INTRODUCTION TO ADVANCED DEGREE STUDENT'S NOTE

In recognition of the important role that advanced degree programs play at the James E. Rogers College of Law, for this issue the editorial board solicited submissions from students seeking Master of Laws, J.D. with Advanced Standing, and Doctor of Juridical Science degrees.[1]

The editors selected the following article by Jide James-Eluyode, who completed his Doctor of Juridical Science degree in the Indigenous Peoples Law and Policy (IPLP) program at the College of Law. Before coming to the University of Arizona, James-Eluyode earned two Bachelor of Laws degrees from Lagos State University in Nigeria and a Master of Laws degree from John Marshall Law School in Chicago.

James-Eluyode's research focuses primarily on how human rights law and indigenous peoples' rights intersect with corporate responsibility, economic development law, and comparative international law. For his doctoral research work, James-Eluyode was awarded the Vine Deloria Jr. Graduate Scholars Award for 2011–2012. He is currently an IPLP Fellow and member of the adjunct faculty at the James E. Rogers College of Law.

1. *See* pp. vii-ix.

NOTE

COLLECTIVE RIGHTS TO LANDS AND RESOURCES: EXPLORING THE COMPARATIVE NATURAL RESOURCE REVENUE ALLOCATION MODEL OF NATIVE AMERICAN TRIBES AND INDIGENOUS AFRICAN TRIBES

Jide James-Eluyode*

I. INTRODUCTION

One of the most important and conspicuous developments in the sphere of contemporary international human rights can be attributed to the recognition of indigenous rights as a distinct regime of collective human rights of peoples and of indigenous peoples as special subjects of international concern. Despite these landmark developments, the rights of indigenous peoples to own, use, and control their lands and natural resources remain elusive in most countries. This lack of recognition causes widespread economic exploitation and relentless extraction of natural resources on indigenous lands without adequate participation and access to fair and equitable benefit sharing.[1]

This paper explores the natural resource rights of two groups, the Native American Navajo Nation and West Africa's Niger Delta Nation. This paper analyzes similarities and dissimilarities between these two groups and determines how the differences have influenced the natural resources revenue or royalty shares accruable to the communities. The hope is that comparing the Native American Navajo Nation and West Africa's Niger Delta Nation will provide a framework for discovering how to continue the process of correcting this lack of recognition.

---

* LL.B, BL., Lagos St. University; LL.M, John Marshall Law School, Chicago; S.J.D., University of Arizona, James E. Rogers College of Law. jidejames@yahoo.co.uk. The author extends special gratitude to Prof. Melissa Tatum, Director of the Indigenous Peoples Law and Policy Program at the University of Arizona, for her constructive appraisal of early drafts of this paper and for the valuable suggestions offered. The author also thanks Prof. Robert Williams Jr. for offering useful remarks on some of the themes explored in this paper.

1. *See* S. JAMES ANAYA, INTERNATIONAL HUMAN RIGHTS AND INDIGENOUS PEOPLES 1 (2009).

II. NATURE OF RIGHT TO NATURAL RESOURCES

The inherent rights of indigenous peoples have been recognized by the International Labour Organisation Convention No. 169[2] and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) of 2007,[3] which include rights of peoples to their ancestral lands, territories, natural resources, and to exercise control and management over their lands, territories, and resources.[4] These rights were proclaimed as a necessary extension of the cardinal right to self-determination, which requires that all peoples freely determine their political status and pursue their economic, social, and cultural developments, including the right to freely dispose of their natural wealth and resources.[5]

According to the ILO Convention No. 169, the rights of indigenous peoples to the natural resources pertaining to their lands and territories shall be specially safeguarded.[6] Convention No. 169 goes on to state that these protected rights should include the right of the people to participate in the use, management, and conservation of natural resources within their domain.[7] For its part, Article 26 of UNDRIP specifically declares:

> 1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
> 2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired, and
> 3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.[8]

---

2. International Labour Organisation, Indigenous and Tribal Peoples Convention, 1989 (No. 169), June 27, 1989, 28 I.L.M. 1382 [hereinafter ILO Convention No. 169].

3. Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007) [hereinafter UNDRIP].

4. *See* U.N. DEP'T OF ECON. & SOC. AFFAIRS, STATE OF THE WORLD'S INDIGENOUS PEOPLES, at 86, U.N. Doc. ST/ESA/328, U.N. Sales No. 09.VI.13 (2009).

5. *See generally* International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI) A, U.N.Doc.A/RES/220(XXI) (Dec. 16, 1966); International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200 (XXI) A, U.N.Doc.A/RES/220(XXI) (Dec. 16, 1966); *see also* Tara Ward, *The Right to Free, Prior, and Informed Consent: Indigenous Peoples' Participation Rights Within International Law*, 10 NW. U. J. INT'L HUM. RTS. 54, 55–56 (2011).

6. ILO Convention No. 169, *supra* note 2, art. 15(1).

7. *Id.*

8. UNDRIP, *supra* note 3, art. 26.

The international framework has established commendable normative standards to protect the rights of indigenous peoples in relation to land and natural resources, and a number of regional human rights mechanisms have applied these firm normative standards to redress violations of indigenous rights. For instance, the Inter-American Commission on Human Rights,[9] the Inter-American Court of Human Rights,[10] and the African Commission on Human Rights[11] have on different occasions had to defer to international indigenous rights prescriptions in a bid to protect the collective right of peoples to their land and territories within the respective local boundaries.

However, at the domestic or national jurisdiction levels, indigenous communities have encountered the most difficulties, often precipitating an alarming rate of abuse of these protected rights.

---

9. Maya Indig. Cmty. of the Toledo Dist. v. Belize, Case 12.053, Inter-Am. Comm'n H.R., Report No. 40/04, OEA/Ser.L/V/II.122, doc. 5 rev. ¶¶ 1–3, 88, 96–97 (2004). The Inter-American Commission, in concluding that State of Belize violated the property right of the Maya people in their land and territories, stated:

> [I]n determining the present case, the Commission will, to the extent appropriate, interpret and apply the pertinent provisions of the American Declaration in light of current developments in the field of international human rights law, as evidenced by treaties, custom and other relevant sources of international law. . . . [And within] inter-American law specifically, special protections for indigenous peoples may be required for them to exercise their rights fully and equally with the rest of the population. Additionally, special protections for indigenous peoples may be required to ensure their physical and cultural survival—a right protected in a range of international instruments and conventions.

Id.

10. *See* Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua, Order of the Court, Inter-Am. Ct. H.R. (ser. C) No. 79, "Judgment," ¶¶ 154–155, 173 (Aug. 31, 2001). The court held that Nicaragua violated the right to property of members of the Mayagna (Sumo) Awas Tingni Community contrary to article 21 of the American Convention on Human Rights, as well as rules of law pertaining to the international responsibility of the State applicable under International Human Rights Law. *Id.*

11. The Endorois decision was adopted by the African Commission in May 2009 and endorsed by the African Union on February 4, 2010. Ctr. for Minority Rights Dev. (Kenya) & Minority Rights Grp. Int'l *ex rel.* Endorois Welfare Council v. Kenya, 276/2003 (Afr. Comm'n on Human & Peoples' Rights Feb. 4, 2010). The African Commission, in recognizing the right of ownership of the Endorois people to their ancestral territory in the Lake Bogoria area of Rift Valley in Kenya, recommended the payment of adequate compensation by the Kenyan government to the community for the loss they suffered from the violation of their property rights. The Commission reviewed relevant international instruments including UNDRIP and concluded that "the African Commission is not convinced that the whole process of removing the Endorois from their ancestral land satisfied the very stringent international law provisions." *Id.* ¶¶ 2, 224, 232, 293, 296.

III. THE TRIBES: BACKGROUND INFORMATION

A. The Navajo Nation

The Navajo Nation is the homeland of the Diné, or Navajo people, one of the largest tribes in the United States.[12] The Navajo Nation extends over 27,000 square miles, spreading across three states—the southeastern part of Utah, northeastern portion of Arizona, and northwestern area of New Mexico.[13] The Navajo reservation was established as a sovereign territory by the Navajo Treaty of 1868 (including amendments made between 1878 and 1930) between the tribe and the United States government.[14] The Navajo nation had long had its own form of government, but the discovery of oil and other natural resources on the Navajo reservation in the early part of the twentieth century necessitated the establishment of a more formal and structured form of tribal governance. As early as 1923, a formal governmental structure recognized by the United States had been instituted by the tribe to deal with the fast expanding quests of business entities, including oil and mining companies seeking to lease Navajo lands for natural resources exploration projects.[15] Today, natural resources such as coal have turned out to be a substantial source of revenue for the tribe, creating millions of dollars in income.[16]

B. The Niger Delta Nation

The Niger Delta region of Nigeria, in West Africa, extends over more than 70,000 square kilometers of the southeastern part of Nigeria, making up about 7.5% of the country's total land mass.[17] The Niger Delta is one of the world's largest deltas, comparable to the Mekong, the Amazon, and the Ganges, and is home to Africa's most extensive mangrove swamp forest.[18] The region has

---

12. *See* NAVAJO PEOPLE – THE DINÉ, http://navajopeople.org/ (last visited Aug. 15, 2012).

13. *See* Navajo Nation Tourism Off., *History*, NAVAJO NATION, http://www.navajo-nsn.gov/history.htm (last visited Aug. 15, 2012); *see also* Navajo Tourism Dep't, *The History of Cowboys and Indians*, DISCOVER NAVAJO, http://discovernavajo.com/Cowboys%20&%20Indians-1.pdf (last visited Aug. 15, 2012) [hereinafter *Cowboys and Indians*].

14. *Cowboys and Indians*, *supra* note 13; *see also* RAYMOND DARREL AUSTIN, NAVAJO COURTS AND NAVAJO COMMON LAW: A TRADITION OF TRIBAL SELF-GOVERNANCE 6 (2009).

15. *Cowboys and Indians*, *supra* note 13

16. *See* ERIC C. HENSON ET AL., THE STATE OF NATIVE NATION: CONDITIONS UNDER U.S. POLICIES OF SELF-DETERMINATION 164 (2008).

17. *See* E. A. Ajao & Sam Anurigwo, *Land-Based Sources of Pollution in the Niger Delta, Nigeria*, 31 AMBIO 5, 442–45 (2002); Chinedum Ile & Chinua Akukwe, *Niger Delta, Nigeria: Issues, Challenges and Opportunities for Equitable Development*, NIGERIA WORLD FEATURE, Mar. 8, 2001, http://nigeriaworld.com/feature/article/niger-delta.html.

18. Ile & Akukwe, *supra* note 17.

a population of more than 12 million people,[19] with more than twenty distinct indigenous ethnic groups, such as the Efik, Ibibio, Ogba, Itsekiri, Urhobo, Isoko, Anang, Ijaw, and Ogoni people, who spread across nine of the thirty-six states that constitute Nigeria.[20] Nigeria is regarded as the largest oil and gas producer in Africa, with estimated oil reserves of 37.20 billion barrels and an estimated 5,110 billion cubic meters of natural gas reserves, making it one of the top ten natural gas endowments in the world.[21] However, constituent states of the Niger Delta region produce more than 75% of Nigeria's total oil and gas production output, equal to more than 80% of the national government's annual revenue.[22] The Niger Delta region, considered to be naturally endowed with one of Africa's most significant oil and gas deposits, is predominantly populated by many indigenous ethnic groups.[23]

The germane questions therefore are, first, whether the indigenous ethnic populations of these countries have adequate beneficial rights in the use, management, and control of the exploitation or commercialization of the natural resources found in their territory. Second, whether they are entitled to fair and equitable revenue sharing from those resources, as prescribed by international normative standards.

IV. OWNERSHIP, MANAGEMENT, AND CONTROL OF NATURAL RESOURCES

A. Self-Governance Deficit

The ability of indigenous groups to self-govern or self-administer their own affairs within their own territorial confines is one of the fundamental underlying problems affecting the implementation of their rights to lands, territories, and natural resources, and their participation in sharing the fruits of these resources, as contemplated by respective international instruments. Coupled with this predicament is the issue of the character of such self-governing powers and the quality of deference accorded them within the national schemes.

In the United States, tribes are seen as distinct political entities, having substantial sovereignty and cognizable property rights. For instance, in accordance with the Treaty of 1866, entered into on July 19, 1866, between the Unites States government and the Cherokee Nation, the U.S. Supreme Court, in

---

19. *See The Oil Industry and Human Rights in the Niger Delta*: *Hearing Before the S. Judiciary Subcomm. on Human Rights and the Law*, 110th Cong. 1 (2008) (testimony of Nnimmo Bassey) [hereinafter *Oil Industry Report*].

20. *See* Ile & Akukwe, *supra* note 17.

21. *See* OPEC, ANNUAL STATISTICAL BULLETIN 21–23 (2011).

22. *See Oil Industry Report*, *supra* note 19, at 2; *see also* P. O. Oviasuyi & Jim Uwadiae, *The Dilemma of Niger-Delta Region as Oil Producing States of Nigeria*, 16 J. PEACE, CONFLICT & DEV. 113 (2010).

23. *See* Oviasuyi & Uwadiae, *supra* note 22, at 117–18.

Cherokee Nation v. Journeycake, confirmed that the lands and territories subject to the treaty are the common property of all Cherokee citizens and that the tribe possesses full common rights and property interests in the designated territory.[24] Thus, apart from the federal and state governmental structures, tribal government systems constitute a vital and legally recognized tier of government.[25] The relationship between tribal authorities and the federal government has always been seen as a "government to government" relationship. To this extent, tribes have jurisdiction over their territories (reservations) to the necessary exclusion of states.[26] A tribal government therefore possesses its own inherent sovereign self-administration powers within the federal system.[27] In order to exert this power, most tribes in the United States have adopted formal constitutions[28] and other regulatory instruments that allow them to exercise jurisdiction over various activities within tribal territories, including crime,[29] civil conduct, and taxation.[30]

By contrast, any conceptual device that is perceived as analogous to the idea of self-determination is abhorred by many national governments in Africa. Most believe that such power, if ceded to tribes as a sovereign unit, would set the stage for political unrest within the national structure, instigate disunity, and subvert the nation-building efforts of the national governments.[31] This point is fairly exemplified by the persistent objection by African countries to the adoption of UNDRIP, largely based on general animus for the underlying concept and the

---

24. *See* Cherokee Nation v. Journeycake, 155 U.S. 196 (1894).

25. *See, e.g.*, Morton v. Mancari, 417 U.S. 535 (1974).

26. *Id.*

27. *See* HENSON ET AL., *supra* note 16, at 15.

28. *See, e.g.*, Indian Reorganization Act of 1934, 25 U.S.C. §§ 461–73 (2011) (facilitating the adoption of a formal constitution and institution of modern governmental structures by many tribes). It should, however, be noted that the Navajo Nation does not have a formal constitution, but it does have its own unique regime of laws and regulations, as well as a formal governmental structure. *See* Eric Lemont, *Developing Effective Process of American Indian Constitutional and Governmental Reform: Lessons from the Cherokee Nation of Oklahoma, Hualapai Nation, Navajo Nation, and Northern Cheyenne Tribe*, 26. AM. INDIAN L. REV. 155 (2002); *see also* DAVID H. GETCHES, CHARLES F. WILKINSON & ROBERT A. WILLIAMS, JR., FEDERAL INDIAN LAW 186 (5th ed. 2005).

29. Traditionally, Native Americans have inherent general criminal jurisdiction over activities on Native American reservations. *See* Ex Parte Crow Dog, 109 U.S. 556 (1883). *But see* 25 U.S.C. § 1301(2) (1990); United States v. Lara, 541 U.S. 193 (2004); Duro v. Reina, 495 U.S. 676 (1990); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978); United States v. McBratney, 104 U.S. 621 (1881).

30. Tribes are generally free to enact regulations and levy taxes within their domain, and they are exempted from the reach of the regulatory powers of states. *See generally* GETCHES, WILKINSON & WILLIAMS, *supra* note 28, at 542; *see also* Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982).

31. *See* INT'L LABOUR ORG. & THE AFRICAN COMM'N ON HUMAN & PEOPLES' RIGHTS, OVERVIEW REPORT OF THE RESEARCH PROJECT BY THE INTERNATIONAL LABOUR ORGANIZATION AND THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS ON THE CONSTITUTIONAL AND LEGISLATIVE PROTECTION OF THE RIGHTS OF INDIGENOUS PEOPLES IN 24 AFRICAN COUNTRIES vi. (2009) [hereinafter ILO OVERVIEW REPORT].

need to qualify the self-determination right contained in the Declaration.[32] Most of the opposing countries became more supportive only when a clarifying proviso was added to the final draft. The proviso, contained in Article 46 of UNDRIP, states:

> Nothing in the Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.[33]

The foregoing provisions were accepted by the African Commission on Human and Peoples' Rights (ACHPR) as adequate to guarantee the inviolability of the integrity of the nation-states within the continent.[34]

In Nigeria, governmental powers, as prescribed by the Constitution, are hierarchically structured among federal, state, and local governments.[35] Any authority put in place by the tribes lacks tangible meaning because they are subject to the superior powers of the local government council where their tribal lands are located.[36] According to the Constitution, it is the duty of the respective local government councils to participate in economic planning and development of the area ascribed to it by law, and to this end, an economic planning board shall be established by the House of Assembly.[37] Under this mandate, governmental structures put in place by tribal elders lack the authority and jurisdictional reach enjoyed by Native American tribes.

---

32. *See* ANAYA, *supra* note 1, at 55–58; UNDRIP, *supra* note 3.

33. UNDRIP, *supra* note 3, art. 46(1); ANAYA, *supra* note 1, at 55–58.

34. In the opinion of the ACHPR, Articles 3 and 4 of the Declaration can be exercised only in the context of Article 46 of the Declaration which is in conformity with the African Commission's jurisprudence on the promotion and protection of the rights of indigenous populations based on respect of sovereignty, the inviolability of the borders acquired at independence of the member states, and respect for their territorial integrity. *See* AFRICAN COMM'N ON HUMAN & PEOPLES' RIGHTS, ADVISORY OPINION ON THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES 5 (2007).

35. *See* CONSTITUTION OF NIGERIA (1999), ch. 1, pt. II.

36. *Id.* § 7(1). The functions vested in the local government council by law cannot be exercised by any other person or authority. *See* Bamidele v. Commissioner for Local Government, [1994] 2 NWLR 568, 585 (Nigeria).

37. CONSTITUTION OF NIGERIA (1999), § 7(3).

B. Lands and Natural Resources: Who Is in Control?

As noted earlier, Native American tribes, including the Navajo, assume a significant participatory role in dealing with issues relating to exploitation, management, and allocation of the natural resources found on tribal lands. More significant, however, is the fact that the federal system actively accommodates the discharge of this role. For instance, the Indian Mineral Leasing Act (IMLA),[38] enacted by the U.S. Congress, stipulates that:

> Unallotted lands within any Indian reservation or lands owned by any tribe, group, or band of Indians under Federal jurisdiction (except those specifically excepted from the provisions of sections 396a to 396g of the Act), may, with the approval of the Secretary of the Interior, be leased for mining purposes, by authority of the tribal council or other authorized spokesmen for such Indians, for terms not to exceed ten years and as long thereafter as minerals are produced in paying quantities.[39]

Consequently, subject only to some federal supervision, Native American tribes can exercise the right to establish certain policies or regulatory mechanisms to maintain control over their lands and natural resources.[40] Tribes can also institute appropriate mechanisms for the purpose of ensuring adequate standards of environmental quality for the tribal communities,[41] while the federal government, on the other hand, acts as a trustee on behalf of the tribes.[42] This

---

38. The Indian Mineral Leasing Act of 1938, 25 U.S.C. § 396a–g (2012).

39. *Id.* § 396a.

40. *See, e.g.*, 25 U.S.C. §§ 396, 397, 398 (2012); *see generally* Mark Allen, *Native American Control of Tribal Natural Resource Development in the Context of the Federal Trust and Tribal Self-Determination*, 16 B.C. ENV'L. AFF. L. REV. 857 (1989); S. James Anaya & Robert A. Williams, Jr., *The Protection of Indigenous Peoples' Rights over Lands and Natural Resources Under the Inter-American Human Rights System*, 14 HARV. HUM. RTS. J. 33 (2001).

41. Various U.S. courts have endorsed tribal efforts to promote tribal self-government in environmental matters. *See, e.g.*, Wash. Dept. of Ecology v. EPA, 752 F.2d 1465 (9th Cir. 1985); Montana v. EPA, 137 F.3d 1135 (9th Cir. 1998). *See also* Allen, *supra* note 40; Anaya & Williams, *supra* note 40.

42. The trust doctrine is one of the fundamental pillars of U.S Federal Indian Law. It embodies a general fiduciary responsibility owed to Native American tribes by the federal government based on a "ward and guardian" relationship. This particular trust doctrine was itself based on the *Marshall Trilogy*, three U.S. Supreme Court decisions handed down between 1823 and 1832: Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543 (1823); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832). *See* Janice Aitken, *The Trust Doctrine in Federal Indian Law: A Look at Its Development and at How Its Analysis Under Social Contract Theory Might Expand Its Scope*, 18 N. ILL. U. L. REV. 115 (1997).

fiduciary responsibility requires the federal government to ensure fair management of tribal lands and natural resources in a manner consistent with the tribal government interests and objectives.[43] To achieve these objectives, the federal Energy Policy Act[44] directs that:

> The Secretary of the Interior is authorized to make annual grants to Indian tribes for the purpose of assisting Indian tribes in the development, administration, implementation, and enforcement of tribal laws and regulations governing the development of energy resources on Indian reservations.[45]

The situation is remarkably different in many African states. Indigenous ethnic populations do not have any ownership rights in either the land they occupy or the natural resources contained therein. All natural resources, including oil, gas, and lands, are almost exclusively controlled and regulated by federal provisions. In Nigeria, the Minerals and Mining Act,[46] the Petroleum Act,[47] the Land Use Act,[48] and the Constitution[49] have collectively deprived tribes of any appreciable rights, whether in terms of ownership, control, or management of lands and natural resources.

According to section 1(1) of the Petroleum Act, the entire ownership and control of all petroleum in, under, or upon any lands is vested in the State, and this extends to all lands including land covered by water.[50] Additionally, Nigeria's Land Use Act and other land-holding legislation exclude rights of claim by any persons or entity to minerals or natural resources attached to a land or real estate as a derivative of ownership.[51] Similar provisions were contained in section 1 of the Minerals and Mining Act, which states that:

> The entire property in and control of all minerals, in, under or upon any land in Nigeria, its contiguous continental shelf and of all rivers, streams and watercourses throughout Nigeria, or any area covered by its territorial waters or constituency, is and shall

---

43. *See* Kevin Gover, *An Indian Trust for the Twenty-First Century*, 46 NAT. RES. J. 317, 340 (2006); *see also* JUDITH V. ROYSTER & MICHAEL C. BLUMM, NATIVE AMERICAN NATURAL RESOURCES LAW: CASES AND MATERIALS 90–91 (2d ed. 2008).

44. Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776 (codified as amended in scattered sections of 12 U.S.C., 16 U.S.C., 25 U.S.C., 26 U.S.C., 30 U.S.C., 42 U.S.C.).

45. *Id.* § 2604.

46. Nigerian Minerals and Mining Act (2007).

47. Petroleum Act (2007) Cap. (350) (Nigeria).

48. Land Use Act (2004) Cap. (202) (Nigeria).

49. CONSTITUTION OF NIGERIA (1999), § 44(3).

50. Petroleum Act (2007) Cap. (350), § 1(1)–(2).

51. *See* I. O. SMITH, PRACTICAL APPROACH TO LAW OF REAL PROPERTY IN NIGERIA 12 (1999).

> be vested in the Government of the Federation for and on behalf of the people of Nigeria.[52]

These provisions were further validated by the Nigerian Constitution, which proclaims:

> The entire property in and control of all minerals, mineral oils and natural gas in, under or upon any land in Nigeria, under or upon the territorial waters and the exclusive economic zone of Nigeria shall vest in the government of the federation and shall be managed in such manner as may be prescribed by the National Assembly.[53]

The Land Use Act, for its part, divested from every entitled landowner in Nigeria, whether individual or collective, the ultimate title of ownership in lands, substituted it with rights of occupancy, and vested the original title in the state governments.[54] Thus, where any customary landowner had title to lands before the advent of the Act, after the Act, he was deemed to be a holder of a lesser right of occupancy.[55]

The practical and legal implication here is that, prior to the enactment of the Land Use Act, corporations, whether private or public, intending to embark on natural resource exploitation projects on any portion of land within tribal territories tended to recognize the indigenous ethnic population as collective owners of their territories.[56] As a result, they approached the appropriate communities, consulted with them, and negotiated terms of the operations, including arrangement for payment of land rates and rents.[57] The Land Use Act radically changed this ownership structure—upon its enactment, corporate entities had to deal with the government almost exclusively on every matter relating to the exploitation of natural resources and land use. The significance of this development is that corporations are no longer legally obligated to acknowledge rights of the indigenous communities with regard to land use and natural resources.[58]

It suffices to say here that this form of ownership and control structure is not peculiar to Nigeria. It has been a common feature in many African countries. For example, the Constitution of the Democratic Republic of Congo of 2005 provided:

---

52. Nigerian Minerals and Mining Act (2007), § 1(1) (Nigeria).
53. *See* CONSTITUTION OF NIGERIA (1999), § 44(3).
54. *See* Land Use Act (2004) Cap. (202), § 1 (Nigeria).
55. *See* SMITH, *supra* note 51, at 69–70.
56. *See* DULUE MBACHU & CLEMENT NWANKWO, LAND, OIL AND HUMAN RIGHTS IN NIGERIA'S DELTA REGION 15 (1999).
57. *Id.* at 15.
58. *Id.* at 16.

> The State exercises permanent sovereignty over the Congolese soil, subsoil, water resources and woods, air space, rivers, lakes and maritime space as well as over the Congolese territorial sea and the continental shelf. The conditions for the management and the granting of concessions with regard to the State domain referred to in the preceding paragraph are determined by law.[59]

Similarly, legal regimes existing in other African countries such as Ghana,[60] Sierra Leone,[61] and Liberia[62] have sustained this sort of emasculatory structure.

V. RIGHT TO EQUITABLE BENEFIT SHARING IN NATURAL RESOURCES AND ACCOUNTABILITY FOR BREACH

Contrary to the plights of indigenous ethnic populations of the Niger Delta, Native American tribes have played an important role in the exploitation, control, and management of natural resources found on tribal lands, including exercising the power to issue leases or permits and to set rates for rent and royalties, and sharing other benefits accruing from the exploitation of their natural resources.[63] Furthermore, the tribes have legal standing to maintain an action against the United States government for any breach of trust with respect to tribal lands and resources whenever the tribes perceive that they have been denied a fair and equitable benefit or that the federal government supported unfavorable benefits or royalty rates on their behalf. In the *United States v. Navajo Nation*

---

59. CONSTITUTION OF THE DEMOCRATIC REPUBLIC OF CONGO (2005), art. 9.

60. *See, e.g.*, Minerals and Mining Act No. (703) (2006), § 1 (Republic of Ghana) (stipulating that ownership of "every mineral in its natural state in, under, or upon land, rivers, streams, watercourses throughout the country, as well as the exclusive economic zone and all areas covered by the territorial sea or continental shelf is the property of the Republic of Ghana").

61. *See, e.g.*, Minerals Act (2009), § 2(1) (Sierra Leone) (providing that "all rights of ownership in and control of minerals in, under or upon any land in Sierra Leone and its continental shelf are vested in the Republic not withstanding any right of ownership or otherwise that any person may possess in and to the soil on, in, or under which minerals are found or situated").

62. *See, e.g.*, CONSTITUTION OF THE REPUBLIC OF LIBERIA (1986), art. 22(b) (stating that "private property rights, however, shall not extend to any mineral resources on or beneath any land or to any land under the seas and water ways of the Republic of Liberia. All mineral resources in and under the seas and waterways shall belong to the Republic and be used by and for the entire Republic"); New Petroleum Law (2002), Ch. III, § 3.1 (Republic of Liberia) (reemphasizing state ownership rights by affirming that "all hydrocarbon deposits belong to and are the properties of the Republic of Liberia").

63. *See supra* text accompanying notes 38–45. *See also* Leasing of Tribal Lands for Mineral Development, 25 C.F.R. pt. 211, subpt. C (Rents, Royalties, Cancellations and Appeals (§§ 211.40–211.58)).

cases,[64] the Secretary of the Interior approved a mining lease (Lease #8580) executed in 1964 between the Navajo tribe and the private company Peabody Coal; the lease allowed the company to engage in coal mining on the Navajo reservation in exchange for royalty payments to the tribe. The maximum royalty rates were initially set at 37.5 cents per ton of coal, and a lease provision provided that the rates were "subject to reasonable adjustment by the Secretary of the Interior" after twenty years, and then at the end of each successive ten-year period thereafter.[65] In 1984, when the initial twenty-year period had elapsed, the tribe requested that the Secretary exercise his power to increase the royalty rate, because the 37.5 cents per ton rate had become lower than the minimum royalty rate of 12.5% of gross proceeds set by the U.S. Congress.[66] The Bureau of Indian Affairs (BIA) recommended adjusting the lease royalty rate to 20% of gross proceeds; however, the Secretary of Interior, after meeting privately with the representative of Peabody, eventually approved a royalty rate set at 12.5% of monthly gross proceeds.[67] The approved rates, which seemed to be an increase from the original 37.5 cents per ton lease rate, were much lower than the 20% of gross proceeds rate initially recommended by the BIA with the support of the Secretary.[68]

The Navajo Nation brought an action against the United States seeking approximately $600 million in damages on the grounds that the Secretary's approval of a less favorable lease royalty amendment constituted a breach of trust by the U.S. government.[69] The Navajo were unsuccessful before the Supreme Court on technical grounds: the relevant implementing regulations did not provide for money damages, and the tribe did not identify a substantive, applicable trust-creating statute or regulation violated by the government.[70] Nevertheless, the fact that a tribe may legally hold the U.S. government accountable for mismanagement of natural resources found on tribal lands was not lost at all.[71] This conclusion is reinforced by the fact that the U.S. Supreme Court has on other occasions found the federal government liable for breach of its trust responsibility to Native

---

64. This refers to the series of *Coal Royalty* cases brought by the Navajo Nations against the U.S government; they are Navajo Nation v. United States (Navajo I), 46 Fed. Cl. 217, 225 (2000); Navajo Nation v. United States (Navajo II), 263 F.3d 1325 (Fed. Cir. 2001); United States v. Navajo Nation (Navajo III), 537 U.S. 488 (2003); Navajo Nation v. United States (Navajo IV), 347 F.3d 1327, 1332–33 (Fed. Cir. 2003); Navajo Nation v. United States (Navajo V), 68 Fed. Cl. 805 (Fed. Cl. 2005); Navajo Nation v. United States (Navajo VI), 501 F.3d 1327, 1348–49 (Fed. Cir. 2007); and United States v. Navajo Nation, 556 U.S. 287 (2009).

65. *Navajo III*, 537 U.S. at 488.

66. *Id.* at 488–89.

67. *Id.* at 488–89, 495–501.

68. *Id.*

69. *Navajo I*, 46 Fed. Cl. at 225.

70. *See Navajo III*, 537 U.S. 488; *Navajo Nation*, 556 U.S. 287.

71. *See Navajo VI*, 501 F.3d at 1348–48; *Navajo Nation*, 556 U.S. 287.

American tribes.[72] Also, the Court of Federal Claims[73] and the United States Court of Appeals[74] have equally, on various occasions, held that the federal government breached its common-law fiduciary duties to the Navajo Nation.[75]

The idea of holding the federal government responsible for a breach in the rights of Native American tribes to use, manage, and conserve their natural resources, as well as to partake in its benefits, has not been an isolated occurrence. It has received appreciable judicial protection in a number of cases, such as *Jicarilla Apache Tribe v. Supron Energy Corp*.,[76] where a federal court of appeals concluded that the U.S government owed a fiduciary duty to tribes in administering tribal oil and gas reserves and in determining royalties to which the tribe is entitled.[77]

The indigenous ethnic populations of the Niger Delta, just like many other ethnic groups in Africa, do not enjoy this kind of protection. In fact, they generally do not own or control natural resources, especially with respect to minerals, precious stones, forestry, oil, and gas.[78] They are often not empowered by the national legal regimes to play a major role in the determination of the royalty or revenue allocation rates with regard to the proceeds derived from the commerce of resources found on their lands.[79] Revenue sharing and royalty rates are often determined by federal legislation or prescribed by national constitutions.[80]

Moreover, attempts to challenge the perceived inequity regarding the structure of natural resource ownership and revenue allocation have largely been unsuccessful. One profound example is the landmark decision of the Nigerian Supreme Court in the case *Attorney General of the Federation v. Attorney General of Abia State and 35 Others*, otherwise referred to as the *Resource Control* case.[81] A prominent part of the issues here arose from the contention of the federal government that all natural resources exploited along the territorial waters of the Niger delta region cannot be regarded as property of the host states and communities, but were deemed vested in the national government. All the

---

72. *See, e.g.*, United States v. Mitchell (Mitchell II), 463 U.S. 206, 218 (1983).

73. *See Navajo I*, 46 Fed. Cl. at 225.

74. *See Navajo II*, 263 F.3d at 1325; *Navajo VI*, 501 F.3d at 1348–49.

75. *See Navajo II*, 263 F.3d at 1325; *Navajo VI*, 501 F.3d at 1348–49.

76. Jicarilla Apache Tribe v. Supron Energy Corp., 782 F.2d 855 (10th Cir. 1986).

77. *Id.* at 857 ("The majority of the court adopts the prior dissenting opinion of Judge Seymour, reported at 728 F.2d 1555, 1563 (10th Cir.1984)," which recognized a fiduciary duty in that circumstance).

78. *See supra* notes 50, 52, 53 & 59–62 and accompanying text.

79. *See supra* notes 50, 52, 53 & 59–62 and accompanying text.

80. *See, e.g.*, Allocation of Revenue Act No. (1) (1982) Ch. A15 (Nigeria).

81. *Attorney General of the Federation v. Attorney General of Abia State and 35 Others* (2002) 6 NWLR (Pt. 764); *see also* I. E. Sagay, *Resource Control and the Law: Beyond the Supreme Court Judgment in* OIL, DEMOCRACY, AND THE PROMISE OF TRUE FEDERALISM IN NIGERIA 379 (Augustine A. Ikein et al. eds., 2008); Oludayo Amokaye, Sovereignty and Jurisdiction Over Offshore Natural Resources in a Federal State: A Case Study of Nigeria 1, 3 (Aug. 30, 2006), *available at* http://ssrn.com/abstract=1581404.

revenues derived from the exploitation of natural resources in these areas belonged to the federation, contrary to the states' assertion that they were entitled to such revenues. The apex court, in upholding the argument of the federal government, established a judicial precedent that has remained difficult for indigenous peoples to surmount.[82]

It is, however, acknowledged that the current situation has not always been the case. Shortly after Nigeria's independence from Britain in 1960, a sizeable portion of the mineral revenues (up to 50%) were apportioned to the regions where the minerals were extracted, a position that was emphasized by section 134 of the then Independence Constitution.[83] It stated:

> (1) There shall be paid by the Federation to each Region a sum equal to fifty per cent of –
> (a) The proceeds of any royalty received by the Federation in respect of any minerals extracted in that Region; and (b) Any mining rents derived by the Federation during that year from within that Region.
> (2) The Federation shall credit to the Distributable Pool Account a sum equal to thirty per cent.
> (a) The proceeds of any royalty received by the Federation in respect of minerals extracted in any Region; and (b) Any mining rents derived by the Federation from within any Region.[84]

Since 1966,[85] however, the issues of royalty rates and revenue-sharing formulas have been subject to arbitrary federal discretion. By the early 1980s, the rates adopted under the Allocation of Revenue Act[86] were:

---

82. Sagay, *supra* note 81, at 379.

83. *See* CONSTITUTION OF NIGERIA (1960).

84. *Id.* § 134(1)(a)–(b). The same provisions were repeated in the 1963 Constitution. CONSTITUTION OF THE FEDERAL REPUBLIC OF NIGERIA (1963), § 140.

85. Nigeria's first Constitution (Suspension and Modification) Decree was promulgated by the military junta that overthrew the then-elected government in January 1966. ONEYEBUCHI T. UWAKAH, DUE PROCESS IN NIGERIA'S ADMINISTRATIVE LAW SYSTEM: HISTORY, CURRENT STATUS AND FUTURE 51–52 (1997). This Decree set the stage for series of decrees and laws that have progressively reduced the access of local indigenous population to revenues derived from natural resources produced in their region, occurring most notably in 1971, when the Petroleum Resources Decree of 1971 repealed section 140(6) of the 1963 Constitution (which is a replicated version of section 134 of the preceding 1960 Constitution). Ben E. Aigbokhan, *Reconstruction of Economic Governance in the Niger Delta Region in Nigeria: The Case of the Niger Delta Development Commission in* RECONSTRUCTING ECONOMIC GOVERNANCE AFTER CONFLICT IN RESOURCE-RICH AFRICAN COUNTRIES 241–45 (Karl Wohlmuth et al., eds. 2007) *available at* http://www.iwim.uni-bremen.de/publikationen/pdf/W040.pdf #page=265.

86. *See* Nigeria's Allocation of Revenue Act of 1982, *supra* note 80. It should be noted that this revenue allocation formula applies directly only to the three constitutionally

i. Federal Government – 55%.
ii. State Governments (jointly) – 32%.
iii. Local Governments (jointly) – 10%.
iv. Fund for amelioration of ecological problem – 1%.
v. Funds for development of mineral producing areas – 15%.

Additionally, the current Constitution explicitly requires:

> The President, upon the receipt of advice from the Revenue Mobilization Allocation and Fiscal Commission, shall table before the National Assembly proposals for revenue allocation from the Federation Account, and in determining the formula, the National Assembly shall take into account, the allocation principles especially those of population, equality of States, internal revenue generation, land mass, terrain as well as population density; Provided that the principle of derivation shall be constantly reflected in any approved formula as being not less than thirteen per cent of the revenue accruing to the Federation Account directly from any natural resources.[87]

By virtue of this arrangement, all revenues, including royalties, that accrue from the commerce of natural resources in any area within the jurisdiction of the Federal Republic of Nigeria, are collected in a central pool designated as "the Federation Account"[88] and are subsequently allocated to the constituent states of the federation by the national government on the basis of certain considerations decided by the federal government.[89] Such considerations may include factors such as land mass, population, and equality of states.[90] In practical terms, non-mineral producing states or regions may derive a greater revenue share than the mineral-producing territories themselves. In effect, the indigenous communities in resource-rich territories are left holding the short end of the national stick.[91]

---

recognized tiers of government in Nigeria and not to any governmental structures put in place by indigenous ethnic tribes.

87. *See* CONSTITUTION OF NIGERIA (1999), § 162(2).

88. *Id.* § 162(1).

89. *Id.* § 162(3).

90. *Id.* § 162(2).

91. Even in the best of scenarios as described under Nigeria's legal regime, only a paltry 13% of the revenue is reserved as derivation funds to deal with other issues relating to exploitation of the natural resources and the resource-producing areas. *See* Allocation of Revenue Act of 1982, *supra* note 80.

VI. CONCLUSION

Native American tribes including the Navajo, as sovereign self-governing entities, do grapple with challenges under the United States federal system, yet their situation is significantly better than that of Africa's indigenous ethnic tribes such as the inhabitants of the Niger Delta region. This is particularly so when the issue relates to land and natural resources. The indigenous people of the Niger Delta neither possess ownership rights in their lands and natural resources nor do they have any tangible control over how the royalties or revenues derived from the natural resources found in their territory are allocated. This situation is clearly at odds with internationally prescribed standards on indigenous rights, which require that the rights of indigenous peoples pertaining to the natural resources found on their lands should include the right of the people to participate in the use, management, and conservation of these resources.

The model in the United States, particularly with respect to land and natural resource rights of Native American tribes may provide a reference for jurisdictions with lagging legal frameworks. It may be unrealistic to predict that the widespread state ownership and control of natural resources will be supplanted by more favorable constitutional and regulatory regimes in the near future. One way to advance this cause, however, is to advocate for the adoption of reasonable revenues or royalty-sharing policies by states as an interim measure. This could at least provide a good starting point to begin the long journey toward change.

Ultimately, the expectation is that national governments in these countries will sooner, rather than later, respond to the fair dictates of international normative prescription and the relentless yearnings of the many marginalized indigenous tribal communities.