

Summer 2015

Nunc Dimittis or Chef Cornerstone?: Evaluating Africa's International Norm-Development Experiment in the Chad-Cameroon Pipeline Project

Emeka Duruigbo

Follow this and additional works at: <http://scholarlycommons.law.northwestern.edu/njilb>

Recommended Citation

Emeka Duruigbo, *Nunc Dimittis or Chef Cornerstone?: Evaluating Africa's International Norm-Development Experiment in the Chad-Cameroon Pipeline Project*, 35 NW. J. INT'L L. & BUS. 297 (2015).
<http://scholarlycommons.law.northwestern.edu/njilb/vol35/iss2/2>

This Article is brought to you for free and open access by Northwestern University School of Law Scholarly Commons. It has been accepted for inclusion in Northwestern Journal of International Law & Business by an authorized administrator of Northwestern University School of Law Scholarly Commons.

***Nunc Dimittis* or Chief Cornerstone?: Evaluating Africa’s International Norm-Development Experiment in the Chad–Cameroon Pipeline Project**

Emeka Duruigbo *

Abstract: Africa extended and strengthened its status as a maker of international law by spearheading the creation and implementation of the norm of “shared sovereignty” in international criminal adjudication and the management of petroleum resources through the Special Court for Sierra Leone that was established to prosecute the principal actors in a devastating war in West Africa in the 1990s and through the Chad–Cameroon Oil Pipeline Project that created a model for effective production and utilization of natural resources for national development. This article argues that by situating itself at the forefront of the shared sovereignty experience, Africa is making significant contributions to the development of international law and, despite an initial setback, Africa’s effort represents a firm foundation upon which major progress can be established. This article highlights the key challenges that orchestrated the failure of the Chad project, focusing on the inability of international financial institutions such as the World Bank Group and state actors to successfully manage complex shared sovereignty arrangements, particularly in weak states in unstable regions. The paper further identifies the specific socio-political, economic, structural, and legal mechanisms that are imperative to ensuring the successful implementation of oil revenue management or natural-resource-based shared sovereignty systems in developing nations grappling with sustainable economic development and democratization.

* *Nunc Dimittis* is the Latin rendering of the prayer by Simeon in the Gospel of Luke in which he prayed that it was time for him to depart the earth since he had witnessed the long-awaited birth and dedication of the Savior, Jesus Christ. Luke 2:29 (Authorized Version) (“Lord, now lettest thou thy servant depart in peace, according to thy word . . .”), available at <http://www.biblegateway.com/passage/?search=Luke%202&version=AKJV>. It has become a song. See also Nsongurua J. Udombana, *The Institutional Structure of The African Union: A Legal Analysis*, 33 CAL. W. INT’L L.J. 69, 72 n.20 and accompanying text (2002); H.W. Arthurs, “Mechanical Arts and Merchandise”: *Canadian Public Administration in the New Economy*, 42 MCGILL L.J. 29, 40 (1997). The reference to chief cornerstone draws from Jesus’ statement, in relation to an Old Testament prophecy, that the rejected stone has become the cornerstone upon which a solid structure is built and maintained. Matt. 21:42 (Authorized Version) (“Jesus saith unto them, Did ye never read in the scriptures, The stone which the builders rejected, the same is become the head of the corner: this is the Lord’s doing, and it is marvellous in our eyes?”), available at <http://www.biblegateway.com/passage/?search=Matthew%2021&version=AKJV>. See also Psalms 118:22 (Amplified Version) (“The stone which the builders rejected has become the chief cornerstone.”).

TABLE OF CONTENTS

I. Introduction.....	299
II. Norm Definition, Generation, and Implementation.....	301
A. Concept of Shared Sovereignty.....	301
B. The Chad–Cameroon Pipeline Project.....	304
III. Assessment of the Chad–cameroon Shared Sovereignty Experiment	308
A. Failing Grade	308
B. Reasons for Failure	311
IV. The Strong Version of Shared Sovereignty	314
A. Features of the Strong Version	314
B. Weaknesses of the Strong Version	314
V. An Intermediate Version of Shared Sovereignty	317
A. Stronger Sovereign-International Actor Commitment	318
B. Corporate Immersion	319
C. Community Participation.....	324
VI. Responding to Potential Criticisms or Objections	327
VII. Conclusion	332

I. INTRODUCTION

Africa extended and strengthened its status as a maker of international law by spearheading the creation and implementation of the norm of “shared sovereignty” in international criminal adjudication and the management of petroleum resources.¹ According to Professor Stephen Krasner of Stanford University, a leading proponent of the concept of shared sovereignty, the Special Court for Sierra Leone represents a “contemporary example of shared sovereignty,” while the Chad–Cameroon Pipeline project is a “second and somewhat less clear contemporary case” of shared sovereignty.² Shared sovereignty occurs when a state allows an external institution to address a specific issue within the state’s borders by granting the institution powers traditionally reserved to the sovereign.³ Shared sovereignty in this sense is an uncommon phenomenon and examples are rare,⁴ however it is a subject that is experiencing a resurgence of interest.⁵

African countries are playing a crucial role in this revival through the Special Court for Sierra Leone that was established to prosecute the principal actors in a devastating war in West Africa in the 1990s⁶ and through the

¹ It is generally assumed that the early development of international law did not involve a great deal of African participation. See MARK WESTON JANIS, *INTERNATIONAL LAW* 1–4 (6th ed. 2012) (outlining the history of international law). Cf. James Thuo Gathii, *Review of Jeremy Levitt, (Ed.) Mapping New Boundaries in African International Law* (Albany Law Sch. Research Paper No. 49, 2012) at 1, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2028999 (“Contributionists, such as T.O. Elias have long argued that Africa participated in the making of international law, contrary to Eurocentric accounts that designated Africa as backward, stateless and as such having played no role in the making of international law.”). Recently, there has been a rise in academic interest as to the role of non-European communities in the making of international law. See, e.g., AFRICA: MAPPING NEW BOUNDARIES IN INTERNATIONAL LAW (Jeremy Levitt ed., 2008) [hereinafter MAPPING NEW BOUNDARIES]; Lillian Aponte Miranda, *Indigenous Peoples as International Lawmakers*, 32 U. PA. J. INT’L L. 203, 236 (2010).

² Stephen D. Krasner, *Building Democracy After Conflict: The Case for Shared Sovereignty*, 16 J. DEMOCRACY 69, 77–78 (2005) [hereinafter Krasner, *Building Democracy*].

³ Jürgen Kurtz, *Commentary to Professor Stephen D. Krasner*, 25 MICH. J. INT’L L. 1103, 1103 (2004) (examining the model of shared sovereignty that permits “the engagement of external actors in specific aspects of domestic governance.”).

⁴ Stephen D. Krasner, *Troubled Societies, Outlaw States, and Gradations of Sovereignty* 31 (Stanford University Department of Political Science, July 2002), available at https://bc.sas.upenn.edu/system/files/Krasner_02.05.04.pdf [hereinafter Krasner, *Troubled Societies*].

⁵ Different scholarly works have recently discussed this subject. See, e.g., Paul Schiff Berman, *Jurisgenerative Constitutionalism: Procedural Principles for Managing Global Legal Pluralism*, 20 IND. J. GLOBAL LEGAL STUD. 665, 692–93 (2013); Christian Eric Ford & Ben A. Oppenheim, *Neotrusteeship or Mistrusteeship? The “Authority Creep” Dilemma in United Nations Transitional Administration*, 41 VAND. J. TRANSNAT’L L. 55, 102–03 (2008); Stefaan Smis & Stephen S. Kingah, *The Chad Cameroon Pipeline Project (CCPP) and the Dilemmas of the Government of Chad*, 101 AM. SOC’Y INT’L L. PROC. 141 (2007).

⁶ The Special Court for Sierra Leone was created under a treaty concluded between the United Nations and the government of Sierra Leone. See Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, Jan. 16, 2002, 2178

Chad–Cameroon Oil Pipeline Project that created a model for effective production and utilization of natural resources for national development. In fact, Africa may be appropriately described as the major theater for contemporary cases of shared sovereignty. This article argues that by situating itself at the forefront of the shared sovereignty experience, Africa is making significant contributions to the development of international law and, despite an initial setback, Africa's effort represents a firm foundation upon which major progress can be established.

This article highlights the key challenges that orchestrated the failure of the Chad project, focusing on the inability of international financial institutions such as the World Bank Group (WBG) and state actors to successfully manage complex shared sovereignty arrangements, particularly in weak states in unstable regions. The paper also notes that the entrance of China and India as serious competitors for Africa's petroleum has the potential to exacerbate poverty and underdevelopment in the midst of natural resource abundance if African governments view the alternative sources of investments as a reason to resist significant concessions of their prerogatives. Still, Chinese and Indian investment may ameliorate poverty and underdevelopment if the new entrants exercise their leverage to insist on people-centered natural resource development. The paper further identifies the specific socio-political, economic, structural, and legal mechanisms that are imperative to ensuring the successful implementation of oil revenue management or natural-resource-based shared sovereignty systems in developing nations grappling with sustainable economic development and democratization.

This Article is organized into five parts. Part I discusses the concept of shared sovereignty and the development and implementation of the norm in the Chad–Cameroon pipeline context. Part II grades international law making in this example, and concludes that the experiment was a failure. This Part explores the reasons for the failure, and notes that the failure is more about the form of shared sovereignty adopted—a weak version—than the nature of shared sovereignty itself. Part III examines a stronger version of shared sovereignty, but views it as incapable of replacing the weak version because of theoretical and practical constraints. Part IV proposes a more effective option that embraces an intermediate version of shared sovereignty. While this option does not dispense with the role and relevance of state actors, it places greater emphasis on the role of corporate actors in promoting socio-economic and political development under the umbrella of shared sovereignty. Part V addresses potential objections to the proposals made in this Article.

U.N.T.S. 38342; Naomi Roht-Arriaza, *The Complex Architecture of International Justice*, 10 GONZ. J. INT'L L. 38, 39 (2006–2007).

II. NORM DEFINITION, GENERATION, AND IMPLEMENTATION

Several centuries ago the Swiss Jurist Emmerich de Vattel made the following observation about sovereignty: “Of all the rights that can belong to a nation, sovereignty is, doubtless, the most precious and that which other nations ought most scrupulously to respect.”⁷ Among other international instruments, the United Nations Charter and the Constitutive Act of the African Union provide for and protect the notion of sovereignty.⁸ Jean Bodin, one of the earliest leading authorities on sovereignty and statehood, viewed sovereignty as being within the absolute domain of the state, “not limited either in power, or in function, or in length of time.”⁹ Nevertheless, a state may, of its own volition, decide that sharing its sovereignty in certain issue areas would be an effective way of accomplishing important objectives.¹⁰ Appropriate candidates for this arrangement are weak States or those that have demonstrated a history of failure in tackling internal problems.

A. Concept of Shared Sovereignty

According to Professor Krasner, shared sovereignty involves the “engagement of external actors in some of the domestic authority structures of the target state for an indefinite period of time.”¹¹ A state applying the concept would engage external actors on an ongoing basis in domestic policy making and the management of functions that would ordinarily fall under the domain of the government.¹² A state may institute a shared sovereignty arrangement through a treaty, accord, compact, or some form of contractual

⁷ EMMERICH DE VATTEL, *THE LAW OF NATIONS OR PRINCIPLES OF THE LAW OF NATURE APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS* (C. Fenwick trans., Carnegie Institution, 1916) (1758).

⁸ U.N. Charter art. 2, para. 1; Constitutive Act of the African Union, available at http://www.au.int/en/about/constitutive_act (last visited Feb. 1, 2014); see also Elizabeth E. Ruddick, *The Continuing Constraint on Sovereignty: International Protection and the Internally Displaced*, 77 B.U. L. REV. 429, 429–30 (1997) (discussing the prominence of sovereignty in the United Nations Charter).

⁹ JEAN BODIN, *ON SOVEREIGNTY: FOUR CHAPTERS FROM THE SIX BOOKS OF THE COMMONWEALTH* 3 (J.H. Franklin ed. & trans., Cambridge University Press 1992) (1583); Stephen M. Shrewsbury, *September 11th and the Single European Sky: Developing Concepts of Airspace Sovereignty*, 68 J. AIR L. & COM. 115, 117–21 (2003) (discussing the evolution of the sovereignty doctrine).

¹⁰ Krasner, *Building Democracy*, *supra* note 2, at 70 (“The legitimacy of shared-sovereignty institutions would depend at first on their voluntary negotiation by internationally recognized national political authorities. Shared sovereignty is not something to be imposed . . .”).

¹¹ Stephen D. Krasner, *Sharing Sovereignty: New Institutions for Collapsed and Failed States*, 29 INT’L SECURITY 85, 108 (2004) [hereinafter Krasner, *Sharing Sovereignty*].

¹² Emeka Duruigbo, *Pioneering Models for International Project Finance and Criminal Adjudication through Shared Sovereignty*, in *MAPPING NEW BOUNDARIES*, *supra* note 1, at 205 [hereinafter Duruigbo, *Pioneering Models*].

arrangement between domestic and external actors to take charge of, supervise, and control some specific issue areas.¹³ To make a viable, enduring arrangement, states must ensure that termination can only take place with the consent of all the parties or upon the satisfaction of clearly specified conditions.¹⁴ The hallmark of an effective shared sovereignty arrangement is self-enforcement, where foreign and domestic parties have an incentive to adhere to the agreement because renegeing would be prohibitively expensive.¹⁵

Both distant history and contemporary experience provide valuable examples of shared sovereignty in practice. The Ottoman Empire created a Council of the Public Debt in the 1870s to forge a pathway for servicing its foreign debts and accessing the international capital markets.¹⁶ The Council comprised representatives from France, Germany, Austria, Italy, Britain, Holland, and the Ottoman Empire itself.¹⁷ The Council, whose members were selected by foreign creditors, derived authority from an Imperial decree, and oversaw revenue from a number of principal taxes such as the salt and tobacco monopolies, the stamp tax, and the spirits tax.¹⁸ With the consent of the government, the Council could engage in activities aimed at promoting overall economic development.¹⁹ Its stature and prominence rose to the point that it controlled over one-quarter of the Empire's revenue and employed more people than the Finance Ministry.²⁰

Greece presents another relevant example of shared sovereignty. At the end of the 19th century, Greece confronted economic calamity arising out of an unsuccessful war with Turkey over Crete. Greece swallowed the bitter pill of surrendering a measure of its sovereignty in order to secure new funding to service its debts.²¹ It established an international commission for fiscal control and incorporated the terms for its establishment in a provisional peace treaty between the countries involved.²² Commission Members included representatives of major powers, namely Austria-Hungary, Italy, Germany, France, Russia, and Britain. The Commission superintended significant sources of revenue such as state monopolies on salt, petroleum, matches, playing cards and cigarette paper, tobacco duties, and the customs revenues of Piraeus. These sources of revenue were essential to repaying Greece's foreign debt and the war indemnity demanded by Turkey.²³ The Commission also challenged the country's fiscal independence

¹³ *Id.*

¹⁴ Krasner, *Troubled Societies*, *supra* note 4, at 27.

¹⁵ Krasner, *Building Democracy*, *supra* note 2, at 70.

¹⁶ Krasner, *Troubled Societies*, *supra* note 4, at 32.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at 32–33.

²⁰ *Id.* at 33.

²¹ *Id.*

²² *Id.*

²³ *Id.*

by limiting what the Greek government could borrow and controlling its capital supply.²⁴

Germany provides a more recent example of shared sovereignty following its defeat in World War II. Germany made commitments under the NATO Status-of-Forces Agreements in the 1950s that shared sovereignty with the Allied Powers over security matters within German territory.²⁵ The Allies had jurisdiction over their own troops who were at liberty to patrol public areas including roads, railways and restaurants.²⁶ Commanders of the Allied forces were given powers to take any measures deemed necessary for maintaining good order and discipline. In addition, the German military could fight only after obtaining the approval of both the German and American governments.²⁷

Africa is contributing significantly to the development of international law and relations by pioneering modern shared sovereignty arrangements.²⁸ Indeed, shared sovereignty arrangements play an important role in the development of international law by providing international law and institutions with an additional tool for strengthening state political and administrative capacity. Shared sovereignty presents a clear mechanism that weak States (especially those emerging from conflicts or lacking adequate political structures) could deploy to build democratic and accountable governmental apparatuses.²⁹ Political theorists contend that natural resources generate power tussles, or a culture of struggles for the resource rents by various segments of the society, which impede the development of democracy in resource-rich societies.³⁰ A workable shared sovereignty model should obviate this predicament.

In addition, a successfully managed shared sovereignty arrangement is likely to forestall debilitating internal conflicts and promote peace in the country of application. This presents benefits to neighboring countries and the international community because the consequences of failed and inade-

²⁴ *Id.*

²⁵ Krasner, *Building Democracy*, *supra* note 2, at 77.

²⁶ *Id.*

²⁷ *Id.*

²⁸ See Anne-Marie Slaughter & William Burke-White, *The Future of International Law is Domestic (Or, The European Way of Law)*, 47 HARV. INT'L L.J. 327, 337 (2006).

²⁹ Krasner, *Building Democracy*, *supra* note 2, at 70.

³⁰ See Michael L. Ross, *Does Oil Hinder Democracy*, 53 WORLD POL. 325, 328 (2001) (exploring the role natural resources can play in militating against democracy and noting that "oil and mineral wealth tends to make states less democratic."). *But see* Benjamin Smith, *Oil Wealth and Regime Survival in the Developing World, 1960-1999*, 48 AM. J. POL. SC. 232, 232 (2004) (disputing the conclusion that oil wealth is more closely linked with non-viability of regimes and political instability). *See generally* Emeka Duruigbo, *Permanent Sovereignty and People's Ownership of Natural Resources in International Law*, 38 GEO. WASH. INT'L L. REV. 33 (2006) [hereinafter Duruigbo, *Permanent Sovereignty*] (discussing the unhealthy political contestation and corrosive corruption that are engendered by a strident pursuit of natural resource rents).

quate governance often transcend national boundaries. It is a fact of life that “[p]oorly governed societies can generate conflicts that spill across international borders.”³¹ Shared sovereignty agreements offer a means to avoid these negative externalities.

Africa is contributing to the development of international law as well, in the sense that embarking on shared sovereignty arrangements will continue historical traditions in international relations. As discussed above, states have long relied on some models of shared sovereignty to promote peace, foster good relations, and enhance national fortunes. The modern application of the concept of shared sovereignty by African countries further solidifies the existence of this historical practice and contributes to its progressive development. Moreover, African countries are placing their mark on shared sovereignty by extending the concept to new situations like natural resource development and management.³² The next section discusses shared sovereignty in the Chad–Cameroon context by examining the purpose and design of the project’s Revenue Management Plan (RMP).

B. The Chad–Cameroon Pipeline Project

The multi-billion dollar Chad–Cameroon pipeline project is one of the biggest private sector investments in Africa.³³ One component of the project relates to the extraction of oil from Chad’s Doba Basin. Another component focuses on transporting oil produced in Chad via a 670-mile (1,070 km) pipeline that passes through Cameroon.³⁴ Commercial project partners established an unincorporated joint venture known as the Upstream Consortium to own and finance the exploration component.³⁵ The pipeline component has two portions, based in Chad and Cameroon respectively. Tchad Oil Transportation Company (TOTCO), an incorporated joint venture between the Upstream Consortium and the government of Chad, owns the Chad portion of the pipeline.³⁶ The Cameroon Oil Transportation Company (COTCO), a joint venture between the Upstream Consortium and the governments of Chad and Cameroon, owns the Cameroon portion of the pipeline.³⁷

The government of Chad entered into a plan with the World Bank, accepting the involvement of the Bank in managing revenues accruing from

³¹ Krasner, *Sharing Sovereignty*, *supra* note 11, at 86.

³² See generally Duruigbo, *Pioneering Models*, *supra* note 12, at 208.

³³ See Emeka Duruigbo, *The World Bank, Multinational Oil Corporations, and the Resource Curse in Africa*, 26 U. PA. J. INT’L ECON. L. 1, 39 (2005) [hereinafter, Duruigbo, *World Bank*].

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

petroleum development.³⁸ The World Bank's participation in the project was driven by two principal factors. First, Exxon Mobil, the leader of the consortium, insisted on the World Bank's involvement as a condition for its proceeding with the investment.³⁹ Second, the World Bank's belief that it could promote its goal of poverty alleviation through the project.⁴⁰ According to then-President of the World Bank James Wolfensohn, "the project provides the best, and perhaps only opportunity for Chad to reduce the severe poverty of most of its population."⁴¹ As a condition for its participation, the World Bank insisted on a revenue management plan (RMP) that would ensure that the proceeds of oil development were used for socio-economic development, particularly the alleviation of poverty and investment in the critical sectors of health and education.⁴²

According to Mr. Wolfensohn, the RMP was intended to act as a counter to the economic distortion, corruption, and waste that often accompany a large influx of oil revenues—a phenomenon known as the "resource curse."⁴³ The former Bank President said the Bank was influenced by the experience of earlier oil-producing countries that had had difficulty managing natural-resource booms.⁴⁴ Accordingly, the Bank decided to collaborate with the government of Chad to develop a revenue management program "that targets oil revenues to key development sectors that are at the heart of its poverty alleviation strategy."⁴⁵

³⁸ *Id.*

³⁹ Exxon Mobil's insistence was based on the belief that the participation of the World Bank would provide the company with the needed cushion from political risk and insulation from critical non-governmental organizations (NGOs). See Duruigbo, *Pioneering Models*, supra note 12, at 216.

⁴⁰ In June 2000 the Board of Executive Directors of the World Bank voted to participate in the project because of its belief in the project's commercial viability and capacity to assist with the alleviation of poverty in Chad, one of the poorest countries in the world. *Id.*

⁴¹ Benjamin C. Esty, *The Chad-Cameroon Petroleum Development and Pipeline Project (A)*, Harvard Business School Case Study No. 202-010 (Rev. Mar. 17, 2006), at 6 (citing Letter from James D. Wolfensohn to Honorable James P. McGovern, The United States House of Representatives (June 28, 1999)).

⁴² Duruigbo, *Pioneering Models*, supra note 12, at 216.

⁴³ See ANDREW INKPEN & MICHAEL H. MOFFETT, *THE GLOBAL OIL AND GAS INDUSTRY: MANAGEMENT, STRATEGY & FINANCE* 10 (2011) (describing the resource curse as "a paradox of the oil and gas industry" in light of the fact that living standards in many oil-producing countries do not match their natural resource wealth); RICHARD M. AUTY, *SUSTAINING DEVELOPMENT IN MINERAL ECONOMIES: THE RESOURCE CURSE THESIS* (1993); Paul Collier, *Laws and Codes for the Resource Curse*, 11 *YALE HUM. RTS. & DEV. L.J.* 9 (2008); Lesley Wexler, *Regulating Resource Curses: Institutional Design and Evolution of the Blood Diamond Regime*, 31 *CARDOZO L. REV.* 1717, 1723 (2010); see also ALAN GELB, *OIL WINDFALLS: BLESSING OR CURSE?* (1988) (noting that inverse relationships between oil exploration and subsequent growth and development are ordinary for oil-exporting countries); see also Esty, supra note 41, at 8.

⁴⁴ Esty, supra note 41, at 8.

⁴⁵ *Id.*; see also Jacqueline L. Weaver, *The Traditional Petroleum-Based Economy: An "Eventful" Future*, 36 *CUMB. L. REV.* 505, 555 (2006) ("The Chad project (operated by ExxonMobil) was to show the world a new model for petroleum development, one that would assure socio-economic benefits to the

The RMP has several core components, notably specifications on the allocation and distribution of the expected revenue, a monitoring committee, an international advisory group, and a special arrangement for the oil-producing Doba region.⁴⁶ The government was given almost unfettered discretion on the expenditure of petroleum tax revenues.⁴⁷ For direct revenues from the project, the government surrendered much of its sovereign discretion and accepted that 10% would be held by the World Bank in a fund for future generations. The rest of the revenue from dividends and royalties would be deposited in a Special Revenue Account with 80% dedicated to the financing of programs in five important sectors: education, rural development, infrastructure, social services, and natural resources. Of the remaining 20%, the government would keep 15% in its coffers to be spent on recurring expenditures outside any oversight, and the remaining 5% would be devoted to the development of the oil-producing Doba region.⁴⁸

The RMP introduced several layers of oversight. The World Bank and the government of Chad approved an annual expenditure, which was then reviewed by a nine-member oversight committee—the Petroleum Revenue Oversight and Control Committee.⁴⁹ Committee representatives were drawn from the government and civil society (representing local development NGOs, trade unions, human rights groups, and religious groups).⁵⁰ The committee members were appointed for terms of three to five years.⁵¹ The Committee had a mandate to publish an annual review of operations that were subject to external audit.⁵² Some World Bank staff suggested that the Committee include foreign membership in addition to the local members, “but the Bank’s board vetoed this shared-sovereignty initiative.”⁵³

The World Bank had considerable power and leverage in monitoring the entire program and in reviewing all expenditures. The RMP was a binding instrument because the International Bank for Reconstruction and Development (IBRD) and European Investment Bank (EIB) linked the government’s performance under the RMP to future lending by the World Bank.⁵⁴ The World Bank also created an International Advisory Group

local populations in the villages near the oil fields and pipelines. The huge effort was designed to prevent another Niger Delta.”)

⁴⁶ Duruigbo, *World Bank*, *supra* note 33, at 41–43.

⁴⁷ *Id.* at 41.

⁴⁸ Republic of Chad, Law No. 001/PR/99, Jan. 11, 1999, *translated in* IAN GARY & NIKKI REISCH, CATHOLIC RELIEF SERVS. & BANK INFO. CTR. CHAD’S OIL: MIRACLE OR MIRAGE?: FOLLOWING THE MONEY IN AFRICA’S NEWEST PETRO-STATE 98 (2005); Edmund Sanders, *Oil Promise Still a Dream*, L.A. TIMES, July 9, 2006.

⁴⁹ Duruigbo, *Pioneering Models*, *supra* note 12, at 218.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ Krasner, *Building Democracy*, *supra* note 2, at 78.

⁵⁴ Duruigbo, *Pioneering Models*, *supra* note 12, at 218.

(IAG), designed to last for ten years and composed of eminent persons.⁵⁵ The IAG's role, however, was merely advisory, and its functions were limited.⁵⁶ As a result, critics found additional ground to view the project as providing a weak form of shared sovereignty.⁵⁷ This weak form contrasted with a strong version in which there would be substantial sharing of sovereignty with a strong external body that could monitor projects and demand and effect any needed changes.⁵⁸

The World Bank Inspection Panel served as another level of oversight for the project.⁵⁹ The Inspection Panel was created in 1993 by the Board of Executive Directors of the Bank to serve as "an independent complaints mechanism for people and communities who believe that they have been, or are likely to be, adversely affected by a World Bank-funded project."⁶⁰ Accordingly, the Panel afforded groups of citizens an opportunity to present their concerns about activities financed by the World Bank that they considered inimical to their interests.⁶¹ The panel's principal purpose, therefore, was to serve as a link between the Board, which is the highest governing body of the World Bank, and the people who are likely to be affected by a project funded by the Bank.⁶² In response to a request for inspection, the Panel undertook an inspection of the Chad–Cameroon pipeline project and issued a report in 2001, in which it called for reinforced monitoring of the project by the Bank to guarantee the protection of human rights.⁶³

In December 1998, the government of Chad passed a law incorporating the principal elements of the RMP, including auditing procedures and

⁵⁵ Press Release, World Bank, World Bank Appoints International Advisory Group on the Chad-Cameroon Petroleum Development and Pipeline Project (Feb. 21, 2001) available at <http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/0,,contentMDK:20014994~menuPK:64282137~pagePK:41367~piPK:279616~theSitePK:40941,00.html>. See also Genoveva Hernández Uriz, *To Lend or Not to Lend: Oil, Human Rights, and the World Bank's Internal Contradictions*, 14 HARV. HUM. RTS. J. 197, 224 (2001).

⁵⁶ Stephen D. Krasner, *The Hole in the Whole: Sovereignty, Shared Sovereignty and International Law*, 25 MICH. J. INT'L L. 1075, 1095 (2004) [hereinafter Krasner, *Shared Sovereignty*] ("Nevertheless, the level of shared sovereignty is modest. Foreign actors are only fully engaged with the International Advisory Group, and it can only give advice.").

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ See Genoveva Hernandez Uriz, *The Application of the World Bank Standards to the Oil Industry: Can the World Bank Group Promote Corporate Responsibility?*, 28 BROOK. J. INT'L L. 77, 120 (2002) (describing a report issued by the panel).

⁶⁰ *The Inspection Panel: About Us*, WORLD BANK, <http://web.worldbank.org/WBSITE/EXTERNAL/EXTINSPECTIONPANEL/0,,menuPK:64129249~pagePK:64132081~piPK:64132052~theSitePK:380794,00.html> (last visited Feb. 5, 2015); see also Sophie Smyth, *NGOs and Legitimacy in International Development*, 61 U. KAN. L. REV. 377, 431 (2012); Daniel D. Bradlow, *International Organizations and Private Complaints: The Case of the World Bank Inspection Panel*, 34 VA. J. INT'L L. 553, 553 (1994).

⁶¹ See Duruigbo, *Pioneering Models*, *supra* note 12, at 219.

⁶² *Id.*

⁶³ *Id.*

provisions relating to the establishment of an oversight committee.⁶⁴ Chad commenced the sale of crude oil in October 2003.⁶⁵ In November 2003, the \$6.5 million earned from the first sale of crude oil was deposited into the account.⁶⁶ In December 2003, the government approved its first budget including oil revenue and presented it to the RMP for approval.⁶⁷

III. ASSESSMENT OF THE CHAD–CAMEROON SHARED SOVEREIGNTY EXPERIMENT

This Part provides an assessment of the Chad–Cameroon project, and also considers the possibility of replicating the experiment elsewhere. The World Bank and a number of independent observers understood from the outset that the success of this innovative model would assist in finding a lasting cure for the resource curse.⁶⁸

A. Failing Grade

The wisdom of extending shared sovereignty to petroleum development is still up for debate. It is clear that its first application in the Chad–Cameroon Pipeline Project failed in some respects.⁶⁹ Still, the Chad experiment was a useful initial effort because once its weaknesses are addressed it can serve as a valuable blueprint for future projects.⁷⁰ By extending shared sovereignty to natural resource development Africa has made posi-

⁶⁴ *Id.*

⁶⁵ Emily Wax, *Oil Wealth Trickles Into Chad, but Little Trickles Down Five Months After Opening of Pipeline to Cameroon, Locals Await Benefits and Crime Rate Rises*, WASH. POST, Mar. 13, 2004, at A16 (reporting on the first few months of oil sales); United Nations, *Oil Pipeline Opens for Business*, 17 AFRICA RECOVERY 24 (Oct. 2003) (describing the fiscal aspects of the oil pipeline), available at <http://www.un.org/en/africarenewal///subjindx/173comm.htm>.

⁶⁶ Wax, *supra* note 65, at A16.

⁶⁷ *Id.*

⁶⁸ See IAN GARY & TERRY LYNN KARL, *BOTTOM OF THE BARREL: AFRICA'S OIL BOOM AND THE POOR* 60 (2003), available at <http://www.ic.ucsc.edu/~rlipsch/AFRICOM/barrel.pdf> (“The Chad-Cameroon Oil and Pipeline Project is the most significant, and most closely watched experiment designed to change the pattern of the ‘oil curse’ and promote poverty reduction through targeted use of oil revenues.”); see also Duruigbo, *World Bank, supra* note 33, at 32–33 (discussing the role of the World Bank in combating the resource curse).

⁶⁹ Dustin N. Sharp, *Requiem for a Pipedream: Oil, the World Bank, and the Need for Human Rights Assessments*, 25 EMORY INT’L L. REV. 379, 380 (2011) (noting that the World Bank’s efforts in the Chad project are viewed as a failure); Scott Pegg, *Chronicle of a Death Foretold: The Collapse of the Chad-Cameroon Pipeline Project*, 108 AFR. AFF. 311, 311 (2009) (concluding that the international community’s experiment in Chad was an “abject failure”).

⁷⁰ Stephen V. Arbogast, *Project Financing & Political Risk Mitigation: The Singular Case of the Chad-Cameroon Pipeline*, 4 TEX. J. OIL GAS & ENERGY L. 269, 292 (2008-2009) (“Although many NGOs were quick to pronounce the Chad RMP a failure, it would be more accurate to consider it a worthwhile first experiment.”).

tive contributions to broader international norms concerning shared sovereignty. Examining the failure of the Chad project with a view to understanding its pitfalls is essential to determining the structural changes that are required for a successful model in the future.

In October 2005, buoyed by rising oil prices, the government of Chad announced that it was jettisoning some of its commitments under the arrangement and sought a review of the revenue management law.⁷¹ In particular, under a law signed by Chad's President in January 2006, the government wanted to redefine priority areas to include national security (in addition to health and education) so that the government could equip its military to contend with rebel uprising in the eastern provinces bordering the already violence-prone Darfur region of Sudan.⁷² The government also expressed its intention to abolish the future generations' fund.⁷³ The World Bank was not amused by this change in direction and warned the government of Chad that it would consider its renegeing on the agreement as a breach of the loan agreement.⁷⁴

The World Bank followed its threat with action. In January 2006, the Bank blocked the government of Chad's access to royalty payments and suspended \$124 million dollars in loans.⁷⁵ In April 2006, the Bank reached an interim deal with the Chadian government that obligated the Bank to resume loan disbursements and release more than \$100 million in overdue royalties to the government, thereby avoiding threatened closure of oil wells by the Chadian government if access to the accounts remained blocked.⁷⁶ The Bank also agreed to double the percentage of money the government could spend without restraint, as requested by the government.⁷⁷ This aspect of the agreement more than doubled the government's discretionary allocation, resulting in a sharp reduction of the poverty allocation.⁷⁸ Instead of helping the poor, the government planned to spend the newly unrestricted funds on security.⁷⁹

⁷¹ Lydia Polgreen, *Chad Backs Out of Pledge to Use Oil Wealth to Reduce Poverty*, N.Y. TIMES, Dec. 3, 2005, at A15.

⁷² Lydia Polgreen, *World Bank Reaches Pact with Chad Over Use of Oil Profits*, N.Y. TIMES, July 15, 2006, at A8.

⁷³ Paul Blustein, *Chad Pipeline Project Steeped in Controversy: World Bank Reconsiders Role as Nation Looks at Altering Terms*, HOUS. CHRON., Dec. 28, 2005.

⁷⁴ Paul Blustein, *Chad's Hard-Line Stance Tests World Bank*, WASH. POST, Dec. 27, 2005. See generally David Vogel, *The Private Regulation of Global Corporate Conduct*, 34-35 (Univ. of Toronto, Munk Ctr. for Int'l Studies, Working Paper No. V, 2006).

⁷⁵ David White, *World Bank in Deal with Chad Oil Funds*, FIN. TIMES EUROPE, Apr. 28, 2006.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ Bruce Zagaris, *World Bank And Chad Reach Agreement on Use of Oil Profits*, 22 INT'L ENFORCEMENT L. REP. 371 (Sept. 2006) (stating that the new deal allocated 70 percent of the revenues to poverty reduction).

⁷⁹ David White, *Why a World Bank Oil Project has run into the Sand*, FIN. TIMES (Jan. 22, 2006), <http://www.ft.com/cms/s/1/83d76a34-8b76-11da-91a1-0000779e2340.html#axzz3ShLoej84>.

The Bank and the government of Chad reached a one-year deal in July 2006 that pertained only to 2007 revenues.⁸⁰ The deal maintained the increase in discretionary revenues to the government and apportioned 70% of all revenues from the project to poverty reduction.⁸¹ In a sharp departure from the original arrangement under the RMP, the July 2007 agreement included indirect revenues, namely taxes and custom duties.⁸² Thus, it meant that the World Bank acquired the authority from the new deal to oversee the management of both direct and indirect revenues from petroleum production.⁸³ This was significant because the indirect revenues would likely represent a substantial portion of government revenues in the years ahead.⁸⁴ Under the agreement, the government of Chad was also required to undertake an audit of the special petroleum revenue accounts in 2006 and cooperate with the World Bank and other stakeholders in strengthening the role of the Monitoring Committee.⁸⁵ The Doba region would retain its allocation of 5% for local projects while revenues in excess of projections would be kept in a reserve stabilization fund for use in the future.⁸⁶ While the agreement rejected the government's redefinition of the priority list to include "security", it nevertheless accepted the government's addition of "justice" to the list.⁸⁷ The July agreement built on the April interim deal and was designed to serve as a basis for a more enduring agreement that would cover revenues in future years.⁸⁸

Nevertheless, the relations between the Bank and the government of Chad remained frosty. In 2008, the World Bank felt that constraints to continuation of the arrangement were overwhelming and decided to withdraw.⁸⁹ Its confidence strengthened by huge oil revenues, and acting on signals from the World Bank, Chad paid off its loans to the Bank, terminating what was left of the relationship.⁹⁰

⁸⁰ Zagaris, *supra* note 78, at 371.

⁸¹ Cathy Landry, *Chad Deal to Raise World Bank Influence: New Oil Production Accord Brings Clearer Revenue Framework*, PLATTS OILGRAM NEWS, July 17, 2006, at 5.

⁸² Press Release, World Bank, World Bank, Govt of Chad Sign Memorandum of Understanding on Poverty Reduction (July 14, 2006), <http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/AFRICAEXT/0,,contentMDK:20994138~menuPK:258658~pagePK:146736~piPK:146830~theSitePK:258644,00.html>.

⁸³ *Id.*

⁸⁴ See John A. Gould & Matthew Winters, *An Obsolescing Bargain in Chad: Explaining Shifts in Leverage Between the Government and the World Bank*, 9 BUS. & POL. 1, 2 (2007).

⁸⁵ Landry, *supra* note 81, at 5.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ Annalisa M. Leibold, *Aligning Incentives for Development: The World Bank and the Chad-Cameroon Oil Pipeline*, 36 YALE J. INT'L L. 167, 178 (2011) (stating that on Sept. 9, 2008 the World Bank announced that it was withdrawing from the project).

⁹⁰ *Id.* at 168 (stating that the World Bank required the loan repayment as part of its withdrawal terms).

B. Reasons for Failure

Shared sovereignty arrangements such as the Chad–Cameroon Oil Pipeline Project include foundational ingredients that could assure their potential viability.⁹¹ They can enhance domestic governance in those developing countries that are rich in petroleum because the government and an external institution, such as the World Bank, share key powers over the revenues.⁹² Such arrangements could also help in building the basic foundation of a democratic society by establishing a link between the citizen-beneficiaries and the authority structures, giving citizens both a stake in natural resources and an insight into how their government utilizes community resources. This sense of ownership exists in developed states through a system of “taxation with representation.”⁹³ These arrangements could also reduce the corrosive problem of corruption and promote transparency and accountability, which can only redound to societal benefit.⁹⁴

Unfortunately, these benefits are unlikely to accrue without essential ingredients like political will, effective institutional structures, and a strong shared sovereignty arrangement. Indeed, the Chad project failed because the incursion into the state’s sovereignty was not deep enough to divest the government of the power to derail it.⁹⁵ An incompetent government ran most of the show and bungled it. Professor Krasner put it succinctly when he viewed the arrangement as a case of shared sovereignty in “watered down form.”⁹⁶

The Monitoring Committee exemplified the inherent weakness of the arrangement. The mandate of the Committee was to “verify,” “authorize,” and “oversee” expenditure of revenues, but the precise contours of this mandate were hard to identify.⁹⁷ For instance, it was unclear whether its monitoring function was limited to expenditure or extended to encompass revenue collection and management.⁹⁸ The Committee was also viewed as

⁹¹ Jason Schwartz, “*Whose Woods These Are I Think I Know*”: How Kyoto May Change Who Controls Biodiversity, 14 NYU ENVTL. L.J. 421, 440 n.89 (2006) (noting that “some notion of shared sovereignty over natural resources may be desirable for developing nations to help maximize utility.”).

⁹² Krasner, *supra* note 4, at 41.

⁹³ See Matthew Genasci & Sarah Pray, *Extracting Accountability: The Implications Of The Resource Curse For Csr Theory And Practice*, 11 YALE HUM. RTS. & DEV. L.J. 37, 43–45 (2008).

⁹⁴ The effect of transparency on development, however, is open to question. See Alexander Gillies & Antoine Heuty, *Does Transparency Work? The Challenges of Measurement and Effectiveness in Resource-Rich Countries*, YALE J. INT’L AFF. 25, 26 (Spring/Summer 2011) (“Despite the widespread support for transparency and advances made in numerous resource-rich countries, assessments suggest that these gains have not triggered major economic or developmental transformations or any significant reductions in corruption.”).

⁹⁵ Krasner, *Troubled Societies*, *supra* note 4, at 41 (noting that effectiveness is dependent on the sharing of a great deal of sovereignty).

⁹⁶ *Id.* at 34.

⁹⁷ GARY & KARL, *supra* note 68, at 67.

⁹⁸ *Id.* at 70.

not sufficiently strong, which would militate against the effective discharge of its duties.⁹⁹ Critics suggested that giving the Monitoring Committee subpoena powers would strengthen it and enhance its work.¹⁰⁰ The process of removing Monitoring Committee members was also easy, leaving enormous room for the government to conveniently remove even competent members who fell out of favor with the political authorities.¹⁰¹ A more meaningful exercise of shared sovereignty would have shared the powers of appointment and removal of Committee members between the government and the external institution. One commentator saw this imbalance of power and presciently predicted the project's imminent failure, reasoning that any workable scheme would have to provide for the appointment of members of the governing or supervisory board by an international organization.¹⁰²

The experiment also failed because the government lacked the political will to follow through with even the modest commitments that it made.¹⁰³ Even at the early stages, critics observed that there was insufficient evidence that the government would follow the RMP's stipulations.¹⁰⁴ They pointed to the fact that the Chadian government spent \$4.5 million out of its \$25 million dollar signing bonus on arms purchases.¹⁰⁵ The criticism was a bit overblown. While it would have been preferable for the government to spend resources on the health and education sectors or follow the RMP, arms purchases were not prohibited under the governing law nor did that law cover how bonuses should be spent. Yet, this early expenditure portended a series of unpalatable moves by the government.

The civil war in Chad that has been raging for years was also a major contributory factor to the project's failure.¹⁰⁶ The government had strong legitimate interests in directing available funds to repelling rebel move-

⁹⁹ Luc Lampriere et al., *Managing Oil Revenues in Chad: Legal Deficiencies and Institutional Weaknesses* (Oct. 13, 1999) (unpublished manuscript) (on file with Harvard Law School Human Rights Clinical Program).

¹⁰⁰ *Id.*

¹⁰¹ See GARY & KARL, *supra* note 68, at 72.

¹⁰² James C. Owens, *Government Failure in Sub-Saharan Africa: The International Community's Options*, 43 VA. J. INT'L L. 1003, 1047-49 (2003).

¹⁰³ Lampriere et al., *supra* note 99, at 2, 5 (stating that the success of the program would depend on political will).

¹⁰⁴ GARY & KARL, *supra* note 68, at 67, 69 ("But as good as the revenue management law sounds on paper, there are very significant weaknesses in the design and practical application of the law. This was made painfully clear in late 2000 when the government announced that it had spent the first \$4.5 million of a \$25 million signing bonus paid for by the oil consortium on military weapons rather than on any priority sectors.").

¹⁰⁵ *Id.* The Chadian government's action embarrassed the World Bank; see Dana L. Clark, *The World Bank and Human Rights: The Need for Greater Accountability*, 15 HARV. HUM. RTS. J. 205, 210 n.17 (2002).

¹⁰⁶ Lydia Polgreen, *World Bank Reaches Pact with Chad Over Use of Oil Profits*, N.Y. TIMES, July 15, 2006, at A8.

ments and restoring at least a modicum of political stability.¹⁰⁷ Finally, some commentators also linked the failure of the experiment to the obsolescing bargaining conundrum.¹⁰⁸ Matthew Winters and John Gould described the obsolescing bargain theory and its effect on the World Bank's efforts in Chad as follows:

Unlike other forms of capital, wealth that is in the ground cannot flee the grabbing hand of the state. However, extraction infrastructure requires heavy initial investment, and this in turn gives investors some leverage over the government at the point of entry. In Chad, the World Bank used this leverage to create specific policies and institutions. Yet this leverage is temporary. It erodes once the initial fixed capital investments are made. "Obsolescing bargain theory" predicts that foreign actors have the greatest leverage over a host country at the moment just before they begin to invest in the infrastructure necessary for extraction. As investment capital morphs into immobile infrastructure and, as domestic partners develop greater expertise and operational capacity, foreign-financed infrastructural investments can become hostages in host-country efforts to obtain an improved share of the final revenues. Bargaining power therefore shifts to the host country.¹⁰⁹

Although this shared-sovereignty experiment was unsuccessful, it should not sound the death knell for future collaboration by international organizations, energy companies, and weak states to develop natural resources in a way that brings development to the country.¹¹⁰ The prospects of shared sovereignty in petroleum development depend on how well the norm is designed to achieve the main objectives. One option is to introduce a strong version of shared sovereignty that is at the opposite end of the spectrum from the version employed in Chad.

¹⁰⁷ *Id.*

¹⁰⁸ Pegg, *supra* note 69, at 313; John A. Gould and Matthew S. Winters, *An Obsolescing Bargain in Chad: Shifts in Leverage Between the Government and the World Bank*, 9 BUS. & POL. 1, 18 (2007) ("As obsolescing bargaining theory predicts, the Consortium and the World Bank had invested their resources in the country, providing infrastructure and expertise, and now, with those costs sunk, Chad had a hostage to deploy in its efforts to redefine the bargain.").

¹⁰⁹ Matthew S. Winters & John A. Gould, *Betting on Oil: The World Bank's Attempt to Promote Accountability in Chad*, 17 GLOBAL GOVERNANCE 229, 233 (2011) (citation omitted). See also Michele Ruta & Anthony J. Venables, *International Trade in Natural Resources: Practice And Policy* 25-26 (World Trade Org., Econ. Research and Statistics Div., Staff Working Paper ERSD-2012-07, March 2012), available at http://www.wto.org/english/res_e/reser_e/ersd201207_e.pdf ("In order to bid for a licence, investors have to formulate a view about the long run return to the project. This is particularly true since capital expenditure will be sunk; unlike other forms of FDI, a mine or oil well cannot be dismantled and moved to another location in the event of the project failing . . . The combination of sunk costs and high and potentially variable tax rates creates a severe hold-up problem.").

¹¹⁰ Leibold, *supra* note 89, at 169-70 ("reiterating the importance of the Bank's potential role as an intermediary in resource exploitation projects in nondemocratic and underdeveloped countries in the continuing quest to solve the resource curse.").

IV. THE STRONG VERSION OF SHARED SOVEREIGNTY

Even before the failure of the Chad experiment, Professor Krasner was skeptical of its success, especially because it represented a weak version of shared sovereignty. In a series of articles, Krasner called for a strong version of shared sovereignty that encroached further into areas traditionally reserved to the state by allowing an international body to play a more robust role in domestic governance. The features of this version are discussed in greater detail below.

A. Features of the Strong Version

The strong version of shared sovereignty is built around the creation of an institution, such as a trust, under an agreement made by a national government and an international organization.¹¹¹ The trust will be domiciled in a foreign country where respect for the rule of law is paramount.¹¹² The resource revenues will be kept in an international escrow account controlled by the trust.¹¹³ The government will appoint half of the trustees, while the international organization will appoint the other half.¹¹⁴ All disbursements from the account must be authorized by a majority of the trustees.¹¹⁵ The trust agreement will stipulate broad areas of spending, but will also allow the government a choice of specific allocations.¹¹⁶ The trust will not disburse funds for non-conforming spending.¹¹⁷ The trust may be empowered to withdraw funds from the escrow account to implement programs if government delays or fails to act.¹¹⁸ The trustees will be subject to the laws of the advanced democracy where the trust is domiciled.¹¹⁹ The arrangement will also incorporate extra-territorial responsibility of home country of the participating multinational corporations to pass laws mandating the firms to pay revenues only into the escrow account.¹²⁰ The country in which the trust is domiciled will also pass similar legislation.¹²¹

B. Weaknesses of the Strong Version

The primary problem with this option is how difficult it is to sell in a

¹¹¹ See Krasner, *Troubled Societies*, *supra* note 4, at 41.

¹¹² See Krasner, *Shared Sovereignty*, *supra* note 56, at 1097.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.* at 1098.

¹²¹ *Id.*

negotiation. It is quite unlikely that any government would accept the level of encroachment into its internal affairs that the above arrangement invites.¹²² The suggested extraterritorial legislation may also be a tough sell to home countries of the foreign enterprises,¹²³ especially if it will place corporations headquartered in their jurisdictions at a competitive disadvantage vis-à-vis companies from countries without similar legislation.¹²⁴ We may also witness an increase in “paper re-incorporations” in jurisdictions that have no link to the corporations but are instead selected because they would not enforce such strict rules.¹²⁵ In essence, the familiar concept of flag of convenience that has been used for a long time in international shipping and trade would be applied to foreign investment.¹²⁶

This challenge is further compounded by the entry of China and India into what has been described as a new “scramble” for Africa’s natural resources.¹²⁷ With these countries eager to meet a significant portion of their energy needs with oil and gas deposits in Africa,¹²⁸ despots would be able

¹²² Stefaan Smis & Stephen S. Kingah, *How the Government of Chad Can Meet Development Pledges to its People Without Breaching its Obligations with the World Bank and Multinational Oil Companies*, 4 MANCHESTER J. INT’L ECON. L. 3, 39 (2007); Krasner, *Shared Sovereignty*, *supra* note 56, at 1095.

¹²³ See Edwin Mujih, *The Regulation of Multinational Companies Operating in Developing Countries: A Case Study of the Chad-Cameroon Pipeline Project*, 16 RADIC 83, 97 (2008) (stating that the home countries of multinationals may be unwilling or unable to exercise extraterritorial jurisdiction to regulate corporate activities to ensure that such corporations act in a socially responsible manner).

¹²⁴ Philip M. Nichols, *Regulating Transnational Bribery in Times of Globalization and Fragmentation*, 24 YALE J. INT’L L. 257, 288 (1999) (discussing the competitive disadvantage that American companies confront with regard to the Foreign Corrupt Practices Act); Russell J. Weintraub, *International Litigation and Forum Non Conveniens*, 29 TEX. INT’L L.J. 321, 352 (1994) (advancing the argument that by entertaining suits by foreigners who were injured abroad, U.S. courts were placing American companies at a competitive disadvantage worldwide).

¹²⁵ R. Tali Epstein, *Should the Fair Labor Standards Act Enjoy Extraterritorial Application? A Look at the Unique Case of Flags of Convenience*, 13 U. PA. J. INT’L BUS. L. 653, 663 (1993) (discussing motivation for registering or re-registering ships in certain countries and noting that the primary motivation is financial). See generally TRANSNATIONAL CORPORATIONS AND HUMAN RIGHTS (Olivier de Schutter ed., 2006) (discussing the problem in connection with human rights legislation).

¹²⁶ See generally Eric Powell, *Taming The Beast: How the International Legal Regime Creates and Contains Flags of Convenience*, 19 ANN. SURV. INT’L & COMP. L. 263 (2013); EMEKA DURUIGBO, MULTINATIONAL CORPORATIONS AND INTERNATIONAL LAW: ACCOUNTABILITY AND COMPLIANCE ISSUES IN THE PETROLEUM INDUSTRY (2003) (discussing flags of convenience shipping). This concern may be overblown in this instance—as opposed to extraterritorial human rights legislation—because in the case of shared sovereignty, the oil companies are assumed to be willing participants, and should have no problem complying with this particular condition if home and host governments agree to it.

¹²⁷ Chris Nwachukwu Okeke, *The Second Scramble for Africa’s Oil and Mineral Resources: Blessing or Curse?*, 42 INT’L LAW 193, 193 (2008); Sharp, *supra* note 69, at 385 (noting Chinese and Indian interest in African oil and gas).

¹²⁸ Richard J. Stoll, *Is Chinese Foreign Policy Targeting Sub-Saharan Africa?*, in THE RISE OF CHINA AND ITS ENERGY IMPLICATIONS 9 (James A. Baker Institute, Rice University, Dec. 2, 2011), available at <http://bakerinstitute.org/files/531/> (“Many observers feel that to feed its need for energy, China has particularly targeted Sub-Saharan Africa.” (citation omitted)).

to evade what would have been a major bargaining lever for extracting concessions from them—the non-availability of capital investment.¹²⁹ Indeed, oil and gas resources have enjoyed this advantage over the years, serving as attractive collateral to lenders and other investors that would otherwise be reluctant.¹³⁰ The World Bank acknowledged as much in its final assessment of the Chad–Cameroon pipeline project: “With the rapid increase in oil price after 2000, it is almost certain that the oil would have been developed and the pipeline constructed even without WBG involvement, albeit one or two years later.”¹³¹

Apart from the practical constraint that virtually no government would find the proposal for strong version of shared sovereignty attractive, there is also the theoretical or conceptual challenge that the proposal is a guise for imperialism or colonialism.¹³² This is a charge that is leveled at shared sovereignty generally, including the weak version deployed in Chad.¹³³ Nevertheless, the complaint becomes more persuasive as the sharing of sovereignty deepens. Proponents of the strong version would of course reject and refute the charge of imperialism. As a matter of fact, Professor Krasner sees shared sovereignty as quite attractive because it does not fit those unpalatable labels.¹³⁴ Krasner notes that shared sovereignty arrangements are not tarred by the “delegitimizing accusations of colonialism”¹³⁵ that trailed other instruments like the Mandate System under the League of Nations or the Trusteeship System under the United Nations.¹³⁶ For instance, there is no

¹²⁹ See Leibold, *supra* note 89, at 177 (stating that Chad’s President Deby threatened to turn over the project to Chinese interests if Exxon did not meet his demands to pay millions of dollars in royalties, bypassing the escrow account established under the Revenue Management Law). China has an interest in Sudanese oil, depending on Sudan for a decent percentage of its oil imports. This is believed to have exacerbated the dangerous, precarious situation in that country. See Elise Aiken, *Energy Justice: Achieving Stability in Oil-Producing African Nations*, 22 COLO. J. INT’L ENVTL. L. & POL’Y 293, 303 (2011); Okeke, *supra* note 127, at 198.

¹³⁰ See ERNEST E. SMITH ET AL., INTERNATIONAL PETROLEUM TRANSACTIONS 713 (3d ed., 2010) (noting that “oil-exporting nations pledged their petroleum resources as collateral and became saddled with huge debts to international institutions when oil prices later fell.”); Jędrzej George Frynas & Manuel Paulo, *A New Scramble for African Oil? Historical, Political, and Business Perspectives*, 106 AFR. AFF. 229, 240 (2007); GARY & KARL, *supra* note 68, at 33 (discussing oil-backed loans by Angola and its potential economic implications).

¹³¹ INDEP. EVALUATION GRP., REPORT NO. 50315: THE WORLD BANK GROUP PROGRAM OF SUPPORT FOR THE CHAD CAMEROON PETROLEUM DEVELOPMENT AND PIPELINE CONSTRUCTION 43 (Nov. 20, 2009) [hereinafter WORLD BANK ASSESSMENT].

¹³² See Stephen Ellis, *West Africa and Its Oil*, 102 AFR. AFF. 135, 137 (2003).

¹³³ See Smis & Kingah, *supra* note 122, at 31.

¹³⁴ Krasner, *Troubled Societies*, *supra* note 4, at 31.

¹³⁵ *Id.*

¹³⁶ For extensive and penetrating discussions of the “Mandate” and “Trusteeship” systems see generally Antony Anghie, *Nationalism, Development and the Postcolonial State: The Legacies of the League of Nations*, 41 TEX. INT’L L. J. 447 (2006); Antony Anghie, *Colonialism and the Birth of International Institutions: Sovereignty, Economy and the Mandate System of the League of Nations*, 34 N.Y.U. J. INT’L L. & POL. 513 (2002); Antony Anghie, “The Heart of My Home”: Colonialism, Envi-

foreign colonial power involved in the arrangement nor does any foreign country station its nationals in the “colonized country” to direct its political and economic affairs.

Shared sovereignty also appears more attractive than modern proposals for neo-trusteeships for failed States and contested territories,¹³⁷ which many developed and developing states will reject as a direct assault on their sovereignty.¹³⁸ Working out the details of such trusteeships may also prove difficult.¹³⁹ Moreover, supporters of shared sovereignty arrangements argue that states like Chad do not represent the will of the people, so their governments’ claims of sovereignty, let alone popular sovereignty, should be discounted.¹⁴⁰ Additionally, where the citizens of the country favor such intervention, government officials should not be encouraged to use sovereignty as a subterfuge to continue subjugating their people to unpopular practices.¹⁴¹ Indeed, there is evidence from early conceptions of sovereignty that it was instituted as a tool to help the people, and not as a cloak to perpetrate and perpetuate poor governance.¹⁴²

V. AN INTERMEDIATE VERSION OF SHARED SOVEREIGNTY

The weaknesses of both the strong and weak versions of shared sovereignty leave room for exploring an intermediate option. The intermediate option envisaged here will strengthen the responsibilities of the World Bank, national government, and private oil companies while increasing opportunities for citizens in oil-producing communities.¹⁴³ Its three compo-

ronmental Damage, and the Nauru Case, 34 HARV. INT’L L. J. 445 (1993).

¹³⁷ For various proposals on forms of modern trusteeship see generally RICHARD CAPLAN, *A NEW TRUSTEESHIP? THE INTERNATIONAL ADMINISTRATION OF WAR-TORN TERRITORIES* (2002); James D. Fearon and David D. Laitlin, *Neotrusteeship and the Problem of Weak States*, 28 INT’L SECURITY 5 (2004); Martin Indyk, *A Trusteeship for Palestine*, 82 FOREIGN. AFF. 51 (May/June 2003); Gerald B. Helman and Steven R. Ratner, *Saving Failed States*, 89 FOREIGN. POL’Y 3 (Winter 1993).

¹³⁸ Krasner, *Troubled Societies*, *supra* note 4, at 24–25.

¹³⁹ *Id.* at 23.

¹⁴⁰ Leibold, *supra* note 89, at 199.

¹⁴¹ *Id.*

¹⁴² Mortimer Sellers, *Republican Principles in International Law*, 11 CONN. J. INT’L L. 403, 410 (1996).

¹⁴³ Peter Rosenblum has made the following observation regarding the Chad–Cameroon project:

At the core is a challenge to the sovereignty of undemocratic rulers Previously, no one would have interfered in the relations between an oil company and an African state. He who ruled the state controlled its resources There is still hope of a delicate balance, where the World Bank strengthens loan conditions that reinforce the democratic process in Chad and enable the Chadian people to better determine how their resources should be spent. That would still threaten the sovereignty of leaders, but would also empower the people.

Peter Rosenblum, *Pipeline Politics in Chad*, 99 CURRENT HIST. 195, 195–99 (2000). This observation

nents of stronger sovereign-international actor commitment, corporate immersion, and community participation are discussed below.

A. Stronger Sovereign-International Actor Commitment

While a strong version of shared sovereignty does not seem feasible, it is also not possible to continue with the weak version and expect remarkable development outcomes. Accordingly, an effective arrangement requires some level of tightening to avoid the loopholes that bedeviled the Chad arrangement with the World Bank. The following suggestion is on point:

For starters, the next RMP should give the Bank more enforcement controls over the portion of the host country's project cash flows dedicated to development. This is an area that warrants careful legal study. In the 2006 showdown Chad was able to access enough funds to avoid a financial crisis while it waited out its conflicts with the Bank. . . . In the future, with careful legal crafting, the Bank and the host government may agree to characterize the use of offshore escrow accounts as a "commercial matter," the handling of which governments can agree to via contract. This may prevent the host government from later asserting its sovereign powers to force funds repatriation and, at a minimum channel any dispute to an international dispute resolution forum. If the government knows it cannot quickly force a repatriation of offshore funds, its incentives to breach a contract are greatly reduced. Similarly, if a host government knows it does not have the funding to withstand a long dispute, the likelihood of the government attempting to override contract terms diminishes.¹⁴⁴

Building and strengthening domestic institutions before the revenue from oil starts flowing should also be an important component of this arrangement.¹⁴⁵ One country that has clearly escaped the resource curse is Norway, and its success has been attributed to the fact that it had strong institutions capable of withstanding the influx of oil revenues prior to the windfall.¹⁴⁶ Scholars believe that massive oil revenues weaken existing institutions or impede their emergence.¹⁴⁷ An effective state should have insti-

can be interpreted as favoring an intermediate version of shared sovereignty.

¹⁴⁴ Arbogast, *supra* note 70, at 294.

¹⁴⁵ *See id.* at 295; *see also* Leibold, *supra* note 89, at 198 ("[T]he Bank should have used its initial leverage in the project to expand its control over the oil revenue until Chad's political institutions matured enough to absorb oil revenue without undue risk of falling into a rentier economy. These policies would have the cumulative effect of promoting institutional and democratic growth within Chad. This growth would have created a crucial counterweight to the perverse political incentives created by oil revenue.").

¹⁴⁶ TERRY LYNN KARL, *THE PARADOX OF PLENTY: OIL BOOMS AND PETRO-STATES* 216 (1997).

¹⁴⁷ Patrick J. Keenan, *Curse or Cure? China, Africa, and the Effects of Unconditioned Wealth*, 27

tutions for collecting and distributing tax revenues from the citizens, which would also gather valuable personal information for meaningful national planning.¹⁴⁸

B. Corporate Immersion

One salient advantage of China's strong interest in African energy is the possibility of entrenching the approach of attaching oil and gas licensing to corresponding investment in domestic infrastructure.¹⁴⁹ This investment could take the form of railroads, airports, refineries, educational institutions, or health facilities. This feature should be required in every shared sovereignty arrangement. Where there are extenuating circumstances, such as political optics or inadequate personnel, that justify abandoning direct corporate involvement, private companies can still make their impact felt through

BERKELEY J. INT'L L. 84, 105 (2009) ("According to a political economic approach, there is increasing evidence that resource wealth can contribute to a weakening of democratic institutions, an increase in official corruption, and a deterioration in human rights practices."). See generally Nathan Jensen & Leonard Wantchekon, *Resource Wealth and Political Regimes in Africa*, 37 COMP. POL. STUD. 816 (2004); Leonard Wantchekon, *Why do Resource Dependent Countries Have Authoritarian Governments?*, 5 J. AFR. FIN. & ECON. DEV. 57 (2002). But see Patrick Wieland, *Going Beyond Panaceas: Escaping Mining Conflicts in Resource-Rich Countries Through Middle-Ground Policies*, 20 N.Y.U. ENVTL. L.J. 199, 222–23 (2013) ("Recently the resource curse literature has been subject to criticism. While it is true that possession of oil, natural gas, and minerals does not necessarily confer economic success, it does not follow that natural wealth must lead to inferior economic or political development. The resource curse is not a categorical rule that resource-rich countries are doomed to failure. Natural endowment should be viewed as a double-edged sword with both benefits and dangers, leading to success in some cases and failure in others." (citations omitted)); see also Stephen Haber & Victor Menaldo, *Do Natural Resources Fuel Authoritarianism? A Reappraisal of the Resource Curse*, 105 AM. POL. SCI. REV. 1 (2011) (stating that fiscal dependence on oil, gas, and minerals does not necessarily lead to authoritarian political regimes in the long run).

¹⁴⁸ Terry Lynn Karl, *Ensuring Fairness: The Case for a Transparent Fiscal Social Contract*, in ESCAPING THE RESOURCE CURSE 256, 278 (Macartan Humphreys, Jeffrey D. Sachs & Joseph E. Stiglitz eds., 2007).

¹⁴⁹ See Alexis Habiaryemye, *CHINAFRIQUE, AFRICOM, and African Natural Resources: A Modern Scramble for Africa?*, 12 WHITEHEAD J. DIP. & INT. REL. 79, 89 (2011) ("The Chinese strategy of swapping large infrastructure projects for access to mineral resources also created a completely new feature in the resource market. By building much needed infrastructure in Africa, China has the advantage of acquiring African resources in exchange for undertaking development projects on African soil instead of sending oil revenues to foreign bank accounts. For example, in exchange for Angolan oil, China agreed to finance huge infrastructure projects that include the building of 215,000 housing units, restoring 1,000 miles of highway and 1,665 miles of railroad, plus the construction of a new international airport in the capital city of Luanda. Reconstruction in war-battered Angola was accelerated by three oil-backed loans from Beijing, under which Chinese companies have built roads, railways, hospitals, schools, and water systems. Nigeria took out similar loans to finance projects that use gas to generate electricity. In May 2006, the China State Construction Engineering Company signed an agreement with the Nigerian National Petroleum Corporation to invest \$23 billion toward the building of oil refineries and a petrochemical plant in Nigeria. Chinese teams are also building a hydropower project in the Republic of Congo, to be repaid in oil, and another in Ghana, to be repaid in cocoa beans.").

indirect participation in development projects. They can make their staff available to government agencies and non-governmental organizations executing meaningful projects in local areas.¹⁵⁰ This part of the arrangement may be bolstered by the World Bank's leverage through its Multilateral Investment Guarantee Agency (MIGA) that insures investment of private corporations in risky political environments.¹⁵¹ The Bank could condition such political-risk insurance on acceptance of this immersion mandate by multinational corporations that enjoy MIGA's investment protection.¹⁵² Besides, the Chad project has demonstrated that the involvement of the World Bank could be very beneficial to the energy companies, not only by providing legitimacy but also by providing insulation that enhances profit-realization.¹⁵³ Exxon and other oil companies essentially conditioned their investment on the involvement of the World Bank, realizing the importance of such collaboration in staving off criticisms from civil society groups and providing

¹⁵⁰ See Arbogast, *supra* note 70, at 295 ("It is understandable that private companies don't want to take on responsibilities more properly within the purview of the government and the Bank. However, there are ways to help the RMP succeed without taking over responsibility for its target projects. Companies like Exxon are experienced in "lending" technical staff to joint ventures. Occasionally they even lend staff to government or non-profit organizations. Such staff makes major contributions to implementing joint projects. This occurs without the private company taking over responsibility for the venture. A willingness to lend a hand in this fashion could give timely reinforcement to the host country's development efforts; this in turn may contribute to a functional RMP that secures stable relations with the host government and the native population.").

¹⁵¹ MIGA was created by the Convention Establishing the Multilateral Investment Guarantee Agency, opened for signature October 11, 1985, and entered into force April 12, 1988. See Convention Establishing the Multilateral Investment Guaranty Agency (MIGA), Apr. 12, 1988, 24 I.L.M. 1598, available at www.miga.org/documents/miga_convention_november_2010.pdf; see also Malcolm D. Rowat, *Multilateral Approaches to Improving the Investment Climate of Developing Countries: The Cases of ICSID and MIGA*, 33 HARV. INT'L L.J. 103, 105 & n.9, 126 (1992).

¹⁵² For additional discussion of MIGA, including history, scope of activities, and modus operandi see *Overview*, MIGA, <http://www.miga.org/whoweare/index.cfm> (last visited Feb. 5, 2015); Sergio Puig, *Emergence & Dynamism in International Organizations: ICSID, Investor-State Arbitration & International Investment Law*, 44 GEO. J. INT'L L. 531, 560 (2013) ("MIGA was conceived as a financially 'sufficient' institution providing risk insurance against losses caused by non-commercial risks such as expropriation, war and civil disturbance to complement the private sector arms of the [World Bank Group] to incentivize long-term commitment of resources. MIGA offers coverage and prices its guarantee premiums based on a calculation of both country and project risk." (citation omitted)); see also Valentina Okaru-Bisant, *Overcoming Challenges in The Multilateral Investment Guarantee Agency's Risk Insurance Coverage to Private Water Investors: Corruption and Consumer Risks*, 57 S.D. L. REV. 277, 280 (2012); Ibrahim F.I. Shihata, *The Settlement of Disputes Regarding Foreign Investment: The Role of the World Bank, with Particular Reference to ICSID and MIGA*, 1 AM. U. INT'L L. REV. 97, 108 (1986) ("MIGA's objective will be to encourage the flow of investments for productive purposes among its member countries, and in particular to developing member countries. To fulfill its objective, MIGA will guarantee and reinsure eligible investments against losses resulting from non-commercial risk. Such insurance activities, however, only represent one means of achieving MIGA's objective, and the Agency will carry out a broad range of promotional activities as well." (citation omitted)).

¹⁵³ See Arbogast, *supra* note 70, at 290-92.

protection from political risks.¹⁵⁴

Corporate immersion may even go beyond participation in development projects to involvement in environmental cleanup and voluntary reduction of natural gas flaring.¹⁵⁵ In the Chad project, oil companies were able to contractually shift virtually every responsibility for environmental damage to the government of Chad.¹⁵⁶ Considering that many developing countries lack the technical expertise, financial resources, and political disposition to handle environmental matters, this is an unfortunate shift that almost assures abdication and neglect.¹⁵⁷ Host communities are doubly affected; not only from an environmental perspective but also from an economic standpoint because their economy may be built around fishing, farming, and other activities that are virtually incompatible with polluted rivers and contaminated soil.¹⁵⁸

Policy makers should start giving thought to a form of compulsory insurance policy that is undertaken and maintained by companies engaged in oil exploration and production that addresses liability claims by affected persons and communities.¹⁵⁹ A program of that nature exists for oil and shipping companies engaged in the transportation of petroleum across the world. Under the Community Risk Insurance Program (CRIP) envisaged here, cleanup responsibilities and compensation for property damage would be financed out of the policy and paid by the insurance company like any other form of insurance.¹⁶⁰ The advantages include promptness in settling

¹⁵⁴ See Scott Pegg, *Can Policy Intervention Beat the Resource Curse? Evidence from the Chad-Cameroon Pipeline Project*, 105 AFR. AFF. 1, 8 (2005).

¹⁵⁵ Ashley Palomaki, *Flames Away: Why Corporate Social Responsibility is Necessary to Stop Excess Natural Gas Flaring in Nigeria*, 24 COLO. NAT. RESOURCES, ENERGY & ENVTL. L. REV. 499, 524–27 (2013) (arguing that multinational corporations should embark on voluntary initiatives that minimize harmful flaring of natural gas in places where regulatory oversight is weak or non-existent, in view of the negative economic and environmental consequences).

¹⁵⁶ Edwin Mujih, *The Regulation of Multinational Companies Operating in Developing Countries: A Case Study of the Chad-Cameroon Pipeline Project*, 16 AFR. J. INT'L & COMP. L. 83, 83 (2008).

¹⁵⁷ Emeka Duruigbo, *Multinational Corporations and Compliance with International Regulations Relating to the Petroleum Industry*, 7 ANN. SURV. INT'L & COMP. L. 101, 139 (2001) (discussing the low level of environmental expertise in many developing countries).

¹⁵⁸ Lisa Stevens, *The Illusion of Sustainable Development: How Nigeria's Environmental Laws Are Failing the Niger Delta*, 36 VT. L. REV. 387, 392–93 (2011) (discussing the negative effects of oil spills and gas flaring on agriculture).

¹⁵⁹ See Muhammad Masum Billah, *The Role of Insurance in Providing Adequate Compensation and in Reducing Pollution Incidents: The Case of the International Oil Pollution Liability Regime*, 29 PACE ENVTL. L. REV. 42, 57 (2011) (“The object of ensuring adequate compensation to oil pollution victims is further strengthened by the provision of direct action against the insurer of a liable ship-owner. This is a major departure from traditional insurance policy under which a third party may not bring an action against the insurer because insurance is a contract between the insurer and the insured ship-owner. Therefore, there is no privity of contract between the insurer and a third party victim. This is especially the case in indemnity insurance as opposed to mere liability insurance.” (citation omitted)).

¹⁶⁰ See generally Kenneth S. Abraham, *Catastrophic Oil Spills and the Problem of Insurance*, 64 VAND. L. REV. 1769 (2011).

claims, internalization of externalities by those generating the harm, and consequently the prevention of such harm from occurring or recurring.¹⁶¹

Another advantage is that insurance companies will serve as monitors of corporate operations, pushing oil companies toward proper environmental behavior since the insurance companies are interested in minimizing the payouts they make under any insurance policy.¹⁶² As commercial monitors, they can be catalysts of desired change. Insurance companies will have an incentive to act as effective monitors because their actions have financial implications for their shareholders as well as themselves.¹⁶³ This monitoring role is likely to assume greater effectiveness when the insurance program is coupled with a direct-action component that enables third parties to bring actions directly against insurance companies under the policy.¹⁶⁴

¹⁶¹ For a helpful discussion of externalities see RICHARD A POSNER, *ECONOMIC ANALYSIS OF LAW* 90 (8th ed. 2011) (defining externalities as costs or benefits that are external to an actor's decision-making process); JAMES SALZMAN & BARTON H. THOMPSON, JR., *ENVIRONMENTAL LAW AND POLICY* 25 (4th ed. 2014) (stating that "[o]ne of the key goals of environmental law is . . . to bring environmental externalities into the marketplace."); Russel Lawrence Barsh, *Coast Salish Property Law: An Alternative Paradigm for Environmental Relationships*, 14 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 1375, 1376 (2008) (stating that "[t]he classic example of an externality has been the impact on the quality of the environment"); see generally R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

¹⁶² Tom Baker & Rick Swedloff, *Regulation by Liability Insurance: From Auto to Lawyers Professional Liability*, 60 UCLA L. REV. 1412, 1415 (2013) ("Once insurers accept the financial responsibility for civil liability, they not only have an incentive to manage the defense and settlement of liability claims, but they also have an incentive to reduce the likelihood that those claims arise in the first place. This should make sense. Just as the fear of liability is supposed to incentivize potential wrongdoers to take appropriate precautions, fear of liability should incentivize an insurer to encourage its insured to take precautions. Once an insurer underwrites a risk, the insurer has every reason to try to reduce its payouts by encouraging insureds to prevent the potential loss from materializing." (citation omitted)). The idea here is that when people have skin in the game, it tends to affect their behavior. See The Monitor, *Bank Regulation*, 32:10 BANKING & FIN. SERVICES POL'Y REP. 20, 20 (Oct. 2013) (noting that in the bank regulatory context, having skin in the game aligns the economic interest of sponsors of securitization transactions with those of investors in asset-backed securities, with the potential effect that securitizers would be more careful about the securities they helped place in the market, as they also stand to lose their own investment if things go wrong).

¹⁶³ This is in contrast to non-commercial monitors. While the latter category of monitors may still be effective in carrying out their responsibilities, the fact that the outcome of their task does not involve a direct financial cost or impact on their bottom line could be a disadvantage vis-à-vis commercial monitors. Besides, business groups tend to favor those non-commercial monitors that are not truly independent unless an independent monitor is imposed on them. See, e.g., F. Joseph Warin, Michael S. Diamant & Veronica S. Root, *Somebody's Watching Me: FCPA Monitorships and How They Can Work Better*, 13 U. PA. J. BUS. L. 321 (2011) (discussing the use of independent monitors under the Foreign Corrupt Practices Act as a means of ensuring corporate compliance with the stipulations of the law).

¹⁶⁴ See Billah, *supra* note 159, at 74–75.

[D]irect action against insurers makes the probability of actual liability even higher than would be the case without the provision of direct action even when insurance is compulsory. There are two explanations for this: first, despite compulsory insurance, an insured may be bankrupt and the insurer could simultaneously deny the liability judgment on grounds of lack of privity of contract between the insurer and the liability claimant; second, the insurer may

Insurance could also have a cascading effect that goes beyond influencing the behavior of one set of actors. Insurance arrangements not only affect the behavior of insurance companies and the insured persons paying the premiums; the resulting change in action could spill over to those who are only indirectly involved in terms of financial responsibility, but who still generate harms. This chain of actions and reactions would lead to better outcomes for potential victims. For instance, in the oil shipping area, where some of the compensation funds are funded by the oil industry and not by ship owners, oil companies have sought ways to protect their own interests by improving the behavior of the shipping companies.¹⁶⁵ One scholar describes the change:

[E]ven though the second and third tier of insurance through the [Compensation Funds] are mainly designed for adequate compensation and are funded by the oil industry and not by ship-owners, these arrangements indirectly put pressure on ship-owners to be more diligent in the operation of their ships. This is because oil companies, who are the main contributors to both funds, are also the main, if not sole, customers of the oil-carrying ships (tankers). Given that the operation of these ships has a direct effect on the ultimate contributions that oil companies make to the Funds, oil companies as a group are naturally opposed to and united against substandard shipping. This opposition translates into various initiatives to motivate ship-owners toward optimal care. One such initiative is a database maintained by the oil industry on substandard ships, known as the Ship Inspection Report (SIRE) Program. The database contains inspection reports on

plead some policy defenses or exceptions (e.g., non-payment of premium) against the insured and consequently against the claimant. The provisions of direct action against insurers under the oil pollution liability regime eliminated both these possibilities.

As insurers will be exposed to more frequent payouts to the victims of oil pollution in cases of negligence by the insured ship-owner, insurers will charge higher premiums on negligent ship-owners. Increased premiums will in turn induce the insured to reduce their insurer's exposure to oil pollution claims. The only way the insured can do this is through improving their standard of care so that the number of oil pollution incidents decreases from the existing level. The dramatic reduction in oil pollution accidents may be at least partly due to this indirect incentive towards care, emanating from the provision of direct action in the oil pollution liability regime.

The direct action provision also motivates insurers to be extra vigilant against the negligent conducts of their insured ship-owners. Insurers have various tools such as premium rate variance, deductibles, policy limit, and even outright denial of coverage to check the carelessness of insured ship-owners. Since insurers use these tools even when there is no provision for direct action against them, they now have an added incentive to use them more frequently. The end result is increased pressure on the owners of substandard ships to take optimal care.

Id. (citation omitted).

¹⁶⁵ See Billah, *supra* note 159, at 75–76.

many oil-carrying ships.¹⁶⁶

In the case of human rights and environmental abuse, a regime of compulsory insurance could galvanize insurers and the insured to seek behavior modification among government security agents and public policy makers that leads to the introduction and implementation of the right policies and initiatives that are environmentally rewarding and human rights enhancing. In sum, insurance represents a market-based solution that has the potential to alter corporate behavior while avoiding regulatory intrusiveness for the corporations and bureaucratic bottlenecks for the communities.¹⁶⁷ The third component of the intermediate form of shared sovereignty is community participation, discussed below.

C. Community Participation

The primary motivation for the involvement of the World Bank in the Chad–Cameroon pipeline project was the alleviation of poverty or promotion of socio-economic development.¹⁶⁸ The achievement of this objective is not ineluctably intertwined with concentration of the wealth in the government and subsequent distribution to the population through public spending. Economic development may even arrive faster through a system of more direct distribution of mineral revenues to the population.¹⁶⁹ Wealth in the hands of the people could spur commercial ventures that create jobs and facilitate the emergence of a veritable and vibrant middle class. It will also replace displaced local sources of livelihood such as farming, which in the case of Chad and other oil-producing countries, become casualties of petroleum production.¹⁷⁰

This intermediate version of shared sovereignty should therefore include a level of “local sovereignty” that involves equity participation of host communities in energy infrastructure projects. Thus, communities, through appropriate investment vehicles, should become partners in joint ventures that are currently the exclusive preserve of governments and ener-

¹⁶⁶ *Id.*

¹⁶⁷ See Haitao Yin et al., *Risk-Based Pricing and Risk-Reducing Effort: Does the Private Insurance Market Reduce Environmental Accidents?*, 54 J.L. & ECON. 325, 326 (2011) (stating that private insurance contracts can employ a system that rewards insured firms with premium discounts if they undertake risk-reducing activities).

¹⁶⁸ Duruigbo, *World Bank*, *supra* note 33, at 39–40.

¹⁶⁹ See Leibold, *supra* note 89, at 198 n.281 (“[I]f oil revenue went directly to the people of Chad, it could transform Chad’s economy to a ‘non-oil economy’ (one in which the government is accountable directly to the people) and in this way offset the inertia of the resource curse.”).

¹⁷⁰ *Id.*; see also Karol Boudreaux, *From Curse to Cure*, TCS DAILY (Oct. 19, 2004, 12:00 AM), http://www.ideasinactiontv.com/tcs_daily/2004/10/from-curse-to-cure.html (reasoning that oil revenue dividends distributed to Nigerian citizens “could provide an engine for human development and for entrepreneurial activity in Nigeria”).

gy companies.¹⁷¹ Local equity participation could be accomplished through the adaptation of a model used in Texas that has proven effective for almost a century. Under the Texas Relinquishment Act, the government shares control of oil and gas with the owner of the land overlying the resources.¹⁷² This model enables the landowner to share in the benefits of the resources located on his land instead of being displaced and given a paltry, often one-time, compensation package.¹⁷³ The expectation is that this approach will obviate disruptive conflicts with landowners, weaken corruptive and corrosive government control, and unleash economic engines through capital formation.

Local equity participation will also help to ameliorate the obsolescing bargain problem discussed above. Recall that the obsolescing bargain occurs because “once the [drilling or mining infrastructure] investment is in place, the advantage shifts through time from the investment supplier and the petroleum companies, to the investment recipient and host countries.”¹⁷⁴ This would empower local players, which could prove to be a useful antidote to the undue influence of the host national governments. First, if the percentage accruable to the government is shared with host communities, the government would be defending a smaller pie and thus would be constrained to weigh its options before embarking on a major battle with the investors. Second, because other players—in this case, communities—have a direct stake in the venture, the government’s unilateral actions to renegotiate the contracts as a way of expressing its leverage would pit it against local, and not just foreign, interests.¹⁷⁵ Communities would be reluctant to give up gains once they start enjoying them.¹⁷⁶ Third, if the distribution of

¹⁷¹ See Emeka Duruigbo, *Community Equity Participation in African Petroleum Ventures: Path to Economic Growth?*, 35 N.C. CENT. L. REV. 111 (2013) [hereinafter Duruigbo, *Equity Participation*] (discussing the traditional approach to energy joint ventures by corporations and governments and arguing for a more inclusive approach that includes community-based companies).

¹⁷² For discussions developing the idea of the Texas Relinquishment Act model as a form of equity participation and its adaptation for adoption in developing countries see Emeka Duruigbo, *Oil, Turmoil and a Texas Export for Energy Security*, 37 T. MARSHALL L. REV. 231 (2012) [hereinafter Duruigbo, *Texas Export*]; Emeka Duruigbo, *Realizing the People’s Right to Natural Resources*, 12 WHITEHEAD J. DIPL. & INT’L. REL. 111, 118–20 (2011).

¹⁷³ Duruigbo, *Texas Export*, *supra* note 172, at 245–48.

¹⁷⁴ Loïc Conan, *The Trans-Saharan Gas Pipeline: An Overview of the Threats to its Success and the Means to Prevent its Failure*, 31 UTAH ENVTL. L. REV. 205, 225 (2011).

¹⁷⁵ See Humphrey Onyeukwu, *Obsolescence Bargaining in Transit Pipelines: What Options Exist for Securing Resource Supply* 10 (2008) (unpublished manuscript), available at http://works.bepress.com/humphrey_onyeukwu/2/ (noting that the investment recipient’s reaction usually takes the form of renegotiated contracts, higher taxes, expropriation, or seizure of the income stream of the investment-supplying firm).

¹⁷⁶ Critics deploy similar arguments against other social programs such as Social Security, Medicare, and the Affordable Care Act, claiming that once people start receiving benefits they are unlikely to permit any real changes to programs. See Cynthia Tucker, *Conservatives Oppose Obamacare Because It May Succeed*, YAHOO NEWS (Sept. 28, 2013, 1:00 AM), <http://news.yahoo.com/conservatives-oppose->

gains to communities takes place for a few years before the government seeks to revise the contract, the communities would arguably be in a stronger financial position to challenge the national government and ensure that terms favorable to them remain in place.¹⁷⁷ It is also likely that communities would secure more favorable terms against the government when foreign intermediaries like oil companies are in charge of distributing contract revenue,¹⁷⁸ so communities would probably feel more secure with an initial contract that involves those intermediaries instead of a contract that is concluded after the intermediaries are kicking them out.¹⁷⁹

Africa's singular success story in escaping the resource curse is Botswana.¹⁸⁰ Through judicious and accountable management of public resources and wise investment in education and healthcare, "Botswana has seen infant mortality drop, its people grow healthier, better educated, living longer, and the number of poor falling."¹⁸¹ Botswana's economic and politi-

obamacare-because-may-succeed-050013503.html (stating that political opponents of President Obama's healthcare law are driven by the concern that if the law succeeds the beneficiaries would like and depend on it, making repeal difficult if not infeasible, and thus garnering political advantage to Mr. Obama's party for generations to come); Kevin Drum, *Republicans Nearing a Dead End on Obamacare*, MOTHER JONES (Dec. 3, 2013), <http://www.motherjones.com/kevin-drum/2013/12/republicans-nearing-dead-end-obamacare> ("It's funny that Republicans don't believe their own propaganda. For years, they've been hellbent on repealing Obamacare because they knew that once it was fully implemented in 2014, it would have millions of beneficiaries who would fight to keep it. Once the benefits of a new program start flowing, it's very, very hard to turn them off.").

¹⁷⁷ Of course, there is the possibility that community members would misuse the money they received from the project, but it is hard to argue that they would be better off without any money, which is likely to be the case without equity participation or direct revenue distribution. See Duruigbo, *Permanent Sovereignty*, *supra* note 30, at 77 (discussing the negative experience of a community in Alberta, Canada with distribution of resource revenues to community members).

¹⁷⁸ See WORLD BANK ASSESSMENT, *supra* note 131, at 43 ("If [oil were developed without World Bank involvement], the environmental and social provisions and the external monitoring arrangements would not have been as thorough as those under the program. Also, it is probable that the revenue allocations to the 'priority sectors' would have been lower, and virtually certain that the support institutions such as the Collège and the advisory group would not have been put in place.").

¹⁷⁹ See Macartan Humphreys, *Natural Resources, Conflict, and Conflict Resolution: Uncovering the Mechanisms*, 49 J. CONF. RES. 508, 512 & n.13 (2005) (discussing skepticism of local chiefs in the Doba oil-producing region of Chad about oil revenues being actually spent in their region despite formal provisions to that effect in the revenue management plan and their resulting petition to oil corporations for direct compensation).

¹⁸⁰ Paul Collier, *Laws and Codes for the Resource Curse*, 11 YALE HUM. RTS. & DEV. L.J. 9, 11–12 (2008) (reasoning that Botswana's rapid growth since the discovery of diamonds presents a counter example that punctures a hole into any argument about the inevitability of the resource curse); *cf.* Amelia Cook & Jeremy Sarkin, *Is Botswana the Miracle of Africa? Democracy, the Rule of Law, and Human Rights Versus Economic Development*, 19 TRANSNAT'L L. & CONTEMP. PROBS. 453, 455 (2010) ("Achievements such as Botswana's noteworthy economic growth, political stability, and regular elections often eclipse issues like human rights, which remain on the periphery of most analyses of Botswana.").

¹⁸¹ Keith Bryer, *Africa Should Heed Botswana's Simple Success Recipe*, IOL (July 24, 2014, 8:00 AM), <http://www.iol.co.za/business/features/africa-should-heed-botswana-s-simple-success-recipe-1.1724670>.

cal successes owe in part to the existence of strong local institutions that are important components of the governing apparatus.¹⁸² These local institutions facilitated participation of the people in decision-making and served as a constraint on the political leaders during the pre-colonial period.¹⁸³ Through the local assembly, or “kgotla,” commoners were able to proffer suggestions and criticize chiefs.¹⁸⁴ In many other African countries, similar institutions were destroyed or enfeebled by the colonial administrators.¹⁸⁵ A shared sovereignty arrangement should incorporate the development of strong local institutions through which the citizens in host communities participate in the economic and political life of the country. While this may be accomplished through existing traditional institutions such as local chiefs, there should be no hesitation in jettisoning them in favor of brand new institutions if the existing ones are enmeshed in corruption and incompetence.¹⁸⁶ These community institutions, in the form of community-based corporations and local trust funds, could be the vehicle for implementing the equity participation component of the intermediate option.¹⁸⁷

While the advantages of the intermediate option are evident, there is also some room for concern. The following Part addresses potential objections to the proposal.

VI. RESPONDING TO POTENTIAL CRITICISMS OR OBJECTIONS

The intermediate version of shared sovereignty provides an opportunity for national governments and international institutions to play more suit-

¹⁸² Nancy Birdsall & Arvind Subramanian, *Saving Iraq From Its Oil*, FOREIGN AFF., July/Aug. 2004, at 83. For a discussion of other factors that explain Botswana’s exceptional performance see JOSEPH STIGLITZ, GLOBALIZATION AND ITS DISCONTENTS (2002), discussing the interaction of a wise political leadership and assistance from experts from international institutions such as the World Bank and the Ford Foundation; Andrés Marroquín Gramajo, *Where Did the Miracle Come From? Exploring Institutional Formation in Botswana*, 17 BOTS. J. AFR. STUD. 45 (2006), exploring the role of foreign aid, foreign human capital, ethnic homogeneity, relatively small population, and effective enforcement of government’s development plans; and Yoshio Wada & Ken Togo, *Development Assistance and Economic Growth: A Case Study of Botswana*, MUSASHI UNIVERSITY (Feb. 28, 2008), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1099080, (discussing the effectiveness of development assistance).

¹⁸³ Daron Acemoglu, Simon Johnson & James Robinson, *An African Success Story: Botswana*, in IN SEARCH OF PROSPERITY: ANALYTICAL NARRATIVES ON ECONOMIC GROWTH 80 (Dani Rodrik ed., 2003).

¹⁸⁴ Scott Beaulier & J. Robert Subrick, *The Political Foundations of Development: The Case of Botswana*, 17 CONST. POL. ECON. 103 (2006).

¹⁸⁵ Birdsall & Subramanian, *supra* note 182, at 83.

¹⁸⁶ See GARRY LEECH, CRUDE INTERVENTIONS: THE UNITED STATES, OIL AND THE NEW WORLD (DIS)ORDER 102 (2006) (discussing local corruption among the traditional chiefs and corporate representatives in Nigeria).

¹⁸⁷ For further exploration of this idea, see Duruigbo, *Equity Participation*, *supra* note 171.

able roles in achieving national development. It also fashions a more robust role for corporate actors and promotes local participation by community representatives. With this form of synergy, success seems more realistic. Nevertheless, the intermediate option is not a silver bullet.

One major drawback of the intermediate proposal is that it does not completely escape some of the problems with other versions. In particular, one should not be overly optimistic of the possibility of its adoption by the countries that need it. Sovereignty is a concept jealously guarded by political leaders who will not want to give up even a modicum of their sovereignty without a bruising battle. While this concern has merit, it is too early to give up. Fortuitous circumstances may cause countries to adopt ideas, policies, and programs deemed unthinkable even a little while before.¹⁸⁸ It is not outside the realm of possibility that in some countries ambitious politicians who can incorporate shared sovereignty contracts into their political platforms will emerge. They may be able to secure the support of those voters who, tired of the status quo, are looking for improved governance that can arise from the cooperation of domestic officials and international actors.¹⁸⁹

Corporate immersion may also elicit some objection from corporations and critics who believe that public and private functions should be kept separate.¹⁹⁰ These critics argue that traditional obligations of government should not be transferred to business entities that are better suited to delivering value for their shareholders.¹⁹¹ Efforts by corporations to assist with development projects may draw the ire of the government, especially if it highlights the government's incompetence and corruption in executing its own projects. The resulting schism could jeopardize the entire shared sovereignty arrangement, leaving all parties worse off. Nevertheless, the issue can be delicately handled in a way that does not ruffle feathers unnecessarily while delivering progress to host communities.¹⁹²

¹⁸⁸ See DANIEL YERGIN, *THE PRIZE: THE EPIC QUEST FOR OIL, MONEY AND POWER* (1991) (discussing how oil-producing states in the United States accepted far-reaching reforms that they would have rejected outright a little while earlier, but instead softened their opposition because of existential threats faced by the petroleum industry in the absence of tough federal regulation).

¹⁸⁹ See, e.g., Leibold, *supra* note 89, at 199 (reporting on interviews with some Chadian citizens who favor involvement of external institutions such as the World Bank to improve domestic governance); see also Krasner, *Troubled Societies*, *supra* note 4, at 39.

¹⁹⁰ See generally J. Nna Emeka 'Wokoro, *Beyond Petroleum Production to Community Development: International Oil Companies as Proxy Governments*, 5 *TEX. J. OIL GAS & ENERGY L.* 323 (2010).

¹⁹¹ See *id.* at 344 ("While companies operating in harsh regions, such as the Niger Delta region, have little practical option when faced with immense domestic and international pressures besides performing quasi-government roles in developing local communities, the reality is that such a role perpetuates corruption, apathy, and neglect. The cure is worse than the disease.").

¹⁹² See Smis & Kingah, *supra* note 122, at 42 ("MNCs lose nothing when they adopt positive and forward looking-pro-poor strategies in the countries where they conduct business. Hitherto, they have been regarded as being aloof and too distant from the population. In terms of concerns over non-interference this option is sensible. However, MNCs can engage directly in social initiatives with poor

Another objection is that corporate participation is sometimes saddled with corruption. Some corporate officers engage in corrupt practices that undermine the execution of their projects.¹⁹³ This problem has arisen in World Bank-funded infrastructure projects.¹⁹⁴ The Chinese investment approach recommended herein is also not immune from corrupt activities.¹⁹⁵ Corporate corruption can be tackled effectively through an all-hands-on-deck approach that involves the World Bank, home countries of multinational corporations (MNCs), host countries, and watchful NGOs.¹⁹⁶ For instance, transparency initiatives, while not a complete panacea, should be vigorously supported to ensure that those responsible for managing oil revenues do not hide under opacity to mismanage the funds or defraud the people.¹⁹⁷ Channeling resources toward citizen education or public enlightenment campaigns that mobilize the people to hold their political leaders accountable can further strengthen transparency measures.¹⁹⁸

Local equity participation may also be constrained by the fact that community-based corporations lack the financial resources to hold an ownership stake in joint petroleum ventures.¹⁹⁹ Their financial predicament is exacerbated by the fact that the oil and gas industry is highly capital-intensive. Appropriate arrangements could be worked out in which other partners could “carry” the community corporations at the early stage, recovering their investment with “penalties” or interest when the projects start

communities where they do business. Rather than use government intermediaries, it will be better for them to craft their programs directly for the benefit of the local communities that host them.”)

¹⁹³ See Emeka Duruigbo, *Managing Oil Revenues for Socio-Economic Development in Nigeria: The Case for Community-Based Trust Funds*, 30 N.C. J. INT’L L. & COM. REG. 121, 162 (2004); Leech, *supra* note 186, at 102 (“In March 2005, Chris Finlayson, Shell’s chief executive for exploration and production in Africa, acknowledged that the company had experienced significant corruption among its employees with regard to funding local community projects.” (citation omitted)).

¹⁹⁴ See generally Courtney Hostetler, *Going from Bad to Good: Combating Corporate Corruption on World Bank-Funded Infrastructure Projects*, 14 YALE H.R. & DEV. L.J. 231 (2011).

¹⁹⁵ See Pádraig Carmody, *The Scramble for Biofuels and Timber in Africa*, 12 WHITEHEAD J. DIP. & INT’L REL. 125, 131 (2011) (discussing cases in Congo-Brazzaville, where the country’s minister of forestry and environment is a major shareholder in a Chinese timber company operating there, and the construction of a large house by the Chinese for a senior government official that manages large infrastructure projects in the country).

¹⁹⁶ See Hostetler, *supra* note 194, at 259–70; Mujih, *supra* note 156 (discussing the role of NGOs in influencing project outcomes, especially when legal regimes are lacking).

¹⁹⁷ See, e.g., Gavin Hilson & Roy Maconachie, “Good Governance” and Extractive Industries in Sub-Saharan Africa, 30 MIN. PROC. & EXTRACTIVE METALLURGY REV. 52 (2009); Gavin Hilson & Roy Maconachie, *The Extractive Industries Transparency Initiative: Panacea or White Elephant for Sub-Saharan Africa?*, in MINING, SOCIETY AND A SUSTAINABLE WORLD 469 (J.P. Richards ed., 2009) (critiquing the Extractive Industries Transparency Initiative).

¹⁹⁸ See Alex Kardon et al., *Extractive Accountability: Implications of the Resource Curse for CSR Theory and Practice*, 11 YALE HUM. RTS. & DEV. L.J. 59, 63 (2008).

¹⁹⁹ See Emeka Duruigbo, *The Global Energy Challenge and Nigeria’s Emergence as Major Gas Power: Promise, Peril or Paradox of Plenty?*, 21 GEO. INT’L ENVTL. L. REV. 295, 448–49 (2009).

producing or become profitable.²⁰⁰ The concept of carrying is well-known and utilized in the oil and gas industry, with some situations (but not all) allowing the party advancing the money to collect a penalty or interest to account for the time value of money.²⁰¹ One context in which interest is carried is a co-tenancy.²⁰² Where co-tenants own mineral rights, some of the owners may choose not to sign a lease with the oil and gas company interested in developing the minerals. If the company obtains a lease from any of the co-tenants, it may proceed with the development in some jurisdictions such as Texas.²⁰³ In that event, the company will shoulder the costs of operations but will be able to recover all the costs (without charging interest) before sharing any available profits with the nonleasing co-tenants.²⁰⁴ Carrying is also practiced in international oil transactions where the oil company signs a production sharing contract with the national government. The operating company bears all the costs of exploration and production. If a commercial discovery is made, the company recovers its costs and shares subsequent production with the government on an agreed formula.²⁰⁵

The Community Risk Insurance Program would also confront challenges. First, the environmental insurance sub-market is not a very attractive one for insurers.²⁰⁶ There are a number of reasons why insurers are reluctant to insure against pollution.²⁰⁷ For example, factual disputes, engendered by the fact that some environmental injuries have a long latency period,²⁰⁸ can lead to uncertainties about the policy years responsible for

²⁰⁰ *Id.*; see also JOHN S. LOWE, OIL AND GAS LAW IN A NUTSHELL 30, 50 (5th ed., 2009).

²⁰¹ See OWEN ANDERSON ET AL., HEMINWAY OIL AND GAS LAW AND TAXATION 480 (4th ed., 2004).

²⁰² JOHN S. LOWE ET AL., CASES AND MATERIALS ON OIL AND GAS LAW 436 (6th ed., 2013) (discussing the process of “carrying” in the context of a non-leasing co-tenant).

²⁰³ See generally PATRICK H. MARTIN & BRUCE M. KRAMER, OIL AND GAS: CASES AND MATERIALS 120–39 (9th ed., 2011).

²⁰⁴ *Id.*

²⁰⁵ ZHIGUO GAO, INTERNATIONAL PETROLEUM CONTRACTS: CURRENT TRENDS AND NEW DIRECTIONS 72 (1994) (defining a production sharing contract as “an agreement under which a foreign company, serving as a contractor to the host country/its national oil company, recovers its costs each year from production and is further entitled to receive a certain share of the remaining production as payment in kind for the exploration risks assumed and the development service performed if there is a commercial discovery”).

²⁰⁶ Abraham, *supra* note 160, at 1770–71 (“Despite the demand for insurance coverage of pollution liability, however, such insurance is not generally offered. . . In short, there is a mismatch between the losses resulting from oil spills, the insurance available to the victims of spills, the liability of the parties responsible for losses caused by spills, and the insurance available to the parties who face such liability.”).

²⁰⁷ See *id.*, at 1784–86; Elli Sperdokli, *Marine Insurance for Oil Pollution*, 49 TORT TRIAL & INS. PRAC. L.J. 611, 619–20 (2014) (discussing the constraints to obtaining environmental insurance coverage to protect against liability from other actors’ activities).

²⁰⁸ See, e.g., Abraham, *supra* note 160, at 1771 n.5 (“There also may be long-latency diseases resulting from exposure to oil or chemical dispersants that do not manifest themselves for considerable periods after exposure . . .”).

coverage.²⁰⁹ Furthermore, there are the enormous costs of cleaning up pollution and remediating the affected areas.²¹⁰ There are also legal obstacles to eliminating the moral hazard that would accompany insuring against gradually occurring pollution as opposed to sudden and accidental pollution.²¹¹ In the case of gradually occurring pollution, the insured companies can take steps to detect the pollution almost at inception and be in a position to mitigate the damage once they detect the pollution.²¹² With insurance, however, they would likely abandon this responsibility.²¹³ Accordingly, to avoid the moral hazard, insurance companies were willing to insure only sudden and accidental pollution, but judicial interpretation stymied this effort.²¹⁴

Thus, even if such a program were adopted, oil companies may not have adequate options for the purchase of the insurance.²¹⁵ The international community could address this problem through the creation of an institution structured like MIGA. This institution would do for communities what MIGA does for companies. In a nutshell, it would protect communities from investment risks in the same way that MIGA protects businesses from political risks that could adversely affect their investment, thereby dissuading them from proceeding with the investment opportunity.²¹⁶

CRIP could also create moral hazards as communities exploit the existence of insurance to their advantage. Communities are constantly accused of vandalizing oil pipelines and other infrastructure to capture their share of the oil rents or to send a message to oil corporations and governments about their grievances.²¹⁷ While some of the accusations are not accurately attributed, because those making the charges have a motive for leveling them, many of the allegations have considerable merit.²¹⁸ A continuation or esca-

²⁰⁹ *Id.* at 1785–86.

²¹⁰ *Id.* at 1786.

²¹¹ *Id.* at 1784–85.

²¹² *Id.* at 1784.

²¹³ *Id.*

²¹⁴ *Id.* at 1784–85.

²¹⁵ For a more optimistic view of the capacity of the market to make environmental insurance available, particularly if there is a mandate for operators to carry insurance, see generally David A. Dana & Hannah J. Wiseman, *A Market Approach to Regulating the Energy Revolution: Assurance Bonds, Insurance, and the Certain and Uncertain Risks of Hydraulic Fracturing*, 99 IOWA L. REV. 1523 (2014).

²¹⁶ For a useful definition of risk, and identification of several commercial and non-commercial risks, see Juan Camilo Hoyos, *The Role of Bilateral Investment Treaties in Mitigating Project Finance's Risks: The Case of Colombia*, 40 SYRACUSE J. INT'L. L. & COM. 285, 288–89 (2013), and Paul E. Comeaux & N. Stephan Kinsella, *Reducing Political Risk in Developing Countries: Bilateral Investment Treaties, Stabilization Clauses, and MIGA & OPIC Investment Insurance*, 15 N.Y.L. SCH. J. INT'L & COMP. L. 1, 4 (1994).

²¹⁷ Ibaba Samuel Ibaba & John C. Olumati, *Sabotage Induced Oil Spillages and Human Rights Violation in Nigeria's Niger Delta*, 11 J. SUST. DEV. AFR. 51 (2009); Weaver, *supra* note 45, at 556.

²¹⁸ For instance, oil operators in Nigeria are eager to make those allegations because those incidents are classified as sabotage, which provides a complete basis for escaping liability in claims against the

lation of such incidents is never too far off. Similarly, corporations may be tempted to shift all responsibility to the insurance companies and not take appropriate steps to conduct their operations as properly as they would be if they were fully financially and legally accountable for any misconduct.²¹⁹ This kind of problem has been identified in the context of “Director and Officer” insurance maintained by companies to protect officers in the event of claims against them for wrongfully discharging their duties.²²⁰ Insurance companies may reduce the moral hazard of corporate apathy by ensuring that the oil companies have sufficient skin in the game, using known underwriting tools such as high deductibles and significant levels of coinsurance.²²¹ Besides, oil companies are also conversant with the fact that they would continue to suffer reputational damage and other costs, including increased premiums and even outright exclusions, if they continue to conduct their operations below acceptable standards.²²²

VII. CONCLUSION

Africa is gradually moving from the position of an avid spectator to

operators for negligence and the resulting damage to individual and communal property. *See* O. ADEWALE, NIG. INST. OF ADVANCED LEGAL STUDIES, SABOTAGE IN THE NIGERIAN PETROLEUM INDUSTRY: SOME SOCIO-LEGAL PERSPECTIVES 14–19 (1990).

²¹⁹ A similar objection has been raised in the context of a corruption risk insurance proposal under MIGA. *See* Okaru-Bisant, *supra* note 152, at 291 (stating that “opponents of the corruption risk insurance propose a weak argument that providing corruption risk insurance coverage to private investors will encourage the vice and sanction bad behavior” (citation omitted)).

²²⁰ *See* TOM BAKER AND SEAN J. GRIFFITH, ENSURING CORPORATE MISCONDUCT: HOW LIABILITY INSURANCE UNDERMINES SHAREHOLDER LITIGATION (2010).

²²¹ *See* Baker & Swedloff, *supra* note 162, at 1420 (“Insurers use contract design to mitigate moral hazard in several ways. They use contract provisions like limits, deductibles, and coinsurance so that the insurance does not fully insulate people from their losses, keeping their skin in the game. Limits keep insureds’ skin in the game at the high end, deductibles at the low end, and coinsurance throughout.” (citation omitted)).

²²² If premiums vary with risk, the theory goes, then policyholders should reduce risk to obtain lower premiums. Insurers should also check episodically to make sure their policyholders are doing what they can to reduce risk. These checks give insurers a chance to pressure policyholders to behave well and also provide early information that something is amiss. Policies should be structured so that policyholders are unable to recoup all their losses. Policyholders need to have some skin in the game so that they will always have a reason to be careful. Of course, insurance only covers monetary losses, so policyholders will always have some stake in the outcome (reputation, goodwill, time, and trouble), but insurers usually insist that they also share monetary losses through deductibles.

Carol A. Heimer, *Failed Governance: A Comment on Baker and Griffith’s Ensuring Corporate Misconduct*, 38 LAW & SOC. INQUIRY 480, 485 (2013); *see also* Okaru-Bisant, *supra* note 152, at 291 (arguing that irresponsible companies would be screened out of the insurance protection); Baker & Swedloff, *supra* note 162, at 1417–23 (examining the moral hazard of policy holders not internalizing the externalities and identifying tools for addressing it).

that of key player in international legal development.²²³ One area of visible progress is in the extension of the doctrine of shared sovereignty to natural resource exploitation through the Chad–Cameroon pipeline project. The Chad experiment may have failed, but the model need not be completely discarded. The application of the shared sovereignty norm in petroleum exploitation for the socio-economic benefit of the population and political development of the country is still a possibility. Success in these undertakings will require greater commitment from the World Bank and other international organizations, the humility of political leaders, sacrifice on behalf of multinational corporations, the dedication of citizens, and the vigilance of civil society. Indeed, Africa can continue to lead the way in further development of the norm of shared sovereignty over natural resources. Instead of the weak form of shared sovereignty that was implemented in Chad, or the strong version advocated by some scholars that has little chance of acceptance by national governments, interested parties should introduce an intermediate form of shared sovereignty. The intermediate form, as outlined in this article, has three core components: greater commitments by sovereigns and international actors, deeper involvement of multinational corporations in development policy, and a clear space for community participation. The lesson so far is not “nunc dimittis” (departure time), but one of laying a foundation that may serve as the chief cornerstone in the quest for symbiotic foreign investment and energy development.

²²³ For more on this point, see AFRICA: MAPPING NEW BOUNDARIES OF INTERNATIONAL LAW, *supra* note 1.