



Course
Global Environmental Litigation
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Chapter 4
The Outcomes of the Proceedings
Decisions and Settlements

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CH. 4 : THE OUTCOMES OF THE PROCEEDINGS : JUDGMENTS AND SETTLEMENTS

There are no rights but effective ones. With a view to contributing to the definition of a global litigation strategy for claimants acting on behalf of indigenous peoples in relation to environmental issues, the perspective of the effective enforcement of the outcomes of the proceedings shall be scrutinized. After 1) identifying the most usual types of outcomes of environmental litigation proceedings, four topics should be relevantly discussed: 2) The sovereign immunities from execution; 3) the scope of the settlement/decision; 4) The available remedies and sanctions, and 5) The review and enforcement procedures.

4.1- Common Types of Proceedings Outcomes

Judgments of a supranational court (international/regional)

The former chapters have evidenced that although litigation regarding environment is mainly dealt with at domestic level, supranational courts (International criminal Court, Regional Courts for Human rights...) sometimes have grounds for dealing with related issues. Their decisions are really "international", but their enforceability and enforcement processes depend on the content of the treaties defining their statute.

Arbitral awards (Investment or Commercial Arbitration)

The effects and enforcement processes of international awards, in both investment and commercial arbitration, are mainly defined by national regulations on arbitration: It is up to each Nation State to decide on the conditions required from an arbitration award to be given effect and/or enforced in its legal order. Beyond the diversity of national regimes, harmonization instruments such as the UNCITRAL Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New-York, 1958) or the ICSID Convention on the Settlement of Investment Disputes between States and Nationals of Other States (Washington, 1966), offer more foreseeability.

Judgments of a foreign domestic court

Foreign domestic judgements are naturally and easily enforced in their country of origin. However, in global litigation, it is often crucial to be able to enforce abroad (see the case study, *Chevron v. Ecuador*). The enforcement regime of foreign domestic judgments is defined by each Nation State. It depends both on the nature of the judgment (administrative, criminal or civil/commercial) and on the country of origin. The circulation of civil or commercial judgments is more widely admitted than the one of administrative or criminal decisions. And some States have entered into bilateral or multilateral agreements to smoothen the circulation of judgments among them.

Private settlements

It is not rare that, before litigation or at any stage of the judicial proceedings, parties decide, where permitted by the law, to settle the case through a settlement agreement. ADR procedures (mediation, conciliation and their alike) also find their natural outcome in such agreements. Settlement agreements usually fall under the qualification "contract" and are enforceable as such. They may however be subjected to judicial approval, the judge playing a more or less important role depending on the circumstances. The judge's intervention could eventually end up in the requalification of the settlement as a judgment, but it is seldom the case.

Public and official statements

At the supranational level, it is not rare that international bodies or authorities receive the power, not to decide on cases, but to draft official statements regarding the behavior of opposing parties. These statements, when made public, may cause reputational harm and therefore represent a sanction. The OECD National Contact Point (NCP) is a good example: when a complaint is lodged for alleged violations of OECD Guidelines by MNC, the NCP produces a final statement. The final statement may either explain why the issues do not merit further consideration, explain any agreement reached by the parties, or, if no agreement is reached, provide an overview of the issues raised and procedures followed. Especially if parties do not reach agreement, OECD Watch encourages NCPs to include in their final statement a determination on whether the company met or did not meet the expectations in the OECD Guidelines, and a request to apply consequences to companies that did not participate in the process of good faith.

4.2. Sovereign Immunity from Execution

It should be considered to which extent, depending on the type of proceedings, the enforcement of the settlement or judgement may be hindered by the Sovereign immunity from execution whenever the unsuccessful party is a State, a State corporation or an international organization.

When it comes to the enforcement of a decision, the immunity from jurisdiction has been disregarded at an earlier stage of the proceedings, either because the cause of action was not within the scope of immunity, or because the sovereign entity has waived its immunity. But non-application of immunity from execution does not derive automatically from non-application of immunity from jurisdiction. The principle is that immunity from execution applies, even if immunity from jurisdiction has been set aside whereas the interrelation between both immunities is the exception.

In a complex system where sources are numerous and of both supranational and national origin, **the scope of the immunity** as well as to **the States' waiver to immunity** (ex.: ICSID or ICC arbitration) shall be considered. Special attention should be given to the regime of supranational courts' decisions (such as Human rights Courts).

4.3- Scope of The Settlement/Judgment

Personal scope

Depending on the type of proceedings, the effects of the settlement/decision may be purely *inter partes*, or have full or limited *erga omnes* effect. The concept of *erga omnes* effect shall be considered in its broad meaning. The question is to identify whether the scope of the settlement/decision may go beyond the parties and contribute -in any way, even if not strictly imposing obligations on third parties- to any change of third-parties behavior. Whereas concrete effects are usually limited to the parties, normative effects of a court decision may have a wider scope (ex.: International courts – All States part of the system are normally bound by the substantive effect of the judgment given against one of them: see for instance art. 47 Conv. HER).

Territorial scope

The geographical reach of settlements/decisions depends on the type of proceedings. Generally speaking, it is permitted to assume that the larger the reach, the better the chances of effective enforcement. A distinction is to be made between the capacity to enforce a settlement/decision

abroad (direct extraterritorial enforcement) and the possibility for a decision to produce extraterritorial substantive effects through purely territorial enforcement measures.

There is, strictly speaking, **direct extraterritorial enforcement** when it is possible to enforce a decision rendered in legal order A by resorting to concrete measures of constraint (such as seizure of property) in legal order B. It is a general rule in public international law, based on the principle of States' sovereignty, that each state has the exclusive power to authorize constraints measures within its own territory. Consequently, national courts' decisions rendered in State A are usually enforceable within the boundaries of State A (enforcement order). Conversely, foreign courts decisions are not enforced through execution outside of the state of origin, unless the state of enforcement expressly consents to such execution: each state defines its own regime for the enforcement of foreign courts decisions. Based on these principles, courts' decisions are subjected, depending on their nature, to different regimes, from strict territorial execution (criminal and administrative decisions) to generous extraterritorial execution (civil and commercial decisions). Arbitration awards benefit from a favorable regime, based on the New York convention.

A court decision may also have a strong extraterritorial effect –in the sense that it influences the behavior of a party abroad- without strictly resorting to public enforcement in the country where execution is expected: it is the case when an extraterritorial injunction (to do/not to do) is pronounced, under the pressure of severe purely **territorial enforcement measures** (ex.: injunctions *in personam* ordered under the threat of contempt of court). The party will then “spontaneously” comply, even if there is -strictly speaking- no constraint applied in the foreign country).

4.4 - Available Remedies and Sanctions

The nature of sanctions and remedies plays a key role in the effectiveness of justice. When it comes to environmental justice, focus should be put on the necessary shift from punitive and compensatory relief towards responsive justice and/or restorative measures.

Punitive and compensatory relief

While **punitive measures**, mainly available in criminal proceedings, may take the form of prison sentences and/or monetary fines, civil and commercial justice has for a long time mainly offered only **compensatory remedies** to the victims of environmental damages. Even if compensation endorses not only a compensatory function but also a dissuasive one, its dissuasive efficiency varies a lot, depending both on the assessment mechanisms (punitive damages v. just compensation based on fair repair) and on the type of damages compensated (pecuniary damage v. non monetary; direct v. indirect, material v. moral).

Restorative justice

Restorative measures are more satisfactory for direct victims as well as for the general purpose of safeguarding the environment and for the public interest. They can result from the mere **substantive effect** of courts' decisions (ex.: cancellation of a contract; declaration of invalidity of legislation; recognition of a right...), but they usually rely on **injunctive relief**. Specific performance is widely available in legal systems. It is known both of international courts (see for instance the case study on IACHR decision: *Kichwa Indigenous people of Sarayaku v. Ecuador*) and of national ones (injunction to stop polluting activities, obligation to clean up). In the latter case, the ability for judges to order specific performance is subjected to a triple constraint: Remedies must be consistent 1) with the law of the contract which, according to conflict of laws principles, normally defines the consequences of a breach;

2) with the power of the judge, as defined by the law of the forum; 3) with the law of the country in which performance takes place. Injunctive power has been more discussed in international arbitration. But is it now well admitted, both in commercial and investment arbitration (see the case study *Chevron v. Ecuador*).

Reputational sanctions may be associated with restorative justice. While the reputational impact often constitutes an additional sanction complementing the main effect of the judgment, it becomes central in some proceedings (see OECD National Contact Point above mentioned, and the case study: *Survival International v. WWF*). Moreover, the reputational impact is often a preliminary for economic sanctions, from the international community and/or markets (lower access to credit and subsidies). It also has a strong psychological effect (see the case study: *Kichwa Indigenous people of Sarayaku v. Ecuador*).

4.5- Review and Enforcement Procedures

Once the proceedings have reached their outcome - a court decision or a party settlement -, review procedures and/or enforcement processes are to be implemented.

Review procedures -where available - may be organized, depending on the court/authority, at international or domestic level, sometimes both (ex. ICSID awards). Heavy review procedures may hinder effective enforcement of settlements/decisions by encouraging dilatory appeals.

Whereas, based on the principle of the territoriality of enforcement jurisdiction, enforcement procedures traditionally rely on the domestic law and mechanisms of the country where enforcement is sought (for which a comparative analysis is needed to select the most efficient ones), original enforcement mechanisms of settlements/decisions should also be acknowledged, such as infringement procedures of Human rights Courts' decisions (see for instance, ECtHR, 29 May 2019, 15172/13, *Ilgar Mammadov v. Azerbaijan*).