attempt to capture part of the oil rents.\(^82\) While such rent-seeking activity has taken the forms of peaceful protests and demands, other times it has turned violent and resulted in deadly consequences.\(^83\) Community members also seek to capture these rents by rupturing pipelines transporting crude oil or scavenging abandoned oil production facilities.\(^84\) While such efforts have met with occasional success, they are fraught with immense danger and have resulted in hundreds of deaths.\(^85\)

\(^79\) See, e.g., Michelle Leighton & Elena Castaneda, Civil Society Concerns in the Context of Economic Globalization, 15 TRANSNAT'L LAW 105, 110 (2002).

\(^80\) See id.


\(^83\) The violence could either emanate from community members or result from the reaction of the oil corporations and government security forces. Leighton & Castaneda, supra note 79, at 110.


5. Human Rights Abuses

Members of oil producing communities have also suffered numerous human rights abuses. From infringement of their social and economic rights, including deprivation of property rights when oil is located on their land, to infractions of their civil and political rights when military or police repression is used to break up their protests, the unfair plight of these communities can hardly be overstated.

In order to address the economic, environmental, and social problems that have become the norm in the oil-producing communities, the Nigerian government has introduced a number of initiatives over the years. Two prominent initiatives are discussed in the following section.

III. Public Initiatives to Address the Negative Impact of Oil Development

In the past decade, the government of Nigeria introduced two influential and controversial initiatives to cater to the needs of oil-producing communities and provide relief from the problems confronting them. These initiatives were OMPADEC and the NDDC.

A. Oil Mineral Producing Areas Development Commission (OMPADEC)

OMPADEC was established by the administration of General Ibrahim Babangida in 1992 to assuage the restlessness in the oil producing areas. The government instituted the commission to

89 OMPADEC DECREE, supra note 88.
90 NDDC ACT, at www.nddconline.org/The_NDDC_Act.shtml [hereinafter NDDC Act].
placate the people by giving the impression that it was concerned with improving their plight. After increasing the financial allocation that the federal government makes to oil-producing areas from 1.5 to 3% of revenues derived from upstream activities, the Babangida administration established OMPADEC with a mandate to more evenly and fairly distribute the allocation.

OMPADEC's primary assignment was to propose and execute development projects in oil and mineral producing communities with the consent of the President. Its mandate included addressing problems pertaining to infrastructure, jobs, education, and environment in the oil mineral producing areas. OMPADEC was charged with the responsibility of "tackling ecological problems that have arisen from the exploration of oil minerals, [consulting] with the relevant Federal and State Government authorities on the control and effective methods of tackling the problem of oil pollution and spillages, [and] liaising with the various oil companies on matters of pollution control.

During its existence, OMPADEC embarked on a number of developmental projects including road and school construction, electricity projects, and purified water provision. Some of these projects were abandoned, with the approval of OMPADEC, after contractors received payments.

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92 Ezetah, supra note 1, at 819.
93 See Ike Oguine, Nigeria's Oil Revenues and the Oil Producing Areas, 4 CTR. ENERGY, PETROLEUM & MINERAL L. & POL'Y ONLINE J. (Jan. – May, 1999), at http://www.dundee.ac.uk/cepmlp/journal/html/vol4/article4-10.html. Upstream activities refer to those aspects of the industry dealing with exploration and production. Id. The other component of the industry is the downstream sector, which consists of refining, marketing, sales and distribution. Id. For a discussion of the structure of the oil industry, see generally Paul FrankeL, THE ESSENTIALS OF PETROLEUM, pt. 4 (1969), and Edward L. Morse, A New Political Economy of Oil?, 53 J. INT'L AFF. 1 (1999).
94 Frynas, supra note 4, at 49.
95 Osaghae, supra note 69, at 332.
96 OMPADEC DECREE supra note 88, § 2(1).
97 Id.
98 Osaghae, supra note 69, at 332.
99 See Okonta & Douglas, supra note 74, at 34-35.
B. Evaluation of OMPADEC

OMPADEC provided a number of benefits such as the provision of electricity and clean water to some of the target communities. While it met with success in these fields, the Commission failed miserably on a number of other fronts. In the environmental arena, OMPADEC did virtually nothing. This has been explained as the result of the overwhelming demands for development projects confronting the Commission.

Another rationale offered for OMPADEC’s relative inaction on environmental issues is that OMPADEC was not properly equipped to carry out its environmental responsibilities. It was not empowered to make regulations, enforce laws, or impose sanctions for breach of environmental laws. These limitations may have adversely affected OMPADEC’s ability to discharge its duties. These limitations, however, do not excuse ineptitude. If OMPADEC wanted to develop and implement directives to improve the environment, it is unlikely that there would have been many legal impediments to prevent it from doing so. Furthermore, if OMPADEC sought to carry out its environmental mandate and was hamstrung by a lack of enforcement capacity, it would then be obvious that the limitations in the law constituted an obstacle. This would lay a legitimate foundation for future legislative reform. Unfortunately, there is hardly anything to indicate that OMPADEC even got to this point.

Indeed, it is doubtful that OMPADEC perceived itself to be

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100 Frynas, supra note 4, at 49.


102 Oguine, supra note 93 (stating “[t]his clamour for development projects was so great that OMPADEC’s other major function of tackling ecological problems was all but forgotten”).

103 See Eaton, supra note 101, at 289.

104 Id.


106 Eaton, supra note 101, at 288.

107 Id. at 288.
After all, this is a commission that at one point blatantly ignored a properly procured court order. When the Federal High Court in Benin City issued an order restraining OMPADEC from swearing in Joseph Popo as the new commissioner for Delta state, OMPADEC defied the court order and proceeded with the swearing in.

OMPADEC's structure also constituted an impediment. The Commission's budget was controlled by the Head of State, which may have affected its independence and flexibility in the discharge of its duties. There might have been good reason for keeping a leash on the Commission through the controls afforded by the budgetary process, but if that was the intent, it does not appear to have worked. OMPADEC operated without any credible financial oversight; its work was marred by gross mismanagement of funds and corruption. OMPADEC's chairman, Albert K. Horsfall, was removed following an investigation launched by the Nigerian government and replaced by a sole administrator, Professor Eric Agume Opia. Eventually, when Opia could not account for approximately $200 million belonging to OMPADEC, he was also removed. Opia eventually "disappeared" with a cloud of suspicion and allegations of corruption surrounding and trailing him.

Even though OMPADEC's budget was controlled by the Head of State, the Commission's poor performance is actually traceable to "the absence of performance guidelines or controls," leading it to embark on projects without restriction. This opened the door to inefficiency and corruption. One such project was the financing of the Eleme Gas Turbine in Port Harcourt, Rivers State in

108 OKONTA & DOUGLAS, supra note 74, at 33.
109 FRYNAS, supra note 4, at 124.
110 Id.
111 OKONTA & DOUGLAS, supra note 74, at 33.
112 See id. (noting that although OMPADEC had a budget of approximately $95 million in 1993, money was dispersed to it at the Head of State's whim, making proper project planning simply impossible).
113 Id. at 35.
114 Id.
115 Id.
116 Id.
At the end of 1995, the project had still not been completed and if it was to be completed, it would require the infusion of additional funds by OMPADEC.

With Opia's removal, OMPADEC underwent a restructuring and Vice Admiral Dan Preston Omatsola was appointed as the Chairman. The major feature of the restructuring was the decentralization of the Commission's operations through the establishment of zonal offices in proximity to the oil producing areas. This did not appear to have solved all the problems, though, and was criticized as creating additional levels of bureaucracy that "translate to new opportunities for corruption and waste and new theatres of conflict over contracts and jobs."

Another barrier to OMPADEC's success was the absence of a meaningful opportunity for community members to participate in the development process. Critics believe that OMPADEC should have been structured in such a way as to allow "local communities to take charge of their own affairs" with as little direct interference as possible.

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

C. Niger Delta Development Commission (NDDC)

Shortly after assuming the reins of office in May 1999, Nigeria's President Olusegun Obasanjo commenced efforts to address the complaints of the people in the oil-producing

117 Id. at 34.
118 Id. at 34-35.
119 FRYNAS, supra note 4, at 50.
120 Oguine, supra note 93.
121 Id.
123 FRYNAS, supra note 4, at 50.
communities of Nigeria. Mr. Obasanjo introduced a bill to the National Assembly in 1999 which, after some legislative tinkering, became the Niger Delta Development Commission Act in 2000. The Act established the NDDC to replace OMPADEC.

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

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

Ostensibly to ensure a closer connection between the oil-producing communities and the Commission, the NDDC Act provides that most of the state representatives on the NDDC

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124 Ebeki, *supra* note 105, at 203.
125 NDDC Act, *supra* note 90.
126 *Id.*
128 NDDC Act, *supra* note 90, at pmbl.
129 NDDC Act, *supra* note 90. For the different definitions of “Niger Delta” including the restrictive and expansive ones, see Azaiiki, *supra* note 75, at 142.
130 NDDC Act, *supra* note 90, § 2(1).
131 *Id.*
132 *Id.*
Governing Board must come from an oil-producing community.\textsuperscript{133} Similarly, the three directors (managing and executive) are also to be selected from oil-producing areas.\textsuperscript{134}

The President enjoys broad powers of appointment. He appoints the Chairman and members of the NDDC Board.\textsuperscript{135} Apart from the oil companies' representative, who is nominated by the companies and forwarded to the President,\textsuperscript{136} the rest of the members are directly appointed by the President.\textsuperscript{137} All of the appointments, however, are subject to confirmation by the Senate, following consultation with the House of Representatives.\textsuperscript{138} Members of the Board are appointed for a term of four years, which is renewable for an additional term.\textsuperscript{139} The Chairmanship rotates among the Member States, in alphabetical order.\textsuperscript{140}

In addition to the Governing Board, the Act also establishes a Management Committee consisting of the Managing Director, two executive directors, and the directors in charge of the Commission’s eleven directorates.\textsuperscript{141}

Monitoring of the activities of the Commission is primarily entrusted to the care of two entities. The first entity is the Advisory Committee whose membership includes the governors of the Member States and two other persons appointed by the President.\textsuperscript{142} The other entity is the Monitoring Committee which is charged with monitoring the implementation of projects and managing the funds of the Commission.\textsuperscript{143} Members of the Committee are appointed by the President from the national civil

\textsuperscript{133} Id.
\textsuperscript{134} Id. § 12(1).
\textsuperscript{135} Id. § 2(2).
\textsuperscript{136} Id. § 2(1).
\textsuperscript{137} Id. § 2(2).
\textsuperscript{138} Id.
\textsuperscript{139} Id. § 3(1).
\textsuperscript{140} Id.
\textsuperscript{141} Id. § 10. The Directorates are: administration, community development, utilities development and waterways, environmental protection, finance, agriculture, planning and research, legal services, education and health, commercial and industrial development, and projects monitoring. Id. § 9(1).
\textsuperscript{142} Id. § 11(1).
\textsuperscript{143} Id. § 21(2).
service core.\footnote{144}{\textit{Id.} § 2(2).}

The mandate of the NDDC, similar to that of OMPADEC, includes the following: the formulation of policies and guidelines for the development of the Niger Delta area; the conception, planning, and implementation of projects and programs for the sustainable development of the area in the fields of transportation (including roads, jetties, and waterways), health, education, employment, industrialization, agriculture and fisheries, housing and urban development, water supply, electricity, and telecommunications, and the handling of ecological and environmental problems that are the consequence of oil exploration in the area.\footnote{145}{\textit{Id.} § 7(1).}

The NDDC Act also contains provisions on the sources of the Commission's funds.\footnote{146}{\textit{Id.} § 14.} The federal government is the major contributor while additional contributions come from the oil-producing states and the Ecological Fund.\footnote{147}{\textit{Id.} The Ecological Fund is a fund set aside by the government to mitigate environmental degradation. \textsc{Financial Information Engine on Land Degradation (FIELD)}, \textsc{Ecological Fund} (Jun. 2003), \textit{available at} http://www.gm-unccd.org/FIELD/Countries/Nigeria/FR_EF.htm (last visited Oct. 1, 2004). Funds have been released in the past to finance desertification and drought-relief projects. \textit{Id.}\footnote{148}{\textit{Id.}\footnote{149}{See Jide Ajani, \textit{How Oil Companies Short Change the NDDC}, \textsc{Vanguard}, Mar. 19, 2004, \textit{available at} LEXIS, News File.\footnote{150}{See Uchenna Awom, \textit{Oil Firms Ordered to Pay N58 Billion}, \textsc{Daily Independent Online}, Feb. 19, 2004, \textit{at} http://www.dailyindependentng.com.\footnote{151}{See Ajani, \textsc{supra} note 149.}}} In March 2004, it was reported that the oil companies had not fully lived up to their financial responsibilities.\footnote{149}{See Jide Ajani, \textit{How Oil Companies Short Change the NDDC}, \textsc{Vanguard}, Mar. 19, 2004, \textit{available at} LEXIS, News File.} All the oil companies, foreign and indigenous,\footnote{150}{See Uchenna Awom, \textit{Oil Firms Ordered to Pay N58 Billion}, \textsc{Daily Independent Online}, Feb. 19, 2004, \textit{at} http://www.dailyindependentng.com.} so far have either short-changed the NDDC or defaulted in making their contributions.\footnote{151}{See Ajani, \textsc{supra} note 149.} In some cases, the companies attribute their lower contribution to deductions for community development activities and for the cost of their participation in the Liquefied Natural Gas Project, although the
law creating the NDDC says nothing about these deductions.\textsuperscript{152}

Since its commencing operations, the NDDC has developed an "interim action plan" which includes the construction of roads, health and educational facilities, shore protection, and building of jetties.\textsuperscript{153} Communities are consulted and allowed to suggest proposals regarding the projects to be sited in their areas.\textsuperscript{154} Contracts are generally executed by members of the beneficiary communities.\textsuperscript{155} The interim action plan also has a human development component that incorporates skill development programs for the youth in the oil-producing areas.\textsuperscript{156} The object is to steer the attention of the youth away from violent tendencies and toward productive community involvement.\textsuperscript{157} Upon completion of their training, the NDDC plans to support the youth in building an entrepreneurial base by providing them with micro-credit advances.\textsuperscript{158} The human development scheme also includes free medical programs to be run in conjunction with health and charitable medical organizations.\textsuperscript{159} The NDDC has also developed a master plan, an undertaking that took about three years, which addresses the Commission's long term goals in the Niger Delta.\textsuperscript{160}

The NDDC views itself as a dramatic departure from OMPADEC and other previous attempts to address the needs of the people of the Niger Delta. According to the NDDC Chairman, Mr. Onyema Ugochukwu, agencies such as OMPADEC and the

\textsuperscript{152} \textit{Id.} The Liquifed Natural Gas Project is a natural gas processing facility in Finima, Rivers State. \textit{VIATON, LIQUEFIED NATURAL GAS PROJECT, at http://www.nigerianoil-gas.com/naturalgas/liquefied_natural_gas_project.htm} (last visited Oct. 1, 2004).

\textsuperscript{153} \textit{See My Plan for Niger Delta, NEWSWATCH (Nig.), Mar. 3, 2003, at 15 [hereinafter NEWSWATCH Interview].}

\textsuperscript{154} \textit{Id.}

\textsuperscript{155} \textit{Id. at 16-17.}

\textsuperscript{156} \textit{Id. at 15.}


\textsuperscript{158} \textit{NEWSWATCH Interview, supra} note 153, at 15.

\textsuperscript{159} \textit{Id.} at 16.

\textsuperscript{160} \textit{See Godwin Haruna, Redressing the Inequities of a People, THIS DAY (Nig.), Apr. 21, 2004, available at LEXIS, News File.}
Niger Delta Development Board of 1962 were intervention agencies, which adopted a crisis management approach.\(^\text{161}\) The crisis management approach is similar to the NDDC’s interim action plan, which is a small component of the NDDC’s intended objectives.\(^\text{162}\) The NDDC’s master plan is a major point of divergence.\(^\text{163}\) The NDDC also professes to differ from OMPADEC because, unlike its predecessor, it has adopted a bottom-up approach to community development.\(^\text{164}\) An additional point of departure is that the NDDC promotes partnerships with other agencies with the similar goal of developing these communities.\(^\text{165}\) Ugochukwu puts it in the following words:

[The NDDC] believes that unless the people own the process of their development then there is no way anybody can sustain it. That is why we want their involvement. The people must be in the driving seat of their own development. So our own [approach] is to involve them right from conception, design and implementation. And that is the only way you can sustain any development plan. If the people don’t own it, they can’t sustain it. The other departure point for us arises from the act itself. The NDDC is conceived as a partnership. A partnership of various agencies and stakeholders who will unite in developing this place . . . . We have made a great effort to forge a partnership with all the agencies. We go on very well with several of the state governments, with the oil companies, with the World Bank, the UNDP. They want to be our partners in providing certain services in the area. I believe the United States will also participate.\(^\text{166}\)

The NDDC is still in its infancy and only time will reveal the extent to which this new institution differs from its predecessors and how far it will go in tackling the serious problems confronting the oil-producing communities in Nigeria. Nevertheless, there is some basis for evaluating its work so far.

\(^\text{161}\) NEWSWATCH Interview, supra note 153, at 16.
\(^\text{162}\) Id.
\(^\text{163}\) Id.
\(^\text{164}\) Id.
\(^\text{165}\) Id.
\(^\text{166}\) Id.
D. Evaluation of the NDDC

The creation of the NDDC, like that of its predecessor OMPADEC, was mired in controversy. Oil-producing states and communities raised objections either to its very existence or to some aspects of it with which they were not comfortable. Nevertheless, the NDDC entered the stage with the intention of avoiding some of the criticisms leveled against OMPADEC.

For instance, OMPADEC was criticized because it did not require members of the Commission’s Board to be selected from oil-producing communities. In response, the NDDC Act introduced this requirement, but it has not been fully or faithfully followed. The current Chairman of the Board, Mr. Onyema Ugochukwu, a close associate of President Obasanjo, is not from an oil-producing community in his native Abia state. Mr. Obasanjo, whom Mr. Ugochukwu served as a Senior Special Assistant before the appointment, insisted on his confirmation by the Senate. Despite the flagrant violation of the NDDC Act’s provisions, President Obasanjo eventually prevailed.

The NDDC is viewed by some scholars and community members as only marginally better than OMPADEC. One commentator scathingly remarked that the “NDDC is hardly different from OMPADEC apart from its name.” Perhaps this is a harsh assessment, but there are valid reasons why the NDDC has come under a barrage of criticisms.

One reason is the absence of clear provisions in the NDDC Act

167 Oguine, supra note 93.


170 Ebeku, supra note 93, at 203.

171 Oguine, supra note 93.


173 Id.

174 See id.

175 Ebeku, supra note 93, at 204.
mandating the Commission to remediate and compensate for past oil operations damage.\(^{176}\) This is seen as a factor that could hamper the Commission’s progress.\(^{177}\) However, though there are no specific provisions conferring such a duty, the NDDC may still be able to fit such an assignment into its broader mandate. A critical question, however, is whether this is the kind of matter with which the NDDC should be concerned. Arguably, it may be better for the federal and state governments to address ‘remediation issues’ through the environmental protection agencies, since they are more likely to be equipped (in terms of staffing and funding) for such a task. Additionally, compensation issues could be addressed under separate arrangements involving the various stakeholders.

Part of the criticisms against the NDDC stem from the fact that the NDDC is not required to allocate projects in proportion to the volume of oil revenue accrued by each state.\(^{178}\) A similar situation occurred in the context of OMPADEC under which shares of development projects were determined in proportion to a community’s current volume of oil production; that arrangement has been criticized, though.\(^{179}\) Adhering to such a formula promotes some level of inequity in the process, since some of today’s minor oil-producing communities were among the leading, if not dominant, producers in the past.\(^{180}\) It may be unfair to treat them as minor players today when the country relied on their resources all these years without much appreciation or compensation for losses suffered.\(^{181}\)

\(^{176}\) Id. at 204 n. 18.

\(^{177}\) Id.

\(^{178}\) Dolezal, supra note 168, at 1207.

\(^{179}\) Eghosa Esoghae, Managing Multiple Minority Problems in a Divided Society: the Nigerian Experience, 36 J. MOD. AFR. STUD. 1, 23 (1998).

\(^{180}\) Id. (citing the example of Oloibiri, the pioneer oil-producing community in Nigeria, which no longer has larger reserves of oil).

\(^{181}\) See Chianu, supra note 172, at 217. Until the establishment of OMPADEC, the government paid little attention to oil-producing communities. See Augustine Ikelegbe, Civil Society, Oil and Conflict in the Niger Delta Region of Nigeria: Ramifications of Civil Society for a Regional Resource Struggle, 39 J. MOD. AFR. STUD. 437, 437 (2001). Thus, communities that produced oil pre-OMPADEC generally provided a considerable portion of the country’s revenue and bore the brunt of oil production with hardly any compensation. Id.
The NDDC Act is also assailed because of the provision that the President is occasionally empowered to give binding directives to the Commission.\footnote{NDDC Act § 23, \textit{at} www.nddconline.org/The_NDDC_Act.shtml.} This is considered unnecessary because "whatever directives and priorities [the President] may wish for the Commission can be stipulated when the Commission's budget is passed through him to the National Assembly."\footnote{Chianu, \textit{supra} note 172, at 217.}

The NDDC structure is also subject to severe strictures because its budgetary process is placed under the control of the National Assembly.\footnote{\textit{Id.}} The annual budget of the Commission must be approved by the federal legislative body.\footnote{\textit{Id.}} This kind of over centralization may not be helpful in the end. The budget approval process invites lobbying of legislators with the attendant opportunity for corruption and rent seeking.\footnote{\textit{See id.}}

A major problem with the NDDC is that it is not insulated from partisan politics. In an interview with a national magazine in Nigeria, NDDC Chairman Ugochukwu expressed his strong desire to work for Mr. Obasanjo's re-nomination and re-election.\footnote{See \textsc{NEWSWATCH} Interview, \textit{supra} note 153, at 20 (quoting Ugochukwu as stating "for me the main objective was, I work for the president, to contribute to his re-nomination and re-election ... we had to put aside our egos or any other considerations and join in the reconciliation to ensure that most Abia votes will go to the president").} He makes his political leanings clear and one wonders to what extent party loyalties affect the carrying out of his or the Commission's functions. A development agency like the NDDC should be thoroughly de-politicized. It is likely to perform better as an apolitical body run by people who have no overt political affiliations or interests.

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

The greatest problem relates to the Commission's composition. Moreover, the Act lacks other appropriate and necessary participatory provisions. Specifically, the NDDC Act does not make provision for the representation of the indigenous people (for whose benefit the Act was made) in the executing body nor
is there a provision for their participation in the planning and execution of projects. The provision for the representation of state members in the Commission cannot be properly regarded as affording representation to the local people, since they have no input in the process of appointment. The problem with this situation lies in the fact that such appointees are likely to see themselves as representing the state authorities that appointed them, and not the people. Moreover, they may be persons who are unfamiliar with the problems and needs of the local people.¹⁸⁸

Regarding the specific issue of composition, the structure of the NDDC, like OMPADEC before it, does not permit communities to have true representation in the body. While it is true that community members are represented in the Commission, the reality is that one representative from one community cannot represent the interests of a myriad of diverse communities.¹⁸⁹ It is hard to believe that these communities see such representation as holding much significance for them.

Yet, the issue of active participation remains of great importance to community members.¹⁹⁰ Chizor Wisdom Dike, former president of Ogbogu, an oil-producing community in Rivers State, Development Association and currently Executive Director of Community Rights Initiative, a social and economic rights non-governmental organization in Rivers State, commented:

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

¹⁸⁸ Ebeku, supra note 105, at 204.

¹⁸⁹ The NDDC Act provides that a member state will be represented by a representative of an oil-producing community. NDDC ACT § 2(1), at www.nddconline.org/The_NDDC_Act.shtml. Since there are usually many oil-producing communities in a particular state, only one of these communities will be truly represented because the Commissioner can only hail from one of the communities.

¹⁹⁰ See Worika, supra note 122, at 27 n. 77.
projects and programmes on the ground shows non-performance. Since 2000, over 60 Billion Naira was released to the commission with very little to show for it. The NDDC has not performed to public expectation.\textsuperscript{191}

In addition, there are still concerns that the NDDC is not immune from the specter of corruption that plagued its predecessor, OMPADEC.\textsuperscript{192} There have already been allegations that up to 300 million Naira, approximately USD$3 million, was taken from the coffers of the NDDC to support a campaign against President Obasanjo's political opponents.\textsuperscript{193}

Finally, whether it is OMPADEC or the NDDC, it is instructive to note that despite the rhetoric,\textsuperscript{194} the government seems to favor a top-down approach with the President and national institutions controlling virtually every aspect of the Commission's work from appointments to execution of its responsibilities and monitoring of its activities.\textsuperscript{195} This article argues for a truly bottom-up approach, where people in the local communities play a bigger role in how development activities are carried out.

Commenting on the government developmental measures, ChevronTexaco expressed the view that "[m]any lessons learned from OMPADEC can [be] and are being avoided by [the] NDDC."\textsuperscript{196} In its assessment of the performance of the NDDC, the company adds: "When compared with OMPADEC, [the] NDDC's performance is encouraging, still there is much to be

\textsuperscript{191} E-mail from Chizor Wisdom Dike to Emeka Duruigbo (May 1, 2004) (on file with author). Mr. Dike and the present author, through the Natural Heritage Institute, have been designing a framework for managing oil revenues in Nigeria. A major alternative being considered by the work is the trust fund initiative.

\textsuperscript{192} See Ebeku, supra note 105, at 204 n. 25 (stating that "[a]lready the NDDC... has been criticised as another aloof government agency and another cocoon for official corruption").


\textsuperscript{194} For instance, the NDDC Chairman, Mr. Onyema Ugochukwu, has stated that the NDDC adopts a bottom-up approach. \textit{See} NewsWatch Interview, supra note 153.

\textsuperscript{195} See Chianu, supra note 172, at 215–17 (discussing the enormous powers of control and supervision enjoyed by the federal government and government-controlled bodies).

\textsuperscript{196} ChevronTexaco Nigeria, Response to the Present Researcher's Questionnaire, Apr. 2004 [hereinafter ChevronTexaco, Response to Questions].
desired. The issues around the Niger Delta are overly politicized. This tends to hamper genuine improvements.”

When asked to assess the NDDC, Shell only gives it a fair grade at this point. According to a company representative, “[i]t is still early to judge their performance, but there has to be separation of their process from influence of government and politics. Transparency and process alignment with what obtains in the industry are factors that will enhance success.”

A harsher assessment has come from the architect of the NDDC himself, President Olusegun Obasanjo. During a meeting with youth leaders in the Niger Delta at which the NDDC Chairman received less than favorable treatment from the youth, President Obasanjo was constrained to observe that “the youths were disenchanted with the NDDC.” He “pointed out that he too was not particularly pleased with the NDDC.” With this assessment, the need for a re-examination of the role of the NDDC cannot be overemphasized.

IV. Private Initiatives: Case Studies

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

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197 Id.


199 Id.


201 Id.

202 See, e.g., infra notes 253-60 and accompanying text.
A. ChevronTexaco

ChevronTexaco was formed in 2001 with the merger of two major oil companies, California-based Chevron and Texas-based Texaco. Before the merger, both companies had been operating in Nigeria either independently or in partnership with the Nigerian government under joint ventures or through production sharing contracts. ChevronTexaco’s affiliates have had operations in Nigeria for over forty years. Chevron (then Gulf) discovered the Okan oil field in 1964, this was the first commercial field discovered on Nigeria’s continental shelf. The field began oil production in 1965. One of the company’s major operating facilities is the Escravos oil terminal in Warri, Delta State, which is operated by Chevron Nigeria Limited in partnership with the Nigerian National Petroleum Corporation (NNPC). This terminal processes approximately 480,000 barrels of oil a day. Most of ChevronTexaco’s operations in Nigeria are offshore with less than 30% of the operations onshore.

ChevronTexaco explains its philosophy regarding community development this way:

[In many of the communities where we operate, poverty persists and multinational corporations such as ChevronTexaco increasingly are being called upon to fill roles that have traditionally been the domain of government, such as providing health care, education and basic infrastructure. We believe that as a private-sector company we cannot, and should not, take on the role of government. But we believe we can make many meaningful contributions to improving the quality of life in the

203 Robert Evans, ChevronTexaco Corp. – 10K, in MD&A WORKSHOP 2002: WHAT EVERY LAWYER NEEDS TO KNOW NOW ABOUT MD&A DISCLOSURE 945, 947 (Practicing Law Institute, 2002).

204 FRYNAS, supra note 4, at 11.


206 FRYNAS, supra note 4, at 12.

207 Id.

208 CHEVRONTEXACO CORPORATE RESPONSIBILITY REPORT, supra note 205, at 10.

209 Id.

210 ChevronTexaco, Response to Questions, supra note 196.
communities where we operate and are focusing our resources toward helping to address these issues.\textsuperscript{211}

ChevronTexaco asserts that governments should not abdicate their traditional roles or transfer them to oil corporations. ChevronTexaco believes that a company should contribute to community development, but only to a limited extent. ChevronTexaco declares that it recognizes the need to be "cognizant" of how it "manage[s] the social, economic and environmental impacts of [its] operations."\textsuperscript{212} A former Columbia University anthropologist that ChevronTexaco hired to assist in redesigning its community development strategy noted:

In my view, this area [Nigeria's Niger Delta] presents one of the most difficult social environments in the world, especially after thirty seven [sic] years of military government. Traditional economies and social organizations have been severely damaged, leaving the area with no way to make consensus decisions or resolve conflict. Meanwhile, anger is growing among local villagers, who feel they have received few benefits from either oil companies or the government.\textsuperscript{213}

In carrying out its community development activities in Nigeria, ChevronTexaco employs a mix of direct funding, contracts with NGOs, sometimes called "voluntary development agencies," and public-private partnerships.\textsuperscript{214} ChevronTexaco does not make direct monetary grants to communities, except in the cases of land or property acquisition and compensation for oil pollution damage.\textsuperscript{215} The company contributes to community development through sponsorship of educational and health programs such as scholarships, building and equipping science laboratories, renovating dilapidated structures, incentivising the teaching of the English language and the sciences in the remote, rural areas by paying stipends to teachers, building classrooms and residences for teachers, hospitals and river boats, and "donation as well as construction of infrastructure of various other kinds."\textsuperscript{216}

\textsuperscript{211} ChevronTexaco Corporate Responsibility Report, supra note 205, at 14.
\textsuperscript{212} Id. at 5.
\textsuperscript{213} Id. at 10.
\textsuperscript{214} ChevronTexaco, Response to Questions, supra note 196.
\textsuperscript{215} Id.
\textsuperscript{216} Id.
ChevronTexaco states that it spends between $55 million and $63 million on community investments worldwide annually. In 2002, the company reportedly spent $62.8 million. In Nigeria, Chevron Nigeria Limited is said to have spent more than $90 million so far on community development, and this has gone toward the provision of water, power, roads, canals, jetties, schools, and hospitals.

In carrying out its community development activities in Nigeria, the company does not pay money directly to communities as grants for the construction of projects. Instead, contracts are awarded to the lowest bidder or to a community contractor if he or she submits a bid that is within 10% of the lowest bid. With regard to micro-enterprise development, the company utilizes the services of NGOs that have “a track record and expertise in rural development.” The decision to work through these agencies, according to ChevronTexaco, was informed by “years of unsatisfactory performance” when the company tried to carry out some of these activities itself. ChevronTexaco’s focus is beginning to gravitate toward micro enterprise development and away from infrastructure building (brick and mortar) because much of the infrastructure erected by the company “has been burned by rival ethnic groups during frequent inter-ethnic clashes.”

In addition, ChevronTexaco has also embarked upon public-private partnerships. In particular, the company formed a partnership with UNDP in Nigeria. In its 2002 Corporate

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217 CHEVRONTEXACO CORPORATE RESPONSIBILITY REPORT, supra note 205, at 14.
218 Id.
219 Id. at 10.
220 ChevronTexaco, Response to Questions, supra note 196.
221 Id.
222 Id.
223 Id.
224 Id.
226 CHEVRONTEXACO CORPORATE RESPONSIBILITY REPORT, supra note 205, at 10.
Responsibility Report, ChevronTexaco stated that its partnership with UNDP is for the development of a “coordinated master plan for separate Delta projects, such as building schools, roads and hospitals.” However, in response to the present author’s questions, ChevronTexaco Nigeria stated that in Nigeria, the company’s “relationship with UNDP is to help strengthen and improve [ChevronTexaco’s] record on M & E [Monitoring and Evaluation], and adherence to [the] Sustainability Index.” UNDP will also provide “greater expertise in oversight functions” as ChevronTexaco increases the number of NGOs with which the company is partnering.

It would appear that by engaging UNDP in the building of schools, ChevronTexaco would be conceding that the partnership was influenced by inadequacies in the existing arrangements for funding community development projects. However, in response to this author’s questions, ChevronTexaco officials insisted this was not the case.

While admitting that there is still room for improvement, ChevronTexaco expresses satisfaction with its accomplishments in community development and aims to gain recognition as the industry leader in community engagement and development.

Yet, the situation of people in the oil-producing communities remains dire, signifying that there is still more to be done. The continuing restlessness in communities in which ChevronTexaco operates clearly indicates that either the company is exaggerating its achievements or that its community development efforts have so far been ineffective against the social, economic, and environmental problems existing in these communities. To underscore their dissatisfaction with ChevronTexaco, local women from the Itsekiri, Ijaw, and Ilaje ethnic groups occupied the Escravos terminal of Chevron Nigeria Limited in the summer of 2002. The women wanted Chevron to provide services,

227 Id.
228 ChevronTexaco, Response to Questions, supra note 196.
229 Id.
230 Id.
231 CHEVRONTEXACO CORPORATE RESPONSIBILITY REPORT, supra note 205, at 14.
232 See id. at 10; Nigerian Women Expand Chevron Takeover: Demands for Jobs, Improvements, Spread to Four More Facilities of Oil Giant, EDMONTON JOURNAL, Jul.
facilities, and additional jobs to members of the area.233

A similar controversy a few years earlier led to more serious problems. In May 1998, Ilaje community members occupied Chevron’s Parabe oil platform protesting against the company and asking for the provision of drinking water by the company, since sources of water had been polluted as a consequence of the company’s oil production.234 They also called for employment of the indigenes of the area and generally, the demonstration of greater corporate social responsibility by the company.235 Chevron’s alleged response through military, naval, and mobile police personnel resulted in the death and injury of some of the protestors and a lawsuit in federal court in San Francisco against Chevron.236 In April 2004, some community members shot and killed several Nigerian sailors and two American employees of a ChevronTexaco contractor in an area in Delta State where ChevronTexaco was preparing to resume operations.237 These killings were apparently an expression of opposition to the resumption of oil operations in the area by those who had one grievance or another with the oil industry.

B. Royal Dutch/Shell238

Shell began its petroleum production in Nigeria in 1937 as Shell D’Arcy (renamed Shell-BP in 1956), a joint venture between


233 CHEVRONTEXACO CORPORATE RESPONSIBILITY REPORT, supra note 205, at 10.


235 See Pegg, supra note 234, at 478.

236 DURUIGBO, supra note 234, at 162.


Shell and Anglo-Iranian (British Petroleum from 1954) for Nigerian operations.\textsuperscript{239} Shell D’Arcy was granted a license to explore oil in 1938 and this license covered the entire territory of Nigeria.\textsuperscript{240} The Second World War caused the company to withdraw in 1941, but it returned in 1946 to resume exploration work.\textsuperscript{241}

The joint venture, which had a monopoly over the exploration of oil in Nigeria, started its drilling activities in 1951 and discovered the equivalent of 450 barrels of oil at Oloibiri in 1953.\textsuperscript{242} In 1956, Shell-BP made a commercial discovery of oil at Oloibiri,\textsuperscript{243} the first time commercial quantities of oil were found in Nigeria.\textsuperscript{244} Two years later, in 1958, a major find was made in the Ogoni area.\textsuperscript{245} Shell has remained the leading oil producer in Nigeria.\textsuperscript{246} This position as market leader has come with a corresponding responsibility to assume major obligations in relation to community development and major controversies pertaining to its operations.

Shell’s corporate philosophy toward community development is encapsulated in its Sustainable Development Policy (SDP).\textsuperscript{247} According to a Shell Nigeria official, the policy or practice of the company in relation to community development is driven by the SDP and “is informed by [a] desire for project sustainability, and participation [in] projects selections and implementation by communit[ies].”\textsuperscript{248} The company says that it maintains the same policy toward community development in every country in which it operates “but with variations to suit needs that are specific for countries.”\textsuperscript{249} An aspect of Shell’s corporate philosophy toward community development, like ChevronTexaco’s, is the belief that

\begin{itemize}
\item \textsuperscript{239} Frynas, supra note 4, at 9 n.7.
\item \textsuperscript{240} Id.
\item \textsuperscript{241} Id.
\item \textsuperscript{242} Id. at 9.
\item \textsuperscript{243} Oloibiri is in present day Bayelsa State.
\item \textsuperscript{244} Frynas, supra note 4, at 9.
\item \textsuperscript{245} Id.
\item \textsuperscript{246} Id. at 11.
\item \textsuperscript{247} See Shell’s website, at http://www.shell.com (last visited Oct. 14, 2004).
\item \textsuperscript{248} Shell Nigeria, Response to Questions, supra note 198.
\item \textsuperscript{249} Id.
\end{itemize}
the primary responsibility for taking care of the social and economic needs of the people rests with public officials and that companies should not be saddled with a role that governments should be playing.\footnote{Id. (stating that "[g]enerally speaking, the expectations [of community members on the company] are enormous, a situation where the communities expect Shell to replace [the] government and provide virtually all her social needs in the areas of operations").}

Shell Nigeria's contributions to the development of communities in which it operates take the forms of company contributions to the NDDC, direct funding of social investment programs, and contributions the company makes in partnership with other donors.\footnote{Id.} In response to the questions of whether the company makes direct monetary grants to build infrastructure such as roads and schools, and to whom this money is made available in the communities, Shell responded that it makes funds directly available to community-based organizations and Project Management Committees established for specific project implementation.\footnote{Id.}

In November 2003, Shell entered into a memorandum of understanding (MOU) with USAID to develop projects in the Niger Delta.\footnote{USAID, Nigeria Country Strategic Plan 2004-2009 23 (n.d.).} This is a $20 million Nigerian Development Program with Shell contributing $15 million over the next five years to the partnership and USAID contributing $5 million.\footnote{Press Release, USAID, USAID and Shell Form Partnership to Launch $20 Million Nigerian Development Program (Nov. 14, 2003), available at http://www.usaid.gov/ng/pressrelease.htm (last visited Jan. 28, 2004).}

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

Shell already spends about $60 million annually in the Niger Delta on its well-established social investment program. I am proud that Shell will now be able to extend this important work with this partnership with USAID. I am confident that that our program together will make a significant contribution to socio-economic development in Nigeria and in the Niger Delta in
This partnership, which is the largest USAID partnership to date, will focus on projects in the areas of agriculture, malaria prevention and enterprise development.\textsuperscript{256} The Cassava Enterprise Development Project (CEDP) will receive the initial funding under this MOU.\textsuperscript{257} Shell was to directly contribute $3 million in addition to the USAID Nigerian Mission's investment of $1.2 million to CEDP for 2003.\textsuperscript{258} The USAID-Shell partnership is also a supporter of the Presidential Cassava Initiative, a program that will receive a combined contribution of $17.1 million from the Nigerian Federal Government, state governments, and the NDDC.\textsuperscript{259} The focus of the program is in eight states in the Southeastern and South-southern parts of Nigeria.\textsuperscript{260}

Despite these efforts, Shell's community development record has not been viewed favorably. Two Nigerian activists, Ike Okonta and Oronto Douglas, documented a number of incidents in which Shell failed to attend to the problems in many of the communities in which it has operations, including Ogoniland (where it has not been allowed to resume operations), Nembe, Okoroba, Iko, Bonny, Forcados, and Ughelli.\textsuperscript{261} Shell indicates that there are areas in its current approach to community development that would benefit from improvement.\textsuperscript{262} Aspects the company has identified include "external stakeholder engagement, NGOs or partnerships for joint funding of programmes... and project execution supervision... possibly done by external bodies [and]..."
NGOs.263

C. Other Corporate Arrangements

In November of 1998, an MOU was signed between three companies - Shell, Mobil and Nigerian Liquefied Natural Gas Limited (NLNG) - and representatives of the Bonny Kingdom.264 Under the MOU, described as "the first agreement of that nature signed between oil companies and a community,"265 the companies agreed on the construction of a 2.7 kilometer road on Bonny Island and the provision of pipe-borne water and electricity within two years.266 One advantage of this arrangement is that the companies entered an area to operate with the express consent of the community, not simply the consent of the state governor as previously has been the case.267 Such an arrangement could help reduce conflicts, especially if all the parties live up to their bargains.268

The initial stage of implementation of this arrangement, however, encountered major problems. Protests erupted in Bonny when the youth from that town complained that the management of the NLNG consortium was not implementing the terms of the MOU.269 The protests led to stoppage of NLNG operations for nearly three days.270 Military intervention led to the death of one protestor and injuries to many others.271 The protests raised the ire of Nigeria’s President who visited Bonny and made it clear that the government would not hesitate to deal ruthlessly with such activities that could hamper economic growth and send the wrong

263 Id.


265 Owei, supra note 264.

266 Id.

267 Id.

268 Id.

269 Worika, supra note 122.

270 Id.

271 Id.
signals to foreign investors.\textsuperscript{272} The youth claimed that they were not afforded an opportunity to state their case.\textsuperscript{273}

Another interesting arrangement was recently entered into between BP and the Norwegian state oil company, Statoil, on the one hand, and several NGOs on the other. This Akassa Project is a self-help project to promote sustainable development.\textsuperscript{274} BP-Statoil has engaged the services of two respected NGOs, Pro-Natura International and the Niger Delta Wetlands Centre, to execute the projects on its behalf.\textsuperscript{275} A strength of this arrangement is that it has the potential to "satisfy the demands of communities better than previous development projects because the local people would have a much greater say in the execution of the project."\textsuperscript{276}

V. Two Problems Thwarting Public and Private Initiatives: Corruption and Public Participation

Two major problems that have hampered the success of the public and private initiatives evaluated above are corruption and the lack of public participation in the formulation and implementation of decisions that affect community members. This Part of the article discusses these problems.

A. Corruption

Corruption has been defined as the co-optation or use of public resources for private gain or personal benefit.\textsuperscript{277} Corruption

\textsuperscript{272} Id.

\textsuperscript{273} Id.

\textsuperscript{274} FRYNAS, supra note 4, at 52.

\textsuperscript{275} Id. The Pro-Natura partnership with business in Nigeria also includes Shell and TotalFinaElf. See PRO-NATURA, PRO-NATURA AND INDUSTRY, available at http://biodiversityeconomics.org/pdf/020831-27.pdf (last visited Sept. 29, 2004).

\textsuperscript{276} FRYNAS, supra note 4, at 52-53.

manifests itself in various facets of Nigerian life. Because of its size and significance in Nigerian life, the oil and gas industry affords numerous opportunities for corruption at various levels.

1. Corruption in Public Initiatives

Perhaps the public initiatives are the best illustration of the effects of corruption. Corruption has been identified as a major factor for the ineffectiveness of community development and poverty alleviation efforts in the oil-producing communities. "[O]ne of the most likely explanations [for the failures of government and corporate development efforts] is the influence of the prevalent corruption and inefficiency in Nigeria on the conduct of government officials, oil company staff and local contractors." OMPADEC essentially failed because of

long ago that corruption could have some beneficial effects in countries where it was prevalent. Professor Diamond calls this, rightly in my view, a revolution:

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


279 FRYNAS, supra note 4, at 53.

280 Id.
mismanagement of resources and massive corruption.\textsuperscript{281} It is disturbing that even at this early stage in the NDDC’s operations, the commission is already associated with controversy regarding its enormous expenditures on presidential politics, an issue that has nothing to do with improving the conditions of the people in the oil-producing areas.\textsuperscript{282}

2. Corruption in Private Initiatives

Equally disturbing are allegations that corporate officials seek to profit personally from their companies’ community development funds.\textsuperscript{283} This allegedly takes place through the inflation of project costs, the award of contracts to cronies and corrupt contractors, and the outright pocketing of funds allocated for contracts.\textsuperscript{284}

For example, Shell has been accused of corruption among its staff.\textsuperscript{285} One instance concerned the completion of an elementary school in Ogoniland at an estimated cost of $5 million when projections indicated that it could have been constructed at a fraction of that sum.\textsuperscript{286} Shell responded to the allegations in the following manner:

There are policies and procedures for placing contracts that are awarded to third party contractors. Contracts are generally placed through open tendering and awards based on benchmark costs. Project costs are controlled by many factors including location, size, quality, duration, cost of labour, etc. Variations in costs are normally within allowable tolerances. The group business principle guides the conduct of staff on ethics, and staff who are found to have compromised are released if investigations prove complicity.\textsuperscript{287}

\textsuperscript{281} Id.
\textsuperscript{282} Eluemunor, supra note 193.
\textsuperscript{283} FRYNAS, supra note 4, at 53.
\textsuperscript{284} Id.
\textsuperscript{287} Shell Nigeria, Response to Questions, supra note 198.
ChevronTexaco also concedes that corruption is a recurring issue at the community leadership level, making it, inter alia, a hindrance to channeling community development money through community leadership. It refutes the allegation, however, that the company’s community relations staff are also engaged in corrupt practices that work against the efficacy of community development initiatives. ChevronTexaco asserts that it maintains a zero tolerance policy toward internal corruption. According to the company:

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

3. Corruption at the Community Level

At the community level, corruption has been checked to an extent through a de-emphasis on community grants and a greater focus on direct execution of contracts by the oil companies and the contractors they select in conjunction with community leaders. Yet, avenues for corruption persist. Companies have control over the award of security contracts, which usually go to community members. These security contracts have been associated with corruption and conflicts. Compensation paid for land or property acquisition or environmental damage has also been prone to corruption. More importantly, even in cases of direct funding, there have been allegations of community leaders trying

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288 ChevronTexaco, Response to Questions, supra note 196.
289 Id.
290 Id.
292 Id.
293 Id.
294 Id.
to cut deals with contractors to abandon their projects before completion. In these cases, the community leader would endorse that the project has been completed if the contractor gives a substantial portion of the contract fee to the community leader.

4. Why Corruption is Prevalent

Although this scenario could benefit the contractors, the community leaders, and to an extent the oil companies, since the community leaders would not trouble them for a while, it inflicts tremendous harm to the communities in general. They do not get the benefit of community development projects, and this could lead to renewed agitation from members of the community, resulting in more problems for the companies and government. Even the community leaders may profit from this renewed round of restlessness, as the companies may be compelled to provide additional funds for community development, channeling them through these same corrupt leaders.

The oil companies officially frown at corruption at the community leadership level, but this corrosive problem persists. Shell states that it "is guided by social structures in place and will work with leaders recognized by the communities. Our business principles guide relationships and the conduct of business with community leaders and do not support corruption in any form." The oil companies officially frown at corruption at the community leadership level, but this corrosive problem persists. Shell states that it "is guided by social structures in place and will work with leaders recognized by the communities. Our business principles guide relationships and the conduct of business with community leaders and do not support corruption in any form."

With the minimal level of transparency that exists at the governmental, corporate, and community levels, it is hardly surprising that oil-producing communities remain mired in poverty and squalor. The importance of devising revenue management institutions that would emphasize transparency and accountability cannot be overemphasized. If transactions are open to the public and monitoring is provided by credible, independent groups, there is the possibility that the fortunes of people in oil-producing communities will improve. It is a great idea to increase allocation of revenues from companies and government for community

295 Id.

296 Information gathered by the author from discussions with Nigerians involved in the oil industry.

297 Kemedi, supra note 291.

298 ChevronTexaco, Response to Questions, supra note 196.

299 Shell Nigeria, Response to Questions, supra note 198.
development, but if these monies continue to be siphoned to private bank accounts there is little hope of improving the plight of the people and environment in the oil-producing areas of Nigeria.

B. Public Participation in Decision-Making

Another major element contributing to the failure of public and private initiatives is the absence of meaningful participation by community members in the creation and execution of policies and projects directly impacting them. There is no precise definition of public participation in decision-making.\(^{300}\) The growing importance of this concept at the domestic and international levels cannot be ignored. This is particularly true in the natural resources arena.\(^{301}\) Public participation is of significance in three broad areas: (1) issues relating to the environment; (2) issues regarding the development of resources (such as oil, gas and mining projects); and, (3) issues regarding the socio-economic development of communities.

The Rio Declaration of 1992 endorses public participation, saying in Principle 10 that "[e]nvironmental issues are best handled with the participation of all concerned citizens, at the relevant level," adding that "[a]t the national level, each individual shall have... the opportunity to participate in decision-making processes."\(^{302}\) The 1998 Aarhus Convention, which took effect in

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\(^{301}\) See Barry Barton, *Public Participation in Resources Development*, in *Human Rights and Natural Resource Development*, 77, 77 (Zillman et al., eds., 2002) (stating that “[i]n the last twenty-five years, public participation has become more significant in energy and natural resources development, and in environmental management generally”); Donald N. Zillman, *Introduction to Public Participation in the Twenty-first Century*, in *Human Rights and Natural Resource Development*, 1, 1 (Zillman et al., eds., 2002) (stating that the “growth of public participation in major natural resource decisions is one of the signal developments of the last years of the Twentieth Century”).

2001, is perhaps the most far-reaching and influential treaty on this subject and has detailed provisions on access to information, public participation in decision-making and access to justice.303 With regard to public participation in decision-making, the Convention provides for public involvement in decisions relating to mining projects, energy sector facilities (such as refineries, large power plants, and nuclear plants), metals production and processing facilities and other development activities.304 There are also provisions for participation in environmental decision-making processes.305 International financial institutions such as the World Bank have embraced the aspects of public participation as well by implementing policies providing for them.306

Not everyone is enamored with public participation, and the concept certainly has some drawbacks. Critics contend that it is expensive and time consuming and that community members, who often allow their emotional attachments to guide them, are not in the best position to make some of these important and technical decisions.307 Besides, some of what is called public participation is actually participation by members from the upper stratum of the socio-economic scale, and the participation and the views of the elite should not be taken as those of the majority of the population.308 One scholar captures the prevailing cynicism about public participation in the following words: "[a] composite list of what is expected of citizen participation is staggering, for participation appears to be akin to the snake oil of ancient vendors. It is supposed to cure whatever is ailing the body politic at the moment."309

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304 Id. Annex I.
305 Id. art. 6(2).
306 See Pring & Noe, supra note 300, at 52-55.
307 Id. at 25.
308 Id.
309 MARY GRIZEZ KWEIT & ROBERT W. KWEIT, IMPLEMENTING CITIZEN PARTICIPATION IN A BUREAUCRATIC SOCIETY 36 (1981). See also Pring & Noe, supra note 300, at 23 (noting that extolling the virtues of participation drives some communities to cynicism).
Nevertheless, there are a number of advantages that can be derived from public participation. A decision that is made with adequate consideration of the perspectives of those who will live with the consequences thereof will ultimately be a better one. Public participation also engenders a sense of empowerment in those who participate, strengthens local communities and other groups, promotes conflict reduction among competing interests, facilitates the accountability of public officials, and imbues the decisions reached with greater legitimacy. The decisions reached are more likely to reflect the needs and the public values of the local communities as well. In addition, the decisions have chances of better substantive quality, although this too is debatable.

Public participation would be particularly useful in the context of socio-economic development of Nigerian oil-producing communities where feelings of alienation pervade the atmosphere, resulting in frosty relations between the community members on one hand and community leadership, oil corporations, and government on the other. Involving local communities, including both the leadership and the ordinary citizens, in development activities will comport with the right to development. This right is believed to incorporate recognition that “peoples have the right to determine their model of development.” The Human Rights Council of Australia, while contending that participation is a component of the right to development, noted that “people

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310 See Michael R. Anderson, Human Rights Approaches to Environmental Protection: An Overview, in Human Rights and Natural Resource Development 1, 9 (Alan E. Boyle & Michael R. Anderson eds., 1996) (stating that “[i]f the people who make the decisions are the same as those who pay for and live by the consequences of the decisions, then we go a long way toward protecting the environment”).

311 Pring & Noe, supra note 300, at 22.

312 Id.

313 Id. For an additional discussion on the rationale and criticisms of public participation, see Barton, supra note 301, at 99-109.


315 See Winter, supra note 157.

should have control over the direction of the development process, rather than simply being consulted about projects and policies that have already been decided upon.\textsuperscript{317}

The case for allowing people in oil-producing communities to be masters of their own fate when it comes to the utilization of oil revenues cannot be overemphasized. It is imperative to cultivate a sense of ownership in the people, so they at least have a stake in these resources rather than simply having handouts thrown at them. Most importantly, a sense of ownership may pave the way to real development in these communities. One arrangement that incorporates both corruption control and public participation is that of the community-based trust fund, discussed below.

\section*{VI. A Proposed Alternative: Community-Based Trust Funds}

Based on foregoing evaluation of the status quo, this work proposes a fundamental change in the way community development activities are handled in the oil-producing communities. A veritable vehicle for introducing and implementing this change is the concept of trust funds. Part V includes a discussion of trusts generally, an analysis of trusts in the context of Nigerian customary law, a comparative study of trusts and trust-like instruments as used in Chad, Canada, and Alaska, and the author's proposed model for community-based trusts in Nigeria.

\textit{A. The Concept of Trust Funds}

A trust is an arrangement in law in which legal ownership of an asset, the res, is transferred to a trustee who becomes responsible for managing the res for the benefit of another person or persons, the beneficiaries.\textsuperscript{318} Keeton defines a trust in the following words:

\begin{quote}
[A trust] is the relationship which arises wherever a person (called the trustee) is compelled in equity to hold property, whether real or personal, and whether by legal or equitable title, for the benefit of some persons (of whom he may be one and
\end{quote}

\textsuperscript{317} Ebeku, \textit{supra} note 105, at 204 (quoting a publication of the Human Rights Council of Australia, Inc.).

who are termed beneficiaries) or for some object permitted by
law, in such a way that the real benefit of the property accrues,
not to the trustees, but to the beneficiaries or other objects of the
trust.\textsuperscript{319}

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

There are disparate and disputed accounts about the origins of
the trust as an institution in Anglo-American law.\textsuperscript{320} Some writers
trace the origin of trusts to the English Use Laws or Middle
Eastern/Islamic Law's waqf, while others trace it to Roman
fideicommissum.\textsuperscript{321} Additionally, the Germanic theory on the
origin of the trust asserts that it originated from the Salic
salmanuss.\textsuperscript{322} Regardless of where one settles on this long-
standing debate,\textsuperscript{323} it remains clear that trusts have generally
emerged as a result of deficiencies in the legal mechanisms
instituted for the management of property.\textsuperscript{324} Thus, the
inadequacies attendant to oil revenue management in Nigeria
make this a particularly attractive concept.

Frederic Maitland made an apt observation many decades ago
that "[o]f all the exploits of equity, the largest and the most
important is the invention and development of the trust."\textsuperscript{325}
Lately, trust funds have been attracting attention in academic and

\textsuperscript{319} L.A. SHERIDAN & GEORGE W. KEETON, THE LAW OF TRUSTS 5 (Professional
Books Ltd. eds., 11th ed. 1983); DAVID J. HAYTON, UNDERHILL & HAYTON LAW
RELATING TO TRUSTS AND TRUSTEES 3 (Butterworth ed., 15th ed. 1995). For an extensive
discussion of trust law and practice internationally and in a number of domestic
jurisdictions, including Canada, Japan, United States and Europe, see MODERN
INTERNATIONAL DEVELOPMENTS IN TRUST LAW (David Hayton ed., 1999).

\textsuperscript{320} See Guerin-McManus, supra note 318, at 3-5.

\textsuperscript{321} See Avisheh Avini, Comment, The Origins of the Modern English Trust

\textsuperscript{322} See Monica M. Gaudiosi, Comment, The Influence of the Islamic Law of Waqf on

\textsuperscript{323} This debate has spanned at least a century. See, e.g., Frederic Maitland, The
Origin of Uses, 8 HARV. L. REV. 127 (1894); Oliver Wendell Holmes, Law in Science
and Science in Law, 12 HARV. L. REV. 443 (1899).

\textsuperscript{324} See Guerin-McManus, supra note 318, at 5.

\textsuperscript{325} W.C. Ekow Daniels, Some Principles of the Law of Trusts in West Africa, 6 J.
AFR. L. 164, 164 (1962).
policy circles as pragmatic tools for addressing the unfortunate predicament generally manifesting in entities blessed with natural resources, especially oil.\(^{326}\) According to Stephen Krasner:

Oil has been a curse for the developing countries in which it has been located leading to less democracy and lower rates of growth. Oil concentrates resources in the hands of the state. The road to wealth and power for any ambitious individual leads through the offices of the central government, not through individual enterprise or productive economic activity. Oil wealth makes it possible for the state to buy off dissenters, and to build military machines that can be used to repress those who cannot be bought off. Only a few political entities, such as Alaska and Norway, have been able to use oil wealth wisely. Domestic governance in oil rich developing countries could be enhanced by creating oil trusts. The board of directors of such trusts would be composed of national and non-national actors. For instance, national directors could be appointed by the country’s parliament or head of state and non-national figures by the World Bank. All oil revenues would be paid into an escrow account in a foreign bank. All transfers from the account would have to be approved by the board of directors of the trust. There might be commitment to using these revenues for specific activities such as health care and education. The trust would monitor the use of the funds after they had been transferred to the national government.\(^{327}\)

Utilizing trust funds to manage public properties, including natural resources, is not an entirely new phenomenon, nor is the creation of a trust wholly dependent on the mismanagement of resources.\(^{328}\) A trust fund can be used to accomplish a variety of

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327 Id. The proposal described by Krasner bears significant resemblance to the oil management and monitoring arrangement under the Chad-Cameroon Pipeline Project. See generally SAVE THE CHILDREN, LIFTING THE RESOURCE CURSE: EX extractive INDUSTRY, CHILDREN AND GOVERNANCE 11 (2003) (describing the Chad Oil Pipeline Project’s revenue management arrangement as an oil trust fund). The Chad arrangement is discussed in Subpart C, infra.

328 See, e.g., Tito et al. v. Waddel et al. (No. 2) [1977] 3 All ER 129 (a dispute over whether the Crown was the trustee of the funds collected from phosphate sale royalties for the inhabitants of an island colony in the Western Pacific); Sir Joseph Gold, Trust
objectives including conservation of natural resources,\textsuperscript{329} protection of the environment,\textsuperscript{330} and development of communities.\textsuperscript{331}

\textbf{B. Trusts in Nigerian Customary Law}

It is important to emphasize that the trust institution is not the exclusive preserve of Western and Islamic legal systems.\textsuperscript{332} In centuries past, African societies have been able to devise trust-like institutions to address particular needs, such as the management of family or communal property.\textsuperscript{333} In \emph{Amodu Tijani v. Secretary of Southern Nigeria},\textsuperscript{334} Viscount Haldane stated:

The notion of individual ownership is quite foreign to native ideas. Land belongs to the community, the village or the family, never to the individual. All the members of the community, village, or family have an equal right to the land, but in every case the Chief or Headman of the community or village, or head of the family, has charge of the land, and in loose mode of speech is sometimes called the owner. He is to some extent in the position of a trustee and as such holds the land for the use of the community or family.\textsuperscript{335}

In \emph{Ozomah v. Ozomah},\textsuperscript{336} the court held that the head of the family, who took over the management of a brother’s property at his death, was trustee of the property where the deceased kinsman

\begin{footnotesize}
\begin{itemize}
    \item \textsuperscript{329} Guerin-McManus, supra note 318, at 8.
    \item \textsuperscript{332} See Daniels, supra note 325, at 164 (discussing the existence of trusts or trust-like institutions in Nigeria, Ghana, and Sierra Leone); J.O. Fabunmi, \textit{Equity and Trusts in Nigeria} 144 (1986).
    \item \textsuperscript{334} 2 A.C. 399 (1921).
    \item \textsuperscript{335} \textit{Id.} at 404. Similar statements have been made regarding the same issue in other West African countries. See, e.g., Daniels, supra note 325, at 168.
    \item \textsuperscript{336} M.N.L.R. 88 (1965/66) (mentioned in J.D. Bakibinga, \textit{Law of Trusts in Nigeria} 5 (1989)).
\end{itemize}
\end{footnotesize}
died without a son who was *sui juris*.

The trustee is therefore accountable to the *cestui que trust* until the beneficiary-son comes of (legal) age and demands return of the property.

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

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

It should be noted that while under Anglo-American law legal ownership of the property resides in the trustee, under Nigerian customary law, the person in the position of trustee is not the owner; the property belongs to the family or community as a whole. Nevertheless, the trustee’s duty of management of

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337 *Id.*

338 *Id.; see also Adigun, Cases & Texts on Equity, Trusts and Administration of Estates* 277 (1987) (discussing how some African societies have placed the head of the family in a position similar to a trustee so as to manage property for the benefit of other family members).


340 *Id.* at 299. *See also Bakibinga, supra* note 336, at 2-6 (analyzing relevant Nigerian judicial opinions that discuss the position and functions of traditional heads, their relationship to those of the trustee in the English sense, and limitations of the analogy).

341 See *S.N. Chinwuba Obi, Modern Family Law in Southern Nigeria* 56-57 (Sweet & Maxwell eds., 1966); *A. A. Utuama, Nigerian Law of Real Property* 7 (1989). Utuama states:

Although the headman of the community in the exercise of his powers, is sometimes described as a trustee... he is not, strictly speaking, a trustee in the English sense. Unlike the trustee in the conventional sense, the title to the communal land is not vested in him. The title remains vested in the community as a corporate entity. The institution of communal land lacks, therefore, the division into legal and equitable ownership that is the fundamental principle of trust property. In strict legal terms, the application of [the] trusteeship analogy to the head of the community is inaccurate. In spite of this misnomer, our courts continued in the past to describe the chief or the headman of the community as trustee, particularly wherever his duty to account was called into
common property for the general benefit is analogous to that of the Anglo-America trust. More importantly, it makes the Nigerian customary version well-suited to the arrangement proposed here, considering the essence of the proposed trust funds is the proper management of communal assets by those holding a fiduciary position.\textsuperscript{342}

C. Comparative Evaluation of Trusts in Various Settings

This subpart evaluates three trust funds or trust-like arrangements introduced in some oil-producing countries to ensure the proper management of oil revenues. The revenue management plan established for the people of Chad under the Chad-Cameroon pipeline project provides an example of a national funding mechanism.\textsuperscript{343} The Alaska Permanent Fund is a state-level institution.\textsuperscript{344} The Nunavut Trust, while applicable to the Territory of Nunavut (akin to a province or state), nevertheless is illustrative of a community-based arrangement by reason of its application to a relatively small number of people.\textsuperscript{345}

1. Chad

The Revenue Management Plan (RMP) established under the Chad-Cameroon pipeline project contains specifications for the allocation and distribution of revenues that would accrue from oil development in Chad.\textsuperscript{346} During the first ten years of production,

\begin{itemize}
  \item question and his liability was determined. \textit{Id.} (citations omitted).
  \item M.G. \textsc{Yakubu}, \textsc{Land Law in Nigeria} 61 (1985) (noting that while the trustee in Nigerian customary law is not a trustee in the strict sense of English law, the trustee still owes duties of a fiduciary nature to the members of the community, including the duty to account and the duty of loyalty, which constrains him in a way that avoids conflicts of interest). For further discussion of trusts from the English and Nigerian contexts, see \textsc{Gilbert Kodilinye}, \textsc{An Introduction to Equity in Nigeria} (Sweet \& Maxwell ed., 1975).
  \item See infra Subpart VI.C.1.
  \item See infra Subpart VI.C.2.
  \item See infra Subpart VI.C.3.
\end{itemize}
income taxes will represent 16% of total revenues to Chad while the remaining revenues are expected from royalties and dividends.\textsuperscript{347} The government has a relatively wide discretion on how to spend the revenues from income taxes, subject to the limitation that they be used for general development purposes.\textsuperscript{348} The government's liberty is more circumscribed in reference to royalties and dividends; the RMP provides for a Special Revenue Account for the deposit of royalties and dividends.\textsuperscript{349}

The RMP also specifies a distribution formula. Ten percent of the money will be kept in deposit at international financial institutions as a fund for future generations (the "Future Generations Fund").\textsuperscript{350} Eighty-five percent of the remaining 90% percent will be deposited in local commercial banks and dedicated to the financing of programs in five critical sectors, namely: education, health and social services, rural development, infrastructure, and environment and water resources.\textsuperscript{351} The remaining 5% is devoted to the government budget and the development of the oil-producing Doba region.\textsuperscript{352}

Several layers of oversight and control are provided for under the RMP.\textsuperscript{353} The World Bank and the government of Chad are responsible for approving an annual budget, while a nine-member oversight committee is empowered to review it.\textsuperscript{354} Of the committee's nine members, seven represent the government while two members, an NGO and a trade union, are drawn from civil society.\textsuperscript{355} The committee will publish an annual review of those operations that is subject to external audit.\textsuperscript{356}

\textsuperscript{347} See id. at 100. See also Benjamin C. Esty & Carrie Ferman, The Chad-Cameroon Petroleum Development and Pipeline Project (A), Harvard Business School 9-202-010 (Rev: Jan. 16, 2003), at 8 (unpublished manuscript, on file with the Harvard Business School).
\textsuperscript{348} Esty & Ferman, supra note 347, at 8.
\textsuperscript{349} Revenue Management Plan, supra note 346, at 96.
\textsuperscript{350} Id.
\textsuperscript{351} Id.
\textsuperscript{352} Id.; Esty & Ferman, supra note 347, at 8.
\textsuperscript{353} Esty & Ferman, supra note 347, at 8.
\textsuperscript{354} Revenue Management Plan, supra note 346, at 97.
\textsuperscript{355} Id.
\textsuperscript{356} Id.
The World Bank also has far-reaching powers and leverage in relation to the monitoring of the full program and review of all expenditures. The RMP is further strengthened by the World Bank’s insistence that its implementation is a contractual obligation under the loans that the International Bank for Reconstruction and Development and European Investment Bank were proposing.\(^\text{357}\) The World Bank also tied the government’s performance under the RMP to any future lending by the Bank.\(^\text{358}\)

There is also an International Advisory Group instituted by the World Bank. The Group is comprised of eminent persons and is slated to function for ten years.\(^\text{359}\) An additional level of oversight for the entire project is provided by the World Bank Inspection Panel.\(^\text{360}\)

In December 1998, the government of Chad passed a law incorporating the major components of the RMP, including procedures for audit and provisions relating to the establishment of an oversight committee, the Oil Revenues Control and Monitoring Board (Revenue Management College).\(^\text{361}\) Under the Oil Revenue Management Law, 10% of royalty and dividend revenues are allocated to the future generations fund, while local banks would hold the balance of royalty and dividend revenues in special accounts.\(^\text{362}\) The law allocates 80% of these funds to the five

\(^{357}\) Id. at 98.

\(^{358}\) Id.


priority sectors enumerated above in accordance with Parliamentary approved budgets\textsuperscript{363} and allocates 5% of royalties to the oil-producing region.\textsuperscript{364} During the first five years of oil production, 15% of royalties and dividends are to be allocated to financing government expenditures.\textsuperscript{365} It is still too early to accurately draw conclusions about the success of this revenue management arrangement.\textsuperscript{366} Chad only commenced oil sales in October of 2003.\textsuperscript{367} In November of 2003, $6.5 million received from the first sale of crude oil was deposited into the account and in December of that same year, the government approved its first budget including oil revenue, and submitted it to the Revenue Management College.\textsuperscript{368} Still, the Chad-Cameroon revenue management arrangement can be viewed as a useful model that could be replicated in other countries.\textsuperscript{369}

2. Alaska

The Alaska Permanent Fund (APF) has been described as a

\textsuperscript{363} Id. art. 8(a).
\textsuperscript{364} Id. art. 8(c).
\textsuperscript{365} Id. art. 8(b).
\textsuperscript{366} See Korinna Horta and Delphine Djiraibe, Africa's Dangerous Treasure, WASH. POST, Mar. 10, 2004, at A29 (stating that initial indicators from Chad provide cause for pause).
\textsuperscript{367} Emily Wax, Oil Wealth Trickles Into Chad, but Little Trickles Down Five Months After Opening of Pipeline to Cameroon, Locals Await Benefits and Crime Rate Rises, WASH. POST, Mar. 13, 2003, at A16. See also Oil Pipeline Opens for Business, 17 AFRICA RECOVERY 24 (United Nations Department of Public Information, Oct. 2003) (discussing how the Chad government agreed to a stringent set of controls on the handling and disbursements of the oil revenues in order to secure World Bank support for the project).
\textsuperscript{368} Wax, supra note 367.
\textsuperscript{369} The Chad-Cameroon Pipeline: A New Model for Natural Resource Development, Hearing Before the Subcommittee on Africa of the Committee on International Relations, U.S. House of Representatives, 107th Cong. 10-14 (Apr. 18, 2002); Gary & Karl, supra note 361, at 60 - 73. Some commentators are a bit more skeptical, however, viewing the project as not properly structured to withstand the political games that might be played by the government of Chad when it believes that it would be too late for the World Bank and oil corporations to withdraw. See, e.g., James C. Owens, Note, Government Failure in Sub-Saharan Africa: The International Community's Options, 43 VA. J. INT'L L. 1003, 1046-48 (2003) (calling instead for the creation of an international supervisory body that would be responsible for controlling and allocating the revenues accruing to developing states from international projects).
“bold and innovative approach to managing natural resource wealth.”

Through a constitutional amendment approved by the people of Alaska in 1976, the APF was created. By virtue of the amendment to the Alaskan Constitution, 25% of mineral revenues paid to the State of Alaska is deposited into a fund to be invested and managed for the benefit of present and future generations of Alaskans. The mineral revenues encompass all mineral lease rentals, royalties, proceeds from royalty sale, federal mineral revenue sharing payments and bonuses. Three years subsequent to the creation of the APF, the Alaskan legislature increased the applicable percentage of mineral revenues to be deposited into the fund from the 25% guaranteed by the Constitution to 50% for certain types of oil and gas receipts.

The underlying objectives behind the creation of the fund were to set aside oil revenues for the benefit of Alaskans and to forestall any effort by the politicians to spend the accruing petroleum revenues in an inappropriate manner. Indeed, the “creation of [the] fund was a reaction to the state’s initial management of its oil windfall when over $900 million, which had been paid to the state for the original drilling leases, was squandered by the state government.”

The APF is managed by the Alaska Permanent Fund Corporation (APFC), a body created in 1980. Like any other trust fund manager, the APFC aims to ensure that at all times, the safety of the principal is maintained and total returns are

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371 Alaska Const. art. IX, §15.
376 Id. at 358, n.5.
377 Alaska Permanent Fund Corp., supra note 372.
maximized.\textsuperscript{378} The Alaskan Constitution also provides investment guidance that reflects the \textit{Harvard College}\textsuperscript{379} standard on speculation. To date, the APF has managed over $25 billion.\textsuperscript{380} With the growth of the APF, Alaskans demanded a return of some of the wealth to the citizens in the form of tax repeal and cash distributions.\textsuperscript{381} The legislature responded to the citizens' demand by enacting legislation that mandated the distribution of a portion of the fund's earnings to the residents of the state through dividend payments.\textsuperscript{382} Remarking on the option of dividend payments, one economist observed that "[t]he idea is, people will care more about how the fund is managed if they know that money is part theirs."\textsuperscript{383} In addition, "the dividend program was chosen on the belief that Alaska's citizens, as owners of the state's natural resource wealth, are entitled to benefit directly from this wealth."\textsuperscript{384}

Oversight of the APF is provided through a system of checks and balances. The APFC makes independent investment decisions but is not excused from accountability to the government and people of Alaska.\textsuperscript{385} The APFC receives guidance through an independent board of trustees whose membership includes four members of the public appointed by the governor, the Commissioner of Revenue, and another member of the


\textsuperscript{379} Harvard College v. Amory, 26 Mass. (9 Pick.) 446 (1830). Justice Putnam of the Supreme Judicial Court of Massachusetts stated the standard as follows:

\begin{quotation}
All that can be required of a trustee to invest, is, that he shall conduct himself faithfully and exercise a sound discretion. He is to observe how men of prudence, discretion and intelligence manage their own affairs, not in regard to speculation, but in regard to the permanent disposition of their funds, considering the probable income, as well as the probable safety of the capital to be invested.
\end{quotation}

\textit{Id.} at 461.

\textsuperscript{380} \textit{Alaska Permanent Fund Corp., supra} note 372.

\textsuperscript{381} Smith, \textit{supra} note 373, at 99.

\textsuperscript{382} \textit{Id.}

\textsuperscript{383} Vicki Quade, \textit{$1,000-per-Alaskan Plan to Share Oil Wealth}, 68 A.B.A.J. 797, 797 (1982) (quoting James Rhode, an economist in Anchorage, Alaska.

\textsuperscript{384} \textit{Tsalk}, \textit{supra} note 370, at 22.

\textsuperscript{385} \textit{Id.}
administration. The legislative branch exercises control and provides oversight through final approval of investments and the work of the Legislative Budget and Audit Committee. The public also plays a role in the oversight because removal of board members is effective only when accompanied by a statement disclosed to the public containing the reasons for removal. The combination of these layers of oversight provides some explanation for why the APF has endured over the years.

A salient feature of the APF is an emphasis on transparency. Citizens have access to information regarding how much the fund earns and how the revenues are distributed. The importance of openness in the way public revenues are managed cannot be overemphasized as it comports with the time-honored dictum that "sunshine is a disinfectant."

The philosophical underpinnings and the structure of the APF present both benefits and grounds for criticisms. The legal and philosophical basis of the APF is the idea that the ownership of Alaska's oil resides in the people of the state and this lucrative resource should be utilized for their maximum benefit. Therefore, an important point of the fund is that it promotes the idea of stakeholding; it gives the citizens a stake in a natural resource found in their territory. The Fund is based on a belief that Alaskans are the primary stakeholders of their oil wealth. The fund is also credited with increasing personal income and employment in Alaska and at the same time mitigating

386 Id.
387 Id.
388 Id.
389 Id.
390 See ALASKA PERMANENT FUND CORP., supra note 372.
391 Id.
392 See Mary Graham, Is Sunshine the Best Disinfectant: The Promise and Problems of Environmental Disclosure, 20 BROOKINGS REV. 18, 18 (2002) (quoting Louis D. Brandeis' statement that "publicity is justly commended as a remedy for social and industrial diseases . . . [s]unlight is said to be the best of disinfectants").
393 TSALIK, supra note 370, at 20.
394 Bruce Ackerman & Anne Alstott, Your Stake in America, 41 ARIZ. L. REV. 249, 260 (1999).
395 TSALIK, supra note 370, at 20.
recessions. A

One writer has marshaled the strong points and weaknesses of the APF in the following words:

It is based on the principle that citizens are the owners of their mineral wealth and that every citizen is entitled to an equal share of this wealth. It adheres to the libertarian belief that people will be better off spending their own money rather than allowing the state to spend it on their behalf. By involving citizens in every aspect of the Fund’s creation and evolution, the APF has given the public a stake in its preservation, and restrained the government from spending away oil wealth in a more effective way than any formal rules could. Although no rules require payment of dividends, the program is so popular that the legislature has always chosen to continue it. Such an approach, however, has drawbacks. The absence of a needs component has led to an inefficient distribution of wealth, since individuals in the highest tax bracket receive the same amount as the poorest Alaskans. The diffusion of economic resources that results from sending a check to every Alaskan comes at the cost of targeting funds to address social and economic needs. Moreover, one might also question the prudence of sending dividend checks to every citizen as the state slashes its operating budget and lays off employees to make ends meet. Critics of the libertarian approach also argue that governments are better placed to pursue economic diversification and wealth distribution than individuals in the marketplace.

Ironically, as indicated above, the fund’s popularity has opened the doors for critics to assail the APF. Due to the fund’s popularity, politicians are not eager to tap dividend money or channel APF revenues to other important state services, even when the need to infuse money into those services can hardly be emphasized. Nevertheless, Bruce Ackerman and Anne Alstott have presented a counter-argument that “the value of stakeholding is sufficiently great to justify a priority over most other competing

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396 See Ackerman & Alstott, supra note 394, at 260 n.28 (citing J. Patrick O’Brien & Dennis O. Olson, The Alaska Permanent Fund and Dividend Distribution Program, 18 PUB. FIN. Q. 139 (1990)).

397 TSALIK, supra note 370, at 25.

398 Id.
programs.\textsuperscript{399} Overall, the APF is considered a successful experiment.\textsuperscript{400} After all, it "has been successful in turning Alaska's depleting oil resource into a renewable financial resource."\textsuperscript{401} This is a commendable feat considering that the non-renewability of petroleum resources should be a major concern of all oil-producing entities.

3. Nunavut

The Nunavut Trust of Canada presents an important example of a community-based trust fund. Svetlana Tsalik describes the fund and its attraction as follows:

Unlike government-run oil funds, the Nunavut Trust is a community-managed fund. It has earned strong returns while maintaining accountability to its constituents and serves as a good example for [other] underdeveloped oil-producing regions. . . . The Trust also demonstrates how these communities can be compensated for the negative external consequences of oil development, and how they can turn such compensation into an enduring source of income.\textsuperscript{402}

The Nunavut Trust was established to receive and manage the capital transfer payments from the Canadian government to the Nunavut Territory consequent upon the Nunavut Land Claims Agreement.\textsuperscript{403} The Agreement led to the creation of the new territory of Nunavut on April 1, 1999.\textsuperscript{404} The Nunavut people will receive the sum of $1.2 billion dollars in compensation money in the course of fourteen years, ending in 2007.\textsuperscript{405} This money is

\textsuperscript{399} Ackerman & Alstott, supra note 394, at 260 n.28.
\textsuperscript{400} See Hoopengardner, supra note 375, at 358.
\textsuperscript{401} Id. at 358-59.
\textsuperscript{402} TSALIK, supra note 370, at 46.
\textsuperscript{405} Id.
channeled through the Nunavut Trust, which is under a duty to protect and enhance the funds for the benefit of the people.\textsuperscript{406}

Two important features of the Nunavut Trust deserve special mention. First, there is no dividend program under the Nunavut Trust.\textsuperscript{407} The dividend arrangement was expressly rejected by the Trust's designers in order to avoid what they perceived to be mistakes in other funds.\textsuperscript{408} A striking example is that of the Samson Cree of Alberta which received more than $2 billion from the time of the oil booms of the 1970s.\textsuperscript{409} The Crees introduced a dividend program entitling every Cree to $40,000 once he or she reached the age of 18.\textsuperscript{410} Unfortunately, a substantial portion of dividend money was squandered on personal consumption, with attendant high levels of alcoholism and death and with hardly any improvement in the material well being of the community.\textsuperscript{411} A second feature is the separation of investment function from the responsibility of expenditure of the Trust proceeds.\textsuperscript{412} Thus, the mandate of the trustees covers earning returns while a separate entity representing beneficiaries, the Nunavut Tunngavik, Inc. (NTI), concerns itself with fashioning the best ways to spend the money for the people's benefit.\textsuperscript{413} The import of this arrangement is that "fund managers invest in a mix of fixed income securities and foreign and domestic stocks with the sole purpose of maximizing return on investment while minimizing risk."\textsuperscript{414}

Oversight is provided through appointed trustees who serve three-year terms and cannot be removed without cause.\textsuperscript{415} Every Inuit beneficiary also has the right to institute legal action against the trustees for breach of duty, which helps in enhancing accountability.\textsuperscript{416}

\begin{itemize}
\item[406] Id.
\item[407] TSALIK, supra note 370, at 47.
\item[408] Id.
\item[409] Id.
\item[410] Id.
\item[411] Id.
\item[412] Id.
\item[413] Id.
\item[414] Id.
\item[415] Id.
\item[416] Id. at 48.
\end{itemize}
A veritable challenge to a trust of this nature is the danger of creating dependencies on the part of beneficiaries. Another problem is that in view of limited obstacles in the trust structure to avoid spending the trust’s principal, the pressure to do so may mount when difficult circumstances arrive. The managers of the Nunavut Trust would need to face these hurdles squarely and prevail.

D. Community-Based Trust Funds for Nigeria

1. The Case for and General Features of Local Trust Funds

National trust funds such as that established under the Chad-Cameroon Oil Pipeline Project have some strong points. They aid transparency and accountability and ensure that governments allocate more money for national community development. Nevertheless, they cannot be a complete panacea and do not purport to be such. There is sometimes a tendency, however, to assume that addressing corruption and other vices at the national level automatically translates into the eradication of such problems at the local levels, thus bringing all the benefits to all the citizens, regardless of where they are. This is not necessarily the case though, and there may be the need to directly address the corruption that also thrives at the local level. Because of local-based corruption, the majority of the people in local resource communities are often deprived of the benefit of the money earmarked for them.

In some cases, governments may be reluctant to set up national trust funds. Chad had little option but to accept the World Bank’s demands because of its poor economic situation. Administering huge national funds may also involve enormous transaction costs that could make them unproductive and

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417 See id. at 47-48.
418 See FRYNAS, supra note 4, at 49.
419 Id. at 52.
420 Id.
421 NEWSWATCH Interview, supra note 153.
422 Revenue Management Plan, supra note 346, at 98.
unattractive. Further, in a big country like Nigeria, there are serious doubts that a national fund, as shown in the case of OMPADEC, and perhaps the NDDC, will be able to address the needs of all the people. Smaller arrangements that are easier to manage may, in some instances, prove more palatable and effective. Thus, community-based trust funds present a useful option.

Community-based trust funds will directly confront and tackle the inadequacies of the existing community development arrangements present in some places. The opacity surrounding the current approaches to community development has provided ample room for corruption to become a way of life, cutting across different facets in the oil-producing areas, including community leaders and corporate executives. Speculations are rife about inflated figures by oil companies on social expenditures to gain some tax and other advantages.

To be effective, it may be necessary for community-based trust funds in Nigeria to marginalize the government, since the high level of governmental inefficiency and ineptitude in the country may become stumbling blocks to achieving the funds’ objectives. A government representative may be included in the Governing Board, as this may be crucial in securing the government’s support or funding for such an arrangement, but the government should not play any key role in running the Board. Even in countries with more efficient governments, a local trust

423 See Guerin-McManus, supra note 318, at 9.
424 See id. at 12.
425 Id.
426 See FRYNAS, supra note 4, at 52 (stating “there are some indications that a significant proportion of the oil companies’ community budget was misappropriated by oil company staff, local contractors or chiefs”) (citation omitted). See also Kemedi, supra note 291 (elaborating on the relationship between oil companies and state officials).
427 FRYNAS, supra note 4, at 51-52.
429 See Guerin-McManus, supra note 318, at 16 (stating the importance of striking the balance between the government and non-governmental representatives of the board).
fund can be structured to dispense with governmental involvement or management. For instance, the Nunavut Trust described above is run by community members independent of governmental involvement.\footnote{See Agreement Between the Inuit of the Nunavut Settlement Area and Her Majesty the Queen in right of Canada, May 25, 1993, Inuit-Can., art. 29, available at http://www.tunngavik.com/site-eng/nlca/artic129.htm (last visited Sept. 10, 2004) (establishing that monies payable to the Trust are under the Trustees’ control).}

An important aspect of the proposed trust funds is the public’s participation in environmental and developmental decision-making. Under Nigerian customary law, communal property is usually managed by those in a position of trust, with the active participation of other community members who are co-owners of the property.\footnote{YAKUBU, supra note 342, at 63. Yakubu states: [E]very member of the community has the right to take part directly or indirectly in the management of the community land. The participation is direct where a member takes an active part in making decisions and in consultations on community land. It is indirect where he only takes part in selecting the Chief and other elders or councillors. It has been held that the requirement of consultation is a requirement of law and not just a matter of convenience by the Chief or elders to be observed or disregarded. Id. (citation omitted).}

Community members will play an active role in directly electing the trustees of the fund. A major function of the trustees, through a management body and in close consultation with the respective communities, will be the designing of projects that are beneficial to the people and the overseeing of their proper completion.

Oil-producing communities need an alternative economic base to replace what has been destroyed by the oil industry. They also need adequate institutions, such as well-equipped and properly functioning hospitals and schools, to take care of their immediate needs and prepare themselves for the kind of future that is suited to their new conditions as centers of major economic activities. This approach would be consistent with the aphorism that it is better to teach a person how to fish than to give a person a fish. The trust funds would handle some smaller projects, but should also be in a position to pool resources from multiple sources (including oil corporations and development institutions) and undertake bigger projects that ordinarily fall outside the capacity

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or scope of individual company budgets. This would be preferable to situations where oil companies might take up minor projects as a token gesture and would avoid duplicative efforts. This scenario would result in a variance of what economists refer to as "coordination benefits," by which people find that it is in their greater interest to work together than going at it alone.  

2. **Key Features of Proposed Trust Funds**

   **a) Legal Structure**

   The trust funds should have a separate legal personality, be self-governing institutions and possess a credible governance structure. They may be created by Deeds of Trust or chartered by the government.

   **b) Financial Structure**

   This could take the form of an endowment, revolving fund, or sinking fund. Revolving funds can have new assets added periodically, possibly yearly and through special taxes and contributions. Because of this, revolving funds are the preferred option that this article recommends for oil-producing communities in Nigeria. Likely sources of funding would be the oil companies, which could contribute a certain percentage of their annual profits. Development agencies could also be useful in providing additional funds. As progress is made, the government could also become a financial contributor.

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432 This is akin to prisoner's dilemma and game theory. For a discussion of coordination benefits, see Cary Coglianese, *Globalization and the Design of International Institutions*, in *Governance in a Globalizing World* 297, 298-300 (Joseph S. Nye Jr. & John D. Donahue eds., 2000).

433 Most of the ideas in this section are drawn from Guerin-McManus, *supra* note 318 and the sources cited therein. I have also adapted some of the applicable features of the Chad RMP.


435 *Id.* at 17-19.

436 *Id.* at 17-18.

437 *See id.* at 19-20 (stating that "[m]ajor sources of funding for trust funds also come from multilateral donors, private and NGO donors, and even host governments").
c) Governance Structure

The trust funds should have a governing body that is representative of the diversity in the community. There should be a board of trustees (Board) representing the interests of all stakeholders, including the government, community, industry and NGOs. The recommended approach in this article is that community members elect their representatives. This will give them a sense of belonging and promote accountability of community leaders. The Board will be the legal owners of the funds and should determine, with the active participation of community members, priority areas where the funds would be spent. The Board will give general directions to the Management Unit on implementation of those ideas.

d) Management Unit

This unit should be responsible for numerous functions, including the preparation of annual work plans and budgets, the development of implementing systems for the processing of grant proposals and the implementation of project activities, the development of strategies for capacity-building, and the institution of systems for financial accountability. The Management Unit should also report to the board of trustees on program and project implementation and play a key role in developing strategies for fundraising.

e) Monitoring Unit

A unit within the trust should be responsible for monitoring the expenditures of the trust funds and those of other institutions such as the NDDC to ensure that funds are being properly utilized for the benefit of the community (area) and in compliance with the governing rules. The Monitoring Unit should publish regular reports and should make its activities open. Documents in its possession should be accessible to the public at their offices, on

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438 Id. at 15.
439 Id.
440 Id.
441 Id.
442 See id. at 24.
the internet and upon request.

f) International Oversight Group

This group should consist of representatives of international financial and developmental institutions and credible domestic and international NGOs, scholars and political leaders who will ensure that the major units, including the Board, Management Unit, and Monitoring Unit, are performing their functions. They should operate independently, and their findings should always be made public.

g) Location of Trusts and Assets

A trust fund or its assets could be located domestically or abroad. A domestic trust with domestic asset management is the preferred choice, though, because it has a greater potential to build domestic capacity in trust and financial management while promoting a sense of local ownership of the trust.

The process of establishing a trust fund should commence with a feasibility study. The object of the feasibility study would be to answer a number of important questions, the most salient of which center around the workability of the trust fund concept in the target community, the availability of alternatives, and the presence of a legal and financial framework in the host country to provide needed support for the trust. The process of preparing or conducting the feasibility study should involve consultations with stakeholder representatives, government representatives, scientists, conservationists, economists, lawyers, business representatives and community leaders. This group should be responsible for determining the needs of the target community, the primary and wider objectives that the trust fund seeks to accomplish, and the kind of development projects that it will finance.

443 See id. at 21.
444 Id.
445 Id. at 8.
446 Id. at 8-10.
447 Id. at 10
448 Id. at 10-11.
3. Benefits of Local Trust Funds

a) Proper Management of Oil Revenues

A trust fund will play a key role in ensuring that revenues are properly managed. With an elected Board of Trustees accountable to the community members and a Management Unit that is carefully chosen, the chances of a prudent and beneficial application of community funds are enhanced.

In managing oil revenues, the community-based trust funds will not become a replacement for the NDDC. However, it has some features that make it a better alternative to the NDDC in some aspects. First, it will utilize a bottom-up approach to management, not the top-down approach favored by the government.\(^{449}\) One of the problems faced by the NDDC, especially at the initial stage, was the absence of acceptance by the communities who were supposed to benefit from the projects.\(^{450}\) In a particular incident recounted by the NDDC Chairman, community members attacked a contractor and forced him to abandon a construction project in the community.\(^{451}\) Where real participation exists and the people truly ‘own’ the projects, as is likely to be the case with community-owned and community-run trust funds, such problems are not likely to be encountered.

On the other hand, there are certain things that trust funds of this size may not be able to accomplish, but which a big development agency like the NDDC can handle with ease.\(^{452}\) One example is attracting investors into the area and collaborating to start giant industrial outfits.\(^{453}\) Some projects also inure to the benefit of many communities such as roads and bridges. The NDDC can continue to exercise responsibility over those common areas. Further, some communities may not be disposed toward the idea of trust funds or may be incapable of managing their funds at the moment due to intra-community crisis or leadership struggles and may opt for continued management by the NDDC.

\(^{449}\) NewsWatch Interview, supra note 153.

\(^{450}\) Id.

\(^{451}\) Id.

\(^{452}\) Guerin-McManus, supra note 318, at 12-13.

\(^{453}\) Id. at 13.
b) Monitoring of Resource Flows to Communities

A trust fund can function as a monitoring mechanism. It can monitor the flow of oil revenues into the oil-producing communities. Information gathered from such monitoring could be used to assess the performance of those entrusted with managing the funds. The presence of monitoring could also deter corruption and waste as managers know that they would be held accountable.

Monitoring may also be augmented by oversight provided by external bodies. A hallmark of the proposed local trust funds would be transparency guaranteed through an oversight mechanism involving domestic and international NGOs, external auditors and international financial and development institutions.

c) Democracy-Building

Trust funds can also serve as a veritable foundation for building democratic structures in other areas of political governance. They could promote a culture of democracy by facilitating the active participation of community members in establishing a local governance structure for resource allocation and utilization. Such participation, while commencing with oil-related matters, is expected to extend to, and permeate, other aspects of community life and become entrenched within the governance of these communities.

Local trust funds can also build democracy by reducing or eliminating corruption through a transparent and accountable approach to management. In a report released in April 2004, Freedom House identified corruption and a weak judiciary as the principal impediments to democratic development.


455 See Ibeanu, supra note 428, at 29.

456 Id. at 31. See also Kemedi, supra note 291 (recommending transparency from governments to encourage democracy).

Successful trust funds will give community members a sense of ownership of development projects. Local trust funds will provide an economic base for communities, leading to less violence and conflicts within the communities, thereby removing obstacles to democratization. The Niger Delta has been plagued by violence within communities, and between communities on one side and the corporations and government on the other.

Community members have sought to disrupt elections or oppose the operations of the NDDC and others. Much of this violence owes its genesis and sustenance in part to perceptions about the mismanagement of oil revenues.

Local trust funds will also promote democracy through stakeholding. A community-based trust fund will give communities a stake in the funds, giving greater incentive to closely monitor how the money is spent. Political history suggests that where people have a stake in the public revenue that consists of their taxes, they have an incentive to demand representation to accompany the taxation.

Moreover, community-based trust funds can aid democratization through group formation. They will help reduce the stronghold of the government on oil revenues, thereby helping to redistribute wealth in the oil-producing areas. The rise of democracy in Europe and America has been traced to the emergence of an independent bourgeoisie. Because of their independence from the state, this group was able to serve as a

458 See Kemedi, supra note 291.
460 Newswatch Interview, supra note 153.
461 See Winter, supra note 157.
check on public officials and hold them accountable.\textsuperscript{464} With the concentration of the wealth in the government, the emergence of such a group in Nigeria in general, and in the oil-producing areas in particular, has been frustrated.\textsuperscript{465} Reducing the stronghold the government has on oil revenues through trust funds will assist in the emergence of a vibrant middle class that would be independent of the state, and ultimately lead to democracy in these areas and the entire country.

\textit{d) Other Benefits}

Some of the trust funds, like the APF, may decide to invest a portion of their funds in national and international capital markets and distribute a percentage of the earnings from such investments to community members.\textsuperscript{466} Drawing from the approach popularized by the Grameen Bank, some trust funds may devote a lot of resources to extending micro-credit, especially to local women, to facilitate their transition into a position of financial independence.\textsuperscript{467} The conservation of land, and the preservation and restoration of areas of communal heritage could also form significant portions of a community trust fund's mandate.\textsuperscript{468}

\textbf{4. Prospects for Local Trust Funds}

Based on preliminary discussions and correspondence with representatives of oil corporations, communities, financial and development institutions and NGOs, there is a favorable disposition toward this concept.\textsuperscript{469} This support is anchored on

\textsuperscript{464} \textit{Id.} at 417.

\textsuperscript{465} \textit{See} Ibeanu, \textit{supra} note 428, at 31.

\textsuperscript{466} Information on Alaska Permanent Fund Corporation is available on its website: http://www.apfc.org (last visited Sept. 10, 2004).

\textsuperscript{467} For information on the bank, see http://www.grameen-info.org (last visited Apr. 17, 2004). For a discussion on the benefits and shortcomings of micro financing as a tool for development, see Editorial Desk, \textit{Microcredit's Limits}, \textit{N.Y. TIMES}, May 5, 2004, at 1A.

\textsuperscript{468} This could be done through easements or other appropriate legal arrangements. On land trusts and easements, see Barton H. Thompson, Non-Profit Land Trusts & Conservation Easements, Stanford Law School (June 25, 2002) (on file with the author). \textit{See also} Ian Bowles et al., \textit{Economic Incentives and Legal Tools for Private Sector Conservation}, \textit{8 DUKE ENVT'L. L. & POL'Y F.} 209, 240 (1998) (discussing conservation easements and conservation agreements as tools for land conservation).

\textsuperscript{469} \textit{See} Kemedi, \textit{supra} note 291, (Kemedi is Head of Programs at an NGO in
some of the attractive features of trust funds discussed above, including provisions for public participation and emphasis on transparency and accountability.\textsuperscript{470} According to Tony Ile, an estate valuer and community activist in Rivers State, a major oil-producing state:

There are several sources of funds for community development in Nigeria, especially oil-producing communities. The issue is not how much will be spent and on what projects. The real issue is who makes decisions over the money that accrues to the communities. In determining the real social power of communities over their resources and environment, communities must have a platform to articulate their needs, negotiate their demands with Government and companies, participate actively in the development process and exercise control over financial resources that are meant for them. There is no better way to achieve this than through the Community Development Trust Fund. The CDTF will enable local communities to understand and participate in decision-making process over funds and projects according to needs of stakeholders in the community. The CDTF enforces on each community a process of accountability based on actual performance. In a democracy nurtured by the will of the people, the CDTF becomes a platform for sustaining community visions and development plans in order to achieve social peace based on justice and equity. We need the CDTF.\textsuperscript{471}

Responding to this author's questionnaire, ChevronTexaco stated with regard to the trust funds proposal contained herein that it “[l]ooks like a good arrangement. . . . The Trust Fund should be run devoid of political posturing and focused on the people who would benefit. The managers ought to be accountable to an external audit system that includes international monitors.”\textsuperscript{472}

Royal/Dutch Shell’s Nigeria affiliate has also welcomed the proposal, while sounding a note of caution and displaying a measure of skepticism:

This model will work where there is honesty and transparency.

\textsuperscript{470} \textit{Id.}

\textsuperscript{471} E-mail from Chizor Wisdom Dike to Emeka Duruigbo, supra note 191.

\textsuperscript{472} ChevronTexaco, Response to Questions, supra note 196.
But intra play of power, and dominance by a group or class can derail the good objectives. In a community environment where culture and power dictates and overrides decisions by the majority, success cannot be assured [at] all times. Every [new] mechanism or model has to be tested, noting also the location specific impact. . . . While some communities will welcome a Trust Fund properly established and managed, others will demand direct access to the funds to “do it their way.” All depends on the power structure at play at any particular time.473

A cautious, or perhaps cynical, way of looking at corporate support for this idea is to view it not as inveterate, but as an attempt by oil corporations to play the public relations game. However, it is also reasonable not to lose sight of the fact that the current scheme of things has taken a toll on all stakeholders, including corporations, since corporate community development activities have not been very fruitful, opening them to criticisms and frustrating their operations. They may, therefore, be genuinely interested in true reforms to improve oil revenue management.

The trust fund arrangement represents a needed change in architecture474 that is expected to interact with and affect the social norms and other modes of regulation at the corporate and community levels.475 With enhanced economic development,

473 Shell Nigeria, Response to Questions, supra note 198.

474 The idea of a structure or architecture as a useful form of achieving policy objectives dates at least as far back as Karl Llewelyn. See LAW & SOCIETY: READINGS IN THE SOCIAL STUDY OF LAW (Stewart Macaulay et al. eds., 1995):

Karl Llewellyn, the famous legal theorist, who died in 1962, liked to talk about the highway “cloverleaf.” This, of course, is a method of structuring entrance to and exit from a major highway or freeway. Legislatures could pass laws regulating or prohibiting left turns across busy lanes of oncoming traffic. However, these laws require police and traffic courts to enforce them. The cloverleaf is more effective. The roadway or ramp sharply turns off the main highway to the right, and then turns to cross over the road on a bridge, or under it through a tunnel. If the lanes of the main highway are separated by a fence or ditch, it is almost impossible to make an illegal left turn. Also, highway engineers can force drivers to slow from superhighway speeds by the way they bank the cloverleaf. The socially desired behavior – slowing down – becomes far easier than deviance for the typical motorist.

Id. at 444.

475 For an excellent discussion of the modes of regulating behavior, namely law, architecture, markets and social norms, see LAWRENCE LESSIG, CODE: AND OTHER LAWS
community members will likely opt for other sources of energy currently beyond their reach, thereby easing the pressure on the forests, from which they collect wood as fuel.\textsuperscript{476} Moreover, constant tensions and conflicts and the attendant police and military brutality could be dramatically reduced as people see themselves moving up in the social ladder.\textsuperscript{477} Viewed from that perspective, trust funds could be seen as important vehicles that can, in one instrument, confront and address not only traditional social and economic issues, but also human rights and environmental problems in the oil-producing communities.

\textbf{VII. Conclusion}

Oil-producing communities in Nigeria have suffered numerous negative effects of oil and gas development. The government of Nigeria and the multinational oil corporations operating in these communities have introduced initiatives to address these problems and promote a better life for the residents of these communities. Unfortunately, primarily because of corruption and a lack of real public participation, the positive effects of the corporate financing tools and public measures have been minimal. Moreover, the efforts of the most recent public initiative, the NDDC, are not likely to adequately address some of the pressing needs of the communities, particularly in the sense of having control over their resources or revenues flowing from them. This work has therefore made a case for local trust funds as important institutions that will help oil-producing communities take control of their destinies and ensure an equitable management of their oil revenues.

The trust funds proposed in this article would be run by community members for their own benefit. These funds would not be a replacement of the NDDC but should be able to address each community's unique needs. Transparency and accountability should define the trust funds' operations. Credible monitoring and oversight mechanisms should be incorporated into the instrument creating the trust. Apart from serving as financing mechanisms,


\textsuperscript{477} See Ibeanu, supra note 428, at 29.
these trust funds will help community members develop a culture of democracy that will prove useful in other aspects of community and national life.