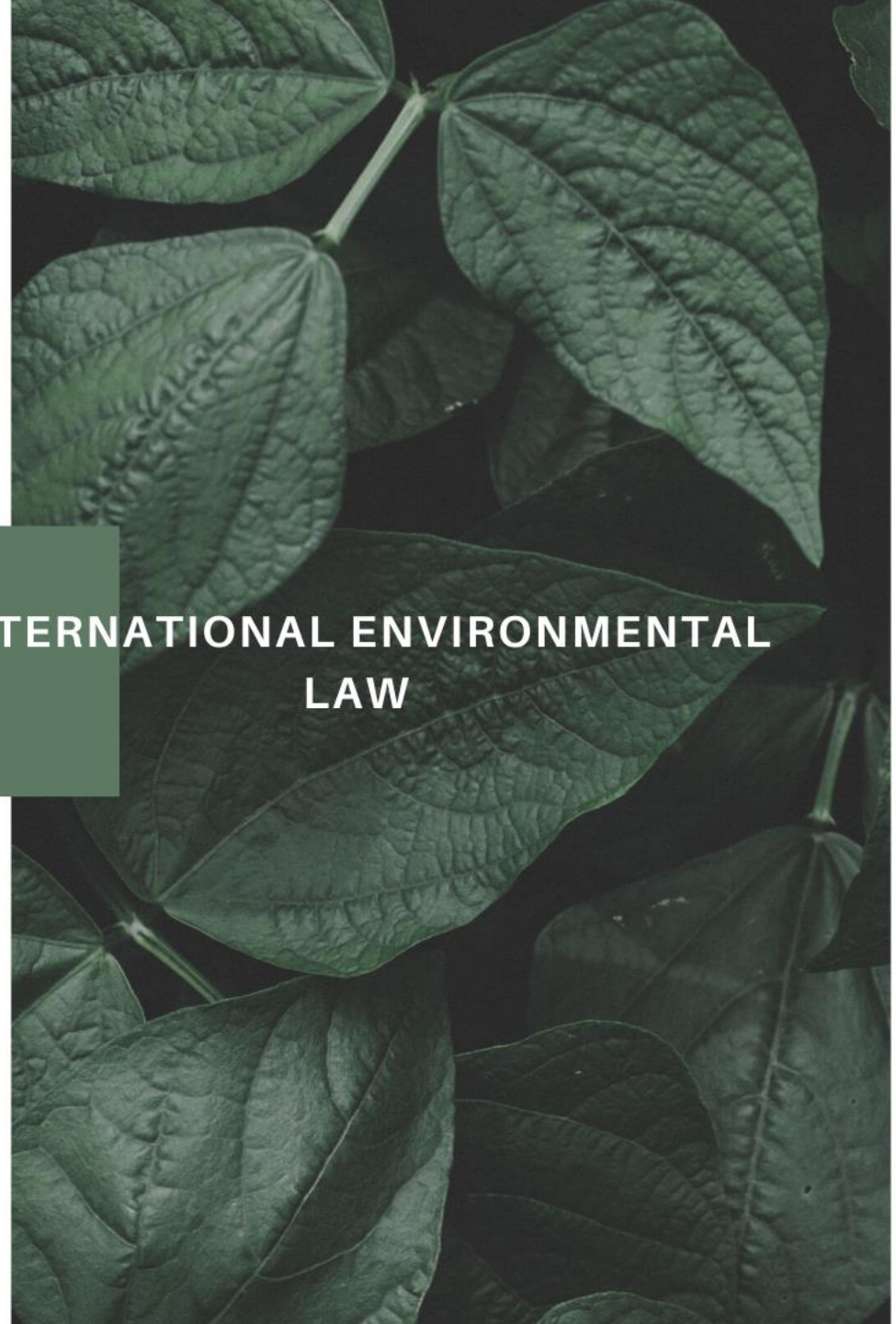

INTERNATIONAL ENVIRONMENTAL LAW

UNIT 3.-THE APPLICATION OF INTERNATIONAL ENVIRONMENTAL LAW

1. General aspects: control procedures and bodies
2. International responsibility in international environmental law
3. Peaceful settlement of international disputes concerning the protection of the environment.

1. General aspects: control procedures and bodies

- **Problems in IEL:**
  - Lack of rules or other problems? insufficiente degree of efficient compliance from:
    - the lack of institutions capable of ensuring multilateral governance supported by effective powers; and
    - the diverse problems encountered by States in ensuring compliance with international environmental rules.
- **Low level of institutional developme**nt of governance mechanisms: no single international organisation in charge of environmental protection or coordinating the many activities that take place around this issue.
  - UNEP.
  - Commission on Sustainable Development.
  - the High Level Political Forum (HLPF).
- **Problems encountered by States**: the predominant role still lies essentially with the States themselves for environmental enforcement processes.

- ❖ BUT recently, certain space has opened up for the implementation of more compelling instruments of control, which sometimes reach a degree of institutional enforcement.
  - ❑ Procedures established by International Conventions:
    - ➢ Administrative techniques: administrative procedures before international authorities or other States for information purposes, used for national policy.

      Such as:
      - ✓ the requirement to declare and register certain hazardous substances and products;
      - ✓ The notification of activities involving transboundary risks,
      - ✓ The registration of areas subject to a special protection regime in the lists established for that purpose; or
      - ✓ The prior informed consent to transboundary movements of wastes, pesticides and hazardous chemicals..

      Other mechanism:
      - ✓ System of prior authorization (licensing) for companyies.
      - ✓ Risk assessment procedures and in particular the so-called "environmental impact" studies.

- Reporting procedures: ex-post control procedures aimed at maintaining continuous monitoring of activities potentially harmful to the environment. Different techniques for information (reporting), verification and surveillance (monitoring), evaluation (assessment) and follow-up (follow up).
  - ✓ "reporting System": States parties to a treaty must submit periodic reports.
- Non-compliance procedures (also called compliance procedures): mechanism which reviews the implementation of a contracting Party's obligations under a convention, using an international organ specifically set up for this purpose. Usually:
  - ✓ Composed by independent experts.
  - ✓ Functions are essentially admonitory and cooperative in nature: recommendations.
  - ✓ Some have acquired a quasi-jurisdictional dimension: complaents presented by parties or observers.
- Inspection procedures: Inspection is aimed at verifying the existence of possible non-compliance through an on-site review and is an exceptional mechanism because it involves direct interference in the exercise of the activities of the inspected State.

- Institutional mechanism: Mechanism put in place by IO: use of procedures and techniques of a flexible nature.
  - Global Environment Facility (GEF): The GEF provides funding to assist developing countries in meeting the objectives of international environmental conventions, serving as "financial mechanism" to five conventions:
    - ✓ Convention on Biological Diversity (CBD),
    - ✓ United Nations Framework Convention on Climate Change (UNFCCC),
    - ✓ UN Convention to Combat Desertification (UNCCD)...
  - Regional organizations mechanism: EU-Council of Europe.

2. International responsibility in IEL
A) General aspects

- "**State responsibility**" may be subdivided into two categories or forms of responsibility:
  - "State responsibility" for internationally wrongful acts (SR), that is for breach of international obligations.
  - "State liability" for the harmful consequences of lawful activities (SL), i.e., for damage resulting from activities that are not prohibited by international law.
- Different development (Historically and juridically):
  - SR: Only covers the case of breach of the states' own obligations owed to another state or states but not the responsibility of civil parties.
  - SL: An activity that is not prohibited by international law but whose consequences may nonetheless give rise to international liability would virtually always be a "hazardous" activity.
    - ILC: Definition of "hazardous activity" as "an activity which involves a risk of causing significant harm through its physical consequences".
    - SL is not logically based on the notion of a wrongful act, but on that of damage resulting from a risky action; this is why the authors have spoken in this regard of liability "for risk".

❖ State responsibility for environmental harm is a highly complex and rather controversial issue:

- ❑ complex nature of international environmental law is particularly marked in relation to questions of State responsibility and reparation of damage.
- ❑ Traditional rules on State responsibility have proved to be partially insufficient to new realities, and the international community has not aproved new rules fully adapted. The application of the general schemes of State responsibility law to environmental protection raises:
  - ➢ **Legal problems**: the regime of responsibility, liability and compensation; imputability and causality; the existence and assessment of environmental damage; the modalities of the reparation of the damage; and assessment of the damage (according to a series of factors whose incidence and effects may be difficult to determine: effects staggered over time, cumulative effects, indirect effects, cost of protection measures, etc.).
  - ➢ **Political and economic reasons** (taboo subject for States and led States to block most attempts to develop international law in this area). This attitude has manifested itself in a double direction:
    - ✓ Certain tendency to avoid making claims based on environmental damage and, in any case, to avoid to channel such claims through formal dispute resolution channels, especially those of a jurisdictional nature.

- ✓ Tendency to hamper the progress of the work of codification and progressive development of international law concerning State responsibility and systematically block the development of the specific mechanisms of State responsibility provided for in various environmental conventions.
- ✓ Persistent tendency to exclude themselves as active and passive subjects of international responsibility in cases of environmental damage.
- ✓ Clear tendency to derive environmental responsibility and liability issues from the field of relations between States to the field of relations between individuals , channelling their treatment through national law procedures, in application of the techniques of private international law (international civil liability).

B) State responsibility for wrongful acts

- SR for internationally wrongful acts, that is for breach of international obligations. For the responsibility of a State for internationally wrongful acts to arise, two main elements must be present:
  - A conduct attributable to the State (subjective element or attribution) and,
  - The conduct must involve the breach of an international obligation on the part of the State and thus constitute a wrongful act (objective element or violation).
- Main consequence:
  - Obligation of the responsible State to make appropriate reparation for the damage caused.
- Central element of the IL System.
- IEL: principle according to which "the breach of an international obligation entails an obligation to make reparation" is also fully applicable.

C) International liability for environmental damage resulting from acts not prohibited by International Law

- Various reasons that may contribute to explain the special tendency to the emergence of this notion in the environmental field:
  - The very flexibility of environmental law leaves a wide grey area between the white of the licit and the black of the illicit; this permissiveness has its logical counterpart in the establishment of an extraordinary guarantee of State liability for the case that ecological damage actually occurs.
  - Tendency to establish a compensatory balance between the conflicting interests of States who want to carry out ecologically dangerous activities and States who seek a guarantee against their possible harmful consequences. The point of balance: establishment of a stricter regime of liability, which would oblige the State to repair, in any case, the ecological damage resulting from such activities.
- Only one multilateral convention: Convention on International Liability for Damage Caused by Space Objects of 29 March 1972.

- SL basic legal profiles:
  - Its theoretical and legal basis are centred not on the idea of responsibility for the violation of an international obligation, but on the simple establishment of a legal guarantee of reparation for possible damage resulting from certain activities that are not prohibited, but are ecologically dangerous.
  - It responds to an effect of mere material causation, whose harmful consequences occur without any fault or negligence on the part of the State.
  - its "absolute" nature excludes the consideration of possible causes of exoneration; once the ecological damage has been caused, the causal State must respond.
  - Tendency of States to establish particular treaty regimes establishing specific liability regimes in certain sectors:
    - damage caused by space objects (State liability);
    - damage resulting from the use of nuclear energy;

- Precedents in State practice: the accident of the Soviet Cosmos 954 satellite in 1979.

- BUT States have shown a persistent tendency to derive environmental responsibility and liability issues from the field of relations between States to the field of relations between individuals, channelling their treatment through national law procedures, in application of the techniques of private international law (**from State responsibility to international civil liability (ICL)**).

- Most of the conventions elaborated and adopted by States in the field compensation for accidental environmental damage established mechanisms of "private" and "civil" liability (international civil liability), which is substantiated between the private producers of the damage and those who are victims of the damage through the domestic jurisdictions.
  - Examples of fields: damage caused by maritime transport of oil, nuclear activities, movement of living modified organisms, movement of hazardous wastes (international civil liability);
- It is based on the notion of strict or absolute liability: it is unnecessary to established fault. It does not matter whether the perpetrator behaved correctly or incorrectly; the decisive factor is that the damage was caused by the operator’s conduct. The plaintiff need only prove the causal link between the action of the alleged perpetrator and the damage.

3. Peaceful settlement of international disputes in IEL

- As in other areas of IEL, regarding the settlement of international environmental disputes necessarily involves the application of the general principles of International law governing this field:
  - The obligation of States to settle their disputes exclusively by peaceful means; and
  - The freedom to choose the means of settlement determined by common agreement.
- And also: particularities that respond to the structural conditioning of IEL.
  - Some conventions: particular procedures in order to regulate the settlement of controversies (annexes of the Conventions).
  - Fragmentation and lack of uniformity. Great diversity of means:
    - Preference for adjudicative methods of dispute settlement (judicial settlement and arbitration) either exclusively or, more generally, in combination with other optional possibilities and always on a voluntary basis.
    - Preference for arbitration over ICJ recourse.
    - Arbitration modelled on the general formulas in force.
    - Raising importance of concilitiation methods.

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