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# **TOWARD DISTRIBUTIVE JUSTICE IN OFFSHORE NATURAL RESOURCES**

## **DEVELOPMENT: ICELAND AND NORWAY IN THE JAN MAYEN**

**by Anita L. Parlow, Esq.<sup>1</sup>**

### ABSTRACT

As pressures of globalization and advances in technology accelerate, more and more remote, coastal, and small communities are left financially stranded and disempowered. Many communities located at the historic periphery of global markets and trade routes are, often paradoxically, marginalized from the benefits of globalized trade, even while their more accessible natural resources have moved far closer to the center of global markets.

The powerful political institutions of nation states combined with growing transnational businesses are driving a combination of boosts in national economies, explosions in technology, and fewer international restrictions on capital. This three-pronged dynamic is reshaping the structure and impacts of an accelerating global economy, creating an international global class of citizenry for whom borders have diminished meaning.

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As more remote, coastal and small communities are left behind, a new generation of rights building upon protections of the environment, Indigenous peoples, and climate is setting the table to collectively protect entire communities, marginalized as collateral damage to the forces of globalization.

This article draws from relevant principles of international law (UNCLOS,) national practice of Norway, the “ Norwegian Model” and other Arctic national views to posit that the evolution of domestic and international law is evolving in the direction of distributive justice strategies that are focused not on individual rights, but rather on the collective rights of marginalized communities to benefit from national policies that would protect them from the downsides of globalization for whom global growth and interconnectedness has not yet met expectations.

## I. INTRODUCTION

As pressures of globalization and advances in technology accelerate, more remote, coastal, and small communities are left financially stranded and disempowered.<sup>2</sup> Many communities located at the historic periphery of global markets and trade routes are, often paradoxically, marginalized from the benefits of globalized trade. This being the case even while the more accessible natural resources located near the remote, often coastal communities, have moved closer to the center of global markets.<sup>3</sup> The powerful political institutions of nation states, combined with growing transnational businesses, propel boosts in national economies as

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<sup>2</sup> Larisa Riabova, COMMUNITY VIABILITY AND WELL-BEING IN THE CIRCUMPOLAR NORTH, IN GLOBALIZATION AND THE CIRCUMPOLAR NORTH, 119, 128 (Lassi Heininen & Chris Southcott eds., 2010). (“To ensure viability of remote communities lying at the periphery of markets, technology networks or loss of traditional natural resources requires that the “communities themselves are engaged in improving their own well-being.”); *see also* Daniel Boyd Kramer ET AL., GLOBALIZATION AND THE CONNECTION OF REMOTE COMMUNITIES, 68 *Ecological Econs.* 2897 (Elsevier, 3 August 2009.)

<sup>3</sup> RICHARD WARD, ARCTIC OPENING: OPPORTUNITY AND RISK IN THE HIGH NORTH, Chatham House. (2012), <https://www.chathamhouse.org/sites/files/chathamhouse/publications/0412arctic.pdf>; *see also* The Economist, *The melting north* (Jun. 16, 2012) [<https://perma.cc/D38Z-7U3N>].

well as technology and fewer regulatory restrictions on international restrictions on capital.<sup>4</sup> This three-pronged dynamic is reshaping the structure and impacts of an accelerating global economy, creating an international global class of citizenry for whom borders have diminished meaning.<sup>5</sup> Despite the proverbial “rising-tide-lifts-all-boats” promise, widening disparities between corporate wealth and main-street has reached levels of impact, visibility, and public opposition that can no longer be ignored.<sup>6</sup> Entire communities and their historic economies have been increasingly marginalized due to the forces of globalization and the international integration of production and markets.<sup>7</sup> The process of globalization has exposed deep fault lines between

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<sup>4</sup> MANFRED B. STEGER, *GLOBALIZATION: A VERY SHORT INTRODUCTION*, 37-43 (2003).

<sup>5</sup> Elias G. Carayannis et al., *Globalization, Nation-States, and Global Governance*, in 13 *INNOVATION, TECHNOLOGY, AND KNOWLEDGE MANAGEMENT BOOK SERIES* (2011).

<sup>6</sup> Dani Rodrik, *Has Globalization Gone too Far?*, Institute for International Economics, 2-4 (1997). Disparities, not only economic, include dispossession from long-time local economies inextricably tied to healthy environments, such as both subsistence hunting and fishing for daily existence and, commercial fishing.

<sup>7</sup> Traditional economies are utilized here in two distinct but interrelated contexts: first, traditional subsistence economies are those protected by international law as it applies to Indigenous peoples with specific application to subsistence, rather than commercial, hunting, fishing and gathering. Second, traditional economies are those of any community, such as those the automotive once supported, that was offshored or left in substantial decline due to the attraction to low wage and cost global competitors. An appropriate practice of distributive justice would

those with the ability to access emerging economic conditions and those without.<sup>8</sup> These disparities were recently illustrated by mass opposition rallies in the streets of Hamburg, Germany, as world leaders arrived for the 2017 G-20 meetings.<sup>9</sup>

Whether or not globalization continues to increase at the pace of past decades, the trajectory of income disparities is likely to continue.<sup>10</sup> Global alliances of domestic and transnational non-governmental organizations will likely follow a similar trajectory in developing common and interlinked initiatives to produce policy and law designed to curb globalism's excesses.<sup>11</sup> Thus far, international advocacy has focused on protecting the rights of

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consider both the subsidence, Indigenous, industry and wage loss situations to develop new opportunities and different competitive advantages.

<sup>8</sup> Rodrick, *supra* note 6.

<sup>9</sup> Bill Chapell, *G-20 Hamburg: Tens of Thousands Demonstrates on Summit's Last Day*, NPR (July 8, 2017, 12:02 PM), <https://www.npr.org/sections/thetwo-way/2017/07/08/536159574/g20-hamburg-thousands-demonstrate-on-summits-last-day>, [https://perma.cc/7MMK-3NKF]; *see also* Marie E. Lowe, *Localized Practices and Globalized futures: Challenges for Alaska Coastal Community Youth*, *Lowe Maritime Studies* (July 16, 2015) [https://perma.cc/7AH8-6HPK] (several scholars noted, with respect to Alaska, the next generation is “caught between traditions that no longer work and new opportunities they are not ready to grasp.”).

<sup>10</sup> Martin Wolf, *Seven Charts That Show How the Developed World is Losing its Edge*, *Fin. Times* (July 19, 2017) [https://perma.cc/6N4N-K84N].

<sup>11</sup> William K. Tabb, *Economic Governance in the Age of Globalization*, 346-347 (Columbia Univ. Press 2004).

Indigenous peoples, environmental protections on land and sea, climate change, and labor rights.<sup>12</sup> These initiatives have succeeded in placing limits on what may otherwise be considered unrestricted global trade, given its advances in technologies, vertical integration of industries, and highly capitalized global markets. This relatively new generation of “rights” regarding the environment, Indigenous peoples, and climate, is setting the table to expand upon international law to protect communities that are marginalized as an externality to the forces of globalization.

This article posits that the evolution of domestic and international law is trending in the direction of distributive justice strategies. These evolving strategies are not focused solely on individuals, but also for the growing number of remote, local, and coastal communities beginning to experience a breakdown of long-standing social contracts with their governments.<sup>13</sup>

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<sup>12</sup> See Margaret E. Keck & Kathryn Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics*, 121-163 (Cornell University Press 1998); see Martha Finnemore and Katherine Kathryn Sikkink, *International Norm Dynamic and Political Change*, *International Organization*, 887- 917, 895 (1998); see generally United Nations Global Compact, *Leadership of the UN Global Compact: Our CEO & Executive Director* (last visited Oct. 10, 2017) <https://www.unglobalcompact.org/about/governance/executive-director> (U.N. Global Compact offers a global response to the challenges of ‘social license,’ bringing the advocacy for environment, Indigenous and climate rights into a voluntary forum designed to improve upon and respond to community impacts).

<sup>13</sup> BRUCE E. MOON, *THE UNITED STATES AND GLOBALIZATION: STRUGGLES WITH HEGEMONY, POLITICAL ECONOMY AND THE CHANGING GLOBAL ORDER* (Richard Stubbs and Geoffrey R.D. Underhill eds., Oxford Univ. Press 1988) (Reprint 2005) [<https://perma.cc/BD5B-GTQG>].

Additionally, this article describes the legal architecture in international law that provides a foundation for the global justice discourse as it builds toward a consensus that rights and protections be extended to entire communities, once vibrant and thriving, now vulnerable and often impoverished by globalization's considerable forces.<sup>14</sup> Finally, the article reflects upon Norway, a nation that has operationalized the language of distributive justice through its Sovereign Wealth Fund ("SWF").<sup>15</sup>

## II. DISTRIBUTIVE JUSTICE

For purposes of this article, the concept of distributive justice builds upon, yet is quite distinct from, the special legal protections or restorations evident in the growing network of treaties, conventions, statutes, and bilateral agreements designed to restore, prevent, or stop negative impacts on the environment and individuals. Distributive justice seeks to correct by international law the colonization of Indigenous peoples and the degradation of marine and terrestrial environments, or to reverse the minimal legal, environmental or social constraints

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<sup>14</sup> CHRIS ARMSTRONG, *JUSTICE AND NATURAL RESOURCES: AN EGALITARIAN THEORY* 36-74 (Oxford Univ. Press 2017); *see also* RYSZARD M. CZARNY, *A MODERN NORDIC SAGA: POLITICS, ECONOMY AND SOCIETY*, 30-31, 79 (2017) (ebook) ("Among the most important operational sources of the Nordic cooperation model, one could list constitutional tradition, citizen movement activity and civil society ... If we combine all these with diligent work and entrepreneurship, we should obtain the constitutive features of a social construct...").

<sup>15</sup> The SWF distributes investment gains from its offshore oil revenues. It is significant that Norway's distributive approach evolved not in response to external pressures, but rather a deeply rooted national concept of governmental responsibility to its citizenry.

historically placed on business activity.<sup>16</sup> In these instances, the rationale for distributive justice is somewhat restorative, yet more anticipatory, given the global trends that continue to marginalize Indigenous communities while stimulating a rebuild of their community economy which, in turn, alters their community identity.<sup>17</sup> Given that governments both regulate and financially benefit from globalizing trade and markets, equity would appear to require a distributive policy in domestic law rather than find acceptable the collateral damage to once thriving, remote, and coastal communities.<sup>18</sup> This article raises the question of the responsibility of sovereign governments to correct the imbalances.

#### *A. Procedure and Substance*

Distributive justice has both procedural and substantive dimensions. It is the view of this article that distributive justice is based more on the quality and equity of the procedure rather than on specific outcomes. Although influenced by international law, distributive justice is also tailored by domestic processes to the particularities of each nation. Communities and their

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<sup>16</sup> Tabb, *supra* note 11.

<sup>17</sup> ROGER HOWARD, THE ARCTIC GOLD RUSH: THE NEW RACE FOR TOMORROW'S ARCTIC RESOURCES 82-84 (2009) (describes transformation of the coastal town of Hammerfest from declining fishing and reindeer herding to "unrecognizable" from Snoehvit, or Snow White gas.).

<sup>18</sup> Andras Miklos, Institutions In Global Distributive Justice, Edinburgh 1-2 (2013) (contrasting state-based obligations to its citizenries with concepts of distributive justice as a global obligation); *see also* The Many Concepts of Social Justice In European Private Law 180 (Hans-W. Micklitz ed. 2011) ("a sustainable society cannot accept the degree of inequality currently being produced.").

citizenry who have been dispossessed of their livelihoods, marginalized, or otherwise negatively impacted by development decisions, must view the level of national procedure as significantly credible for those communities to sustain a belief in the equity of the government process. Despite the specific outcomes, if the public participation procedures are perceived as fundamentally fair, then the outcome, even if unfavorable, is likely to be perceived as acceptable. Thus, the processes of distributive justice contain the potential to deepen democracy itself. More inclusive processes for stakeholder input has the potential to reduce the extent of community vulnerability.

Broad community participation in national decision-making enables the identification of specific actions regarding national regulatory strategies and global markets that might otherwise be unnoticed.<sup>19</sup> Furthermore, this level of inclusivity has the capacity to ensure that distributive and sustainable results are achieved. With proper national and local feed-back mechanisms, decisions can be better refined to meet changing circumstances as they unfold. For example, a collapsed fishing community seeking to build a successful alternative economic base can more ably convey the specific resources needed from its central government to accomplish the task. This approach has been called a “redistribution of sovereign power” designed to curb both corporate and government excess, or where large-scale privately owned and developed natural resources benefit only a few.<sup>20</sup>

### III. ARCTIC CONTEXT

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<sup>19</sup> George Vasiliev, *Minority Rights Activism beyond Borders*, 36 J. OF POL’Y. STUD. 329, 332 (2015).

<sup>20</sup> *Id.*

This High North polar region's primary source of income generation for each of the Arctic nations – Canada, Russia, Norway, Iceland, Greenland via Denmark, and Alaska in the United States – are natural resources, particularly oil, gas, geothermal energy development, and commercial fishing.<sup>21</sup> The reason to consider distributive justice in Arctic offshore natural resources development is twofold: (1) offshore natural resources are foundational for income generation in the High North, and (2) the strongest examples of distributive justice worldwide are located in the Arctic region.<sup>22</sup>

In some Arctic nations, a paradox is unfolding amongst some rural, coastal, and remote communities between the high expectations from the benefits of global commerce, and anxiety about the marginalization from globalization's economic benefits. With greater surface warming, and melting sea ice, the Arctic region is warming twice as fast as the rest of the planet.<sup>23</sup> The retreating sea-ice and warming waters have advanced often-opposing commercial

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<sup>21</sup> See Arnfinn Jørgensen-Dahl, Arctic Energy and Mineral Resources, Arctic Knowledge Hub (2010) [<https://perma.cc/WYW4-AHG7>]; See generally LARS LINDHOLDT, THE ECONOMY OF THE NORTH: ARCTIC NATURAL RESOURCES IN A GLOBAL PERSPECTIVE (Solveig Glomsrød and Julie Aslaksen eds. 2006) [<https://perma.cc/B848-YF3V>].

<sup>22</sup> CHRIS ARMSTRONG, JUSTICE AND NATURAL RESOURCES: A EGALITARIAN THEORY 9-26 (2017).

<sup>23</sup> Christopher Joyce, *Arctic is Warming Twice as Fast as World Average*, National Public Radio (Dec. 18, 2014) [<https://perma.cc/95ZV-7LCT>]; see E. Carina H. Keskitalo et al., *Climate Governance in the Arctic: Introduction and Theoretical Framework*, in *Climate Governance in the Arctic*, 1-22 (Timo Koivurova, E. Carina H. Keskitalo, & Nigel Bankes eds., 2009); see also Timo Koivurova & Md. Waliul Hasanat. *The Climate Policy of the Arctic Council*, in *Climate*

and environmental interests, such as shipping, offshore oil and gas development,<sup>24</sup> commercial fishing, and the protection of marine ecosystems<sup>25</sup> and climate.<sup>26</sup> It has also elevated geopolitical interest in the Arctic as part of the world's foreign policy agenda.<sup>27</sup>

The development, production, and exportation of the Arctic's vast natural resources are expected to increase in the near and distant future.<sup>28</sup> The combination of the Arctic's substantial offshore oil and gas deposits, projections of increased commercial shipping, the continued growth of a vertically integrated fishing industry, and an expansion of port-to-port agreements amongst the major ports of the nations of the North Atlantic, reflect greater Arctic-wide integration into both the region and the global economy.

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*Governance in the Arctic*, 51-75 (Timo Koivurova, E. Carina H. Keskitalo, & Nigel Bankes eds., 2009).

<sup>24</sup> Council of Foreign Relations, *The Emerging Arctic* (2014) [<https://perma.cc/DPS5-WJN9>].

<sup>25</sup> Hajo Eiken, *Internationally Coordinated, Cooperative Arctic Marine Science during the Fourth International Polar Year*, in *ARCTIC SCIENCE, INTERNATIONAL LAW AND CLIMATE CHANGE* 285, 298 (Susanne Wasum-Rainer, Ingo Winkelmann & Katrin Tiroch eds., 2011).

<sup>26</sup> *The Paris Agreement*, UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE, [<https://perma.cc/J4Z9-A2NY>] (last visited Mar. 26, 2017).

<sup>27</sup> Rob Huebert, *Rising Temperatures, Rising Tensions: Power Politics and Regime Building in the Arctic*, in *Polar Oceans Governance in an Era of Environmental Change*, 65 (Tim Stephens & David L. VanderZwaag eds., 2014).

<sup>28</sup> Charles Emmerson & Glada Lahn, *Arctic Opening: Opportunity and Risk in the High North*, 5 (2012).

Despite the recent collapse of the price of oil, declining offshore oil fields on the Norwegian shelf, the high cost of offshore oil exploration and production in the High North and increased opposition to petroleum development,<sup>29</sup> new discoveries are ongoing. For example, in the resource-rich Barents Sea – the current subject of a Greenpeace lawsuit against the Norwegian government on climate change grounds<sup>30</sup> – the anticipated steady oil driven growth in Norway’s offshore is about five times Norway’s current substantial annual production.<sup>31</sup>

#### A. Growth Trajectory

Despite the considerable resources in the High North, it is not clear that all of the oil producing states in the Arctic region will continue with their earlier growth trajectories, given the

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<sup>29</sup> Emma Wilson & Florian Stammler, *Beyond Extractivism and Alternate Cosmologies: Arctic Communities and Extractive Industries in Uncertain Times*, 3 *EXTRACTIVE INDUSTRIES AND SOC’Y* 1 (2016) (“Where industrial activity takes place, local involvement in shaping an industry’s ‘social license to operate’ (e.g., might) offer a counterbalance to an ‘extractivist’ imperative, by focusing more on equitable benefit sharing and protection of local livelihoods and the environment.”).

<sup>30</sup> Vilhelm Carlstrøm, *Greenpeace’s Historical Lawsuit Against Norway for Arctic Drilling Has Been Approved for Court*, *BUSINESS INSIDER NORDIC* (Feb. 15, 2017) [<https://perma.cc/9SWY-2NWJ>]; Writ of Summons, Greenpeace Nordic (Oct. 18, 2016), [http://www.greenpeace.org/norway/Global/norway/Arktis/Dokumenter/2016/legal\\_writ\\_english\\_final\\_20161018.pdf](http://www.greenpeace.org/norway/Global/norway/Arktis/Dokumenter/2016/legal_writ_english_final_20161018.pdf).

<sup>31</sup> Espen Erlingsen, *Barents Sea: Norway’s Emerging Oil Province*, *OFFSHORE* (Aug. 11, 2016) [<https://perma.cc/YPB8-V5SQ>].

combination of the recent collapse in the price of oil, the high costs of Arctic development, economic sanctions against Russia, and significant public opposition to carbon fuels.<sup>32</sup> However, over the next twenty years it is anticipated that oil and gas production will grow and thrive.<sup>33</sup>

Recent joint initiatives, such as the ongoing Norway and Russia agreement,<sup>34</sup> and the projected petroleum development between Iceland and Norway, offers not only a glimpse of the Arctic's commercial future, but an example of an effective distributive revenue model.<sup>35</sup>

### *B. Distributive Justice and Natural Resources Development*

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<sup>32</sup> Peter F. Johnston, *Arctic Energy Resources and Global Energy Security*, 12 JOURNAL OF MIL. AND STRATEGIC STUD. 1, 11-15 (2010); see Arctic Monitoring and Assessment Program, ASSESSMENT 2007: OIL AND GAS ACTIVITIES IN THE ARCTIC – EFFECTS AND POTENTIAL EFFECTS 7-2 (Carolyn Symon ed., 2010); see Reuters Staff, *Norway and Russia to Step Up Cooperation in Hunt for Arctic Oil*, REUTERS (Nov. 28, 2016) [<https://perma.cc/XDE6-PAQW>].

<sup>33</sup> Alex Williams ET AL., *The Future of the Arctic Enterprise: Long Term Outlook and Implications*, Smith School of Enterprise and Environment University of Oxford, 28 (2011) [<https://perma.cc/6RVV-MURE>].

<sup>34</sup> See Beth Gardiner, *Iceland Aims to Seize Opportunities in Oil Exploration*, N.Y. TIMES, (Oct. 1, 2013) [<https://perma.cc/95RZ-AR3A>]; see also Ithaca Kolventi and Petoro License in the Dreki Area Relinquished, NATIONAL ENERGY AUTHORITY (Jan. 4, 2017)[<https://perma.cc/H4PC-RRAK>].

<sup>35</sup> See generally Iceland Energy Policy, *Laws and Regulation Handbook: Volume 1 Strategic Information and Basic Laws* (2016).

The development of natural resources is foundational to the global citizenry and essential to nations where energy production is a cornerstone to national economies, such as those in the Arctic High North.<sup>36</sup> Arctic nations, particularly Norway, Iceland, Finland, and the State of Alaska, are on the forefront of practice and thinking about the issues of environmental sustainability and distributive justice.<sup>37</sup> In that respect, the evolution of the “Norwegian Model” offers, perhaps, the most successful example for distributive justice. This has encouraged other States to look to the Norwegian Model for guidance, as green shoots of distributive justice become visible in both its national policy and Constitutional practice, particularly in the Arctic.

Every person has the right to an environment that is conducive to health and to a natural environment whose productivity and diversity are maintained. Natural resources shall be managed on the basis of comprehensive long-term considerations which will safeguard this right for future generations as well. . . . [T]he authorities of the state shall take measures for the implementation of these principles.<sup>38</sup>

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<sup>36</sup> Lars Lindholdt, *Arctic Natural Resources in a global perspective*, in *THE ECONOMY OF THE NORTH 27-37* (Solveig Glomsrod & Julie Alasken eds., 2008) [<https://perma.cc/33WP-WU37>].

<sup>37</sup> Edward Canuel, *Sustainable Development and Natural Resources Extraction, and the Arctic: The Road Ahead*, 32 *ALASKA L. REV.* 31-63 (2016) [<https://perma.cc/5YZT-ZJ6Z>]; see Karl Widerquist, *About the Alaska Dividend*, Alaska Dividend Blog (Nov. 13, 2017 12:41PM) [<https://perma.cc/DQZ2-YM62>].

<sup>38</sup> Norwegian [constitution] May 17, 1814, art. 112 (Nor.).

The concept of private ownership of natural resources and a national distributive framework for revenue arguably illuminates a considerable, although not unresolvable, tension between the concepts of sovereignty, private ownership, and the democratic process. Globalization and global integration is certainly not all negative. What is in question, given the breathtaking velocity of the internationalization of trade, markets, and capital, is whether governments will specifically assist the hard working, enduring communities whose citizenry finds themselves irrelevant to global markets or lacking access to tools that would support community resiliency and the capacity to recreate its economic life. Government regulatory support and guidance to assist the citizenry of marginalized communities to find a future within the new economic landscape is the cornerstone of distributive justice.<sup>39</sup>

### *B. Iceland*

Iceland, the small island nation located in the Arctic perimeter between the geologically similar Norway and Greenland, arguably offers new possibilities for a distributive model. The Icelandic government, as it engages a joint offshore petroleum development project in cooperation with Norway, is also in the preliminary stages of considering how to allocate revenues generated by its offshore natural resources development.

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<sup>39</sup> *Iceland's Finna fjord port inches closer*, PORTSTRATEGY (Feb. 1, 2017)

[<https://perma.cc/3QLN-R7MU>] (Finna fjord, a coastal town on Iceland's east coast, is seeking to build a deep water port in advance of the Jan Mayen petroleum development project and to serve as a port of call for the likely increase in Arctic traffic as the sea ice in the high North retreats. It is anticipated that construction might begin as early as 2020 for a remote, coastal community to expand its use, creating jobs and infrastructure).

The Iceland-Norway cooperative petroleum project in the Jan Mayen region, located within Iceland's 200 nautical mile exclusive economic zone ("EEZ") waters,<sup>40</sup> is iconic to Iceland's combination of a globalizing economy, fishing community decline, along with new possibilities for eastern port communities, proximate to the Dreki licensing region.<sup>41</sup>

Environmental protections at the highest levels, and, possibly, a Norwegian-style Sovereign Wealth Fund has opened questions of what an Icelandic distributive strategy might look like and, what national conceptual framework and legislative gaps are needed to achieve it. Optimistic estimates ranging from 1 – 10 billion barrels of oil equivalent ("BOE") in projected petroleum development in the Iceland-Norway joint development area, the Dreki license in the

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<sup>40</sup> See GUDNI TH JOHANNESON, *TROUBLED WATER: COD WAR FISHING DISPUTES AND BRITAIN'S FIGHT FOR THE FREEDOM OF THE HIGH SEAS, 1948-1969* (2007); ANDREW WELCH, *THE ROYAL NAVY IN THE COD WARS* (2006).

<sup>41</sup> Finna fjord, located on Iceland's north-east coast, is being revitalized by a public-private community-municipality-investor port project that will serve as a base-port for the projected offshore oil and gas, serve as a hub-port for trans-Arctic shipping and serve as a service and search and rescue port. The support for this deep-water port project at the national level, with its emergence from the municipality level, offers a world class example of how local and national governments along with private industry can revive and recreate a local economy in the midst of globalization. While Finna fjord offers a compelling story given the timeliness of the need to build infrastructure to support offshore petroleum and shipping growth to the national growth strategy, it offers a world class example of public-private, national-local investment strategies that draw an otherwise marginalized community into the national and global economy.

Jan Mayen region,<sup>42</sup> contains the potential to significantly boost Iceland's revenues.<sup>43</sup> This has stimulated a preliminary conversation at national and local levels regarding the Norwegian Model and its distributive implications regarding natural resources development.<sup>44</sup> In this context, green shoots of distributive justice have been unfolding since Iceland's recovery from the 2008 financial crash that impoverished both individuals and the state.<sup>45</sup>

Two years after the crash, the Icelandic Parliament established a Consultative Constitutional Assembly<sup>46</sup> that was assigned the complex task of revising its 1944 Constitution through a participatory national forum. While a majority of voters declared support for a key element of the proposed Constitution that required state ownership of natural resources, skeptics

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<sup>42</sup> See generally Gudni A. Johannesson, Iceland Offshore Exploration, national Energy Authority of Iceland [<https://perma.cc/2NJR-FCUE>].

<sup>43</sup> Jichang Lulu, *Billions and Billions of Barrels of CNOOC in Iceland* (Feb. 18, 2014) [<https://perma.cc/WCE6-L9AS>].

<sup>44</sup> See generally Ministry Industry Report, *Oil Exploration in the Dreki Area on the Jan Mayen Ridge*, NATIONAL ENERGY AUTHORITY (Mar. 2007) [<https://perma.cc/Z9T6-DXBM>] (Strategic Environment Assessment of Jan Mayen Licensing Area shows the, yet unknown, but potential extent of the resource in the offshore petroleum joint development project Iceland-Norway offshore, the Dreki license.).

<sup>45</sup> See *The Economy of Iceland*, The Central Bank of Iceland (Oct. 2016) [<https://perma.cc/3WP4-4SQE>].

<sup>46</sup> See *A Proposal for a new Constitution for the Republic of Iceland*, Stjornlagarad (Mar. 24, 2011) [<https://perma.cc/2WH7-ENL4>].

note that adoption in the short term is unlikely, given current Parliamentary opposition. Yet, a national movement regarding distribution of petroleum revenues<sup>47</sup> enjoys some degree of support in Iceland's remote coastal communities in the north and northwest that have been significantly diminished to the impacts of globalization. The coastal community interest, to reshape the meaning of recovery from economic collapse, is perhaps best reflected in Iceland's Draft Article 34, a tentative and perhaps unlikely part of a basis for a proposed constitution Draft Article 34 states: "Iceland's natural resources that are not private property shall be the joint and perpetual property of the nation. No one can acquire the natural resources, or rights connected thereto, as property or for permanent use and they may not be sold or pledged."<sup>48</sup>

Beyond the anticipated oil and gas revenues, Iceland contains the potential to offer a bridge between relevant international legal standards, its own legal and regulatory trajectory, implementation of the Norwegian Model, and a more strategic model for distributive justice that creates an even more resilient democracy.

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<sup>47</sup> Thorvaldur Gylfason *The Icelandic Constitutional Reform: People, Principles and Process*, Conference University Akureyri (Sept. 23-24, 2016).

<sup>48</sup> A Proposal for a new Constitution for the Republic of Iceland (Mar. 24, 2011) [<https://perma.cc/J2BR-T3RS>] (Iceland's proposed Constitution, at Article 34, describes the ownership of natural resources to belong in perpetuity to the nation ... in the public interest." Further, several of Iceland's major political parties have spoken of the "Norwegian Model" for investment and distribution of the nation's natural resources revenues).

The issue of natural resource development is both personal and emotional in Iceland where fishing is the economic centerpiece of the nation's economy and culture.<sup>49</sup> The history of Iceland's rich fishing industry offers an example of globalization, the vertical integration of industry, and, perhaps paradoxically, what it has taken for Iceland's commercial interests that built a world-class fishing industry.

In part, to prevent what became substantial overfishing from domestic vessels, Iceland's Parliament in 1990, through its Uniform Fisheries Management Act, produced a controversial quota system to provide protection for what counts today among the world's most environmentally protected fisheries.<sup>50</sup> In turn, those who hold the largest quotas created the controversial yet, world class, vertically integrated, high-tech, and globalized fishing industry. In the course of becoming a top exporter, the process, arguably, "crowded out" a significant

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<sup>49</sup> Gisli Pálsson & Agnar Helgason, FIGURING FISH AND MEASURING MEN: THE INDIVIDUAL TRANSFERABLE QUOTA SYSTEM IN THE ICELAND ICELANDIC COD FISHERY, 117-146, OCEAN & COASTAL MANAGEMENT (Elsevier Vol. 28 1995) (Abstract notes that the individual transferable quota (ITQ) system, introduced in 1984, concentrated access to fisheries on the basis of who happened to be boat owners and catch levels during the three-year period prior to the allocations. The ensuing public discontent and social repercussions has led to the current government expressing an interest in exploring the Norwegian Model with respect to collection, investment and allocation of natural resource revenues.).

<sup>50</sup> Bradley Turner, *Iceland Offers a Model for Arctic Fisheries Management*, ARCTIC DEEPLY (Dec. 9, 2016) [ <https://perma.cc/5BZA-KCYL>].

number of local fishers, charged by some as leading to the collapse of the fishing communities, many of which hark to a fishing culture and industry over a thousand years old:

The market-based quota system led to social problems, including loss of jobs, outmigration, depopulation, a significant decrease in the value of homes and a sense of social alienation from the capital, Reykjavik. The village lost income and a thousand year old way of life based on fishing, diminished government support followed for regional development and, as the fishing industry consolidated, and, is currently situated among the world's top ten fishing exporters, the government's emphasis shifted from supporting employment and small-scale fishing industries to the increased productivity, efficiency and globalization of a fishing industry that is now dominated by four or five major companies that withdrew their trawlers from local villages into the capital or nearby areas.<sup>51</sup>

An intense, national debate sprang from a core, yet controversial, quota system that limited access and catch to protect the fisheries and marine ecosystems as well as build a sustainable industry. Where freedom to fish for the past millennia had been the norm, communities like Iceland's far north and west are in collapse, as many of its fishing villages are bereft of once prevalent trawlers and jobs.<sup>52</sup> However, coastal communities on the east, in close proximity to

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<sup>51</sup> Iceland Government Page, *Icelandic Fisheries* [<https://perma.cc/6QCS-M78H>] (last visited Mar. 24, 2017; *see also* Helgi Áss Grétarsson, Allocation of Desmersal Harvest Rights in Iceland, *Arctic Review on Law and Politics* (2010).

<sup>52</sup> *Id.*

the Dreki licensing region, are vying at municipal levels for government support to build a deep water port that is capable of supporting oil production and the likely increase in shipping traffic as the waters warm and High North shipping increases.

#### 1. Boom and Bust Oil Cycles

Even though drilling is probably several years away, communities such as Finna fjord prepare to build port infrastructure to support offshore oil and gas and trans-Arctic shipping. Finna fjord's projected port development project and Norway's Sovereign Wealth fund's distributions, reflect how revenues and development policy can be shaped for local and community benefit.<sup>53</sup> As the Icelandic government proceeds to support the Finna fjord project, even as it grapples with its quandary of dispossessed, remote, coastal communities, the larger global challenge has been described as being "poised between an old world that no longer works and a new one struggling to be born."<sup>54</sup>

The Norwegian Model has engaged Iceland's discourse both as a Constitutional matter<sup>55</sup> and a matter of reflection upon distribution of all of its offshore natural resources revenues.<sup>56</sup> The Norwegian Model offers the Iceland authorities both an effective track record on

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<sup>53</sup> THE BARENTS OBSERVER *supra*, note 46.

<sup>54</sup> David Bollier & Silke Helfrich, *The Wealth of the Commons: A World Beyond Market and State*, xi (2012).

<sup>55</sup> A Proposal for a New Constitution for the Republic of Iceland, [Constitution] Mar. 24, 2011. art. 33-34.

<sup>56</sup> See Jane Mayen on the Exploration Map (Jan. 22, 2009) Norwegian Petroleum Directorate [https://perma.cc/7TAZ-HYLM] (last visited Mar. 26, 2017).

environment and distribution of revenues and a unique relationship of trust as Iceland moves forward to develop its first offshore petroleum initiative.<sup>57</sup>

#### IV. SOVEREIGNTY, JURISDICTION, AND GREEN SHOOTS OF DISTRIBUTIVE JUSTICE

Just as the Arctic region is defined by a combination of cooperation and co-existence, the 1982 United Nations Convention on the Law of the Sea (“UNCLOS”) provides a linkage between maritime law, global justice, and trade.<sup>58</sup> Further, international law, as it applies to sovereignty and jurisdiction in the world’s oceans, is directly tied to natural resources development. The first obligation for any nation with interest in developing its natural resources, is to confirm that it has jurisdiction over the boundaries in which the resources exist. Without clearly identified boundaries, jurisdiction remains in doubt, and thus investments are less likely.<sup>59</sup> The foundational international legal framework<sup>60</sup> for the procedures, authorities, and strategies that drive norms in the world’s oceans, offers a point of departure for a sovereign’s

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<sup>57</sup> Andrew Holland, *Iceland, Like All Arctic Nations is Drilling for Oil*, AM. SEC. PROJECT (Sept. 4, 2015) <https://www.americansecurityproject.org/iceland-like-all-arctic-nations-is-drilling-for-oil/>.

<sup>58</sup> JURGEN FRIEDRICH, *INTERNATIONAL ENVIRONMENTAL SOFT LAW* 6-8 (2013).

<sup>59</sup> Helge Ryggvik, *The Norwegian Oil Experience: A Toolbox for Managing Resources?*, CENTRE FOR TECHNOLOGY, INNOVATION AND CULTURE, 10 (2010) [<https://perma.cc/K2EW-XZZU>].

<sup>60</sup> DONALD R. ROTHWELL, *THE POLAR REGIONS AND THE DEVELOPMENT OF INTERNATIONAL LAW* 116 (Cambridge Univ. Press, 1996)

right to exploit the resources within its jurisdictional waters.<sup>61</sup>

*A. United Nations Convention of the Law of the Sea*

Referred to as the “Constitution of the Oceans,” the United Nations Convention of the Law of the Sea emerged on December 10, 1982. Unfortunately, it was not until 1994 that the Treaty attained the signatures of the sixty requisite parties that brought it into force, despite hopes for universal participation. The product of the longest running negotiation in the history of the United Nations, UNCLOS has been called a “balance” of competing interests. Its core challenge was to balance the breadth of coastal state projections of sovereignty over adjacent seas and oceans and, its opposite, marine power demands for freedom of the high seas.

*B. Exclusive Economic Zone*

The establishment of the EEZ, an establishment that extended the jurisdiction of coastal states over waters adjacent to territorial waters, was directly connected to commercial activities, particularly oil and gas exploration and fishing. In 1945, perhaps as a precursor to UNCLOS, President Truman asserted the right of the United States to claim jurisdiction over the natural resources in the continental shelf adjacent to coastal regions.<sup>62</sup> In 1972, Iceland, like several

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<sup>61</sup> *Id.*

<sup>62</sup> Laura Beckman & Tara Davenport, *The EEZ Regime: Reflections After 30 Years*, LOSI CONFERENCE PAPERS (2012) [<https://perma.cc/PDY5-YXZ7>] (In 1945, President Harry S. Truman, responding in part to pressure from domestic oil interests, unilaterally extended United States jurisdiction over all natural resources on that nation's continental shelf - oil, gas, minerals, etc. This was the first major challenge to the freedom-of-the-seas doctrine. Other nations soon followed suit).

Latin American nations, established the 200 nautical mile fishing zone to demonstrate its preferential right to fish in its coastal waters.<sup>63</sup> When UNCLOS later established the 200 nautical mile EEZ, called “entirely new maritime zones,”<sup>64</sup> coastal and littoral States were able to enjoy the exclusive sovereign right to “explore, exploit, conserve and manage”<sup>65</sup> the natural resources, living or non-living, in the seabed of its territorial waters, its subsoil and water column.<sup>66</sup> However, counter arguments suggest that this new global legal framework provided

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<sup>63</sup> Gudni Johannesson, *The Jan Mayen Dispute Between Iceland and Norway, 1979-1981*, ARCTIC FRONTIERS (Jan. 24, 2013) [<https://perma.cc/2G4U-VRXB>]; Fisheries Jurisdiction (U.K. v. Ice.), Judgement, 1974 I.C.J. 3 (July 25); see also R.R. Churchill, *The Fisheries Jurisdiction Cases: The Contribution of the International Court of Justice to the Debate on Coastal States' Fisheries Rights*, 24 INT'L. AND COMP. L.Q. 82, 82-105 (1975).

<sup>64</sup> Tim Stephens & Donald R. Rothwell, *The LOSC Framework for Maritime Jurisdiction and Enforcement 30 Years On*, 27 INT'L. J. OF MARINE & COASTAL L. 701, 703 (2012); Beckham, *supra* note 73.

<sup>65</sup> CHRIS ARMSTRONG, JUSTICE AND NATURAL RESOURCE: AN EGALITARIAN THEORY 202-205 (Oxford Univ. Press, 2017) (UNCLOS provides only a “quasi-sovereignty” over the EEZ waters as the sovereign’s legal regime does “not extend all the elements of state sovereignty to EEZs.”).

<sup>66</sup> DONALD R. ROTHWELL & TIM STEPHENS, THE INTERNATIONAL LAW OF THE SEA 82-97 (Hart Publishing, 2010) (The Exclusive Economic Zone perhaps the most significant UNCLOS zone, extended coastal state sovereignty to 200 nautical miles from the coastal state baseline, where coastal states have sovereignty over living and non-living resources and an exclusive responsibility to protect the marine environment).

“legal cover for a rapid resource-grab,”<sup>67</sup> given the twin realities of the “newly created EEZs” combined with the right of coastal states to extend the outer continental shelves that “contains the vast majority of the known oil and gas reserves contained under the seabed. . . .”<sup>68</sup>

### *C. Common Heritage of Mankind*

In the view of the skeptics, UNCLOS established a foundational international right to a distribution of revenues generated from resources exploited in the seabed of the high seas. Referred to as UNCLOS’ “most innovative”<sup>69</sup> and “most controversial”<sup>70</sup> and, perhaps, most contentious Article, the oceans treaty established the principle, through its Common Heritage of Mankind Article,<sup>71</sup> that the deep seabed, subsoil and its resources are beyond national jurisdiction, and, thus not subject to national jurisdiction or appropriation.<sup>72</sup>

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<sup>67</sup> Armstrong, *supra* note 74, at 202-205.

<sup>68</sup> J. Evensen, *Working Methods and Procedures in the Third United Nations Conference on the Law of the Sea*, 199 *Recueil des Cours* 414, 436 (1986).

<sup>69</sup> Stephens, *supra* note 73, at 701-709.

<sup>70</sup> Peter Tzeng, *Supplemental Jurisdiction Under UNCLOS*, 38 *HOUSTON J. OF INT’L. L.* 499, 503 (2016).

<sup>71</sup> United Nations Convention on the Law of the Sea art. 140, para. 1-2, Dec. 10, 1982 [<https://perma.cc/3Z5V-AC4C>].

<sup>72</sup> *Id.* at art. 137, para. 1 (providing that: “No State shall claim or exercise sovereignty or sovereign rights over any part of the area or its resources, nor shall any State or natural or juridical person appropriate any part thereof. No such claim or exercise of sovereignty or sovereign rights nor such appropriation shall be recognized.”).

The distributive ethos established in UNCLOS Article 137 finds its roots in a speech of given before the First Committee of the General Assembly of the United Nations on January 11, 1967. The speech contemplated technological developments that were making the high seas accessible to mining, oil, and gas production, and argued that there should be “no public or private appropriation” of the high seas, that the high seas be used “exclusively for peaceful purposes,” belonging to all of humankind that retains a collective right to benefit from any development, “rather than exclusively benefit the richest states with the most advanced mining capabilities.”<sup>73</sup> Specific processes and environmental standards have not yet significantly materialized, but this speech set the next stage for distributive norms development for global resources regimes for nation states both multilaterally and, to some extent, influencing domestic policy.<sup>74</sup>

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<sup>73</sup> United Nations General Assembly, *First Committee 1515<sup>th</sup> Meeting*, UNITED NATIONS OFFICIAL RECORDS (Nov. 1, 1967, 10:30AM) [<https://perma.cc/69ZN-43KD>]; *see also* THOMAS COTTIER, *EQUITABLE PRINCIPLES OF MARITIME BOUNDARY DELIMITATION* 64-65 (Cambridge Univ. Press, 2015) (Cottier cautions that deep sea-bed mining, compensatory rights and, over-fishing in the high seas evokes the “tragedy of the commons” as well as distributive justice in the international arena); Garrett Hardin, *The Tragedy of the Commons*, 162 SCI. 1243, 1243-1248 (1968).

<sup>74</sup> Rowland J. Harrison, *Article 82 of UNCLOS: The Day of Reckoning Approaches*, 10 J. OF WORLD ENERGY & BUS. L. 488, 488-452 (2017); *see also* Caitlyn Antrim, *The International Seabed Authority Turns Twenty*, 16 GEO. J. OF INT’L. AFF. 188, 188-196 (2015) [<https://perma.cc/YF4Q-B4HK>].

With its “Common Heritage of Mankind” proviso, UNCLOS offers a legal basis in international law that links sovereignty, jurisdiction, state action, and a distributive philosophy for revenues generated from natural resources development.<sup>75</sup> UNCLOS, particularly through its Common Heritage of Mankind Article, raises a question of international law: should natural resources be developed with revenues distributed to benefit a national citizenry or, to only a few owners?<sup>76</sup>

*D. More Green Shoots: Environmental Protections and Public Participation*

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<sup>75</sup> JAMES HARRISON, *MAKING THE LAW OF THE SEA* 60 (Cambridge Univ. Press, 2011) (noting that the provisions of UNCLOS, the International Maritime Organization (IMO) and the Arctic Council, form the core of the international legal regime that governs the Arctic, although it is individual state jurisdiction that applies to jurisdictional waters of the coastal states. While the United States, a leading maritime power, has not yet ratified UNCLOS, the U.S. does accept much of the Treaty as customary international law. All of the other Arctic nations have ratified the treaty); *see also* Rebecca Bratspies, *Human Rights and Arctic Resources*, 15 SW. J. OF INT’L L. 251, 251-281 (2009) [<https://perma.cc/N4AZ-RTSJ>]; *see also* Commander Robert C. “Rock” De Tolve, *At What Cost? America’s UNCLOS Allergy in the Time of “Lawfare”*, 61 NAVAL L. R. 1, 1-16 (2012) [<https://perma.cc/9KTJ-W953>].

<sup>76</sup> Armstrong, *supra* note 76, at 217 (Primarily focusing on the 200 mile EEZ for littoral states, Armstrong notes that Ambassador Pardo was “crushed by the eventual form that UNCLOS took, describing it as “probably the most inequitable treaty that has ever been signed.” However, despite distributive inequities, in the *Common Heritage of Mankind* Article, Armstrong wrote, Pardo “found hope.”).

The growing regulatory support for inclusion of community stakeholders in Environmental Impact Assessments (“EIA”) has become a basis both for best practices in environmental protections, and a process by which new issues are uncovered.<sup>77</sup> Over the past forty years, the development and evolution of EIA, Strategic Environmental Assessments (“SEA”), and Trans-boundary Environmental Impact Assessments (“TEIA”) advanced from controversial frontline views to commonly held norms in both domestic and international law.<sup>78</sup> The EIA acknowledges the centrality of communities located in the footprint of operations to fully understand any adverse environmental impacts, and the implications for communities located in the footprint of operations.<sup>79</sup> The public participation standard for environmental assessments in both domestic and international law offers a significant brick in the edifice of

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<sup>77</sup> KEES BASTMEIJER & TIMO KOIVUROVA, *THEORY AND PRACTICE OF TRANS-BOUNDARY ENVIRONMENTAL IMPACT ASSESSMENT* 1-28 (2007) (describing the evolution of Trans-boundary EIA between states, EIA for activities in international and shared areas, and EIA required by international financial institutions).

<sup>78</sup> Bram Noble et al., *Strategic Environmental Assessment Opportunities and Risks for Arctic Offshore Energy Planning and Development*, 39 *MARINE POL’Y* 296, 296-302 (2013); see also Tyra Ohman, *Strategic Environmental Assessment in Norway’s Offshore Oil and Gas* (Mar. 2013) (unpublished Masters of Arts thesis) (on file with the University of Saskatchewan Saskatoon library system).

<sup>79</sup> Organisation for Economic Co-operation and Development, *Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractives Sector*, 20 (Apr. 2015)

[<https://perma.cc/3B7M-V275>].

distributive justice to entire communities where natural resources development is concerned. The public participation requirements reflect a greater democratization of processes where large-scale development, particularly in the extractives sector, is proposed.<sup>80</sup>

The globally accepted environmental norms and standards, EIA, SEA, TEIA, emerged through external drivers visible in the form of a loose network of hundreds of interconnected environmental advocacy groups that employed a variety of, often interlinked, policy, organizational, and media strategies. This advocacy has moved the political needle toward greater stakeholder input by emphasizing the soft law norms of corporate social responsibility, stakeholder risk assessments, and social license to operate (“SLO”).<sup>81</sup> The combined pressures by organized advocacy networks, litigators, scientists, and impacted communities gave rise to these critical public participation requirements.<sup>82</sup>

#### *E. Indigenous Rights and Sovereignty*

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<sup>80</sup> See Alan Boyle, *Developments in International Law of the EIA and their Relationship to the Espo Conference*, 20 REV. OF EUR. COMP. AND INT’L. ENVTL. L. 229 (2011); see also NEIL CRAIK, *THE INTERNATIONAL LAW OF ENVIRONMENTAL IMPACT ASSESSMENT: PROCESS, SUBSTANCE, AND INTEGRATION* 146 (Cambridge Univ. Press, 2008).

<sup>81</sup> Finnemore, *supra* note 12.

<sup>82</sup> Julia S.P. Loe & Ilan Kellman, *Arctic’s Petroleum’s Community Impacts: Local Perceptions from Hammerfest, Norway*, 16 ENERGY RES. & SOC. SCI. J. 25, 25-34 (2016); Trond Nilsen, *Stabilizing Mega-Projects in the Arctic? When Trans National Oil Companies Meet Local Communities in Norway, Iceland and Greenland*, Norut Nor. Res. Inst. Alta-rapprot, 53-63 (2013).

Perhaps the strongest expression of participatory rights in international law is found in the land and sovereignty rights of Indigenous peoples to fully participate and consent to any form of natural resources production on treaty, sovereign, or aboriginal lands.<sup>83</sup> Indigenous peoples achieved the right to say “no” to proposed natural resources projects. The ability to say “no” to proposed development on tribal, treaty, aboriginal, or culturally significant lands, is a critical departure from colonial models of the past and present.<sup>84</sup>

Somewhat like large-scale commercial interests, environmental NGOs have advocated policies that, while designed to offer protection to the environment, marine ecosystems, or climate, their policy prescriptions often bypass, or negate, the interests and inputs of residents of the same Indigenous, coastal, and small communities. Participatory rights, particularly where

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<sup>83</sup> United Nations Declaration on the Rights of Indigenous Peoples art. 18-19, Sept. 13 2007 [<https://perma.cc/3PQ3-G2YE>] (Free Prior and Informed Consent (FPIC), is the principle that a community has the right to give or withhold its consent to proposed projects that may affect the lands they customarily own, occupy or otherwise use. The concept of “consent” was memorialized in the *U.N. Declaration on the Rights of Indigenous Peoples* that, amongst other confirmation of rights, affirms at Article 18, the “right to participate in decision-making matters which would affect their rights.”).

<sup>84</sup> Parshuram Tamang, *An Overview of the Principle of Free, Prior and Informed Consent and Indigenous Peoples in International and Domestic Law and Practice*, UNITED NATIONS, at 6 (Jan. 17-19, 2005) [<https://perma.cc/869D-8TJA>]; *see generally* John B. Henriksen, *Oil and Gas Operations in Indigenous Peoples’ Lands and Territories in the Arctic: A Human Rights Perspective*, 4 J. OF INDIGENOUS PEOPLES RTS. 24 (2006).

natural resources are at play, are central to any meaningful approach to distributive justice.<sup>85</sup> The trend in international jurisprudence toward greater public participation appears to cement not only principles of distributive justice but also of democracy itself.<sup>86</sup>

#### V. EVOLUTION OF THE NORWEGIAN MODEL

The widening demands for states to take action to protect their citizenry in a globalizing world offers an opportunity to do better in the 21<sup>st</sup> century. One nation that demonstrates an expansion of both principles and processes of distributive justice toward accomplishing this daunting, yet vital, task of our globalizing era is the government and people of Norway.<sup>87</sup> Norway has linked its world class, oil financed, Sovereign Wealth Fund with a process of national economic distribution that offers a distributive example that is referred to with global respect, as “the Norwegian Model.”<sup>88</sup>

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<sup>85</sup> E.A. Barry-Pheby, *The Growth of Environmental Justice and Environmental Protection in International Law*, 13 SUBSTANTIVE DEV. OF L. & POL’Y 48, 51-53 (2012).

<sup>86</sup> Jan van Tatenhove, *Integrated Marine Governance, Questions of Legitimacy*, 10 Mast 87, 92, *Environmental Policy Group*, Wageningen University (2010) (Makes a key point regarding the legitimacy of process to outcome – central to the procedural dimension of distributive justice. The “involvement of multiple actors, multiple levels and the coordination and integration of different sectoral marine activities will affect the legitimacy of integrated marine governance.”).

<sup>87</sup> Ryggvik, *supra* note 59, at 6-7.

<sup>88</sup> See Gemma Corrigan, *Lessons from Norway, the World’s Most Inclusive Economy*, World Economic Forum (Apr. 12, 2017) [<https://perma.cc/8A4Y-AAM3>].

The Kingdom of Norway has charted a course to distribute its gains from offshore natural resources development for the benefit of its national citizenry through a strategy that the World Economic Forum has called “inclusive growth.”<sup>89</sup> The Norwegian Model is being observed with interest worldwide, particularly by Iceland, as the nation prepares to develop offshore petroleum in cooperation with Norway, should the petroleum exist in sufficient quantity.

It has been thirty-five years since the Iceland–Norway Conciliation Commission made its determination regarding joint use of the Icelandic offshore, nearly fifty years since Norway entered the world of energy exploration in its outer continental shelf, and four years since Iceland’s Eykon Energy teamed up with China’s CNOOC to bid for a license in collaboration with Iceland’s National Energy Authority in the offshore Dreki license of the *Jan Mayen* waters located between Iceland and Norway.<sup>90</sup> Thus, it is an opportune moment to briefly reflect upon the Norwegian Model as a standard-setting approach as petroleum development unfolds in the Jan Mayen waters.<sup>91</sup>

#### A. *Offshore Petroleum and Social Supports*

Norway, the world's third-largest exporter of natural gas and the seventh largest oil

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<sup>89</sup> *Id*; Øysetin Noreng, THE OIL INDUSTRY AND GOVERNMENT STRATEGY IN THE NORTH SEA 109-127 (Croom Helm Ltd., 1980).

<sup>90</sup> Iceland-Norway: Agreement on the Continental Shelf Between Iceland and Jan Mayen, 21(6) INT’L LEGAL MATERIALS 1222, 1222-1226 (1982); see Adina Anghelache, *History of Unitization-based Cooperation in the Development of Offshore Cross-Border Disputes*, ENERGY POLICY GROUP (Aug. 15, 2017) [<https://perma.cc/TX73-BEG4>].

<sup>91</sup> Noreng, *supra* note 89.

exporter to the global market, is considered a highly successful model of petroleum development.<sup>92</sup> Revenues from the sale of oil and gas have played a vital role in the creation and maintenance of Norway's high levels of social, political, and economic quality of life that count amongst the world's best.<sup>93</sup>

The total export value of oil, gas, and related products in 2015 was about 350 billion Norwegian Krone ("NOK") or about 47 percent of the total value of Norwegian goods, this correlates to \$42 billion USD.<sup>94</sup> Most Norwegian oil and gas is transported by a fleet of shuttle tankers from the Norwegian shelf to European destinations, including the UK, and by large tankers to the Mediterranean and Asia.<sup>95</sup>

Norway's nearly \$500 billion economy is dwarfed by its \$960 billion Sovereign Wealth Fund which is financed by petroleum revenues and decades of wise investments.<sup>96</sup> The petroleum industry plays a vital role in the Norwegian economy as, under Norwegian law, petroleum revenues and taxes finance the Government Pension Fund Global, the world's largest

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<sup>92</sup> See Norwegian Ministry of Petroleum and Energy, *An Industry for the Future – Norway's Petroleum Activities*, 42-51 (June 24, 2011) [<https://perma.cc/WF9H-EXEC>].

<sup>93</sup> Norwegian Petroleum, *Exports of Oil and Gas* (last visited Mar. 24, 2017) [<https://perma.cc/NAT7-ZM36>].

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Factbox: Norway's \$960 Billion Sovereign Wealth Fund*, REUTERS (June 2, 2017) [<https://perma.cc/XY8E-RNDK>].

sovereign wealth fund.<sup>97</sup> Transfers made from the Fund support public priorities without drawing down the Fund's capital.<sup>98</sup>

In 2016, about one in nine NOK spent from the fiscal budget came from the Government Pension Fund Global, which helps to finance Norway's extensive social support system.<sup>99</sup> The long-term management perspective of Norway's petroleum revenues is designed to ensure that Norwegian society and future generations will benefit from Norway's petroleum wealth. The oil and gas sector is Norway's largest when measured in terms of value added, government revenues, national investments, and export value.<sup>100</sup>

In 2016, about 185,300 people in Norway, a labor force of about 2.8 million, were directly or indirectly employed in the petroleum sector.<sup>101</sup> This amount is about 47,000 fewer than in 2013, due to the collapse in the price of oil.<sup>102</sup> With a labor force expanding and contracting along with the petroleum boom-bust cycle, government officials opted to maintain patterns of production and employment with petroleum revenues, rather than changing them,

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<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> Norwegian Petroleum, *The Government's Revenues* (Feb. 28, 2017) [<https://perma.cc/Y9QT-Y5CS>]; see Javier E. David, *For US Oil Boom, Some See Lessons in Norwegian Model*, CNBC (June 2, 2013) [<https://perma.cc/Z7LJ-J5YN>].

<sup>100</sup> *Id.*

<sup>101</sup> Norwegian Petroleum, *Employment in the Petroleum Industry* (Feb. 10, 2017) [<https://perma.cc/MT44-P5N4>].

<sup>102</sup> *Id.*

resisting a “temptation to solve economic and political problems through increased use of oil revenues,”<sup>103</sup> the epitome of the “resource curse.”

### *B. Socially Responsible System of Governance*

North Sea petroleum was discovered in commercial quantity in the early 1960s, followed by the enormous Ekofisk find in 1969.<sup>104</sup> At this point, the Norwegian government had little knowledge of the technical and commercial practices of the oil industry.<sup>105</sup> However, the nation did have significant experience with its highly effective hydropower and commercial fishing industries. Thus, Norway entered its petroleum era with the advantage of a highly capable system of governance combined with experience regulating other natural resources industries.<sup>106</sup>

With its strong democratic government, well-organized trade unions, progressive taxation policies, a relatively extensive system of social benefits, and a history of social grievance systems, the Norwegian government was able to shape its own priorities regarding petroleum development.<sup>107</sup> The Norwegian government designed a development approach that allowed itself the time to develop an institutional capacity to produce, while exercising control

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<sup>103</sup> Noreng, *supra* note 89, at 195.

<sup>104</sup> Factpages, *Norwegian Petroleum Directorate* [<https://perma.cc/834S-YTLF>].

<sup>105</sup> Stig S. Kvendseth, *GIANT DISCOVERY: A HISTORY OF EKOFISK THROUGH THE FIRST 20 YEARS* 59 (1988) [<https://perma.cc/NY26-XDMF>] (the Norwegian parliament agreed that “The ocean floor and the underground of the underwater areas off the coast of the Kingdom of Norway are under Norwegian sovereignty as regards the exploitation and research of natural deposits, . . .”).

<sup>106</sup> *Id.* at 59.

<sup>107</sup> Noreng, *supra* note 89, at 109-110.

over the production, the rate of depletion, and the extent and approach to environmental protections.

Norway's cautious approach allowed the government to protect its ability to maintain freedom of action from an external industry's timetable. The hybrid strategy that emerged—the Norwegian Model—sought to meet its national political and economic priorities.<sup>108</sup> The government opted to keep the petroleum industry under firm public control, with Statoil being the primary instrument through which the government would implement both its oil policy and exploitation of the resource. A primary purpose for developing a new wealth was to make Norway a “qualitatively better society.”<sup>109</sup> The earliest plans included a series of social, regional, environmental, and industrial policies to achieve this goal, through a social democratic approach.<sup>110</sup>

### *C. Paced Development*

Norway created three separate entities to govern, produce, and regulate oil exploration and production. These entities include a national oil company engaged in commercial hydrocarbon operations, a government ministry to set policy, and a regulatory agency to provide oversight and technical expertise.<sup>111</sup> This system of checks and balances helps to avoid conflicts

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<sup>108</sup> *Id.*

<sup>109</sup> Ryggvik, *supra* note 59, at 34.

<sup>110</sup> Noreng, *supra* note 89, at 189-212.

<sup>111</sup> Mark C. Thurber & Benedicte Tangen Istad, *Norway's Evolving Champion: Statoil and the Politics of State Enterprises*, 5-7 (Program on Energy and Sustainable Dev. Working Paper No.

of interests, allows Statoil, the national oil company, to develop commercial opportunities, while the government agencies regulate the operators, including Statoil.

As a governance matter, an ongoing challenge for Norway is to keep Statoil from becoming a “state within a state,” even as the national oil company has become commercially competitive worldwide.<sup>112</sup> Norwegian leadership designed extraction rates so that the nation will continue to produce well into the 21<sup>st</sup> century. As petroleum on Norway’s continental shelf matures, new fields are becoming increasingly necessary. Norway continues to create a corporate model that is capable of withstanding many of globalization’s anti-democratic environmental and social pressures.<sup>113</sup> The combination of its regulatory and management strategies, along with its allocation of revenues, to its meticulously attended Sovereign Wealth Fund, intended to benefit the entire population.

Norway’s general tax on the petroleum industry was followed by a Special Tax for the industry’s extraordinary returns on production.<sup>114</sup> The current ordinary company tax rate is 24 percent and the special tax rate is upwards of 54 percent. Innovations such as the Special Tax, similar to an excess profits tax, allows for taxation policy and the Sovereign Wealth Fund to

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92, 2010); *see* Mark C. Thurber et al., *Exporting the Norwegian Model*, 39 ENERGY POL’Y ISSUE 9, 5366, 5367 (2011).

<sup>112</sup> *See id.* at 26-27.

<sup>113</sup> TIMO KOIVUROVA & PAMELA LESSER, ENVIRONMENTAL IMPACT ASSESSMENTS IN THE ARCTIC: A GUIDE TO BEST PRACTICES 9 (2014).

<sup>114</sup> *The Petroleum Tax System*, Norwegian Petroleum (Oct. 12, 2017) [<https://perma.cc/JUM6-QQ6S>].

maintain the revenue distributions that, in part, allow remote and coastal fishing communities to remain viable.<sup>115</sup>

#### *D. Challenges and Downsides*

The more recent Greenpeace lawsuit against the Norwegian government for granting licenses to energy companies to drill in the Barents Sea, suggests new legal fronts are opening against the production of Arctic oil.<sup>116</sup> A core question is whether Norway's Sovereign Wealth Fund will continue to be funded exclusively by petroleum revenues, as the non-renewable resource is subject not only to volatile oil prices, but a finite future.<sup>117</sup> Given that the small, remote, coastal fishing villages, depend in part, upon the Sovereign Wealth Fund revenues to sustain the local fishing industries, another question that underlies the Sovereign Wealth Fund discourse, is whether a greater diversity of natural resources would sustain the Sovereign Wealth Fund and make sense for the long term.

Beyond concerns regarding peak oil, or peak demand, for outer-continental shelf oil, new

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<sup>115</sup> *See id.*

<sup>116</sup> Writ of Summons, *supra* note 30, at 1-3, 14, 18-19 (Greenpeace filed lawsuit against the Norwegian government for allowing petroleum development in the Barents Sea, thus violating, Greenpeace alleges, its constitutional responsibility to guarantee environmental protections to future generation, and in violation of its "Conference of the Parties"- COP 21 obligations regarding the climate).

<sup>117</sup> Ryggvik, *supra* note 59, at 2, 3, 7, 63, 69, 83.

pressures are emerging from litigation.<sup>118</sup> As Statoil seeks new fields in joint operations on its Russian border, Statoil is bridging the “all of the above” approach to energy development by expanding its operations to include renewables, such as its geothermal project in Iceland’s offshore.

Whether all nations have something to learn from this particular high North approach to egalitarian distributions of resource revenue, or, distributive justice, remains to be seen. However, if any two nations can make a contribution to stop the marginalizing of remote, coastal, and small communities, it would, indeed, be Iceland and Norway, in their cooperative venture. As perhaps the most resilient and nimble of the Arctic nations, both Iceland and Norway share a sensibility and capability to build community-government-corporate interactive systems that epitomize distributive justice. Iceland and Norway have ignited discussion in both nations, and beyond, about the meaning of equitability, sustainability<sup>119</sup> and its corollary: distribution of revenues<sup>120</sup> particularly regarding small, remote, coastal communities that depend upon or are positioned in the midst of offshore natural resources development.

## VI. CONCLUSION

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<sup>118</sup> See generally Jonas Ebbesson, *Environmental Law and Justice in Context* (Cambridge Univ. Press, 2009); Richard Milne, *Lawsuit Tests Norway’s Enthusiasm for Arctic Drilling*, FINANCIAL TIMES (Nov. 8, 2017) [<https://perma.cc/7MA6-RW53>].

<sup>119</sup> See David B. Spence, *Corporate Social Responsibility in the Oil and Gas Industry: The Importance of Reputational Risk*, 86 CHI.-KENT L. REV. 59, 62-64 (2010).

<sup>120</sup> See generally Ryggvik, *supra* note 59.

The widening responsibility of nations to take corrective action in the form of structural changes to protect their citizenry in a globalizing world is particularly vital in the Arctic High North. While the number of energy producing countries is growing worldwide, all eight of the Arctic nations are significantly involved in natural resources development. International law offers a framework of standards and norms that trend toward expanding and protecting entire communities that have been, or will be, marginalized by the forces of globalization. However, irrespective of the “cascade” of international standards and norms, local residents are generally clear about their specific expectations from oil or gas projects, both in environmental, economic, and cultural terms.

Distributive justice is not a matter of welfare, nor, of an absolute equality of distribution. The Norwegian Model and Iceland’s deliberate, skilled, and thoughtful process to navigate, emulate, cooperate, and break-ground, demonstrates how systemic, logical, and responsive thinking can both anticipate and mitigate globalization’s downsides to include otherwise vulnerable communities in its successes.