INTERNATIONAL ENVIRONMENTAL LAW

Academic course: 2022-2023

VNIVERSITAT DE VALÈNCIA

ENVEU Jean Monnet Module
Project No. 101085459

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Unit 3. Application of International Environmental Law

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1. General aspects: control procedures and bodies

* All problems in international environmental law are complex and have multiple dimensions that require for their solution effective actions at different levels: scientific; economic; political; and legal.
    - Lack of rules? Insufficient degree of efficient compliance.
        - lack of institutions capable of ensuring multilateral governance supported by effective powers; and
        - diverse problems encountered by states in ensuring compliance with international environmental rules.
- **Low level of institutional development** of governance mechanisms: no single international organisation in charge of environmental protection or coordinating the many activities that take place around this issue:
        - UNEP;
        - High-level Political Forum on Sustainable Development.
- **Problems encountered by states**: the predominant role for environmental enforcement processes still lies essentially with states.

- BUT recently, space has opened for the implementation of more compelling instruments of control, which sometimes reach a degree of institutional enforcement.
    - The procedures established by international conventions are:
        - **Administrative techniques:** administrative procedures before international authorities or other states for information purposes, used for national policy. Such as:
            - requirement to declare and register certain hazardous substances and products;
            - notification of activities involving transboundary risks;
            - registration of certain areas subject to a special protection regime in the lists established for that purpose; or
            - prior informed consent for the transboundary movements of wastes, pesticides, and hazardous chemicals
            - Other mechanisms:
                - System of prior authorization (licensing) for companies.
                - Risk assessment procedures, and in particular, 'environmental impact’ studies.

- **Reporting procedures:** ex-post control procedures aimed at maintaining continuous monitoring of activities potentially harmful to the environment. There are different techniques for information (reporting), verification and surveillance (monitoring), evaluation (assessment), and follow-up (follow up).
    - 'reporting system': states party 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/treaty/agreement, using an international organ specifically set up for this purpose. It is usually:
    - Composed of independent experts;
    - Their functions are essentially admonitory and cooperative in nature, i.e., recommendations;
    - Some have acquired a quasi-jurisdictional dimension: complaints 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.

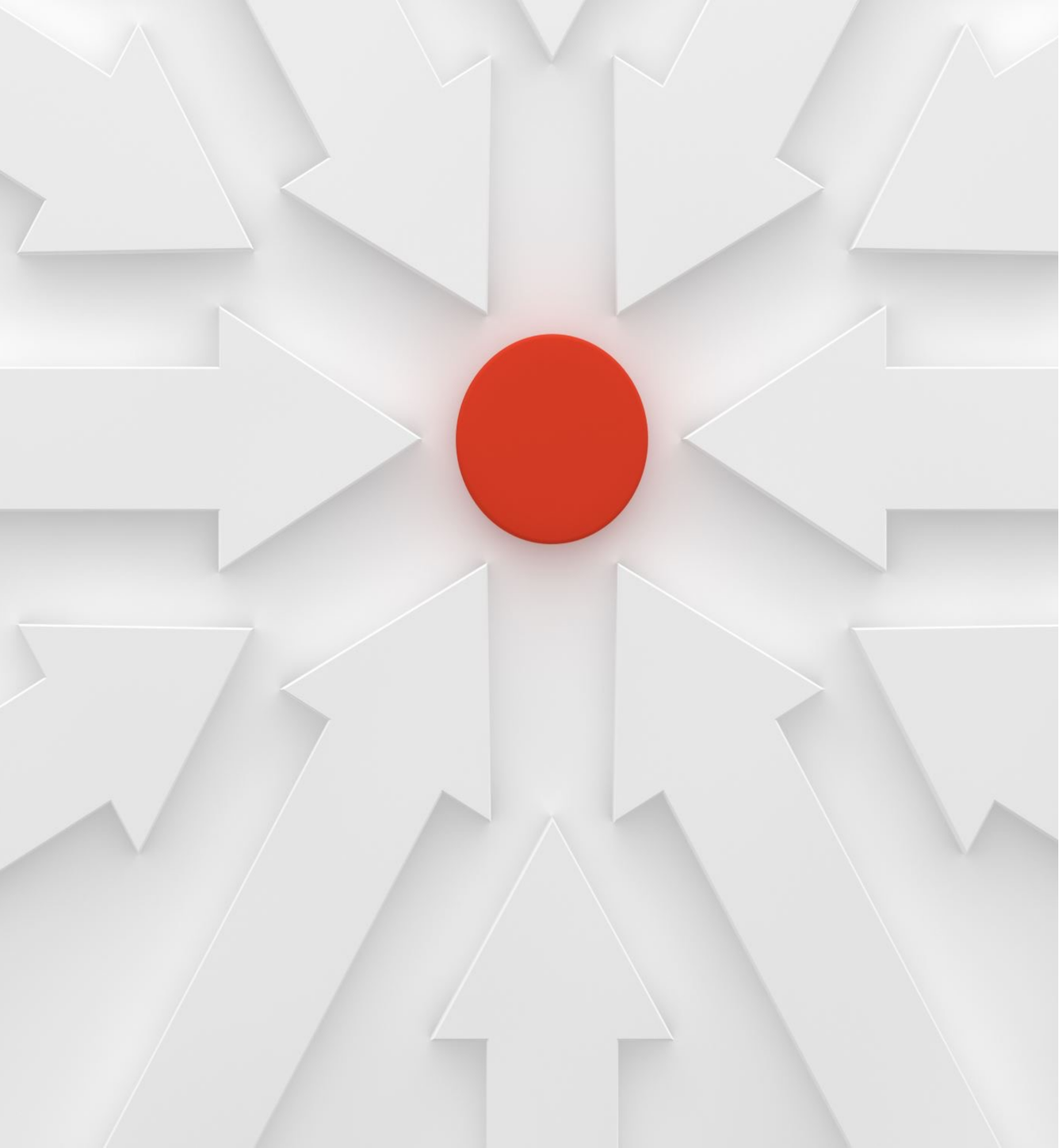
- **Institutional mechanisms:** mechanism put in place by IO: use of procedures and techniques of a flexible nature.
    - Global environment facility (GEF): provides funding to assist developing countries meet the objectives of international environmental conventions, serving as a 'financial mechanism' to five conventions:
        - Convention on Biological Diversity (CBD);
        - United Nations Framework Convention on Climate Change (UNFCCC);
        - United Nations Convention to Combat Desertification (UNCCD);
        - Regional organisations mechanism: EU-Council of Europe.

2. International responsibility in international environmental law

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 a states' own obligations owed to another state or states - but not 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.
    - International Law Commission definition of 'hazardous activity' → '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 doctrine speaks in this regard of liability 'for risk'.



b) State responsibility for wrongful acts

- SR for internationally wrongful acts, that is for **breaching international obligations.** For the responsibility of a state for internationally wrongful acts to arise, two main elements must be present:
    - A behaviour attributable to the state (subjective element or attribution) and;
    - behaviour 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.
- International environmental law has developed a principle according to 'the breach of an international obligation that entails an obligation to make reparation' and it is also fully applicable.

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

- Several reasons that may contribute to explaining 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 in which 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.
- Convention on International Liability for Damage Caused by Space Objects of 29 March 1972.

- SL basic legal profiles:

  - Its theoretical and legal bases 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;

    - damage resulting from the use of nuclear energy;

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

- 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, linking 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 made and adopted by states in the field compensation for accidental environmental damage establish mechanisms of 'private' and 'civil' liability (international civil liability), which are substantiated between the private producers of the damage and those who are victims of the damage through the domestic jurisdictions.
    - Example: damage caused by maritime transport of oil, nuclear activities, movement of living modified organisms, and movement of hazardous wastes pertain to 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 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 international environmental law

- As in other areas of international environmental law regarding the settlement of international environmental disputes, the application of the general principles of international law governing this field are necessarily involved:
    - 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.
- There are also particularities that respond to the structural conditioning of international environmental law:
    - Some conventions have established procedures to regulate the settlement of controversies (annexes to the conventions).
    - Fragmentation and lack of uniformity. Great diversity of means:
        - Preference for 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.
        - Rising importance of conciliation methods.

SOURCES

- Juste Ruiz, J. & Castillo Daudí, M. (2014). *La Protección del Medio Ambiente en el Ámbito Internacional y en la Unión Europea.* Tirant lo Blanch.
- UNEP training manual on international environmental law.
- Pérez Salom, R. Teaching materials for international environmental law.
- Torres, M. Teaching materials for international environmental law.
- Zambrano, K. Teaching materials for international environmental law.