



Course
Global Environmental Litigation
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Chapter 1
Mapping of the Available Dispute Settlement
Mechanisms

LECTURERS

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CH. 1. MAPPING OF THE AVAILABLE DISPUTE SETTLEMENT MECHANISMS

The aim of this chapter is to provide an overview of the various dispute settlement mechanisms available when an environmental damage affects an indigenous community. The decision to lodge a claim depends on various factors. Among them, the availability of a dispute settlement mechanism, the chance to succeed and, eventually, the direct and indirect impacts that can be achieved through litigation shall be considered.

1.1. Overview of the available options

Many dispute settlement mechanisms can be mobilized when an environmental damage affects an indigenous community. Some of them are judicial, others can be qualified as alternative dispute resolution mechanisms; some of them are domestic, others international.

Domestic mechanisms

The more obvious way to litigate a dispute is probably to bring it before the courts of a State. These domestic courts shall be distinguished, depending on their nature (civil, criminal, administrative), and on their link to the dispute (territorial State's courts/foreign courts).

See, the claims brought before the Nigerian, Dutch, British and US Courts in the *Shell/Ogoni* case, those submitted to the Ecuadorian and US courts in the *Chevron-Texaco/Ecuador* case or those rejected by the Ecuadorian courts in the *Kichwa de Sarayaku* case.

Alternative dispute resolution mechanisms have also emerged at the domestic level. Some of them are purely national, even though they tend to appear in various systems (*ombudsperson*). Others stem from an international initiative, such as the National Contact Points set up to advance the effectiveness of the OECD guidelines for multinational enterprises. Even though their organization vary from one State to another, and despite their final statement are not binding, such mechanisms should not be underestimated.

See the *Survival v. WWF* case, submitted by the claimant to the Swiss National Contact Point.

International mechanisms

At the International level, various mechanisms exist, that can be seized of disputes that involve indigenous peoples and environmental issues. Their jurisdiction always stems from States' consent and is framed by States' consent. But their independence and the potentially broad impact of their decisions have made them attractive to litigants.

As a matter of principle, any international court can be seized of disputes related to the environment. The International Court of Justice, which have an unlimited subject-matter jurisdiction, have regularly been confronted to environmental issues, especially in the recent years. But other, more specialized, international courts, such as the WTO dispute settlement body or the ITLOS, have also dealt with such issues. That being said, the claims involving the damages caused to the environment of minorities and

indigenous groups have mostly been submitted to human rights bodies, be them judicial (human rights regional courts) or quasi-judicial (human rights regional commissions, human rights committee).

See the *Kichwa de Sarayaku v. Ecuador* case decided by the Inter-American court of human rights.

These international judiciary or quasi-judiciary bodies can only be seized of claims directed against sovereign States. Therefore, it appears difficult to invoke the responsibility of a private person for environmental damage at the international level. The International Criminal Court (ICC) could decide to prosecute crimes involving environmental destructions, but its subject-matter and personal jurisdictions remain limited. Arbitration could perhaps offer a new venue for environment-related disputes. Indeed, although investment arbitration has sometimes been used to challenge measures adopted in defense of the environment, the Hague rules on business and human rights arbitration illustrates the possibility to use arbitration to settle environment-related disputes involving businesses.

Alternative dispute resolution bodies, such as the World Bank Inspection Panel, are also to be considered, since they can be seized of decisions taken by an international organization in the funding of projects that adversely affect the environment of indigenous communities.

1.2. Drivers for the selection of an option

When deciding to litigate a dispute, the claimants shall take into account various considerations, including the potential outcome of the proceeding, but also the availability of the mechanism, the applicable law or the procedural rules.

Outcome

First, the decision to introduce a claim depend on the potential outcome of the proceeding. The purpose of a claim can be immediate, applicants hoping either to affect the course of an ongoing or planned project and/or to redress the consequences of a project. Therefore, the nature of the possible reliefs and the possibility to actually enforce the decisions taken of course play a fundamental role in the decision to initiate a claim. But a claim can also be animated by the sole willingness to raise awareness on a situation or by long-term objectives such as a change in the law or a change in the mentalities. Depending on what they are searching for, claimants can prefer one dispute settlement mechanism or the other.

Procedure

Remedies are not the only element that litigants shall take into account before lodging a claim. Very quickly, they also have to think about the procedure (third-parties intervention, proof, evidence, provisional measures, interlocutory judgments, enforcement...), and the applicable law. These procedural rules will significantly affect their chance to succeed.

Availability

But a first question in need for an answer from the outset is: will it be possible to have the case heard on the merits? The answer depends on jurisdiction and admissibility requirements that can limit access to a dispute settlement mechanism. Indeed, access to any dispute settlement mechanisms, be it of a jurisdictional nature or not, is submitted to conditions. Depending on the situation of a particular claimant, these conditions can drive him to choose one dispute settlement mechanism or another.