Conflict Resolution and Sustainability Disputes: Authority and Consensus in the Shadow of Law

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1 Lon Fuller, "The Forms and Limits of Adjudication" (1978) 92 *Harv. L.Rev.* 352 at 394-95. Fuller derives this concept from that of Michael Polanyi's "polycentric task" in *The Logic of Liberty: Reflections and Rejoinders* (Chicago: University of Chicago Press, 1951) at 171. Note that the distinction is presented by Fuller as being "often a matter of degree" (at 397), and that the way in which a problem is framed will greatly impact its polycentricity.

Introduction

When asked to address a topic concerning models of conflict resolution in sustainability disputes, I was tempted to have a go at a bigger question which I have found puzzling since I heard of sustainable development law. The question is: must this law be a different kind of law? Sustainable development law raises this question because it is directed toward a future which, being both distant and global, is particularly uncertain. But this is not the place for such an ambitious project. What I propose to do here is modest. I propose to share some preliminary thoughts about the conflict resolution models that we know and the way in which they relate to law as it serves to connect past and future. My hypothesis is that what I will call the model of principles appears as the inevitable normative reference for the resolution of sustainability disputes.

I. Models of Conflict Resolution: Authority and Consensus

In order to outline the conflict resolution models that we know, I shall make use of two broad categories: the *authority model* on one hand, and the alternative *consensus model* on the other. The first model refers to impartial third-party decision-making eventually imposed on parties who have made their case; the second model refers to all alternatives where the result must be agreed to by the parties, at least in the weak sense conveyed by the notion of consensus.

If we look at disputes that have already arisen, the authority model of conflict resolution inescapably evokes the ideal-type which court adjudication still represents today. We all have a vague intuition of what the model of court adjudication is beyond the description given in the previous paragraph. But it is useful to recall that we still have very little

sense of when the model is appropriate. This has created a malaise usually discussed in terms of the legitimacy and accountability of judicial decision-making. The most telling symptom of this malaise is that law and legal scholarship have not been able to provide a reliable guide to "justiciability" that can trace its lineage to the underlying reasons why we should have courts and more generally adjudication. The best we have in this respect, at least in the Anglo-American literature, is probably Lon Fuller's intimation that "polycentric" problems with multiple centres of gravity and diffuse interests are not suited to adjudication.[1] The authority model, meanwhile, keeps evolving in response precisely to these kinds of dispute and in doing so keeps moving the target of our analysis.

The authority model has undeniably responded to internationalization, notably through the vehicle of arbitration in various forms. It has done so in the areas of trade, investment and commerce, and is now experimenting with the same concept in family matters and consumer transactions. The authority model has also responded to broad-based, polycentric disputes more generally with measures for broad-based input, creating or extending the reach of procedural vehicles allowing third-parties to make submissions. We have seen this in national courts, in arbitration under the *North American Free Trade Agreement*[2] and dispute resolution under the World Trade Organization (WTO).[3] The authority model has thus attempted to meet or diffuse legitimacy concerns through a form of direct participatory democracy built into the deliberative process. This clearly shows how profoundly the model is changing as it is being observed. But these profound changes are about venue and process within the model, not strictly about reasons for

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2 *North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States*, 17 December 1992, Can. T.S. 1994 No. 2, 32 I.L.M. 289 (entered into force 1 January 1994) [*NAFTA*].

3 In the context of NAFTA, see *Statement of the Free Trade Commission on non-disputing party participation*, 7 October 2003, online: Canadian Department for Foreign Affairs and International Trade <http://www.international.gc.ca/assets/trade-agreements-accords-commerciaux/pdfs/Nondisputing-en.pdf>. In the context of the WTO, see General Council, *Minutes of the Meeting* (held on 22 November, 2000), WTO Doc. WT/GC/M/60; this special meeting was held to discuss the filing of *amicus curiae* briefs with the Appellate Body following the latter's decision to allow and regulate the submission of such briefs in WTO, Appellate Body Report, *European Communities — Measures Affecting Asbestos and Asbestos-Containing Products*, WTO Doc. WT/DS135/AB/R, 5 April 2001 [*EC—Asbestos*].

outcome. I shall come back to the latter. Before I do so, let me turn briefly to what I have termed the consensus model.

The consensus model is generally presented as an alternative to adjudication, including arbitration, and sometimes as an alternative to law.[4] The advantages offered by the model normally include savings in time and money, a greater likelihood of preserving relationships, the possibility of taking interests into account beyond legal rights when carving a solution and the attendant increased likelihood of a durable resolution outcome.

It is not unfair to say that many of these advantages do obtain in most cases where a dispute has arisen and adjudicative approaches are "avoided." But bluntly opposing without qualification the two approaches can be misleading. The unqualified opposition overlooks the fact that authority, both normative and adjudicative, plays a crucial role in shaping consensus. Consensus-based approaches are by definition predicated upon the principle that the parties or stakeholders enjoy unfettered freedom to determine outcomes. In other words, these approaches are often understood as being predicated upon a "rule of consent" governing a space where the only law is that upon which equal parties can agree.

Of course there is no such space, and there has never been any such space anywhere, at any time. There are always power disparities that are partly created or redressed by force or by law, notably by mandatory law, and ultimately by the attendant threat or prospect of adjudication going one way or the other. Whether adjudication goes one way or the other will depend partly on the law taken to govern which tribunal has jurisdiction and partly on the law which, with or without the parties' agreement, will govern the merits of the dispute.

To the extent that the power relations between the parties or stakeholders depend on the legal norms that will govern the resolution of the conflict in respect of both venue and merits, consensus-based approaches can be said to operate under these norms, that is, in the shadow of law.

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[4] The consensus model would fall within Fuller's category of social ordering based on contract, whose mode of participation is negotiation (Fuller, *supra* note 1 at 363). This category includes pre-dispute decision-making and is therefore too broad to be useful in the present discussion.

Now putting to the side the questions of venue and process, the contours of the shadow of law can only be as clear as the law is clear. The threat or prospect of adjudication going one way or the other is more or less predictable depending on the law's degree of determinacy. Determinacy on a particular point can range from the availability of a rich collection of logically organized detailed rules at one end of the spectrum to, at the other end, the resort by parties to "authority without law," that is, the power conferred by consent on a tribunal to decide *ex aequo et bono*. In the middle of the spectrum, one apparently finds the form in which sustainable development law is emerging. What I have in mind is a common form of normativity cast at a higher level of abstraction and operating in an evaluative mode quite distinct from the binary mode that makes rules either binding or not. I refer to the concept of legal principle. Legal principles, on first analysis, seem ideally suited to the provision of a structure for consensus-based approaches that foster consent while allowing for parameters that control impact on third parties, present and future.[5] Have principles a particular role to play in sustainability disputes? At least at this stage of development, the answer seems clear:

> Most international environmental issues are resolved through mechanisms such as negotiations, rather than through third-party dispute settlement or unilateral change of behaviour. In this second-party control process, international environmental norms can play a significant role by setting the terms of the debate, providing evaluative standards, serving as a basis to criticize other states' actions, and establishing a framework of principles within which negotiations may take place to develop more specific norms, usually in treaties.[6]

Let me first take a closer look at legal principles and the way they relate to legal rules.

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[5] It is assumed that sustainability problems are to a certain extent "polycentric." The argument here is that legal norms play a crucial role in both adjudication and contract negotiation.

[6] Daniel Bodansky, "Customary (and not so Customary) International Environmental Law" (2005) 3 Ind. J. Global Legal Stud. 105 at 118-19.

II. Models of Norms: Rules and Principles

In the sense I mean to convey here, principles can be distinguished from rules in that they guide and constrain decisions without necessarily determining outcomes. They are more or less relevant or pervasive depending on the legal system one is looking at but seem increasingly well accepted as a source of justification in judicial decision-making. They remain controversial, however, in terms of judicial legitimacy. This is because they have a place in both the artificial reasoning of the law and the kind of moral reasoning that is free of the constraints of a theory of legal sources. To that extent, principles seem to mediate between the formal rules of a legal system and the normative considerations that unrestricted practical reasoning brings to bear on human decision-making. They function as a reflection of the values more or less explicitly pursued by law or a legal system, that is, by the human beings behind these constructs. As Neil MacCormick explains, "values are characteristically expressed in statements of the principles of a given legal system," and the "formulation, haltingly and hesitatingly and subject to improvement, of statements of principles in law is one way of making such values relatively more explicit."[7]

The elucidation of the relation between principles and rules is a task which has given rise to much controversy in Anglo-American legal theory. The failure to account for the importance of principles in adjudication has been perceived as a major weakness of the dominant rule-of-recognition framework of Herbert L. A. Hart's theory of law. The debate engendered by this perception may be described as one ultimately concerning how much power should be left to the judiciary in the development of the law: putting the emphasis on principles in a theory of adjudication is saying that judges have a major role to play in that development.[8]

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[7] Neil MacCormick, *Legal Theory and Legal Reasoning* (Oxford: Clarendon Press, 1978) at 234. One will recognize Lord Mansfield's idea of the law "working itself pure": *Omychund v. Barker* (1744) 1 Atk 21 at 33; 26 E.R. 15 at 23 (argument presented by Solicitor-General Murray, later Lord Mansfield).

[8] See John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1981) at 356.

It is often forgotten by advocates of principles that what makes law a distinct means of social ordering is form. Directly or indirectly, form is what provides "content" with law-quality. And as Joseph Esser had noted well before the Anglo-American debates I referred to, there is a distinct relation between "content" and "principles" on the one hand, and "form" and "rules" on the other.[9] MacCormick suggests that principles, which he does not doubt belong to the genus "law," get their law-quality by virtue of their relation to the rules of the system, which are in turn legal by virtue of their pedigree, that is, their formal relation to a rule of recognition. To him, principles are "the conceptualized general norms whereby its functionaries rationalize the rules which belong to the system in virtue of criteria internally observed."[10] Tying this in with Hart's original theory, he explains that a rule-of-recognition framework can thus indirectly account for the principles of a legal system:

> There is a relationship between the 'rule of recognition' and principles of law, but it is an indirect one. The rules which are rules *of law* are so by virtue of their pedigree; the principles which are principles *of law* are so because of their function in relation to those rules, that is, the function which those who use them as rationalizations of the rules thus ascribe to them.[11]

MacCormick's is probably the most convincing account of principles which preserves the Hartian rule-of-recognition framework. It provides a satisfactory response to the main thrust of the systematic attack mounted against Hart's "model of rules" by the early Ronald Dworkin.[12]

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[9] Joseph Esser, *Grundsatz und Norm in der richterlichen Vorbildung des Privatrechts,* (Tübingen: Mohr, 1956). Esser explains principles in terms of content behind the formal validity of rules (here "legal norms"):

> ... a legal principle is not a proposition of law or legal norm in the technical sense as long as it does not contain a binding direction of an immediate kind for a specific range of questions: it requires or presupposes the judicial or legislative definition of these directions. Legal principles, as opposed to legal norms, are content as opposed to form (at 50; translation quoted from Hans Kelsen, *General Theory of Norms*, trans. by Michael Hartney (Oxford: Clarendon Press, 1991) at 117).

[10] MacCormick, *supra* note 7 at 155.

[11] *Ibid.* at 233.

[12] Ronald Dworkin, *Taking Rights Seriously*, Essays I and II (London: Duckworth, 1977); the original publication is Ronald Dworkin, "The Model of Rules" (1967) 35 U. Chicago L. Rev. 14. Hart had nearly completed a formal reply when he died: *The Concept of Law*, 2d ed. with postscript by Joseph Raz & Penelope A. Bulloch (Oxford: Clarendon Press, 1994).

If one is clear about the foregoing, the remaining difficulty is one of emphasis. The main source of discomfort in MacCormick's account (and this may seem rather trite) is the primary role given to the framework of formal validation in defining law. In any human endeavour, form is usually conceived of as serving content, and this makes it somewhat unsettling to describe content-bearing legal principles as dependent on their relationship with rules deriving their authority from formal criteria. The relationship between form and content is never unidirectional, so why pick form as somehow primary in the case of law? One can go a long way towards answering this difficult question by pointing out that principles are here and there discussed, formulated, and applied in the free flow of practical reasoning which guides human action independently of law. What makes a principle legal and what makes legal reasoning a distinct form of practical reasoning can only be form. Formal legal frameworks are set up, maintained and fostered to provide certainty and foreseeability in the resolution of disputes, ultimately in the name of an open-ended notion of justice.

The fear of forms in general is typically that they may stray from the purpose they serve. The ultimate purpose of legal forms being an open-ended notion constantly being questioned and articulated, its tenor always remains controversial as does the extent to which legal forms actually work to serve it. The emphasis put on legal principles by some legal theorists reflects this fear of legal forms and suggests that formal rules have to be checked by means of the flexible standards which provide tentative formulations of the abstract purposes underlying a legal system. In order to keep legal forms in check, formally validated rules must also somehow depend on the principles which can be said to underpin them.

MacCormick, in fact, makes room for much of this. He writes that "it would be false to argue that the principles are themselves determined by the 'rule of recognition.'"[13] "There may be, he continues, more than one set of normative generalizations which can be advanced in rationalization of the rules which 'belong' to the system concerning a certain subject-matter [...]."[14] The formulation of legal principles is a matter of "making sense" of the law, he notes, as much as of finding what is there; and in this endeavour, judges have an eye on such things as

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[13] MacCormick, *supra* note 7 at 234.

[14] *Ibid.* at 234-35.

"political opinion," "common sense" and "community consensus," so that legal principles may feed onto "political" or "moral" discussions about the ultimate end of justice.[15] In adjudication, "[...] the principles interact with the rules, underpin them, hedge them in, qualify them, justify the enunciation of new rulings as tested by consequentialist arguments, and so on."[16]

At this point a form of circularity becomes apparent and can be welcomed as an explanatory tool for law:

> Is it a paradox then to claim that there are principles which are *legal* only given their indirect relationship to the institutive rules ('rule of recognition'), but that these very rules and the other rules validly instituted are in turn qualified in the light of and fully understandable only by reference to the aforesaid principles? There is apparently a logical circle here, but is it a vicious one?
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> I think not.[17]

Hart had acknowledged this circle at the level of his rule of recognition, perhaps only with respect to unwritten rules;[18] MacCormick recognizes that there is a circle of justification at all levels. The question here is how a full acknowledgement of this can convincingly be made compatible, intra-systemically, with the notion of formal validity organized around rules of recognition. If "valid" rules somehow depend on their relationship with "justificatory" principles which function in terms of "weight," how can "all-or-nothing" validity survive? If one is willing to say that even validity, considered intra-systemically, can sometimes be affected by principles, the only plausible answer seems to be that which MacCormick articulated in a different context: *the rule of recognition must be understood as providing no more than "ordinarily necessary and presumptively sufficient" criteria of validity*.[19] This answer preserves the all-or-nothing notion of validity while recognizing fully the role played by principles in adjudication. It takes account of the general rule-of-law purpose underlying formal validation while giving

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15 *Ibid.* at 234, 236.

16 *Ibid.* at 244.

17 *Ibid.* at 245.

18 Hart, *The Concept of Law, supra* note 12 at 148.

19 Neil MacCormick, "Law as Institutional Fact" (1974) 90 Law Q. Rev. 102 at 123.

due regard to other values related to content or substantive justice. Rules remain either valid or invalid, but the formal criteria of validity are not fully conclusive; they must be applied in light of the principles which link legal rules to their purpose.

III. Models of Law: Coherence and Sustainability

Though this is rarely articulated, it is quite clear that linking legal rules to underlying principles involves the application of a test of coherence. Once this is established, I will turn to the relationship between coherence and sustainability envisaged on a global scale.

In *R. v. Nova Scotia Pharmaceutical Society*,[20] the Canadian Supreme Court had an occasion indirectly to think about principles and coherence in a context which called for an intra-systemic, working definition of "law." The need for that definition flowed from the requirement of the *Canadian Charter of Rights and Freedoms*[21] that limitations imposed on rights and freedoms must, in order to be valid, be "prescribed by law." The requirement is expressly stated in the limitation provision of the Charter,[22] and it is also interpreted as flowing from the right not to be deprived of one's liberty "except in accordance with the principles of fundamental justice."[23] This is generally taken to mean that legislative provisions involving a limitation on rights and freedoms will not pass muster if they are too "vague." As the Court noted, this requirement relates to the rule-of-law principles "that form the backbone of our polity"[24] in expressing a concern for fair notice and the necessity to circumscribe executive discretion in law enforcement.[25] In this case the central issue was whether the time-honoured provisions of the *Combines*

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[20] *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606 at 640 [*Nova Scotia Pharmaceutical*].

[21] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act* 1982 (U.K.), 1982, c. 11 [*Charter*].

[22] *Ibid.* at s. 1.

[23] *Ibid.* at s. 7.

[24] *Nova Scotia Pharmaceutical*, *supra* note 20 at 640.

[25] Fair notice is taken to require "accessibility" (formal notice) and "foreseeability" (substantive notice) (*ibid.* at 637). This was borrowed from the *Sunday Times* case before the European Court of Human Rights: *The Sunday Times v. United Kingdom* (1979), 30 Eur. Ct. H.R. (ser. A), 2 EHRR 245.

Investigation Act[26] which make it an offence to enter an agreement that "unduly" prevents or lessens free-market competition violated the principles of fundamental justice. The relative vagueness of the provision, note, does not necessarily make it a principle: the direction is given in an all-or-nothing fashion. As Dworkin remarked with respect to a generic standard in the same field, "[t]he rule that unreasonable restraints of trade are invalid remains a rule if every restraint that is unreasonable is invalid [...]."[27] The Supreme Court found that the Canadian provision was not too vague to be upheld and had in this connection interesting things to say about what a working definition of "law" should be like. The following passage sums up the Court's position:

> A vague provision does not provide an adequate basis for legal debate, that is for reaching a conclusion as to its meaning by reasoned analysis applying legal criteria. It does not sufficiently delineate any area of risk, and thus can provide neither fair notice to the citizen nor a limitation of enforcement discretion. Such a provision is not intelligible, to use the terminology of previous decisions of this Court, and therefore it fails to give sufficient indications that could fuel a legal debate. It offers no grasp to the judiciary.[28]

It should be quite clear that in the case of a provision turning on a term such as "unduly," the materials which ultimately provide the "legal criteria" necessary for a "legal debate" resulting in a "reasoned analysis" can hardly be anything but the principles underpinning the provision. If the surrounding provisions of the legislation and the case law are relevant to the assessment—and the Court notes that they are, and can ground the conclusion that "unduly" is not unconstitutionally vague in this case—it is necessarily through the filter of the principles which are believed to underlie the whole set of rules in the field.[29] The assessment ultimately relates, as the Court put it, to "the substratum of values underlying the legal enactment."[30] What makes neighbouring rules relate to one another

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[26] R.S.C. 1985, c. C-34, as rep. by *Competition Act*, R.S.C. 1985, c. 19 (2d suppl.).

[27] Dworkin, *Taking Rights Seriously*, *supra* note 12 at 79.

[28] *Nova Scotia Pharmaceutical*, *supra* note 20 at 639.

[29] *Ibid.* at 633, 657.

[30] *Ibid.* at 634.

is actually the set of principles which are believed to underpin them, that is: to make them coherent in the light of their purpose.

It should also be clear that the same reliance on principles is what provides analogy with its universal power in legal reasoning. The use of analogy, or reasoning from examples, necessarily involves an appeal to principles, for no example or analogate can yield a conclusion in a case which it does not directly cover before a maxim or principle is drawn from the example, to be applied in the instant case,[31] making the law's reaction to both coherent in the sense conveyed by the maxim that like cases should be treated alike. There are two questions arising from this the answer to which I shall only be able to hint at.

The first question is the extent to which reliance on coherence allows the long-term considerations involved in sustainable development law to take their place in legal reasoning. At first glance, the application of a test of coherence seems to focus on connecting current questions to past solutions rather than linking them to the distant consequences one may be able to foresee. There is no question that much of the law we know was developed with liberal, capitalist assumptions that favour the form of social ordering which Fuller calls *organization by reciprocity*, where participants come together in the pursuit of their own objectives, typically by contract or treaty.[32] This is distinguished from *organization by common aims*, where participants share purposes, typically through government or legislation.[33] Some of these assumptions will be competing with and may well slow down the development in law of such principles as the duty to ensure sustainable use of natural resources. But experience shows that legal principles operate in ways that ensure a dialogue between established law and open-ended practical reasoning. Thus a principle can gain in currency at the expense of another over the course of jurisprudential developments. This clearly prevents stagnation in legal thinking, even if legal forms do exert significant pressure against drastic changes that are not formally brought about by legislation.

The second question greatly complicates the same issue by casting it in global normative terms. As I briefly mentioned at the outset,

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[31] MacCormick, *supra* note 7 at 163; Melvin Eisenberg, *The Nature of the Common Law* (Cambridge, Ma.: Harvard University Press, 1988) at 77.

[32] Fuller, *supra* note 1 at 357-58.

[33] *Ibid.*

sustainable development law is directed toward a global future and so must concern itself with both domestic and international ordering. How relevant is our discussion of legal principles in the context of public international law, a system which has its own theory of sources and its own adjudicative mechanisms?

The public international law system relies heavily on Fuller's mode of organization by reciprocity,[34] where participants come together in pursuance of their own objectives. Traditionally participants cannot be bound by law unless they have agreed to be bound. Here the prospect of a change formally brought about by legislation and imposed on recalcitrant participants is non-existent and so the importance of principles should be much heightened. Leaving treaties aside and following article 38 of the Statute of the International Court of Justice, one would naturally say that there are two obvious vehicles for the deployment of principles as international law. The first is international custom and the second general principles of law. The strict requirements for the recognition of custom being what they are, the first is not a likely candidate. The second candidate is a more promising source of recognition. It is cast at the right level of generality and evokes persuasive normativity.[35] But general principles of law are not deployed in the same way in the international system as they are in domestic systems. Because public international law relies mostly on organization by reciprocity rather than organization by common aims, there is at first blush relatively little scope for principles that would connect common aims to rules of law or for principles that could be induced from those rules and used to work out the common aims they were adopted to pursue. Whence the conclusion of publicists that the reference in the Statute of the International Court of Justice to general principles of law recognized by civilized nations can only be a reference to principles expounded in the context of domestic legal systems.[36] At the

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[34] *Ibid.*

[35] Note that even if most legal principles are cast at a high level of generality, their defining characteristic for our purpose is that they are evaluative rather than determinative, or persuasive rather than binding.

[36] See Johan G. Lammers, "General Principles of Law Recognized by Civilized Nations" *in* Frits Kalshoven, Pieter Jan Kuyper and Johan G. Lammers, eds., *Essays on the Development of the International Legal Order* (Rockville, Md.: Kluwer Academic Publishers, 1980) who lists the authors who claim that article 38(1)(c) of the *Statute of the International Court of Justice*, 3 Bevans 1179, refers to domestic laws: Oppenheim & Lauterpacht, Cavaré, Guggenheim, Ripert, Sorensen, Schwarzenberger, de Visscher, Waldock et Bin Chen. Georges Ripert had put this

time when the Statute of the Permanent Court of International Justice (whose article 38 provided the substance for article 38 of the Statute of the International Court of Justice) was adopted, the paucity of public international law considered as a set of generally applicable rules was such that reference to more elaborate bodies of law—domestic legal systems—seemed inevitable. For a long time, the bulk of the creative energy of legal science had been directed to domestic systems rather than international law, so that the latter seemed bound to depend and draw upon the former. This dependence seemed natural at the time, particularly in view of the widely recognized proscription of *non liquet* and the attendant duty of the international judge to decide even where no governing rule can be found.[37] But the situation has evolved a great deal since then. International law can now boast of a significantly larger pool of normative resources derived from a logic of organization by common aims. So much so that domestic law, even in dualist or incorporation systems, increasingly draws upon international legal sources.[38] The development that Fuller had envisaged seems at least to have begun:

> […] in extending "the rule of law" to international relations, law and community of purpose must develop together. It is also apparent that a community of purpose which consists simply in a shared desire to avoid reciprocal destruction is too impoverished to furnish a proper basis for meaningful adjudication. Where the only shared objective is the negative one of preventing a holocaust, there is nothing that can make meaningful a process of decision that depends upon proofs and reasoned argument.[39]

Where no governing rule can be found, principles are likely to provide the reasons for a ruling, making adjudication the meaningful

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thesis forward some 75 years ago in his Academy lectures: « Les règles du droit civil applicable aux rapports internationaux (Contribution à l'étude des principes généraux du Droit visés au Statut de la Cour permanente de Justice internationale) » (1933) 44 R.C.A.D.I. 569. For other possible interpretations, see Herman Mosler, "General Principles of Law," in R. Bernhardt, ed., *Encyclopaedia of Public International Law*, Instalment 1 (N.p., 1981).

[37] On *non-liquet*, see Iain G.M. Scobbie, "The Theorist as Judge: Hersch Lauterpacht's Concept of the International Judicial Function" (1997) 8 E.J.I.L. 264 at c. 4.

[38] See generally Oonagh E. Fitzgerald, *The Globalized Rule of Law* (Cowansville: Yvon Blais, 2006) (a collection of essays on the relationships between international and domestic law—largely from a Canadian perspective).

[39] Fuller, *supra* note 1 at 378.

process of decision based on proofs and reasoned argument that Fuller had contemplated.[40] And these principles may now be extracted not only from a study of comparative law but also from decisions of international courts and tribunals.[41] We know that in theory, such decisions are but a subsidiary means to determine the rules of international law.[42] But it may well be that the time has come to recognize the central role of decisional law in international law:

> The reality, or course, is that effective advocates before the ICJ, and indeed before the ever-expanding variety of other international courts and tribunals, must be steeped in the precedents of the World Court; it is fundamental to their art, because international adjudicators themselves rely on other international judgments [and awards].[43]

One can still say that such decisions have "no binding force except as between the parties and in respect of that particular case."[44] But this says nothing of the impact of decisional law at the level of principles, where law works by means of persuasion, and authority is analysed in terms of weight. Since ancient times, decisional law has depended not on a formal theory of binding authority but on the unique way in which adjudication links past and future, i.e.: by following the maxim that like cases should be treated alike. As we saw, this is an intimation to strive for coherence when we "make sense"[45] of the law, when we "haltingly and hesitatingly and subject to improvement"[46] work out the aims that law is taken to pursue.[47]

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40 *Ibid.*

41 On coherence in international law in view of the explosion of international courts and tribunals, see Olivier Delas *et al.*, *Les juridictions internationales: complémentarité ou concurrence?* (Bruxelles: Bruylant, 2005).

42 *Statute of the International Court of Justice*, *supra* note 36, art. 38(1)(d).

43 Jan Paulsson, "International Arbitration and the Generation of Legal Norms: Treaty Arbitration and International Law" (Paper presented at the International Council for Commercial Arbitration (ICCA) Congress of 2006 in Montreal), available in *Transnational Dispute Management*, vol. 3, issue 5, December 2006, at 3.

44 *Statute of the International Court of Justice*, *supra* note 36, art. 59.

45 MacCormick, *supra* note 7 at 234.

46 *Ibid.*

47 MacCormick expresses this in terms of "fundamental values" in *Rhetoric and the Rule of Law: A Theory of Legal Reasoning* (Oxford and New York: O.U.P., 2005) at

Conclusion

Disputes about sustainability, particularly at the international level, are more likely than other disputes to be resolved through methods relying on consensus. Consensus decisions need not be principled or rights-based. Indeed, one of the advantages of methods relying on consensus is that they free participants from the blinkers of the law. At the same time, consensus decisions are in a very real sense taken in the shadow of law. In the case of sustainable development law, this shadow is cast by legal principles, whose role seems to be on the increase in both domestic and international law. Legal principles will therefore likely play a key role in the resolution of the sustainability disputes which the coming decades no doubt will bring.

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1. For an analysis of the notion of precedent in the international law context of the WTO, see Fabien Gélinas, "Dispute Resolution as Institutionalization in International Trade and Information Technology," (2005) 74 Fordham L. Rev. 489 at 492-501.