ENFORCING INTERNATIONAL LAW IN U.S. COURTS: THE LAW OF THE SEA CONVENTION AT PLAY IN KIVALINA

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“Laws are a dead letter without courts to expound and define their true meaning and operation. The treaties of the United States, to have any force at all, must be considered as part of the law of the land. Their true import, as far as respects individuals, must, like all other laws, be ascertained by judicial determinations.”

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I. INTRODUCTION

In the divide between law and justice, individuals often propend for justice and find law. When it comes to international law, individuals might not even find any law, let alone the sacred ideal of justice. Neither was international law originally conceived for directly applying to individuals, nor was any court purposefully created for adjudicating their claims. Yet, this major gap is prominently perceived when industrial installations and environmental degradation either affect or threaten to affect individuals’ life. What is the role of international law in adjudicating environment-related claims which are put forward by individuals or non-state parties?

The insight to understand how international law and domestic law are intertwined is not a novel one. Nor is the factual and normative assumption that individuals are sometimes able to invoke international law norms specifically in domestic courts rather than in international settings. Nevertheless, attempts to understand whether international law is apt to offer a repository of underused assets for advancing the “sacred” idea of justice in a specific case, before the case appears in court, might be an interesting one. Not only would domestic courts provide a more proximate and familiar environment for individuals than international settings, but they would also be better placed to mandate scientific assessments and issue enforceable reliefs. Yet, international law is not always easy to adapt neither to domestic courts nor to specific legal claims.

Kivalina, a community in Northwest Alaska, has recently encountered many setbacks in the courts of the United States, in what one may characterize as a long and bitter environmental confrontation with major corporations, both in terms of climate change litigation and on account of water degradation due to the operation of the Red Dog Mine, one of the largest mines worldwide.

In this paper, I will attempt to address Kivalina’s water issues that still appear outstanding and not addressed after long years of purely domestic litigation in the courts of the United States. This article will proceed as follows. Part II.A will address the reasons why it is advisable that international law be implemented, among other means, within domestic courts. Parts II.B and II.C hinge on the different approaches U.S. courts have applied toward international law and how international law can play out in future environmental claims. I will then consider the factual matters and case posture of Kivalina claims under Part III.A, with specific reference to the shortcomings of domestic litigation and the outstanding claims related to the pollution of water under Part III.B. Under Part III.C, I will identify which water claims should still be addressed, and how this can be

done by looking at the United Nations’ Law of the Sea Convention (LOS Convention) in order to test the following hypothesis: would Kivalina residents be able to invoke specific provisions of the LOS Convention in order to have their claims better addressed in courts of the United States? In the affirmative, what techniques could be deployed, in light of past and present approaches of U.S. courts, and specifically the U.S. Supreme Court, vis-à-vis international law? I conclude by arguing that Kivalina residents are able to advance water-related claims by relying on the interpretation of domestic statutes consistent with the LOS Convention. Most specifically, I will hold that both common law and statutory remedies can be triggered effectively by relying on the customary character of some of the environmental provisions contained in the LOS Convention, as summarized in Part IV.

The foregoing hypothetical is based on a number of assumptions and limitations. I am assuming that Kivalina residents are/will be willing to engage in litigation, rather than Alternative Dispute Resolution. Moreover, I am specifically considering the available information in public domain documents, yet the factual characterization of the case is necessarily more complex. Furthermore, notwithstanding the host of issues that might be addressed, I am going to tailor down this account to solely water issues, which will not be assessed through multiple sources of international law, but solely by hinging on the LOS Convention. Most fundamentally, I am going to select exclusively some provisions under the LOS Convention that may be applicable. The chosen wording for addressing the difference between U.S. states and States at international law rests on qualifying U.S. states as states and states at international law as States.

II. THE MIXED FUEL OF U.S. AND INTERNATIONAL LAW

The implementation of international law is not a given. All the more so, the implementation of international law in domestic courts is specifically challenging due to the host of rules and approaches on how to domesticate internationally binding law within domestic legal orders.

In order to prepare the groundwork for a prospective application of international law to the Kivalina case, I will evaluate whether and why a given legal order should aim as much as possible at a mixed fuel, namely a combination of domestic and international law to be applied by judges for the resolution of controversies, especially in environmental matters. I will then sketch the historical trajectory along which U.S. courts have variegated applied international law. The ultimate aim is to appraise the likelihood for U.S. courts to make any use of international law in environmental cases, in

light of the most recent judgments. I will conclude by arguing that U.S. courts are not as unfriendly to international law as some scholarship has depicted them, however, a vein of self-restraint specifically emerges when environmental claims are advanced through the Alien Tort Claims Act.

A. Do We Actually Need a Mixed Fuel?

If we look at the law as a fuel for development and prosperity, the preservation of the environment and cohesive communities, it would not be hard to understand that there is still a long way for environmental laws to achieve the most effective fuel composition. Almost in every country, environmental laws are in place, but their enforcement is extremely difficult as some instances may exemplify. In South Africa, a middle-income country, transition to democracy has made way for environmental policies and legislation, but domestic agencies have faltered to enforce environmental law. Conversely, in such a developed country as the United States, notwithstanding innovative policies, enforcement is still critical, and a survey has shown that two-thirds of U.S. corporate counsels admitted that their companies had recently violated environmental laws.

If the law enforcement apparatus is not effective and responsive to societal concerns on environmental depletion, individuals usually turn to domestic courts. But what happens if domestic law is not protective enough? If domestic law is narrowly characterized, i.e. as a body of normative rules that are domestically produced, individuals might not be able to find any effective judicial remedy and courts will not play their established role in the dynamics of checks and balances.

I believe, however, that domestic law can be effectively supplemented by an additional ingredient to the fuel of prosperity, environmental protection and cohesiveness, namely international law. This would result from either application or interpretation. By way of application, domestic courts are incrementally able and prone to apply international law even when the latter has not been fully implemented internally, at either the legislative or executive level (direct application). By way of

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4. *See* Final Policy Statement on Incentives for Self-Policing of Violations, 65 FED. REG. 19, 618 (2000) (the Environmental Protection Agency (EPA) has incentivized self-policing of violations, given the multitude of sources of pollution and the difficulties of monitoring them all at a centralized level).


interpretation, national courts are often able, and sometimes specifically required, to construe and apply national law in such a manner that any conflict with international rules is prevented (consistent interpretation or the Charming Betsy canon). More generally, the types of international obligations that I will look after in this paper are ‘inward-looking obligations,’ namely obligations undertaken by the specific State in the capacity of international actor, in relation to its conduct within its domestic jurisdiction rather than with other States on the international plane.

This emerging practice, which has been characterized by Lord Bingham as almost unimaginable in the past, is progressively leading to a new branch of international law dubbed comparative international law. Techniques of implementation differ widely and bring about a variety of results according to each domestic system, yet the domestication of international law is not contingent to specific domestic cases, but also contributes to the development and enforcement of international law more broadly. In fact, the implementation of specific international law norms at domestic level signals and strengthens their legitimacy, allowing for their overall enforcement according to Thomas Franck’s theory of compliance; what is more, the International Court of Justice (ICJ) has consistently portrayed domestic courts’ decisions as reflective of international customary law, and the implementation of specific international law norms would ease out and fasten the identification of customary rules.


9. Lord Bingham, Foreword to SHAHEED FATIMA, USING INTERNATIONAL LAW IN DOMESTIC COURTS, at xi (Hart Pub’g 2005).


11. Casse, supra note 1, at 224.

12. Roberts, supra note 10, at 58.

Nonetheless, international law is no panacea to the shortcomings of domestic environmental law. As a “global environmental crisis” is unfolding, international environmental conventions and soft law are at their apex, yet enforcement often lacks teeth and even domestic measures are sometimes “exported,” making for their (extraterritorial) application in place of the feeble and fragile specter of international law. Yet, exporting domestic legislation—albeit highly protective—is a byword for diplomatic hostility and non-coordinated, therefore inefficient, implementation of common legal rules and principles. For this reason, I am herein propounding the vision of a mixed fuel scenario of domestic law and international law as intertwined tools for incrementally addressing environmental issues that local communities in general, and the Kivalina community in particular, are faced with.

B. The Mixed Fuel in U.S. Courts: An Overview from the Bench

In order to understand whether the mixed fuel of international and domestic law might work in the case of Kivalina, which should be advanced in U.S. courts, I will here overview the historical posture of U.S. courts vis-à-vis international law, with no intent to provide an exhaustive line of cases.

Notwithstanding the fairly clear interplay between international and national law under the monistic and dualistic doctrines, the enforcement of international law in U.S. courts has been characterized as one of “the ‘most confounding’ in the United States law of treaties.” Within the perspective of the present contribution, it is safe to contend that the confusion is not limited to the United States’ law of treaties, but also vastly affects the status of international law in U.S. courts, as well as the tools that are available for individuals to vindicate their rights in court. When and how do treaties create judicially enforceable individual rights in U.S. courts?


15. Id. at 367; see some notable exceptions to this assertion id. at 404, 405.

16. Id. at 1455.


The choice of U.S. courts for my hypothesis on the Kivalina case is mainly due to three reasons. Firstly, Kivalina is located in Northwest Alaska, namely the 49th State of the Union, so that any remedy to be devised for Kivalina at the domestic level will be set in a U.S. court. Secondly, U.S. judges appear to be a good example of a disinterested third party able to determine the merits of even complex disputes, which is the assumption of any enforcement of international law in domestic courts. Moreover, the case-law trajectory on the interaction between U.S. and international law epitomizes some of the most fundamental challenges that a national judiciary faces when approaching international law.

U.S. courts are presently not regarded as particularly international law-friendly. Yet, it strikes to note that in 1972, Justice Powell characterized domestic courts as the “the best means for the development of a respected body of international law ‘[u]ntil international tribunals command a wider constituency.”

The very origins of the United States as a country rest with international law. The Federalist Papers extensively mentioned the role of the law of nations in U.S. courts, and the Constitution bestowed the judicial power of the United States not only to cases arising under the Constitution and the laws of the United States, but also to cases arising under treaties, and specific controversies of an international kind. According to the majestic expression of the U.S. Constitution, “all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land,” which judges are bound to enforce “any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”

For this reason, U.S. courts and legislators initially viewed customary international law and treaty obligations as part of domestic law.

Indeed, the Supreme Court took the constitutional wording very seriously, as illustrated in *Ware v. Hylton*, where it held that a treaty

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20. Tzanakopoulos, supra note 8, at 157.
21. Koh, supra note 6, at 2356–58; Benvenisti, supra note 13, at 248 (sometimes, courts cannot be international-law friendly on account of statutes prohibiting any reference to so-called foreign law); Tzanakopoulos, supra note 8, at 166 (citing Oklahoma’s constitutional amendments to prohibit State courts to consider Sharia law or international law or indeed “the legal precepts of other nations or cultures.” The Amendment passed by referendum in 2011).
23. U.S. CONST. art. III, § 2; Koh, supra note 6, at 2352 (citing the internationalist approach enlivened in the Federalist Papers).
24. U.S. CONST. art. VI, § 2; Remedies, supra note 18, at 508.
overrules all State laws upon the subject.\textsuperscript{26} Until 1860, the Supreme Court gave no deference to the executive branch’s interpretation of treaties,\textsuperscript{27} but it rather vigorously enforced international law to the detriment of statutes, and more sparsely interpreted the Constitution itself in light of international treaties.\textsuperscript{28}

An abrupt change occurred in mid-nineteenth century, when the Supreme Court started denying treaties’ status of federal law,\textsuperscript{29} under the comity exception, the separation-of-powers and related political question doctrine, as well as the judicial incompetence exception.\textsuperscript{30}

Firstly, under the comity exception, which was further asserted through the act of state doctrine, the Supreme Justices decided not to adjudicate on “the acts of the government of another,”\textsuperscript{31} for sake of a ‘comity’ exception,\textsuperscript{32} further declaring that no federal common law could govern the case “except in matters governed by the Federal Constitution or by acts of Congress.”\textsuperscript{33}

Secondly, the separation-of-powers exception revolved around the separation-of-powers disclaimer, by which the Supreme Court inaugurated a phase of deference to the President of the United States,\textsuperscript{34} and more generally to the executive power of states. Self-restraint was no more

\textsuperscript{26} Ware v. Hylton, 3 U.S. 199 (1796); David Sloss et al., International Law in the Supreme Court to 1860, in INTERNATIONAL LAW IN THE U.S. SUPREME COURT CONTINUITY AND CHANGE 13 (Cambridge U. Press 2011) [hereinafter Supreme Court].

\textsuperscript{27} Supreme Court, supra note 26, at 17.

\textsuperscript{28} Sarah H. Cleveland, Our International Constitution, 31 YALE J. INT’L L. 1, 15 (2006); Supreme Court, supra note 26, at 41 (where the international law-bound interpretation of the Constitution is deemed more opportunistic than with statutes).


\textsuperscript{30} Koh, supra note 6, at 2357.

\textsuperscript{31} Underhill v. Hernandez, 168 U.S. 250, 252 (1897) (noting that “every sovereign State is bound to respect the independence of every other sovereign State”); see Oetjen v. Central Leather Co, 246 U.S. 297, 303–04 (1918) (act of State doctrine “rests at last upon the highest considerations of international comity and expediency”); see also Ricaud v. American Metal Co, 246 U.S. 304 (1918); Hilton v. Guyot, 159 U.S. 113 (1895); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964).

\textsuperscript{32} Koh, supra note 6, at 2357.

\textsuperscript{33} Erie R Co. v. Tompkins, 304 U.S. 64 (1938) (a case of diversity jurisdiction on civil liability overruling Swift v. Tyson, 41 U.S. 1 (1842)).

\textsuperscript{34} United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936) (holding that “the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution.”).
applied in light of mere comity to other countries, but was rather entrenched in the U.S. separation of powers system, by which any question entailing determinations on the legality of foreign states’ acts was tantamount to a political question,\textsuperscript{35} which appertain to the political branch’s prerogatives. It is no coincidence that such shift happened quite lately, and precisely in the 1930s and 40s,\textsuperscript{36} when alliances were sought and wars waged.\textsuperscript{37}

Thirdly, the Supreme Court branched out the separation-of-powers doctrine into a new exception, namely the judicial incompetence exception, by which “the very nature of executive decisions as to foreign policy is political, not judicial,”\textsuperscript{38} thus banning not only findings of fact in international cases, but also the very activity of interpretation regarding international law and foreign affairs law.\textsuperscript{39}

Besides the three exceptions, more interpretive hurdles were set forth by the courts. It might have very well been that the wave of human rights treaties, which swept and reshaped international law after the Second World War, increasingly put pressure on the U.S. judiciary, and prompted federal and state courts to hammer out a more defined doctrine of non-self-executing treaties, which must be domesticated into national law by a statute to become the “Law of the Land.”\textsuperscript{40} The judge-made distinction between self-executing and non-self-executing treaties kept percolating in the case law as long as the Cold War era ensued, and the need for protecting U.S. governmental actions might have been one of the reasons for upholding such a theory.\textsuperscript{41}

A new trend favoring international law was impressed back again in such decisions as \textit{Mendoza-Martinez} and \textit{Afroyim} on denaturalization laws,

\begin{itemize}
\item \textsuperscript{35} United States v. Pink, 315 U.S. 203 (1942); see Baker v. Carr, 369 U.S. 186 (1962).
\item \textsuperscript{36} See generally United States v. Belmont, 301 U.S. 324 (1937).
\item \textsuperscript{37} See generally Curtiss-Wright Export Corp., 299 U.S. at 311.
\item \textsuperscript{38} Chicago & S Air Lines, Inc. v. Waterman Steamship Co., 333 U.S. 103, 111 (1948).
\item \textsuperscript{39} Koh, supra note 6, at 2358.
\item \textsuperscript{40} See, e.g., Sei Fuji v. State, 38 Cal. 2d 718 (1952); Pauling v. McElroy, 278 F.2d 252 (D.C. Cir. 1960) (individual may not invoke the UN Charter to enjoin detonation of test nuclear weapons in Marshall Islands); Vlissidis v. Anadell, 262 F.2d 398 (7th Cir. 1959) (alien may not resist deportation on ground that U.N. Charter superseded racist provisions of immigration laws); See Remedies, supra note 18, at 20. But see Hollis, supra note 29, at 76; Lori Fisler Damrosch, \textit{Medellin and Sanchez-Llamas: Treaties from John Hay to John Roberts INTERNATIONAL LAW IN THE U.S. SUPREME COURT CONTINUITY AND CHANGE} 460 (David L. Sloss et al. eds., Cambridge Univ. Press 2011) (according to some commentators, the doctrine of non-self-executing treaties was first shaped in Foster v. Neilson, 27 U.S. 253 (1829)) (the distinction \textit{Foster} drew between self-executing and non-self-executing treaties, did not prove a hurdle in the judicial enforcement of treaties. The most extensive discussion of the issue case in a dissent by Justice Field in Baldwin v. Franks, 120 U.S. 678 (1887)).
\item \textsuperscript{41} Koh, supra note 6, at 2362; \textit{Banco Nacional de Cuba}, 376 U.S. at 398 (which also dates back to the Cold War era and is a landmark decision on the act of state doctrine).
\end{itemize}
which the Court struck down by relying on the Law of Nations.\textsuperscript{42} The Eighth Amendment also prominently became a fertile ground for citing foreign and international sources.\textsuperscript{43} With \textit{Filartiga v. Peña-Irala},\textsuperscript{44} a branch of transnational public law litigation seemed to parallel the achievements of domestic public law litigation\textsuperscript{45} in Federal courts under the Alien Tort Claims Act (ATCA or ATS, Alien Tort Statute).\textsuperscript{46}

In \textit{Sosa} the Supreme Court explained at length the "transnationalist" approach historically applied in such decisions as \textit{Paquete Habana}\textsuperscript{47} and \textit{Nereide},\textsuperscript{48} but refrained from adjudicating ATS claims for violations of "any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar" when the ATCA was enacted,\textsuperscript{49} and therefore "specific, universal, and obligatory."\textsuperscript{50} The ATS-kind of law of nations, however, was understood as encompassing even present-day norms of international law.\textsuperscript{51}

The understanding of \textit{Sosa} is still debated,\textsuperscript{52} yet it has been argued that it bestows jurisdiction on Federal courts to decide on customary international law status if no express interpretation is offered by the political branches, which is a fairly balanced solution since judges are still often perceived as unelected actors.\textsuperscript{53}

Yet, the rise of transnational public law litigation was apparently quelled in recent cases, such as \textit{Breard},\textsuperscript{54} \textit{Sanchez-Llamas},\textsuperscript{55} and \textit{Medellin}.

\begin{itemize}
\item \textsuperscript{43} See Coker v. Georgia, 433 U.S. 584 (1977).
\item \textsuperscript{44} See \textit{Filartiga v. Peña-Irala}, 442 U.S. 901 (1979).
\item \textsuperscript{45} See Abram Chayes, \textit{The Role of the Judge in Public Law Litigation}, 89 Harv. L. Rev. 1281 (1976).
\item \textsuperscript{46} Alien Tort Claims Act, 28 U.S.C. § 1350 (2012).
\item \textsuperscript{47} The \textit{Paquete Habana}, 175 U.S. 677, 714 (1890).
\item \textsuperscript{48} The \textit{Nereide}, 13 U.S. 388, 423 (1815).
\item \textsuperscript{50} \textit{Id.}
\item \textsuperscript{51} \textit{Id. at} 2761–62; see U.S. v. Hasan, 747 F. Supp. 2d 599 (2010).
\item \textsuperscript{53} \textit{Id. at} 484.
\item \textsuperscript{54} \textit{Breard v. Greene}, 523 U.S. 371 (1998); see Damrosch, \textit{supra} note 40, at 458.
\item \textsuperscript{55} \textit{Sanchez-Llamas v. Oregon}, 126 U.S. 2669, 2679 (2006) (concerning the police not informing a person under arrest or detention that he/she could request his/her own Consulate to be notified of his/her detention).
\end{itemize}
II. The latter decision is widely known for having further extended the wall of separation between domestic law and international law by excluding the automatic enforcement—absent implementing legislation—of ICJ decisions when provisions at issue are not self-executing, in this case Article 94 of the U.N. Charter.\(^\text{57}\)

The legacy of this new line of decisions, and specifically of Medellin, is a seeming presumption of non-self-execution of international law norms,\(^\text{58}\) however enforcing environmental treaties and customary norms requires a separate analysis, to which I will now turn.\(^\text{59}\)

C. The Enforcement of Environmental Treaties and Customary International Law

With respect to environmental agreements, almost twenty years ago they were considered non-self-executing\(^\text{60}\) more often than not. In a notable case, involving the enforcement of international whaling quotas, the Supreme Court seemed to set aside the political question doctrine\(^\text{61}\) by maintaining that, “under the Constitution, one of the Judiciary’s characteristic roles is to interpret statutes, and we cannot shirk this responsibility merely because our decision may have significant political overtones.”\(^\text{62}\) In some other instances, courts have not found provisions specific enough to warrant their application,\(^\text{63}\) or applicable to non-state parties.\(^\text{64}\)

More generally, with concern to international agreements, U.S. courts apply two different approaches that have been labeled as the nationalist approach and the transnationalist approach.\(^\text{65}\) Under the nationalist

\(^{57}\) U.N. Charter art. 94.
\(^{58}\) Crotof, supra note 7, at 1787.
\(^{59}\) Damrosch, supra note 40, at 453.
\(^{61}\) See Baker, 369 U.S. 186.
\(^{64}\) Beanal v. Freeport-McMoran Inc., 197 F.3d 161 (5th Cir. 1999); Defenders of Wildlife Inc. v. Endangered Species Scientific Authority, 725 F.2d 726, 726 (1984) (the Court merely referred to Article VI (2) of the Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES) and then struck down administrative guidelines as incompatible with it); see CATHRIN ZENGERLING, GREENING INTERNATIONAL JURISPRUDENCE 57, (Martinus Nijhoff Publishers 2013).
\(^{65}\) Remedies, supra note 18, at 504.
approach, courts deploy an array of interpretive tools as agents of the domestic legal system only, while under the transnationalist approach courts act as agents of both the domestic and international legal system, in a sort of double role. Quite understandably, outcomes vary according to the specific approach that courts discretionarily apply. Most notably, the transnationalist approach is shown as the most favorable approach for the advancement of international law in U.S. courts.

According to recent empirical research on the subject, the transnationalist conceptual framework is applied more often than the nationalist approach when private parties are adverse to each other, rather than to the government.

When it comes to customary law, customs in environmental matters have not been often invoked in court, however such a litigation strategy has been attempted in some instances by hinging on the Alien Tort Claims Act. In a specific case of alleged pollution of the rain forests and rivers in Ecuador and Peru, a Federal court implied that a corporation could be liable to indigenous people for breaches of international environmental law, but later dismissed the claim on the forum non conveniens ground.

Still, a recent attempt to have human rights law directly applied as customary law in domestic courts brought about the landmark Kiobel v. Royal Dutch Petroleum Co. lawsuit, characterizing ATCA as presumptively against extraterritorial application in the absence of an express declaration of extraterritoriality on the part of Congress, according to the political question theory. Secondly, it maintained that ATCA can be invoked only in “causes of action based on sufficiently definite norms of international law,” namely norms that are “specific, universal, and obligatory.”

Not only is Kiobel relevant for environmental litigation, but it also encapsulates the Supreme Court’s most recent attitude toward ATS

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66. Id. at 522; Georges Scelle, Précis de Droit des Gens: Principes Et Systématique pt. 2, at 10–12 (1934).
67. See Remedies, supra note 18, at 509.
68. Id. at 532 (according to a recent empirical research, in cases where private parties are adverse to each other, U.S. courts are more likely to apply transnationalist tools than nationalist tools, whilst in government-party cases U.S. courts are more likely to apply nationalist tools than nationalist tools).
69. 28 U.S.C. § 1350; see Hunter et al., supra note 14 at 1380–90.
70. Aguinda v. Texaco, 303 F.3d 470 (2nd Cir. 2002).
73. Id. at 1668; Doe v. Unocal Corp., 248 F.3d 915 (9th Cir. 2001).
74. Kiobel, 133 U.S. at 1664–65; Sosa, 124 U.S. at 2766.
litigation, which is all the more restrictive in light of the political question, separation of powers and act of state theory.\(^75\)

All in all, such a framework concerning the aptitude of U.S. courts to either apply or interpret international law will be especially useful as soon as it is applied to the specific facts of the Kivalina case, which will now be considered.

### III. THE KIVALINA CASE

In this section, I will illustrate the most relevant environmental impacts that the Red Dog Mine is alleged to have caused on the Kivalina community and the surrounding environment.

The Red Dog Mine is the United States’ largest mining polluter, whose activities have been often countered by the nearby Kivalina community. Three issues have principally arisen from its operation: the effects of wind-blown ore dust and traffic air pollutants; the disruption of animal migration; and the unlawful discharge of pollutants in riverine waters as well as at the port site.

For the purposes of the present paper, I will tailor down the scope of the research to water-related issues.

With reference to water protection from the operation of the mine, Kivalina individuals currently perceive that many issues are still outstanding, in spite of the long-battled lawsuits. Such a recount attempts to make way for the application of my initial hypothesis stating the need for a mixed fuel of domestic and international law in the case of Kivalina. Most notably, I argue that water-related issues that have not been addressed at domestic level could receive a more effective response through the interwinnement of domestic law and international law.

#### A. Factual and Procedural Recount

The Red Dog Mine is a lead and zinc mine, and the most heavily polluting facility in the United States,\(^76\) which was excavated and mined out by Teck Alaska Incorporated (Teck) on the land owned by NANA Development Corporation (NANA),\(^77\) approximately forty-six miles inland.

\(^{75}\) Koh, supra note 6.


\(^{77}\) CHRISTINE SHEARER, KIVALINA: A CLIMATE CHANGE STORY 79, 106–07 (Haymarket Books 2011).
from the coast of the Chukchi Sea. Teck is now excavating a nearby deposit, the Aqqaluk Pit, which is also located on NANA land.

In order to understand which norms of either treaty law or general international law are applicable to the case, an overall assessment of the mine’s environmental impact is in order.

Three main issues have arisen from the operation of the mine. Firstly, the mine has been deemed responsible of emitting wind-blown ore dust and traffic air pollutants, principally due to the transportation of mineral ore from the Delong Mountain Transportation System (DMTS) to a Teck-run nearby port. Secondly, environmental groups and native communities have been vocal in reporting the disruption of animal migration, mainly due to the use of the DMTS and the operation of the Aqqaluk Deposit. Lastly, Teck has experienced waste-water discharge issues, inland and at the port site on coastal/ocean waters. With reference to the port site, the Alaska Spill Prevention Unit has also reported the occurrence of petroleum spills.

All three types of alleged degradation were perceived by Kivalina residents, an Inupiat community living fifty-four miles southwest of the mine on a thin long-barrier reef island located between the Chukchi Sea and a lagoon at the mouth of the Kivalina River. Kivalina is perhaps best known as the first village suing major fossil fuel companies on the ground of their contribution to climate change, which is now disrupting not only the subsistence life of Kivalina but also its own very existence. Subsistence is at danger due to the faster migration of animals to northern colder areas, and related difficulties for hunters to provide the community

79. Id.
80. Id. at 11. The 52-mile DeLong Mountain Regional Transportation System (DMTS) haul road leads to port facilities located on the Chukchi Sea. The road has been of concern also for the fact that it passes through the Cape Krusenstern National Monument. However, EPA stipulated with the Alaska State Historic Preservation Officer (SHPO) that no adverse impact would ensue if measures and operational controls were included in the Cultural Resources Protection Plan (CRPP) presented by Teck, which it did.
81. Id. at 5.
83. Id.
84. SHEARER, supra note 77, at 101.
86. SHEARER, supra note 77, at 101.
with sufficient traditional food.\textsuperscript{87} Additionally, recurrent storms and the rising sea level have put the community under physical and emotional stress, with a majority of people voting for relocation.\textsuperscript{88} Indeed, the lawsuit against the major fossil fuel companies on grounds of climate damages was intended to collect the necessary funds for relocating the threatened village, but it was unsuccessful.\textsuperscript{89}

Action has recently been taken with former President Obama requesting Congress to earmark $400 million “to cover the unique circumstances confronting vulnerable Alaskan communities, including relocation expenses for Alaska Native villages threatened by rising seas, coastal erosion, and storm surges,” which would be administered by a Coastal Climate Resilience Fund to be established at the Department of the Interior.\textsuperscript{90}

Nevertheless, given the difficulties in finding an alternative location and the lack of governmental involvement, I am arguing that more efforts need be devoted to understanding whether life as it is now in Kivalina can be ameliorated by way of international law. Domestic law has often been invoked, especially with reference to water-related issues, but not much has been achieved, and people in Kivalina still characterize water as being one of the most urgent challenges to be addressed.\textsuperscript{91}

Given the limited aim of this paper, I will tailor down my quest for domestic remedies through international law by considering only water-related issues that have been attributed to the Red Dog Mine and leaving aside those contentions that the Kivalina community relates to wind-blown ore dust and animal wildlife disruption. Both aspects will nonetheless come up in relation to water issues. In case water claims are established, my ultimate aim is to tentatively equip Kivalina people with tools to make them justiciable, and achieve an enhanced quality of life.

\textsuperscript{87} Id. at 76.

\textsuperscript{88} Id. at 103–04; Glenn Gray et al., \textit{Kivalina Consensus Building Project: Results of Door-to-Door Survey} (July 2010), http://www.relocate-ak.org/wordpress/wp-content/uploads/2012/09/Kivalina_survey_summary5.pdf.

\textsuperscript{89} \textit{Kivalina}, 133 U.S. at 2390; \textit{Kivalina}, 696 F.3d at 849.


\textsuperscript{91} Gray, supra note 88.
B. Water Issues and Responses at Domestic Law

In the present paragraph, I broach the specific mining processes undertaken by Teck, which relate to the alleged degradation of water. After considering the first site (the “Main Deposit”), I will turn to the newly-dug Aqqaluk Deposit. Finally, I will look at the port facilities, which have been serving both sites. In all instances, I will also highlight the procedural history of the relevant environmental claims that have been brought throughout time, notably by members of the Kivalina community. Notwithstanding a host of claims, which have been adjudicated by notoriously advanced courts, most of such water-related issues are still outstanding, all the more so after the excavation of the second site, namely the Aqqaluk Deposit.92

The Main Deposit started operating in 1989 and was mined out by 2011.93 It was subject to an Environmental Impact Assessment under NEPA94 and both a point-source wastewater/stormwater permit and a dredge-and-fill permit under the Clean Water Act (CWA).95 Ore was removed from the open pit mine and milled to obtain zinc and lead concentrates; tailings and process wastewater were impounded in a storage area (tailings pond); from there, treated wastewater was discharged into the Middle Fork of Red Dog Creek.96

What is here of concern is the wastewater permit, which is known as the National Pollutant Discharge Elimination permit (NPDES), in that Kivalina residents rely on that water—specifically, from the Wulik River—for drinking, subsistence hunting and fishing, and aesthetic enjoyment.97

In 2002, six Kivalina residents filed a citizen enforcement suit under section 505 CWA, documenting over 2,171 violations of Teck NPDES permit, of which Teck admitted to more than 1,100.98 The ultimate aim was

92. See ExxonMobil Corp., 696 F.3d at 849.
95. Federal Water Pollution Control Act, 33 U.S.C. §§ 1251–1387 (2012) (Teck was specifically required to apply to and obtain a NPDES permit under § 402 CWA (EPA’s authority and a dredge-and-fill permit under § 404 CWA (Army Corps of Engineers’ authority)) [hereinafter Clean Water Act].
96. U.S. ENVIRONMENTAL PROTECTION AGENCY, supra note 78, at 2.
to ask the Court to enforce/have enforced the limit standards. The lawsuit was eventually settled through consent decree with Teck purchasing reverse osmosis units and good faith-pledging to build an effluent pipeline from the Red Dog Mine to the Chukchi Sea.\(^9\) The interesting part of the settlement comes about when it reads that, whether Teck Cominco decided not to build the pipeline for good cause, it would pay a penalty of $8 million, or, whether it did not build it without a good cause, then it would pay a penalty of $20 million, both penalties apparently to the Federal Government.\(^10\)

Turning to the Aqqaluk Deposit, major litigation arose after the EPA’s issuance of its Record of Decision and new NPDES permit taking into account the imminent reclamation of the Main Deposit and fast advancing project for the Aqqaluk Deposit.\(^101\) Such issuance followed a complex Teck-led Supplemental Environmental Impact Assessment (SEIS), which convinced the EPA to permit the operations and discharges at the Aqqaluk deposit, lower some of the effluent standards,\(^102\) and allow for self-compliance by Teck coupled with periodic inspections on the part of the Administration.\(^103\) For the fact that Kivalina and Port Hope residents did not explain why such enforcement strategy was not sufficient, their appeal was dismissed by both the Environmental Appeals Board and the Ninth Circuit.\(^104\) The SEIS also clearly stated that maintenance of the two deposits would be needed in perpetuity,\(^105\) with the concurrent need of


\(^10\) Id. (another prong of the settlement dwelled on the compliance Teck pledged to the 1998 permit, as amended in 2003, with a major exception on Total Dissolved Solids (TDS), for which Teck would have paid a penalty when non-compliance occurred).

\(^101\) Native Village of Kivalina IRA Council v. EPA, 687 F.3d 1216 (9th Cir. 2012).

\(^102\) Red Dog Mine Extension—Aqqaluk Project: Final Supplemental Environmental Impact Statement, TETRA TECH, Inc., (Oct. 2009), http://dnr.alaska.gov/mlw/mining/largemine/reddog/pdf/rdseis2009vol1.pdf [hereinafter TETRA TECH, INC.] (most specifically, in their adjudicatory appeal lodged with the Alaska Department of Environmental Conservation (ADEC), petitioners held that the Alaska certification under § 401 CWA was violating the State’s Antidegradation Policy (no degradation analysis plan was in place) and amounted to backsliding under CWA (§§ 402(e) and 303(d)(4)), restricting the cases under which NPDES permit limits might be relaxed in case of permit renewal, reissuance, or modification. Most notably the contested limits covered average monthly effluent limits (AMEL) for lead, and the effluents limits for cyanide, zinc and TDS as compared to the 1998 permit limits. A request for recusation was made towards ADEC’s Commissioner, who was appointed in 2007 by Alaska Governor Sarah Palin as Commissioner of the ADEC, after being Teck’s lawyer for a decade).

\(^103\) U.S. ENVIRONMENTAL PROTECTION AGENCY, supra note 78, at 7–8.

\(^104\) Native Village of Kivalina IRA Council, 687 F.3d at 1216.

\(^105\) U.S. ENVIRONMENTAL PROTECTION AGENCY, supra note 78, at 4.
hazing activities to deter wildlife from using open water at the sites.\footnote{\textit{TETRA TECH, INC., supra note 1062 at 245; U.S. ENVIRONMENTAL PROTECTION AGENCY, supra note 78, at 47 (“EPA accepts that personnel may not be available to implement hazing practices 24 hours a day, seven days a week; however, we are confident that the measures Teck proposes will not result in population-level effects to any species in the vicinity of the operation.”).}}

There appears to be, however, no relevant plan in place to address this specific issue.

All in all, the EPA approved the plan put forward by Teck. The EPA approved Teck’s plan as the Preferred Alternative, yet the Environmentally Preferable differed from what Teck proposed, and consisted of three pipelines for transporting (i) concentrate to the port, (ii) wastewater to the Chukchi Sea instead of the Middle Fork Red Dog Creek, and (iii) diesel fuel from the port to the mine.\footnote{\textit{U.S. ENVIRONMENTAL PROTECTION AGENCY, supra note 78, at 6–7.}} The Preferred Alternative was identified in the plan proposed by Teck because the EPA asserted not to have the authority “to require construction of a pipeline and a separate marine discharge, but rather this would be a separate permitting action in response to an application provided by Teck.”\footnote{\textit{Id. at 36.}} Nevertheless, the EPA acknowledged that the Preferred Alternative was identified precisely on the basis of the SEIS, including an assessment of impacts that would result from the construction and operation of the pipeline.\footnote{\textit{TETRA TECH, INC., supra note 102, at 99 (the SEIS, upon which the Record of Decision is based, at times appears to ground its assessment on the construction of a water pipeline, which is “considered reasonably foreseeable in terms of cumulative effects,” on the basis of a future NEPA action “once Teck finalizes its plans and submits an application to build and operate a wastewater pipeline.”).}}

Teck ultimately opted out of any wastewater pipeline project, lodging a file with the U.S. District Court for Alaska that contained the findings of a study it conducted.\footnote{\textit{Id. at 110.}}

Yet, doubts that Alaskan officials will not be able to monitor the actual release of water effluents are still looming over the wilderness of Alaska. All the more so after the EPA tasked the Alaska Department of Environmental Conservation (ADEC) with the NPDES permit program, a decision that was unsuccessfully challenged in court.\footnote{\textit{Akiak Native Community v. U.S. EPA, 625 F.3d 1162 (9th Cir. 2010) (DEC started administering wastewater and discharge permitting and compliance program for Alaska on October 31, 2012, after the passage of Senate Bill (SB 110) and EPA’s final approval in October 2008, under State primacy).}}

In June 2014, Kivalina residents faced a public health emergency as Kivalina’s source of drinking water was contaminated due to an equipment...
failure at the mine site. Teck recognized that the company failed to keep Kivalina residents informed after the incident, and no specific actions appear to have ensued.

By way of difference, Kivalina residents have not brought issues concerning the port along the Chukchi Sea from where Teck ships minerals overseas. According to the Alaska Division of Spill Prevention and Response, the entire transportation corridor (DMTS) from the mine to the port, including the road, the port facilities, and the barges is under Alaska’s Contaminated Sites Program, apparently due to escaping (“fugitive”) dust from operations along the transportation corridor. The program is also addressing historic spills of petroleum products at the mine. Still, risk assessments have never covered organic compounds associated with past petroleum hydrocarbon spills at the port site, allegedly because they occur in localized areas and generally remain at depth or beneath pavement, apparently being “not in a place where current human exposure occurs.”

Moreover, it does not appear that the Corps made a decision to issue, deny or update a Rivers and Harbor Act Section 10 permit for any work or structures at the port sites. The EPA acknowledges the existence of a pollution issue concerning the port site and nearby wetlands. In its Record of Decision to the SEIS, it deemed wetlands already contaminated due to past and ongoing fugitive dust emissions from the road. The latest independent study on fish


113. Id.

114. STATE OF ALASKA CONTAMINATED SITES PROGRAM, supra note 82.


116. Id.


118. U.S. ENVIRONMENTAL PROTECTION AGENCY, supra note 78, at 6.

119. Id. (the EPA concedes that a concentrate pipeline would have manifold beneficial effects. It would avoid truck traffic, reduce fugitive dust emissions and future dust-related effects on the environment, as well as reduce effects on traffic-induced caribou movement to the advantage of Kivalina’s harvest of caribou. Concerning particulate matters, EPA asserts that it is highly unlikely that the PM2.5 NAAQS is exceeded, but does not exclude that); id. at 4 (the State of Alaska has proposed to adopt the federal PM2.5 standard, although this has not yet been finalized. According to area
population was undertaken by the Alaska Department of Fish and Game Division of Habitat in 2011, and it seems to ambiguously reveal that heavy metals were found in the Dolly Varden fish population in the Wulik River. Yet, no sampling was undertaken in marine waters. The only available sampling on marine water appears to date back to 2003, and was published in 2007 but the ensuing assessment does not seem to be in the public domain.

Furthermore, the latest study concerning heavy metals on mosses and soils can only be tracked to 2001, when the highest levels of heavy metal concentrations were retrieved near the Red Dog Haul Road, prompting evaluators to state that those levels equaled or exceeded (1.5 – 2.5 times) “maxima reported for samples from severely polluted regions in Central European countries.”

Harvesting animals both at sea and in the tundra, Kivalina residents have been concerned with possibly heightened blood lead level (BLL). The EPA did not address the issue in its Record of Decision, stating that there was no baseline to contrast current BLLs against since no blood lead levels were collected prior to the opening of the mine. In 2005, Teck and ADEC signed a Memorandum, later amended in 2007, by which Teck

designation in 2006 (the latest issued) Northwest Arctic Borough is unclassifiable/attainment areas for PM2.5 under Part C of the Clean Air Act (CAA)).

120. Alvin G. Ott & William A. Morris, Aquatic Biomonitoring at Red Dog Mine 2010, Alaska Department of Fish and Game Division of Habitat vi (2011) (the study on the Dolly Varden fish concluded that it “is unlikely that tissue metals concentrations or changes could be related to events at the Red Dog Mine since large Dolly Varden fishes attain their growth in the marine environment.” However, ADEC Spill Division acknowledges that marine degradation principally results from ore dust-blown pollution).

121. Division of Spill Prevention and Response Contaminated Sites Program, Appendix A 23 (2007); see State of Alaska Contaminated Sites Program, supra note 82.


123. Elizabeth J. Kerin & Hsing K. Lin, Fugitive Dust and Human Exposure to Heavy Metals around the Red Dog Mine, 206 Reviews of Environmental Contamination and Toxicology 60 (David M. Whitacre ed., Springer 2010) (residents do not appear to have blood levels of concern, however no statistical analysis and no isotopic studies were undertaken for elucidating the environmental source of blood level in children. Moreover, the last public health analysis dates back to 2001 and referred to blood tests undertaken in the 90s); see Public Health Evaluation of Exposure of Kivalina and Notak Residents to Heavy Metals from Red Dog Mines, Division of Spill Prevention and Response Contaminated Sites Program, http://dec.alaska.gov/spart/csp/docs/reddog/publichealthexpos_102501.htm [https://perma.cc/HJA3-45EK] (last visited Jan. 15, 2017) [hereinafter Heavy Metals].

committed to hammer out and implement a fugitive dust risk management plan. The latter gave rise to a series of Annual Management Plan Reports, the latest of which is from 2013 and refers to a 2007 human health and ecological risk assessment undertaken by Teck-contracted Exponent. The human health risk assessment stated that harvesting remained off limits only within the DMTS, and the ecological risk assessment evaluated potential risks to “ecological receptors inhabiting terrestrial, freshwater stream and pond, coastal lagoon, and marine environments from exposure to DMTS-related metals,” therefore also at the port site. No specific action, however, was undertaken.

C. A Proposed Solution at International Law

The mixed fuel of domestic and international law, as proposed in Section II of this paper, is not intended to remain wishful thinking, but should rather be tested in practice, and specifically in the Kivalina case.

I will first assess which water-related claims might not have found a proper response in previous litigation. I will contend that this legal gap could be filled by applying relevant international law norms, and specifically the LOS Convention. Since its provisions can only be applied in U.S. courts if they are proven customary, I will draw on political statements, relevant case law and scholarship in order to prove that specific environmental provisions of the LOS Convention have reached the rank of customary rules. I will advocate for the adoption of the Charming Betsy canon when invoking relevant federal law, namely NEPA, the CWA, EPCRA, the Rivers and Harbors Act, as well as Alaska private nuisance law. To my understanding, such interpretation of domestic law can be embraced by U.S. courts, allowing for the recoup of damages to be awarded to Kivalina people and the prevention of further pollution.

1. In the Aftermath of Domestic Litigation: Prospective Outstanding Claims

In the following paragraph, I briefly summarize the main water-related impacts of the mine sites on Kivalina residents that are still outstanding,

125. Elizabeth J. Kerin & Hsing K. Lin, supra note 123 (residents do not appear to have blood levels of concern, however no statistical analysis and no isotopic studies were undertaken for elucidating the environmental source of blood level in children. Moreover, the last public health analysis dates back to 2001 and referred to blood tests undertaken in the 90s); see Heavy Metals, supra note 123.


127. Id. at 8.
either because they were not mitigated through domestic litigation or they never achieved the status of legal claims.

As explained in Sections III.A and III.B, three factors have been and are allegedly affecting inland and coastal waters, as well as Kivalina residents’ life, namely (i) the water pollutants discharged from the mine sites onto the Middle Fork Red Dog Creek, which confluences with the Ikalukrock Creek and then flows into the Wulik River, the source of Kivalina’s drinking water and a tributary of the Chukchi Sea; (ii) the contamination of the fish population, which constitutes part of Kivalina’s subsistence life, through effluents in the river, and ore deposits/possibly oil spills at the port site; (iii) the contamination of marine waters and sediments at the port site due to air pollution and possibly oil spills.

Some of these adverse impacts of the mine operations have already been known, e.g., the exceedance of effluents discharges on the creeks.\textsuperscript{128} Some of these impacts have seemingly been overlooked, such as the presence of petroleum and ore contamination at the port site.\textsuperscript{129} Past litigation under both Alaska and federal law—albeit somewhat successful—has not addressed specific issues, nor provided long-term solutions.

Some leeway left for effective litigation might revolve around the following: (i) the need for compensating individuals, rather than the executive branch, for noncompliance of Teck with environmental laws; (ii) the need to increase permit standards and assess the impact of wastewater discharges, oil spills and air-borne ore dust on the marine environment, at least at the port site, since no follow-up ensued the 2007 ecological risk assessment undertaken by Teck-contracted Exponent, which evaluated potential risks to ecological receptors inhabiting terrestrial, freshwater stream and pond, coastal lagoon, and marine environments from exposure to DMTS-related metals; (iii) the need to tackle the presence of hydrocarbon spills, even in localized areas, and primarily at the port site since the site might well become a Superfund site\textsuperscript{130} if no proper action is undertaken; (iv) the need for an Environmental Assessment in light of fresh data to be collected, especially at the port site; (v) the tools that are available for preventing the unlawful degradation of waters; (vi) the feasibility of building a wastewater pipeline directly discharging on the Chukchi Sea so that Kivalina’s residents’ drinking water would not risk being contaminated; (vii) the protection of the marine ecosystem from climate change, and the protection of Kivalina from submergence.

\textsuperscript{128} See SHEARER, supra note 77, at 113.

\textsuperscript{129} See U.S. ENVIRONMENTAL PROTECTION AGENCY, supra note 78.

2. Possible Responses from International Law: A Case for the Law of the Sea Convention

I now turn to the LOS Convention in order to test the hypothesis that I put forward in Section I, namely whether outstanding water issues of Kivalina can be addressed by way of a mixed fuel encompassing international (substantive) law and U.S. (procedural and substantive) law.

The chosen international law instrument to be deployed in the case is the LOS Convention, namely the most comprehensive, and successful, instrument for protecting the seas. For the purpose of this paper, I will not be able to offer a fair account of the Convention’s history, case law and varied implementation. Rather, I will first overview the sections specifically relevant to the case, give an account of the positioning of the United States vis-à-vis the Convention and understand whether a case can be made for the customary status of some of the Convention’s environmental provisions.

Indeed, here lies a legal dilemma: the United States has never ratified the Convention, but the ‘magic’ of customary law has persuasively been invoked with respect to specific sections of the Convention.

If it is true that the law of the sea is “as old as nations,” the modern law of the sea is also the remarkable result of UNCLOS III, a nine-year negotiated conference extending the efforts of the previous UNCLOS I and II conferences. The Convention resulting from UNCLOS III notably contains a comprehensive legal framework devoted to the protection and preservation of the marine environment (Part XII), encompassing a variety of provisions, among which general obligations, monitoring and environmental assessment, international rules and national legislation to prevent, reduce and control pollution of the marine environment, enforcement in general and provisions for the smooth coordination of the LOS Convention with other conventions on the protection and preservation of the marine environment.


133. LOUIS HENKIN, HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY 212 (2d ed. 1979).


The United States signed and ratified all four UNCLOS I conventions. It also actively engaged in UNCLOS III negotiations, yet an abrupt change of posture occurred after the election of President Reagan, when, among other opposition techniques, an internal U.S. policy review known as the Green Book was being circulated at the Conference in early 1982, with the proposal of over 100 amendments. On that account, President Reagan considered the deep seabed provisions fatally flawed and in contrast with his “free enterprise philosophy.” In July 1982, Reagan announced that he would not sign the Convention, which nonetheless hit all previous records with 117 countries signing on the very first day it was open to signature.

As early as in 1983, Reagan announced that the United States regarded the LOS Convention, save for the deep seabed mining provisions (Part XI), as containing “provisions with respect to traditional uses of the oceans which generally confirm existing maritime law and practice and fairly balance the interests of all states.” Reagan sketched instances of the traditional uses of the oceans as navigation, overflight, and generally all high seas rights and freedoms that are not resource related. Quite interestingly, the Declaration also encompassed a number of statements concerning the marine environment, establishing a 200 nautical mile Exclusive Economic Zone with a view to enable “the United States to take limited additional steps to protect the marine environment,” specifically by working “through the International Maritime Organization and other appropriate international organizations to develop uniform international measures for the protection of the marine environment while imposing no unreasonable burdens on commercial shipping.”

After the adoption of the Convention’s Implementing Agreement by the U.N. General Assembly in 1994, the Convention was sent to the Senate for advice and consent, which have not been given yet.

Since this paper is geared toward judicial remedies, it is worth considering whether U.S. courts have characterized the LOS Convention as part of customary law. Firstly, I am going to tackle this issue by looking at

137. Id. at 102.
138. Id. at 103.
139. Id. at 104; Tetra Tech, Inc., supra note 102, at 99.
141. Id.
142. Id.
143. Damrosch & Murphy, supra note 134, at 1357.
144. Id.
courts’ understanding of the customary character of the LOS provisions in light of the declarations made by the United States in that concern. Secondly, I will turn to a tentative analysis of the customary character of some of the LOS environmental provisions at international law and besides the understanding that U.S. courts have had of the political branch position on the issue.

With reference to the courts’ view on the U.S. Executive Branch stance toward the LOS Convention, the Supreme Court has consistently maintained that the United States has not ratified the Convention, “but has recognized that its baseline provisions reflect customary international law.”145 This understanding has prompted a District Court to note in Sarei v. Rio Tinto, that the United States “is obliged to refrain from acts that would defeat the object and purpose of the agreement,”146 specifically when the norms at issue are customary norms reflected in Article 194(1) of the LOS Convention, but dismissed the claim as non-justiciable, which was overturned in appeals.147 Eventually the Supreme Court vacated the appellate judgment and remanded the case to the United States Court of Appeals for the Ninth Circuit for further consideration in light of Kiobel.148 The Appellate Judges affirmed the district court’s judgment upholding the non-justiciable character of the claim for it being a political question and rendered a judgment of dismissal with prejudice, which means any further attempt to bring the same case to court is ruled out.149

Be that as it may, the finding of a customary character of specifically Article 194(1) by the District Court was not contended, and will be material to the Kivalina case, as I will explain further in this paragraph under the prong of a general (non US-based) assessment of the customary nature of some of the LOS Convention’s environmental provisions. Nevertheless, in Sarei v. Rio Tinto, the district court approached the environmental claims of the dispute by asking for and obtaining evidence of the linkage between the mining corporation and the State where environmental violations occurred,150 yet it later dismissed the case precisely because any such act


146. Sarei v. Rio Tinto Plc., 221 F. Supp 2d. 1116, 1116 (2002); see also Rio Tinto PLC et al. v. Alexis Holyweek Sarei et al., 133 U.S. (2013); see also Sarei v. Rio Tinto Plc., 722 F.3d 1109, 1109 (9th Cir. 2013).

147. Rio Tinto, 221 F. Supp. 2d at 1209.

148. Rio Tinto, 722 F.3d at 1109 (citing Kiobel v. Royal Dutch Petroleum Co., 133 S.Ct. 1659 (2013)).

149. Id. at 1207.

150. OREN PEREZ, ECOLOGICAL SENSITIVITY AND GLOBAL LEGAL PLURALISM: RETHINKING THE TRADE AND ENVIRONMENT CONFLICT (Hart Pub’g 2004).
would fall under the act of state doctrine, making any claim non-justiciable. Were the customary character of Article 194(1) to be put forward in future claims, courts might be confused by the district court’s request of a linkage between the corporation and the State in the perpetration of the alleged environmental violations. Such a linkage would not be present in the Kivalina case since the concession for exploiting mineral resources is granted by a Nonprofit Organization, NANA Regional Corporation Inc., rather than by the state or the federal government, and the latter have no part in the management of the mines.

As a separate strand from the U.S. positioning and practice, U.S. courts might alternatively consider whether provisions show a customary character at international law.\(^ {151}\)

Any such inquiry should follow the strict _dicta_ put forward by the Second Circuit in _Kiobel_, even more so in the context of environmental cases since _Kiobel_ was an environmental case also.\(^ {152}\) The first step of the evidentiary inquiry dwells on retrieving “international conventions, whether general or particular, establishing rules expressly recognized by contesting states,” which in this case is the LOS Convention.\(^ {153}\) As _Kiobel_ maintains, the treaty’s evidentiary value for customary law depends on the number of signatory parties and the parties’ relative influence on the issue,\(^ {154}\) which are quite numerous and would lead to the affirmative in the case of the LOS Convention.\(^ {155}\) Nonetheless, the further steps pointed out by _Kiobel_ are not as easy to assess since evidence of a custom also springs from a general principle of law recognized by civilized nations; an international custom as evidence of a general practice accepted as law; or judicial decisions and the teachings of the most qualified publicists of the various nations, which would only constitute _subsidiary_ means for the determination of rule of law.

Since the Convention’s text was finalized and adopted, all countries have agreed that many provisions parallel the provisions included in the UNCLOS I Conventions, and even some of the provisions that had no UNCLOS I counterpart are clearly established customary law.\(^ {156}\) As of late 2014, 167 countries have become party to the Convention, and 147 of them have become party to the Implementing Agreement.\(^ {157}\) It is, however, safe

\(^{151}\) Hasan, 747 F. Supp. 2d at 634.

\(^{152}\) _Kiobel_, 133 U.S. at 1660.

\(^{153}\) _Id_. at 1161.

\(^{154}\) _Id_. at 1166.

\(^{155}\) Hasan, 747 F. Supp. 2d at 634.

\(^{156}\) DAMROSCH & MURPHY, supra note 134, at 1356.

to say that the UNCLOS I Conventions still govern States Parties to them, but it also governs States Parties to the UNCLOS III Convention insofar as the latter did not supersede the earlier Conventions.\textsuperscript{158} Since the 1958 Conventions are guides to the customary law of the sea governing States not party to the convention, we now turn to those.\textsuperscript{159}

The 1958 Convention on the High Seas, resulting from UNCLOS I, encompasses several provisions seeking to ensure safety at sea (Article 10) and the prevention of sea pollution by the discharge of oil from ships or pipelines or resulting from the exploitation and exploration of the seabed and its subsoil (Article 24), or even from the dumping of radioactive waste (Article 25).\textsuperscript{160} It does not, however, comprise some of what UNCLOS III would later cover, namely pollution from land-based sources, through the atmosphere and from dumping at sea (Article 207 – 212), nor its enforcement provisions, notably foreign vessels, by port countries (Article 218 covering pollution in the internal waters, territorial sea or exclusive economic zone) and coastal countries (Article 220 covering pollution in the territorial sea and exclusive economic zone).\textsuperscript{161}

With reference to land-based sources of marine pollution (LBSMP), which is material in the case of Kivalina, it was argued that customary law is established as covering the principles and obligations of good neighborliness and reasonable use of the seas.\textsuperscript{162} The same commentator, however, also recalled the customary nature of Article 207 of the LOS Convention (Pollution from land-based sources), which is eventually deemed too general for effectively tackling this kind of pollution, but the author did not set as his objective to provide a thorough account of all the applicable provisions of the Convention to cases of land-based pollution affecting the marine environment.\textsuperscript{163}

\textsuperscript{158} M\textsc{orakinyo A\textsc{dedayo A\textsc{yoade}, Disused O\textsc{ffshore I\textsc{nst}allations and P\textsc{ipes}ines Towards “S\textsc{ustainable D\textsc{ecommissioning}”} 56 (Kluwer Law Int’l eds., 2002); Damrosch \& Murphy, supra note 134, at 1359.

\textsuperscript{159} Damrosch \& Murphy, supra note 134, at 1359.

\textsuperscript{160} Convention on the Law of the Sea, supra note 2, at art. 10, 24, 25.

\textsuperscript{161} Damrosch \& Murphy, supra note 134, at 1494; see Convention on the Law of the Sea, supra note 2.


\textsuperscript{163} See id. (for retrieving soft law instruments relating to LBSMP, most notably Montreal Guidelines for Protection of the Marine Environment against Pollution from Land-Based Sources, Decision 13/18/ii, Governing Council of Unep (May 24, 1985); Washington Declaration on Protection of the Marine Environment from Land-Based Activities, a/51/116, Annex I, Appendix li (Nov. 3, 1995). Further soft law instruments relevant to the environmental provisions of the LOS Convention are, inter alia, Principles 7 and 21 of the Stockholm Declaration and Intergovernmental Working Group on
In my view, the underused assets of the Convention’s environmental provisions can be better retrieved in the repository of the general provisions (Arts. 192 – 196). As sharply noted, Article 192 sets forth an obligation on “States,” rather than “States Parties,” to “protect and preserve the marine environment,” alternatively implying (i) the customary character of such rule; (ii) obligations for third-State parties within the meaning of the 1969 Vienna Convention on the Law of Treaties (Articles 34 – 48 of the VCLT); or, (iii) a general principle of international law, which is the most favored option by commentators. The term pollution and dumping are quite broadly defined in Article 1 of the LOS Convention. Article 192 of the LOS Convention seems to require active measures to maintain or improve the marine environment, in “all parts of ocean space both within and beyond the limits of any national jurisdiction.”

Article 192 is further fleshed out in Article 194(1), whereby “States shall take, individually or jointly as appropriate, all measures consistent” with the Convention “that are necessary to prevent, reduce and control pollution of the marine environment from any source, using for this purpose the best practicable means at their disposal and in accordance with their capabilities, and they shall endeavor to harmonize their policies in this connection.”

Again, the article appears applicable also to countries that have not ratified the LOS Convention, and clearly refers to the need for establishing international standards (also Article 213 – 222 of the LOS

166. Nordquist et al., supra note 164.
167. Convention on the Law of the Sea, supra note 2, at art. 1(1)(4) (pollution of the marine environment means:
The introduction by man, directly or indirectly, of substances or energy into the marine environment, including estuaries, which results or is likely to result in such deleterious effects as harm to living resources and marine life, hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of sea water and reduction of amenities.
According to Article 1(1)(5)(a) dumping means “(i) any deliberate disposal of wastes or other matter from vessels, aircraft, platforms or other man-made structures at sea; (ii) any deliberate disposal of vessels, aircraft, platforms or other man-made structures at sea.”).
169. Id. at 43.
171. Nordquist et al., supra note 164, at 64.
Convention), to be enforced through national organs, whether judicial or not.\textsuperscript{172} Most notably, Article 194(3) provides that prevention/protection measures should be applied in relation to a number of circumstances, and, for the purposes of this paper, “(a) the release of toxic, harmful or noxious substances, especially those which are persistent, from land-based sources, from or through the atmosphere or by dumping; (b) pollution from vessels,” taking into consideration vessels’ construction, equipment, operation and manning.\textsuperscript{173} Pursuant to Article 194(5), the required measures “shall include those necessary to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life,” which is specifically suited to the ecosystems in and around Kivalina.\textsuperscript{174}

Nonetheless, what is most important to assess is the host of international standards that would allow these provisions to be specific enough, in the light of the Sosa decision, to supplement domestic rules. With relation to pollution from vessels, MARPOL\textsuperscript{175} would fill in the gap or suggest an increase of domestic standards through its six technical annexes requiring preventive measures covering five categories of substances, as well as a Protocol concerning Reports on Incidents Involving Harmful Substances.\textsuperscript{176} Differently, with relation to the inadequacy of water permit standards, further standards cannot be provided by the Convention on Biological Diversity, since the United States signed it in 1993, but never ratified it.\textsuperscript{177} Rather, possibly applicable provisions can be retrieved in the LOS Convention itself, and specifically in Article 204(1), which sets forth the obligation for “States” to “observe, measure, evaluate and analyze, by recognized scientific methods, the risks or effects of pollution of the marine environment.”\textsuperscript{178} Furthermore, pursuant to Article 204(2) of the LOS Convention, States shall “keep under surveillance the effects of any activities which they permit or in which they engage in order to determine whether these activities are likely to pollute the marine environment.”\textsuperscript{179} The obligation

\textsuperscript{172} Id. at 65.  
\textsuperscript{173} Convention on the Law of the Sea, supra note 2, at art. 194, ¶ 3.  
\textsuperscript{174} Id. ¶ 5.  
\textsuperscript{176} MYRON H. NORDQUIST ET AL, UNCLOS 1982 COMMENTARY SUPPLEMENTARY DOCUMENTS 803 (Martinus Nijhoff Publishers 2012).  
\textsuperscript{178} Convention on the Law of the Sea, supra note 2, at art. 204, ¶ 1.  
\textsuperscript{179} Id. at art. 204, ¶ 2.
to carry out an Environmental Impact Assessment (EIA) was acknowledged as customary in character under certain circumstances by the ICJ in the Pulp Mills case,\(^\text{180}\) and a domestic court might be able to flesh out the content of Article 204 of the LOS Convention by mandating EIAs on environmental agencies, even when the activities have been permitted but long-term effects were not duly/possibly anticipated.

All in all, Article 192, Article 194 and Article 204 of the LOS Convention, as supplemented by further instruments at international law, are seemingly apt to be applied also in domestic settings, on ground of their fairly established customary character and specificity.\(^\text{181}\) With reference to the U.S. judicial setting, specificity would be needed for these provisions to meet the Sosa test and therefore be applied either directly as a rule or indirectly as a standard within the canon of interpretation (the Charming Betsy canon). Moreover, the holding by which Article 194 of the LOS Convention partakes in customary law has never been invalidated through the Sarei v. Rio Tinto case law.\(^\text{182}\)

Be that as it may, this conceptual framework is now to be applied to the specificities of Kivalina’s prospective claims.

3. The LOS Convention at Play in Kivalina

In the following paragraph, I specifically address the water issues that I have previously characterized as still outstanding for Kivalina residents in light of my contention on the customary character of Articles 192, 194 and 204 of the LOS Convention. I will eventually argue that specific legal claims may be brought to the competent U.S. courts, or environmental administrations, mainly by relying on specific provisions of the LOS Convention.

Such legal claims would be targeted to the following objectives: (i) to achieve compensation for individuals; (ii) to increase the environmental standards contained in the relevant permits and assess the impact of wastewater discharges, oil spills and air-borne ore dust on the marine environment, at least at the port site in that the last ecological risk assessment dates back to 2007, was undertaken by Teck-contracted Exponent and it eventually emphasized potential risks to ecological receptors inhabiting terrestrial, freshwater stream and pond, coastal lagoon,


\(^{181}\) See Damrosch & Murphy, supra note 134, at 1493 (reporting that the works of the International Law Commission have only analyzed customary norms with relation to transboundary damage prevention and allocation of loss, as well as in transboundary aquifers context).

\(^{182}\) Sosa, 124 U.S. at 2763 (requiring a specific, universal, and obligatory content for rules to be the law of nations under the ATS); Sarei, 722 F.3d at 1109.
and marine environments from exposure to metals related to the operation of the mine; (iii) to assess the presence of hydrocarbon spills, even if in localized areas, and primarily at the port site since no official documents have been issued apparently on this concern; (iv) to undertake an Environmental Assessment in light of fresh data to be collected, especially at the port site; v) to understand which tools are available for preventing the unlawful degradation of waters; (vi) to assess the feasibility of the construction of a wastewater pipeline directly discharging on the Chukchi Sea so that Kivalina’s residents drinking water would not risk being contaminated; and (vii) to ensure the protection of the marine ecosystem from climate change, and the protection of Kivalina from submergence.

I will eventually argue that Kivalina residents might resort to three avenues, and specifically to (a) a private nuisance action before an Alaska state court and an ATS action before a federal court for point (i); (b) a request for the issuance/re-issuance, modification and revocation of permits and the right to petition for points (ii), (iii) and (iv); (c) a citizens’ suit based on the violation of the NPDES permit and an EPCRA action for point (v). I did not find, however, a way to address points (vi) and (vii) by relying on the customary provisions of the LOS Convention.

With reference to the need for compensating individuals, the CWA spells out the right for citizens to sue in section 505, with no possibility to be awarded damages in case of violation of the wastewater permit, i.e., the NPDES permit. 184

Alaska’s Civil Code of Procedure allows individuals to bring a civil action to enjoin or abate a private nuisance, with damages awarded in the action. 185 Such remedy has not been displaced by the CWA, according to section 505 (e) CWA. 186 In case of actions connected to air emission or water or solid waste discharge, which would be the case for Kivalina people, an action would be barred “where the emission or discharge was expressly authorized by and is not in violation of a term or condition of (1) a statute or regulation; or (2) a license, permit, or order that is issued after public hearing by the state or federal government and subject to (i) continuing compliance monitoring; (ii) periodic review by the issuing agency; or (iii) renewal on a periodic basis; or (3) a court order or judgment.” 187

Kivalina residents might contend that no continuing compliance monitoring nor periodic review has been warranted at the port site, nor a

184. Clean Water Act, supra note 95, § 505.
186. Clean Water Act, supra note 95, at § 505(e).
187. § 09.45.230(b).
periodic renewal of the permit for the operation of the port has been undertaken since the NPDES renewal ensuing the approval of the Aqqaluk project arguably refers only to discharges on the Middle Fork Red Dog Creek, neglecting discharges at the port and the effect that the discharge of increased effluents on the Middle Fork Red Dog Creek has on the port site. Nevertheless, plaintiffs need to work very carefully to (i) show substantial harm, probably by referring to the effects of water pollutants on the animals they harvest and the fallouts of air pollutants on their own health, as well as (ii) negligence or reckless conduct.\(^1\)

Such actions are not apparently displaced by the Clean Water Act in that the Supreme Court referenced to *Ouellette*\(^2\) in a dicta of *American Elec. Power Co., Inc. v. Connecticut*\(^3\) asserting that the Clean Water Act does not preclude aggrieved individuals from bringing a “nuisance claim pursuant to the law of the source State.”\(^4\)

Be that as it may, Articles 192, 194, and 204 of the LOS Convention would not need to be directly applied, but rather invoked for the consistent interpretation with international law of Alaska’s provisions on private nuisance (*Charming Betsy* canon).\(^5\) Most notably, the three LOS provisions would imply a need for stringent monitoring and permit renewal in order to protect and preserve the marine environment, and Kivalina residents could bring a private nuisance action concerning all three outstanding claims that I identified previously. As for most international agreements, provisions are not binding on private parties, be they either individuals or corporations, but rather on States Parties.\(^6\) Still, by applying the *Charming Betsy* canon, the analyzed LOS Convention provisions would not be apt to horizontal application (private-to-private claim), but rather would specify both state and federal legislation as they belong to the law of the land and should therefore be enforced.\(^7\)

With reference to the first outstanding claim, namely the water pollutants discharged from the mine sites onto the Middle Fork Red Dog Creek, which are alleged to impact the source of Kivalina’s drinking water and possibly also the Chukchi Sea, any violation of the NPDES might trigger a private nuisance claim in that Kivalina residents might show substantial harm and recklessness/negligence of the violating conducts,

\(^1\) Restatement (Second) of Torts § 822 (1979); Fernandes v. Portwine, 56 P.3d 1 (Alaska 2002).
\(^4\) *Ouellette*, 107 U.S. at 497.
\(^5\) *Convention on the Law of the Sea*, supra note 2, at art. 192, 194, 204.
\(^6\) *Id.* at art. 192, 194, 204.
\(^7\) *Id.*
which are further aggrieving given the lack of notification of such events, as it turned out in 2014. Article 194(3) of the LOS Convention would help construe some of the terms of Alaska private nuisance rules, and specifically the reference to “continuing compliance monitoring,” “periodic review by the issuing agency” or “renewal on a periodic basis,” which should cover “(a) the release of toxic, harmful or noxious substances, especially those which are persistent, from land-based sources, from or through the atmosphere or by dumping,” as set forth in Article 194(3)(a) of the LOS Convention. By leveraging on the threat of private nuisance claims, companies might be incentivized to voluntarily put in place such customary-based monitoring mechanisms even when the permit does not require them to do so.

In relation to the second outstanding claim, namely the contamination of the fish population, which constitutes part of Kivalina’s subsistence life, through effluents in the river, and ore deposits/possibly oil spills at the port site, the monitoring apparatus necessary for avoiding a threat of private nuisance claims would consist of mechanisms “to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life,” pursuant to Article 194(5) of the LOS Convention, which is particularly apt for the fragile ecosystem of Alaska. On Kivalina’s facts, no recent impact statement on the fish population at the port site is currently available.

Also with respect to the third outstanding claim, namely the contamination of marine waters and sediments at the port site due to air pollution/possibly oil spills, in order not to be liable for a private nuisance claim, Teck would be required to comply with Article 194(5) of the LOS Convention, assessing the impact of vessels and discharges on the “fragile ecosystems” of the port, as well as the “habitat of depleted, threatened or endangered species and other forms of marine life.” More importantly, Teck itself is in charge of operating the port. In order to avoid pollution from vessels, Teck would be spurred on to evaluate which MARPOL protocols have been domesticated in the U.S. legal system, as well as to assess whether any such obligation is binding on private port authorities as well.

What is most interesting about Alaska’s Code of Civil Procedure is the fact that the foregoing restrictions on private nuisance actions do not apply

196. § 09.45.230(a).
198. See generally § 09.45.230(a).
200. Id.
if the discharge produces a result that was unknown or not reasonably foreseeable at the time of the authorization. Therefore, if Kivalina residents were able to prove the unknown result/not reasonably foreseeable effect of the discharge, they would be able to succeed in the action, even when the relevant judge deems the level of monitoring and permit renewal sufficient. Unfortunately, it is not possible to make any prediction on the environmental impact of the mine operations on the port site in that data are lacking. Nevertheless, permit and monitoring do not appear to have been periodic. This might suggest that nuisance conducts were unknown or not reasonably foreseeable at the time of the authorization, allowing private nuisance actions to be brought with no restriction. By qualifying the polluting conduct as “an action for waste or trespass upon real property” and in light of Alaska Supreme Court’s decision in *Fernandes v. Portwine*, the statute of limitations appears to be six years.

With reference to the ATS claim, an alien should file it, so there should be at least one person within the Kivalina community having multiple citizenships/a foreign citizenship and being willing to file the claim. Yet, no case law has been retrieved on standing for U.S. citizens filing the ATS claim as foreign nationals on account of multiple citizenships.

On the likelihood of succeeding in court, the *Sarei v. Rio Tinto* litigation would not be a legitimate precedent. Although the Court did not rule out the customary nature of the LOS Convention, and specifically Article 194, *Kiobel* is still an overpowering legacy and might dispel purely environmental law-based ATS claims without a specific differentiation between human right-based and environmental law-based claims. Given the non-extraterritorial character of a prospective ATS claim brought by Kivalina residents, however, the outcome might not be impacted by *Kiobel*. Yet, the *Sosa* standards for a customary rule to apply would still need to be met. ATCA contains no limitations period, yet this does not imply there is none and court practice is varied in this regard.

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201. § 09.45.230(c) (2011).
203. See *Sarei*, 722 F.3d at 1110.
204. See generally *Kiobel*, 133 U.S. 1659.
205. See *Sosa* 124 U.S. 2739 at 2766 (according to *Sosa*, in order to be applied under the ATCA international law norms need be “specific, universal and obligatory.”); see Wesley Papa v. U.S. and the U.S. Immigr. & Naturalization Serv., 281 F.3d 1004, 1011–13 (Fed. Cir. 2002); Doe v. Islamic Salvation Front, 257 F. Supp. 2d 115, 118–19 (D.C. Cir. 2003); Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424, 461–66 (D.N.J 1999) (the case-law on the relevant statute of limitations for an ATCA claim is varied, usually being a ten-year time bar in analogy to the Torture Victims Protection Act (TVPA)); see In re Agent Orange Prod. Litig., 373 F. Supp. 2d 7, 63–64 (E.D.N.Y 2005) (it appears that in this instance only a federal court held that “there are no statutes of limitation with respect to war
As a second prong of litigation, Kivalina residents might petition for the re-issuance, modification, and revocation of permits pursuant to specific environmental regulations, which are also applicable to state programs. In the case of Alaska, the NPDES permit program is administered at the state level. This prong of litigation is not per se judicial, however, it might become so in case the petition is denied with no reasonable ground in light of the holdings of Massachusetts v. EPA.

Under this prong, the analyzed LOS Convention provisions would be directly binding on the relevant level of government in the permit process, rather than on a corporation, such as Teck. A corporation would, however, be indirectly affected by the application of those provisions at the governmental level, which would result in higher environmental standards.

Most specifically, with regard to section 402 CWA (stormwater) permit, which is required for the discharge of water pollutants on the Middle Fork Red Dog Creek, Kivalina plaintiffs will need to petition the Alaska Department of Environmental Conservation. Kivalina plaintiffs are in the position to ask for more stringent effluents limits, which would counter the lowering of some of the effluent standards in the latest NPDES permit, which were challenged unsuccessfully. Such a right to petition is enshrined in the Code of Federal Regulations and can be better fleshed out by relying on the need for states to “take, individually or jointly as appropriate, all measures consistent” with the LOS Convention “that are necessary to prevent, reduce and control pollution of the marine environment from any source, using for this purpose the best practicable means at their disposal and in accordance with their capabilities, and they shall endeavor to harmonize their policies in this connection” (Article 194(1) LOS Convention). On the same ground, Kivalina residents might require a modification of the current system of NPDES enforcement, which

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211. Id.
212. See Native Village of Kivalina IRA Council, supra note 104.
presently provides a mechanism of self-compliance by Teck coupled with periodic inspections on the part of the Administration. Enhanced controls on the part of either ADEC or third parties that have been assessed as truly neutral could provide a better enforcement system.

With regard to section 404 CWA (dredge-and-fill) permit, which is required for the operation of the Aqqaluk deposit and probably also at the port site, yet the latest point is not apparent, the relevant authority to petition would be the Army Corps of Engineers, Alaska District.\textsuperscript{214} The aim would still be to petition for increased environmental standards and more frequent controls on the governmental side.

Moreover, Kivalina residents would also need to petition the Army Corps of Engineers, Alaska, for a Rivers and Harbors section 10 permit for the operation of the port site in that it does not appear to be in place. By way of difference from the CWA, the right to petition is not specifically granted in the Rivers and Harbors Act.\textsuperscript{215} Such a right should be derived from the general right to petition as enshrined in the Right to Petition Clause contained in the First Amendment of the U.S. Constitution and the petition would be substantiated by relying on Article 204(1) of the LOS Convention (\textit{Charming Betsy} canon), which sets forth the obligation for “States” to “observe, measure, evaluate and analyze, by recognized scientific methods, the risks or effects of pollution of the marine environment,” namely the activities that are required for the issuance of a Rivers and Harbors section 10 permit.\textsuperscript{216}

All in all, pursuant to Article 204(2) of the LOS Convention, States shall “keep under surveillance the effects of any activities which they permit or in which they engage in order to determine whether these activities are likely to pollute the marine environment.”\textsuperscript{217} This obligation appears specifically stringent in the context of permit issuance, re-issuance, modification, and revocation, all the more so at the port site, which was not covered by the latest Supplemental Environmental Impact Assessment.

Since the project is subject to NEPA, one further line of petitioning might dwell on the request for an Environmental Assessment to be carried out at the port site according to specific environmental regulations.\textsuperscript{218} Moreover, the same LOS Convention provision, as complemented with the \textit{Pulp Mill} judgment,\textsuperscript{219} can be construed as requiring recurrent or at least precautionary Environmental Assessments. On Kivalina’s facts, citizens

\begin{footnotes}
\item[214] Clean Water Act, \textit{supra} note 95, § 404.
\item[215] \textit{Id}.
\item[216] Convention on the Law of the Sea, \textit{supra} note 2, art. 204.
\item[217] \textit{Id}.
\item[218] 40 C.F.R. § 1501.4 (2016).
\item[219] See Pulp Mills on the River Uruguay (Arg. v. Uru.), \textit{supra} note 180.
\end{footnotes}
may petition for an Environmental Assessment concerning the impact of Middle Fork Red Dog Creek’s discharges on the Chukchi Sea, and specifically at the port site, which was not analyzed by the latest SEIS.

With concern to the permit process, Kivalina residents might also petition for the withdrawal of approval from the programs that have been delegated to Alaska, under both the stormwater (section 402(c)(3)) and dredge-and-fill (section 404(i)) programs. Even in these cases, the right to petition would need be grounded on the First Amendment to the U.S. Constitution and substantiated within the activities mandated by Article 204(2) of the LOS Convention.

Under the third prong of action, namely citizens’ suits and civil actions, Kivalina residents may bring a suit against any person alleged to be in violation of water-related permits immediately for violations of NPDES or toxic effluents standards, and in general after sixty days from when the plaintiff has given notice of the alleged violation to the Administrator, the State, and the alleged violator.

Nonetheless, any such action is barred if the Administrator or State “has commenced and is diligently prosecuting a civil or criminal action.” Kivalina residents were able to meet the standing prongs in previous NPDES litigation, therefore they are likely to meet them also at this time. Such a citizen enforcement action, however, could only be targeted to stop permit violations, since it does not allow citizens to recoup damages, but only litigation costs.

A citizens’ suit may also be brought against the EPA Administrator on a failure to perform any act or duty. Such a strand of litigation, however, is specifically difficult to pursue in that the duty/act should be non-discretionary. On Kivalina’s facts, the Administrator’s duty can be fleshed out in the obligation to update and tighten up the NPDES and dredge-and-fill permits, as well as in the duty to carry out/update an environmental assessment at the port in light of the obligation for States, pursuant to Art. 194(1), to “prevent, reduce and control pollution of the marine environment from any source, using for this purpose the best practicable means at their disposal and in accordance with their capabilities.” Yet, the means for accomplishing these duties are discretionary. Besides, this strand of

220. Clean Water Act, supra note 95, § 404.
222. Clean Water Act, supra note 95, at § 505(b).
223. Id. at § 505(b)(A).
224. Id. at § 505(b)(B).
225. Id. at § 505(d).
226. Id. at § 505(a)(2).
litigation would not specifically benefit from the consistent interpretation of the CWA with the customary environmental provisions of the LOS Convention.

This prong of litigation also rests on the civil actions’ provision set forth in EPCRA, which can be filed against either the violator or the State Administrator. Such actions, nonetheless, are geared toward a different goal from the one set in the CWA, and precisely compliance with reporting obligations, also in case of accidental chemical release under the Toxic Release Inventory (TRI) Program. The EPA would investigate cases of EPCRA non-compliance and may issue civil penalties, including monetary fines, and require correction of the violations. On Kivalina’s facts, citizens can certainly file such an action were a violation of the NPDES to occur without Teck stating an emergency notice, as it happened in 2014. This specific prong of litigation, however, would not require the application of the Charming Betsy canon with reference to the LOS Convention, since the latter could not add much to such a specific piece of legislation. Citizens would not be able to recoup damages, but they can still count on the further means of an injunctive relief.

Likewise, I do not see how the actual construction of a wastewater pipeline directly discharging into the Chukchi Sea can be mandated by wielding on LOS Convention provisions. Therefore, this specific claim of Kivalina people cannot be advanced by relying on the LOS Convention.

The last outstanding claim that I have put forward is the protection of the marine ecosystem from climate change, and the protection of Kivalina from submergence. I believe that both concerns might come under the ambit of the specific solicitude that States need to show for “rare or fragile” ecosystems (Article 194(4) LOS Convention) and climate change considerations should be internalized within a new EIS according to NEPA and Article 204 of the LOS Convention. Notwithstanding, I cannot see how greenhouse gas emissions, namely the cause for Kivalina’s prospective submergence, might be curbed by relying on the LOS Convention. Therefore, this prong of litigation cannot rely on the Charming Betsy canon, as applied to the LOS Convention.

A specific concern might be addressed at policy level, which is the environmental justice posture of the present case. The landmark executive order issued by President Clinton in 1994 prompts all federal agencies to

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229. Clean Water Act, supra note 95, § 505(a).
carry out a review of their internal decision-making procedures to incorporate consideration of environmental justice issues therein. Such an executive order will not create a right of action for Kivalina people, still the concerns it addresses must be adequately incorporated in such federal executive actions as an environmental statement/EIS under NEPA.\textsuperscript{233}

All in all, I contend that it is possible to flesh out rules of diligence at both company level (Teck), and governmental level (State and Federal government) by way of a consistent interpretation of domestic legislation with the specific provisions resulting from the customary rules of the LOS Convention, namely Article 192, Article 194 and Article 204. In this way, companies, such as Teck, might anticipate the risk of litigation, especially under the private nuisance prong, and undertake actions to exceed permits’ requirements. Similarly, under the administrative prong, in case the relevant authorities refusal to reissue modify or revoke permits, courts might pay less deference to the executive branch under the \textit{Chevron} doctrine, or at least frame deference within the limit of political discretion and claim jurisdiction to rule on how the agency is fulfilling its duties in light of the environmental rules of the LOS Convention, which have been ascertained as customary in character.\textsuperscript{234}

Nevertheless, in any thread of litigation one should carefully balance the opposing interests of full environmental soundness and public health safety with the economic prosperity Teck is bringing to the area. In all the foregoing legal argumentations, legal counsels should emphasize the need for tackling pending environmental issues as they appear now in order to avoid future litigation costs, epidemiological diseases, reclamation costs, and internal opposition from Native American workers at Teck.

In conclusion, and especially in light of the historical trajectory of the stance U.S. courts have taken vis-à-vis international law and its judicial enforceability, I would not recommend a litigation strategy that depends on the direct application of the LOS Convention environmental provisions, but rather on the application of the \textit{Charming Betsy} canon while applying relevant domestic legislation and regulations.

IV. TAKING STOCK

In this paper, I have attempted to analyze how a specific case of environmental injustice can be addressed by hinging on international law provisions.


The case of environmental injustice is now unfolding around the largest zinc mine worldwide, Alaska’s Red Dog Mine, and is specifically impacting the Native Alaskan Kivalina community. The latter has long battled against environmental degradation under U.S. law, with no apparent success. In light of the impasse of purely domestic remedies, I have focused on the water-related issues of the litigation and argued that international law might equip plaintiffs with stronger arguments allowing for the implementation of international law in U.S. courts.

Most notably, I have made the case for specific pieces of U.S. environmental legislation being interpreted consistently with the environmental provisions of the Law of the Sea (LOS) Convention. The LOS Convention is of interest to the case not only by the fact that it is strictly relevant to the subject matter, but also because of the customary character of some of its provisions, as acknowledged by U.S. courts and scholarship.

Some issues, however, are still outstanding, even at the end of my analysis.

It still must be proven that the ICJ Pulp Mill decision can be extended to the imperative of undertaking recurrent or even precautionary environmental assessments. Moreover, I have not tested the potential of the LOS Convention on all the possibly applicable pieces of environmental legislation. For instance, I did not assess its impact on the interpretation of some of the provisions of the Safe Drinking Water Act. Furthermore, I have not tested the potential of all LOS applicable provisions either. The understanding of how the LOS Convention can be intertwined with climate change instruments is specifically compelling, but worth a brand new chapter.

The quest for justiciable rights and competent courts to assess them is ultimately intended to enhance awareness on the part of the national judiciary of its entrustment as interpreter of the whole of the relevant law, be it both domestic and international. Moreover, this attempt of domestic/international solutions to current environmental issues might also serve the cause of the international legal order, where enforcement is often problematic. It can also conjure up the threat of litigation costs that companies may incur in case such litigation claims prove successful, enabling companies to prevent environmental degradation in the first place. Lastly, and more importantly, the domestic staging of environment-related claims against the backdrop of international law would set individuals, and not only States, as recipients and actors of international law, hopefully equipping them with further tools to advance their rights.