Course
Global Environmental Litigation
2020

LECTURERS

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LECTURE ABSTRACT

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 course anayzes the relative merits of the various types of available proceedings, following a list of relevant issues.

Chapter 1 provides a general overview of the available procedural options, exploring both environmental litigation and human rights litigation at international and national levels but also ADR, and comparing their relative merits in terms of accessibility, publicity, efficiency.

Chapter 2 deals more specifically with the jurisdiction of courts, and the admissibility of claims, analyzing the main rules on both issues at international and national level, in order to clarify the students' view on the accessibility of each forum (international and domestic / binding and non binding): Who is the claimant? Who is the defendant? Where are located the main elements of the case? Is there a time-limit applying? Are there rules having an impact on the admissibility of the case (exhaustion of domestic remedies, *ne bis in idem, forum non conveniens*...).

Chapter 3 focuses on procedure-related issues. It deals notably with questions related to the taking of evidence, interim measures, costs, default parties.

Chapter 4 considers the outcomes of the various proceedings, usually a court decision or a party settlement. It compares the "enforceability" of each type of outcomes (decisions of supranational courts, judgments of domestic courts; arbitral awards; ADR settlements; NCP statements) based on different criteria, notably: sovereign immunity from execution; available remedies and sanctions; scope (personal and territorial) of the outcome; review procedures and enforcement mechanisms.

Bibliography (Indicative)

No.	Author, title, publisher / Case name
	N. Affolder, "Transnational conservation contracts", *Leiden Journal of International Law*, 2012, 25(2), 443-460
	S. Amrani-Mekki, "La médiation environnementale », in M. Hautereau-Boutonnet (ed.), *Le contrat et l'environnement, Etude de droit interne, international et européen*, PUAM, 2014, p.115
	S. Amrani-Mekki, « Vers un droit processuel de l'environnement ? Actions préventives et principe de précaution », in M. Mekki (ed.), *Les notions fondamentales de droit privé à l'épreuve des questions environnementales*, Buylant, 2016, p. 187.
	C. Asfar-Cazenave, L. Ravillon, "L'appréhension de la dette écologique en droit du commerce international : approches contractuelle et contentieuse", *VertigO - la revue électronique en sciences de l'environnement* [En ligne], Hors-série 26 | septembre 2016, mis en ligne le 09 septembre 2016, URL : http://journals.openedition.org/vertigo/17485 ; DOI : https://doi.org/10.4000/vertigo.17485
	D. Augenstein, *Study of the Legal Framework on Human Rights and the Environment Applicable to European Enterprises Operating Outside the European Union*, University of Edinburgh, 2010
	A. Aynès, « La preuve et le droit de l'environnement », in M. Mekki (ed.), *Les notions fondamentales de droit privé à l'épreuve des questions environnementales*, Buylant, 2016, p. 211.
	D. K. Anton, D. L. Shelton, *Environmental Protection and Human Rights*, Cambridge UP, 2011

	S. P. Baumgartner, “Is Transnational Litigation Different ?”, 25 U. Pa. J. Int'l Econ. L. 1297 (2004)
	L. Boré, “Actions collectives et protection de l’environnement », in O. Boskovic (ed.), *L’efficacité du droit de l’environnement*, Dalloz, 2010, p. 47.
	O. Boskovic, “Le contexte transnational en matière de responsabilité climatique », in M. Hautereau-Boutonnet, S. Porchy-Simon (ed.), *Le changement climatique, quel rôle pour le droit privé ?*, Dalloz, 2019, p. 193.
	O. Boskovic, « L’efficacité du droit international privé en matière environnementale », in O. Boskovic (ed.), *L’efficacité du droit de l’environnement*, Dalloz, 2010, p. 53.
	O. Boskovic, « La compétence des juridictions des pays source pour connaître des actions intentées à l'encontre des entreprises multinationales », *Dalloz* 2018 (n°14) p. 732
	E. Brosset & E. Truilhé-Marengo, “L’accès au juge dans le domaine de l’environnement : le hiatus du droit de l’Union européenne », *RDLF* 2018 chron. n°07
	J. Brunnée, “Common Areas, Common Heritage, and Common Concern”, in *Daniel Bodansky, Jutta Brunnée & Ellen Hey (eds.), The Oxford Handbook of International Environmental Law*, 2008
	M. Byers , K. Franks, A. Gage : “The Internationalization of Climate Damages Litigation”, 7 *Wash. J. Envtl. L. & Pol’y* 264 (2017)
	J. Cassel, “Enforcing Environmental Human Rights: Selected Strategies of US NGOs”, 6 *Nw. J. Int'l Hum. Rts.* 104 (2008)

	L. Cata Backer, “The Corporate Social Responsibilities of Financial Institutions for the Conduct of Their Borrowers: The View from International Law and Standards”, 21 *Lewis & Clark L. Rev.* 881 (2017)
	C. Chalas, H. Muir Watt, "Le contentieux international pour atteinte à l'environnement : la responsabilité de Royal Dutch Shell au Nigéria (nouvel épisode)", *Rev. crit. DIP 2020*, p. 577.
	J. Clark, “Kiobel's Unintended Consequences: The Emergence of Transnational Litigation in State Court”, 41 *Ecology L.Q.* 243 (2014)
	S. Clavel, “The Challenges of Transnational Contractual Enforcement : The Relative Merits of Arbitration and State Courts’ Litigation », in H.-W Micklitz, A. Wechsler (eds), *The Transformation of Enforcement*, Oxford & Portland., 2016, p. 303-317 (chapiter 14)
	G. Corsi, “A bottom-up approach to climate governance: the new wave of climate change litigation”, *ICCG Reflections* No. 57, October 2017
	Ch. Cournil, « “ Verdissement ” des systèmes régionaux de protection des droits de l’Homme : circulation et standardisation des normes », *Journal européen des droits de l’homme = European Journal of human rights*, Larcier, 2016, 2016 (1), pp.3-31. ffhal-01758783f
	W. de Ruyter III Woods, “Transnational Litigation of Comprehensive General Liability Coverage in Environmental Impairment Cases and the NAFTA”, 15 *Ariz. J. Int'l & Comp. L.* 345 (1998)
	A.-S. Epstein, « La portée extraterritoriale de la loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d’ordre », *Cahiers de Droit de l’entreprise* n° 4, juillet 2018, dossier 30

	ESCR, *Land in the struggle for social justice: Social movement strategies to secure human rights,* 2013
	FIDH, *Corporate Accountability for Human Rights Abuses: A Guide for Victims and NGOs on Recourse Mechanisms*, 2016
	M. Fitzmaurice, "International Responsibility and Liability", in Daniel Bodansky, Jutta Brunnée, and Ellen Hey (eds.), *The Oxford Handbook of International Environmental Law*, 2008
	B. Frydman & L. Hennebel, « Le contentieux transnational des droits de l'homme : une analyse stratégique », *Revue Trimestrielle des Droits de l'Homme*, Vol. 77, p. 73, 2009
	L. Garcia Alvarez, "Environmental Damages Caused by Transnational Groups: Access to Justice", 18 *Ybk. Priv. Int'l L*. 259 (2016-17).
	F. Giansetto, « Droit international privé et nouveaux contentieux en matière de responsabilité climatique », *JDI 2018*, Doctr. 6.
	J. Gilbert, *Strategic Litigation Impacts. Indigenous Peoples Land Rights*, Open Society Justice Initiative, 2017
	M. A. Gomez, "The Sour Battle in Lago Agrio and beyond: The Metamorphosis of Transnational Litigation and the Protection of Collective Rights in Ecuador", 46 *U. Miami Inter-Am. L. Rev.* 153 (2015)
	U. Grusic, "International Environmental Litigation in EU Courts: A Regulatory Perspective", (2016) 35 *Yearbook of European Law* 180-228

	V. Heyvaert, L.-A. Duvic-Paoli (ed.), *Research Handbook on Transnational Environmental Law*, Edward Elgar, 2020, DOI:https://doi.org/10.4337/9781788119634
	F. Jault-Seseke, « Du nouveau sur la responsabilité sociale des multinationales ? », *Rev. trav.* 2016. 57
	G. Handl, J. Zekoll & P. Zumbansen (eds.), *Beyond Territoriality: Transnational Legal Authority in an Age of Globalization*, M. Nijhoff, 2012
	M. Hautereau-Boutonnet, E. Truilhe-Marengo : « Quel modèle pour le procès environnemental ? », *D.* 2017, n° 15, p. 827
	G. Kaminskait-Salters, *Constructing a private climate change lawsuit under English law: a comparative perspective*, Kluwer Law International, 2010
	R. O. Keohane,A. Moravcsik & A.-M. Slaughter, "Legalized Dispute Resolution: Interstate and Transnational", *International Organization* 54, 3, Summer 2000, pp. 457–488
	H. H. Koh, "Transnational Legal Process"*,* 75 *NEB. L. REV.* 181 (1996)
	Franck Latty, « L'Etat demandeur (reconventionnel) dans les procédures arbitrales : le gymkhana de la réaffirmation de l'Etat », in Tarek EL GHADBAN, Charles-Maurice MAZUY, Alexandre SENEGACNIK (dir.), *La protection des investissements étrangers, vers une réaffirmation de l'Etat ?*, Paris, Pedone, 2018, pp. 161-178
	A. Marx *et al*, *Access to legal remedies for victims of corporate human rights abuses in third countries*, European Parliament studies, 2019

	J. R. May & E. Daly, *Global Environmental Constitutionalism*, Cambridge University Press, 2015
	E. Merino Blanco & B. Pontin, "Litigating Extraterritorial Nuisances under English Common Law and UK Statute", *Transnational Environmental Law*, 6:2 (2017), pp. 285–308
	H. Muir Watt, "Chevron, l'enchevêtrement des fors : Un combat sans issue ? », *Rev. crit. DIP* 2011. 339
	H. Muir Watt, L. Bíziková, A. Brandão de Oliveira and D. P. Fernandez Arroyo (ed.), *Global Private International Law. Adjudication without Frontiers*, Edward Elgar, 2019, DOI: https://doi.org/10.4337/9781788119238
	S. Murase, "Extraterritorial application of domestic environmental law", in: *Collected Courses of the Hague Academy of International Law*, The Hague Academy of International Law, vol. 253, 1995.
	L. Neyret, « Les sanctions à l'épreuve des enjeux environnementaux », in M. Mekki (ed.), *Les notions fondamentales de droit privé à l'épreuve des questions environnementales*, Buylant, 2016, p. 171.
	R. Nollez-Goldbach : "La compétence de la Cour pénale internationale à l'égard des crimes environnementaux", *JCP* 2016, n° 41, 1058.
	O. Osterlé, « Pour la consécration d'un forum necessitatis en cas de violations de droits humains par les entreprises transnationales », *Semaine sociale Lamy* 2018, p. 1808
	R. V. Percival, "Global Law and the Environment", 86 *Wash. L. Rev.* 579 (2011)

	A. Pigrau, "The Texaco-Chevron case in Ecuador: Law and justice in the age of globalization", *Revista Catalana de Dret Ambiental*, [S.l.], v. 5, n. 1, jul. 2014. ISSN 2014-038X. Disponible a: <https://revistes.urv.cat/index.php/rcda/article/view/1437>. Data accés: 17 des. 2020. doi:https://doi.org/10.17345/rcda1437.
	C. Planchou, « Les mobilisations autochtones dans l'Amérique d'Obama : L'exemple des luttes anti-oléoduc », *Revue française d'études américaines*, 2017/3 (N° 152), p. 27-41 (available at Cairn)
	M. Prieur. « Instruments internationaux et évaluation environnementale de la biodiversité : enjeux et obstacles », *Revue juridique de l'environnement*, vol. spécial, no. 5, 2011, pp. 7-28
	P. Ricard, « La clarification du lien entre droits de l'homme et protection de l'environnement et de ses conséquences par la Cour interaméricaine des droits de l'homme dans son avis consultatif du 15 novembre 2017 », *Journal du Centre de Droit International (CDI)*, Centre de Droit International (CDI), 2018, pp. 15-18. ffhal-02514693
	J. Rochfeld, "Défense du climat: les figures des communautés de protection des "ressources communes"", », in M. Hautereau-Boutonnet, S. Porchy-Simon, *Le changement climatique, quel rôle pour le droit privé ?*, Dalloz, 2019, p. 225.
	G. Saumier, « L'ouverture récente des tribunaux canadiens aux poursuites dirigées contre les sociétés mères pour les préjudices causés par leurs filiales à l'étranger », *Rev. Crit. DIP* 2018, p. 775.
	S. L. Seck, "Transnational Business and Environmental Harm: A TWAIL Analysis of Home State Obligations", 3 *Trade L. & Dev.* 164 (2011)
	SFDI, *Entreprise multinationale et droit international*, Paris, Pedone, 2017
	G. Skinner, R. McCorquodale, O. de Schutter, *The third pillar. Access to Judicial Remedies for Human Rights Violations by Transnational Business*, 2013

	B. Stephens, "Translating Filartiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations", 27 *Yale J. Int'l L.* 1 (2002)
	F.-G. Trébulle, "Environnement et développement durable - Responsabilité et changement climatique : quelle responsabilité pour le secteur privé ? », *Énergie - Environnement - Infrastructures* n° 8-9, Août 2018, dossier 24
	È. Truilhé et M. Hautereau-Boutonnet (dir.), *le procès environnemental : du procès sur l'environnement au procès pour l'environnement*, 2019, https://www.courdecassation.fr/IMG/rapport.pdf
	Civil Society Engagement with the Independent Accountability Mechanisms: Analysis of Environmental and Social Issues and Trends, Report of the Office of the Compliance Advisor Ombudsman (CAO) for the International Finance Corporation and Multilateral Investment Guarantee Agency (MIGA),
	UNEP, *Environmental Courts & Tribunals: A Guide for Policy Makers*, 2016
	UNEP, *The status of climate change litigation: A global review*, 2017
	E. J. Urbani, C. P. Rubin & M. Katzman (eds.), *Transnational environmental law and its impact on corporate behavior : a symposium on the practical impacts of environmental laws and international institutions on global business development*, Juris Publications,1994
	V. Tomkiewiz, "Réparations collectives devant la CPI", *JDI* 2019. Doctr. 3.
	H. Ward, "Securing Transnational Corporate Accountability through National Courts: Implications and Policy Options", 24 *Hastings Int'l & Comp. L. Rev*. 451 (2001)
	Ch. A. Whytock, "Some Cautionary Notes on the Chevronization of Transnational Litigation", 1 *Stan. J. Complex Litig.* 467 (2013)

	M. Wilensky, “Climate Change in the Courts: An Assessment of Non-U.S. Climate Litigation”, 26 *Duke Environmental Law & Policy Forum* 131-179 (2015)
	J. Zerk, *Corporate liability for gross human rights abuses: Towards a fairer and more effective system of domestic law remedies*, A report prepared for the Office of the UN High Commissioner for Human Rights, 2013

Table of relevant cases

No.	Case name	Court / Body
1	***Chevron / Equador***	National Courts (USA, Equador, Investment arbitration, Netherlands) **Full case-study**
2	***Shell / Ogoni***	National courts (USA, Netherlands, UK) and supranational bodies (African Commission on Human and Peoples' Rights, Dutch National Contact point) **Full case-study**
3	***Vendata***	National courts (UK)
4	***Trafigura***	National Courts (Ivory Coast, UK, Netherlands)
5	***Handolsdalen Sami Village v Sweden***	National Courts, ECHR
6	***Bear Creek Mining Corp. v. Peru***	ICSID Investment Arbitration
7	***TransCanada v. USA***	ICSID Investment Arbitration
8	***Álvarez y Marín Corporación S.A. v. Republic of Panama***	ICSID Investment Arbitration
9	***Urgenda v. Netherlands***	National Courts (Netherlands)
10	***Montagne d'or***	UN bodies
11	***Mount Taylor***	National authorities (USA)
12	*Leghari v. Pakistan*	National Courts (Pakistan)
13	*Juliana v. USA*	National Courts (USA)
14	***Chef Ominayak et la bande du lac Lubicon c. Canada***	UN bodies
15	***Ogiek of Kenya (Mau Forest)***	African Commission / Court of Human Rights
16	***Kichwa Indigenous People of Sarayaku V. Ecuador***	Inter-American Court of Human Rights **Full case study**

No.	Case name	Court / Body
17	***Survival c. WWF***	OECD, Swiss NCP, UNDP **Full case study**
18	***South32 v. Columbia***	National Courts
19	***Glamis Gold v. USA***	UNCITRAL Arbitration
20	***Sawhoyamaxa c. Paraguay***	Inter-American Court of Human Rigths
21	***Apirana Mahuika v. New Zealand***	UN, OHCHR
22	*Renco Group v. Peru*	ICSID ARbitration
23	*Urbaser v. Argentina*	ICSID Arbitration - ICSID Case No. ARB/07/26 http://www.italaw.com/cases/1144
24	*South American Silver v. Bolivia*	UNCITRAL Arbitration
25	*Tahoé Resources*	National Courts

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.

1.1. 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 planed 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.

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?

CH. 3: PROCEDURE-RELATED ISSUES

This chapter shall focus on procedure-related issues, which have a major impact on the definition of a litigation strategy. The main relevant points concern 1) Interim measures; 2) Rules on the taking of evidence; 3) Publicity of the proceedings and public participation; 4) Costs.

3.1. Interim measures

In transnational proceedings, deciding where to seek interim measures is a strategic issue. The basic rule is that the court having jurisdiction on the merits also has jurisdiction to order interim measures. However, other courts may also have (limited) jurisdiction to order interim measures.

Domestic courts having jurisdiction on the merits

- **Jurisdiction**

Is the court having jurisdiction on the merits also competent to order interim relief: Comparative law on the jurisdiction of courts.

- **Law applicable**

What is the law applicable to the interim measure? Distinction to be made between the content of the measure and the power of the judge.

- **Geographical reach of the measure**

If all or part of the measure's effects are expected in one or several other countries, will the order of the court be enforced in such other countries? If not, duplication of the proceedings in other countries might be needed, nonetheless.

Other domestic courts

- **Jurisdiction**

Is a court, different from the one seized on the merits, ready to exercise jurisdiction to order interim measures? Comparative law on jurisdiction of the courts over interim measures.

- **Law applicable**

Is such a court applying its own law? If so, does such a law provide measures that could not be obtained elsewhere?

- **Geographical reach of the measure**

Is the effect of the interim measure expected on the territory of this other State? If not, what is the territorial reach of the measure outside of its country of origin?

See the case-study in *Chevron v. Ecuador* to illustrate the issue.

International courts and arbitration tribunal

Do they have the power to order interim measures in relation with cases they are dealing with?

3.2. Evidence

Issues related to the taking of evidence are usually at the core of the definition of a litigation strategy. Depending on the availability of poofs, parties might favor one way or another, one forum or another.

Applicable law and power of the courts

Decision to choose a forum should be taken based on a careful assessment of the laws in presence, the rule being that each forum shall apply mainly its own domestic law, eventually combined with the law applicable on the merits.

The rule on the applicable law (conflict-of-laws) depends on the issue at stake: subject of proof, forms of proof, burden of proof, standard of proof. The availability of *discovery* is often seen as a competitive advantage; however this might be questioned.

Alternative fora

On the issue of proof, it is particularly relevant to consider possible other fora. For instance, the OECD National Contact Point procedure, even if it may be questioned in terms of effectiveness of the outcome, shows great interest in terms of proof, since the NCP might personally engage in the gathering of proof.

Impact of Human rights

National laws on the taking of evidence may be subjected to international constraints, mainly derived from regional Human rights systems: Evidence is a key element of a fair trial (see ECtHR: Handolsdalen v. Sweden).

3.3. Publicity and participation

Whereas international and State courts proceedings are traditionally covered by the principle of publicity, ADR proceedings tend to protect the confidentiality of the debates. Growing concern is shown for transparency and public participation in proceedings having an impact on the public interest, which is the case for environmental and human rights litigation. Investment arbitration has been the driver of an evolution which should now be questioned everywhere. The status of amicus curiae should be analyzed in the various procedures.

Transparency in ADR

From Investment arbitration (see for instance the case study on *Chevron v. Ecuador*, or the ICSID case *Bear Creek Mining v. Peru*, ARB/14/21) to mediation (see the case study on Survival v. WWF, with the assumed breach of confidentiality by Survival as a strategic weapon).

Amicus curiae

Analyze the availability ofof amicus curiae

3.4. Costs

The issue of costs is a crucial one and it should not be underestimated when defining a litigation strategy: Where to bring a claim also depends on whether the availability of justice is subjected to financial conditions, and on the risks incurred in terms of financial burden if you lose your case.

See ECtHR, Handolsdalen Sami Village v. Sweden, as a relevant illustration. The case highlights two different issues regarding costs.

Costs as a pre-condition for proceedings

The first one appears at the very beginning of the procedure, *before the case is tried, when costs are incurred by the parties as a condition to participate in proceedings*: assignment of a sum of money *(cautio judicatum solvi*); fees paid to appoint a lawyer where representation is mandatory (legal aid).

Costs as a consequence of the proceedings

The second issue occurs *after* the case is tried, depending on how costs are allocated between the parties. The question is relevant since the risk of supporting excessive fees could deter some parties to access justice -and for the respondent it is even worse since he is not the one taking the initiative of the claim.

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*).