Peaceful Settlement of Environmental Disputes

By Martti Koskenniemi *

1. Introduction

"Peaceful settlement of disputes" is an eminently procedural topic - a fact which undoubtedly explains some of its continued popularity among international lawyers. For material norms inevitably raise issues of breach and sanction which are not easily disposed of in a world of sovereign equals. A purely material code of international law would either be unduly dependent on how States choose to interpret and apply it, or it would need to rely on non-statal institutions with an inordinate degree of unreality about them. By contrast, peaceful settlement does not imply any unpleasant analogy to criminal law. It seems to be more about consent, adjustment and compromise - everything that diplomatic rhetoric holds crucial for the establishment of a rational world order.

With the increase of the transboundary effects of industrial and technological activity, the prospect of international environmental disputes - or, more accurately, disputes concerning the relationship between environmental and economic values - has become a commonplace. It is striking to what extent international efforts to grapple with the problem have concentrated on procedural reform. The Declaration of the Hague, for example, signed by high representatives of 24 countries on 11 March 1989, makes little mention of the content of the norms States should follow in their conduct having an effect on the physical environment. Instead, it calls for "new and more effective decision-making and enforcement mechanisms" and declares five principles relating to the creation of such mechanisms, research, assistance, enforcement and negotiation.1

The various multilateral environmental treaties negotiated within the United Nations Environment Programme (UNEP)2 or elsewhere, usually contain a few material principles of great generality while more detailed provisions address procedural issues of prior notification, consultation, monitoring, and various forms of institutionalized cooperation between the States parties. Though there are no instruments dealing expressly with dispute settlement in regard to activities having an effect on the environment, these bilateral and multilateral procedural provisions perform precisely that function. Suggestions have, however, been made both within the UN "Decade of International Law" as well as the preparatory work for the 1992 UN Conference on Environment and Development (UNCED) to concentrate explicitly on dispute prevention and settlement.3

To the extent that the UNCED will succeed in adopting legally formulated stan-
dards, it now seems that those standards will take the form of “framework conventions” which establish structures of cooperation - dispute avoidance and settlement - between the parties but defer decision on positive prohibitions (and permissions) to the future. In a like manner, the set of draft articles on liability for the injurious consequences of activities not prohibited by international law, under discussion within the International Law Commission (ILC) - an eminently “environmental” project - tackles its subject-matter through a set of procedural commitments ranging from early notification and consultation in respect of harmful activities to suggesting negotiation for the purpose of establishing a “balance of interests” between the source-State and the affected State.

The reasons for such proceduralization are easy to grasp. Agreement on substantive law requires more of a consensus about political value than agreeing upon procedure. Procedural solutions, combined with generally formulated calls for equitable balancing, do not prejudice any State’s substantive policy or its view about the limits of its own freedom of action. The concentration on peaceful settlement in the recent United Nations Decade of International Law is explainable precisely from this perspective: lack of a reasonable prospect of early agreement on the substantive do’s and dont’s of international law between all the 160 members of the organization quite naturally leads to suggestions for procedural reform which neither prejudice the self-perception of the rights of individual States nor imply a commitment to the enhancement of particular social values.

No doubt, Terry Nardin is correct to argue that the acceptability of international law in a multicultural world will have to be linked with its being more about process than substance. This paper will present a brief overview of the processes of what has become called international environmental law. But it also argues that substance and procedure, value and mechanism, politics and law are really not as distinct as it may appear. The development of settlement mechanisms should not be considered in isolation from - even less in contrast to - addressing substantive conflict over legitimate interests and the character of the good life among States. In the diplomatic field, a “pure” procedural orientation will lead to little more than extended reformulations of the principle of the free choice of means - reformulations which, like the very recent “Mechanism” agreed upon by the CSCE expert meeting on peaceful settlement of disputes in Valletta 15.1.-8.2.1991, stand or fall with the political consensus behind them. As academic discussion, it will produce yet another taxonomy of available methods by reference to the list in article 33 (1) of the United Nations Charter. Though procedure is far from irrelevant, it cannot be successfully used nor interestingly discussed without regard to the types of outcomes it is intended, or likely to produce.

2. The Structure of the Environment Dispute

The possibility of multilateral environmental disputes is by no means a remote prospect in an age of climatic change and massive pollution of the world’s oceans. Nevertheless, the standard environmental problem remains that of transboundary flow of polluting substance from the territory of one State into that of another. The listing of massive pollution among “international crimes” in article 19 of the Interna-