Course
Global Environmental Litigation
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Chapter 2
Jurisdiction and Admissibilité

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CH. 2: JURISDICTION AND ADMISSIBILITY

This chapter focuses on the legal capacity to bring a claim to a dispute settlement mechanism, which itself depends both on jurisdictional and admissibility conditions. Jurisdiction refers to the power of a mechanism to settle an identified category of disputes, while admissibility concerns the conditions that shall be met in order to submit a specific claim to such a mechanism. The rules that govern the jurisdiction of a dispute settlement mechanism and the admissibility of a claim vary depending on the mechanism at stake. Those applicable to international mechanism usually stem from their status and public international law. Those that apply to domestic mechanism result from each domestic law, but are partially framed by international agreements or, as regards the member States of the European Union, by European law. The chapter describes successively jurisdiction (2.1) and admissibility (2.2) requirements. These requirements play a significant role when determining where to lodge a claim for environmental damage.

2.1. Jurisdiction

The jurisdiction of any dispute settlement mechanism, be it judiciary in nature or not, is circumscribed to a more or less broadly identified kind of disputes. Therefore, claimants have to fulfil jurisdictional requirements so that to be able to submit a dispute to a court. These jurisdictional requirements are usually classified as personal (jurisdiction *ratione personae*), territorial (jurisdiction *ratione loci*), material (jurisdiction *ratione materiae*) and temporal (jurisdiction *ratione loci*). Is a dispute were to be submitted to a dispute settlement mechanism without meeting one of these requirements, it would be dismissed. In this section, we will focus on the first two (personal and territorial), since the other two (material and temporal) raise less specific and sensitive issues.

Personal jurisdiction

- **The claimants**

As regards the claimants, dispute settlement mechanisms can be distinguished depending on three elements. First, whether they can only be seized by the victims of a damage or by others through a kind of *actio popularis* that permits those who are not directly affected by a conduct to act in the best interest of the law or of the community (NGOs, States…). Second, when only victims can lodge a claim, who can be considered as a victim: only individuals or a group, and especially a people as such? Third, when only individuals can introduce a claim, do they have the possibility to aggregate their claims when way or the other?

> The case-studies illustrate some of these mechanisms: in some cases, the claim was lodged by individuals, acting on their own or through a class-action (*Okpabi* case concerning the Shell/Ogoni dispute), in others by the American Commission on Human rights itself initially seized by an association acting on behalf of a people (*Kichwa de Sarayaku*), in others by NGOs (*Milieudefensie* case).

- **The respondents**

The choice of a dispute settlement mechanism also depends on the nature of those who can appear as defendants before it. Some dispute settlement mechanism can be seized of claims directed against any person, be it natural or legal, even though the possibility to challenge the conduct of a State before them is limited by the sovereign immunities. Others, at the international level, can only decide on cases

involving States or, for some, international organizations (World Bank Panel). Since individuals, corporations, States or international organizations (acting as funders) can play a role, be it active or passive, in environmental damages, claimants can choose a mechanism or the other depending on who they want to sue.

> In our case-studies, some claims have been brought against corporations, considered directly (operators) or more remotely (parent companies) responsible for the damage suffered, but also against the States in which the damage occurred, either for their actions or their omissions (failure to protect). But the conduct of the funders of a project (such as the WB) or, even, of NGOs acting in the furtherance of environmental interests (*Survival v. WWF* case) has also been challenged. The criminal responsibility of individuals has also been invoked, but not really deepened (*Chevron* case).

Territorial jurisdiction

Another prominent issue relates to the territorial jurisdiction of the dispute settlement mechanism at stake.

- **International mechanisms**

As regards international mechanisms, the answer is rather straightforward: they can be seized of any breach of the applicable law that occurred under a State party's jurisdiction. That being said, it shall be kept in mind 1. that all the international mechanisms always depend on State consent; 2. that States can sometime modulate the extent of their consent (see article 56 of the ECHR, the so-called colonial clause); 3. Conversely, that the jurisdiction of a State can extend beyond its territory (see the case-law of the ECtHR).

- **Domestic mechanisms**

The territorial jurisdiction issue appears far more complex regarding domestic mechanisms. Of course, the courts of the State in which the damage occurred appear as the most "natural" judges for such cases. But, for various reasons, they are not always in the best position to settle it. This raises the issue of the international jurisdiction of domestic mechanisms: is it possible for the courts of a State distinct from the one in which the damage occurred to rule on it? If so, on which ground? Should the jurisdiction of the courts of the States in which the parent companies of transnational groups have their seat or are incorporated be broadened? Should there exist a kind of universal jurisdiction to permit foreign courts to decide such cases on behalf of the international community when no other judge is able or willing to do it?

These issues appear topical (discussions are ongoing regarding the adoption of a treaty to further regulate the activities of transnational corporation) and very sensitive, especially when judicial mechanisms are at stake. The required link could be less stringent as regards alternative disputes settlement mechanisms, such as the one provided by the OECD National Contact Points.

> In our case-studies, some claims can be described as territorial, such as the ones brought before the courts of the State where the damage occurred (*Chevron*, Nigerian decisions related to the Shell/Ogoni dispute) or before regional human-rights bodies (*Kichwa de Sarayaku*). But many of them involve some kind of extraterritoriality, such as the one submitted to the domestic courts of the State of nationality of the parent company, those of a third-State (*Kiobel*) or to the National contact points of the OECD (*Survival v. WWF*).

Although this issue of international jurisdiction of domestic courts is decided on the basis of private international law, public international law could also have a role to play. Indeed, some tend to consider that States' parties to human rights instrument may have extraterritorial positive obligations, that is the obligation to make sure that human rights are respected in the private parties' relations, even abroad. These could also lead to conventional developments towards the affirmation of the capacity/obligation of States to extend their jurisdiction to offer judicial remedies to those affected by the acts committed abroad by transnational groups.

2.2. Admissibility

Once the jurisdictional hurdles overpassed, a claim shall also meet additional requirements in order to reach the merits phase. These additional requirements are usually qualified as admissibility requirements since they relate to the claim itself rather than to the dispute. Some of them are of peculiar relevance when considering environmental claims. They relate to the articulation between the various fora that can potentially be seized of a same dispute. On the one hand, the relation between domestic and international mechanisms is usually organized by the requirement to exhaust domestic remedies before submitting a case to an international court. But, on the other hand, claimants sometimes have the possibility to address themselves to various courts, either at the national or at the international level. They can then be confronted to the *forum non conveniens* doctrine and the parallel claims exception.

Forum non conveniens

Forum non conveniens refers to a common law doctrine that allows courts to prevent a case from moving forward on the basis that another jurisdiction is a more appropriate venue for the case due to the location of the parties, witnesses, evidence, and given that the local court is more familiar with the local law, which is often the law applied in the case. As a matter of principle, this doctrine could be considered as a reasonable way to deal with extraterritoriality issues. But as a matter of fact, it is often used by home States court to avoid cases, that have little if no chance to be actually resubmitted to the host State's court. This explain why the doctrine appears to be in decline, especially in Europe (ECJ, *Owusu v. Jackson*, 2005) even though it sometimes reappears under another form.

> The issue appears central in many of the cases examined, especially the *Chevron/Ecuador* dispute, but also the *Okpabi* case related to the *Shell/Ogoni* dispute.

*Parallel claims (*lis pendens/ne bis in idem*)*

Once the applicants have decided to submit their claim to a specific dispute settlement mechanism, do they retain the capacity to address themselves to another mechanism, either while their initial claim is still pending or after it has been dismissed. Admissibility rules exist in order to regulate such situations, both at the international (see ECHR, article 35, al. 2) and domestic levels. Their application is not straightforward since it depends on how identic are the successive claims and on how the first one has been treated by the initial mechanism?