The Case Concerning the Gabčíkovo-Nagymaros Project: A Message from the Hague on Sustainable Development

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The Vice-President of the International Court of Justice recently described sustainable development as "... not merely a principle of modern international law. It is also one of the most ancient ideas in the human heritage." This is a remarkable statement, for a number of reasons. First, it appeared as a separate opinion to the majority judgment of the International Court of Justice (ICJ), in a recent case between Hungary and Slovakia (one of two successor states to Czechoslovakia).[1] In contrast to the Vice-President's comments, the majority judgment's reference to sustainable development was much weaker. Second, it implies that sustainable development has achieved the status of a rule of customary international law. If this is so, then it potentially creates a binding international legal obligation upon all states[2] — one that will also have large ramifications for domestic legal systems. Third, the suggestion that sustainable development is "one of the most ancient ideas in the human heritage" must come as a surprise to those who have long considered the 1987 Brundtland Report as the source of the first authoritative definition.[3]

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1 Case Concerning the Gabčíkovo-Nagymaros Project *(Hung. v Slovak.)*, 1997 I.C.J., 37 I.L.M. 162 (1998) hereinafter referred to as the *"Case"*.

2 Subject to doctrine of persistent objector.

3 *Our Common Future — The Report of the World Commission on Environment and Development* (1987), 43.

I. INTRODUCTION

This article begins by considering some of the ramifications of the majority judgment in the *Gabčíkovo-Nagymaros Project* case for the development of international environmental law. The primary focus, however, is on the implications of Vice-President Weeramantry's comments for New Zealand's domestic environmental law. The analysis is particularly topical as it raises the issue of the relationship between "sustainable management" and "sustainable development", under New Zealand's Resource Management Act ("the RMA"), at a time when reform proposals seem to be moving New Zealand further away from international consensus. How will we reconcile removal of social and economic considerations from the definition of sustainable management,[4] with a binding international legal obligation (or non-obligatory international standard), which requires fundamental re-evaluation of economy and society? The analysis undertaken in this article also provides the opportunity to reflect on recent New Zealand Court of Appeal jurisprudence concerning sources of law and the relationship between international and national law, in the context of the environment.[5]

II. THE CASE CONCERNING THE GABČÍKOVO-NAGYMAROS PROJECT

In 1977 the Hungarian Peoples Republic (Hungary) and the Czechoslovak Peoples Republic (Czechoslovakia) entered into a treaty[6] ("the Treaty") for the construction and operation of a system of locks on the Danube River. One lock was to be built in Czechoslovak territory (later to become Slovak territory), and the other two in Hungarian territory.[7] The project was described as a joint investment designed for the "broad utilization of the natural resources of the Bratislava-Budapest section of the Danube River for the development of water resources, energy, transport, agriculture and other sectors of the national economy ..."[8] of the parties. Its primary objectives were for the production of hydroelectricity, the improvement of

4 Via amendment to RMA s 2 definition of "environment".

5 The more general and larger issues of the compatibility of international and national environmental law are the subject of a recent publication; Ebbesson, J., *Compatibility of International and National Environmental Law* (1996).

6 Treaty Concerning the Construction and Operation of the Gabčíkovo-Nagymaros System of Locks, 32 I.L.M. 1249 (1993).

7 The two locks to be built in Hungary were to be at Dunakiliti and Nagymaros, the lock to be built in Czech territory was to be at Gabčíkovo.

8 *Case*, para 15. This included joint financing, construction and operation of the Project, works and locks.

navigation, and the protection of flooding along the Bratislava to Budapest section of the Danube (approximately 200 km).

The Danube has long been subject to international co-operation because of its significance for the commercial and economic development of riparian states. Over the years, human activity has substantially damaged the river and its immediate environment. The common interests of riparian states led to an awareness that international co-operation was also the best means to address these problems. Accordingly, the Treaty contained obligations for environmental and water quality protection in connection with construction and operation of the project.[9] It also provided that project costs and benefits were to be shared equally between the two states. There was no provision for termination of the Treaty, and dispute resolution provisions merely assigned the task to government officials, or the governments themselves.[10]

Work began on the project in 1978, but by 1989 major difficulties had arisen primarily as a consequence of the intense criticism that the project attracted from Hungarian scientists and environmentalists. Ecological dangers identified included ground water and wetland damage. Project criticism, together with economic difficulties and political change, led to an abandonment of works by Hungary in October 1989.[11] By this stage, two of the locks were nearly complete (one at Dunakiliti in Hungary and one at Gabčíkovo in Slovakia), whilst only a small portion of the third at Nagymaros had been built.

Slovakia, in response to Hungary's action, began a unilateral diversion of the river with the objective of continuing the project, in an adapted form, on its own. This diversion of the river, through its territory, became known as Variant C. It involved damming of the river and major changes to the Danube's course and flow for the purpose of serving a Slovakian power plant at Gabčíkovo. Hungary (the downstream riparian state) alleged that this unauthorised diversion was causing substantial environmental harm and reduced water flow and levels, and that construction should cease. Slovakia contended that Variant C was a legal and legitimate response to Hungarian abandonment of the project. Discussions between the parties failed to resolve their dispute and by May 1992 Hungary gave notice that it wished to terminate the Treaty. Later that year Variant C came into operation.

An offer by the EC Commission to help mediate was accepted, following which the parties agreed to submit their differences over the original project and Variant C to the ICJ, and adopt a temporary river management plan.

9 Treaty, Articles 15, 19 and 20.

10 Treaty, Article 27.

11 Hungary did, however, continue to maintain existing structures built as part of the Project.

1. Decision of the International Court of Justice

The Court considered three primary legal issues:

(1) Whether Hungary had a legal right to suspend and then abandon the project in 1989;
(2) Whether Slovakia had the legal right to operate Variant C; and
(3) The legal effect of Hungary's 1992 notice of termination of the Treaty. The Court's decision on these three issues was not unanimous.

In brief, it decided that both parties had acted contrary to international law; that they were obliged to compensate one another for damage; and that the Treaty remained in force. With respect to this last point, the states were left in the rather unsatisfactory position of being told to go back and negotiate their differences in good faith, according to the Treaty's original objectives and in light of the ecological problems that had arisen.[12]

From the perspective of international environmental law, one of the primary issues of interest argued before the ICJ was whether there was, in 1989, an ecological "state of necessity" which permitted Hungary to suspend and then abandon the work it was committed to perform under the Treaty. According to international law on state responsibility, Hungary's action would be a wrongful act, and therefore constitute a breach of its international obligation to comply with the Treaty, *unless* a recognised "state of necessity" existed which precluded wrongfulness.

Hungary's contention was that by 1989 it had become clear that the project was a mistake; that it constituted a "totalitarian, gigomaniac monument which is against nature"; that an "ecological state of necessity" existed.[13] In support it produced a number of scientific studies that identified a variety of ecological dangers. In response, Slovakia denied that any "state of ecological necessity" existed. According to its scientific studies, the ecological problems could have been remedied and the operation of the project modified. Slovakia also cast doubt on whether "ecological necessity" or "ecological risk" could amount to a "state of necessity" precluding wrongfulness of an act.[14]

The Court identified the principal elements of a "state of necessity":

(1) There must be an "essential interest" of the state (Hungary) at stake;
(2) That interest must have been threatened by a "grave and imminent peril"; and

12 Significant amounts of scientific evidence were presented to the Court; *Case*, para 40, 54–56.
13 *Case*, para 38.
14 *Case,* para 44.

(3) The act being challenged (suspension and abandonment of project works) must have been the only means of "safeguarding" that essential interest.[15]

The Court did accept that a "state of necessity" could, in principle, apply to the need to preserve the ecological balance of state territory.[16] However, it ultimately held that Hungary failed to establish the requisite elements of a "state of necessity". This was largely due to uncertainties surrounding the ecological impact of the project (ie, no "peril" existed in 1989), and whether that impact was "imminent". Hungary was also held to have had means available to it, other than the suspension and abandonment of the works, of responding to the situation.[17] The Court concluded on this issue that Hungary was not entitled to suspend and then abandon work on the project in 1989.[18]

Hungary's four further arguments, in support of the lawfulness of its notification of termination of the Treaty, also failed for a variety of reasons. These arguments were:

(a) The impossibility of performance of the Treaty;
(b) The occurrence of a fundamental change of circumstances;
(c) The material breach of the Treaty by Slovakia (adoption of Variant C and failure to comply with the environmental protection provisions of the Treaty); and
(d) The development of new norms of international environmental law.[19]

After considering all these grounds, the Court concluded that none were successful and that Hungary's notification of termination of May 1992 did not have the legal effect of termination of the Treaty. It therefore remained in force between the parties.[20]

On the issue of the legality of Variant C, in addition to the argument that it constituted a material breach of the Treaty by Slovakia, Hungary argued that it amounted to an internationally wrongful act, for which Slovakia was responsible. In reply, Slovakia contended that it was a legitimate response to Hungary's suspension of work, which had left Slovakia with some serious problems. The

15 *Case*, paras 49–52. These were the elements essential to the facts. Other elements included: the abandonment must not have seriously impaired an essential interest of the other state (Slovakia); and the state whose act is in question (Hungary), must not have contributed to the state of necessity.

16 *Case*, para 53.

17 *Case*, para 55.

18 *Case*, para 59. The Court made it clear that a state of necessity is not a ground for termination of a treaty; its existence can only be invoked to exonerate from responsibility a state that has failed to implement a treaty; *Case*, para 101.

19 *Case*, paras 92–115.

20 *Case*, para 115.

Court found that Variant C was too far removed from the joint project's objective of equitable and reasonable sharing of an international watercourse, and concluded that: "... Czechoslovakia, in putting Variant C into operation, was not applying the 1977 Treaty but, on the contrary, violated certain of its express provisions and, in doing so, committed an internationally wrongful act".[21]

The Court then considered, at the request of the parties, the rights and obligations of the parties under the continuing Treaty.[22] In elaborating on these rights and obligations, it referred to the importance of the specific Treaty obligations, other relevant conventions to which the States are party, and rules of general international law. In respect of the later two sources of rights and obligations it said:[23]

> Owing to new scientific insights and to a growing awareness of the risks for mankind — for present and future generations — of pursuit of such interventions [with nature] at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past. This need to reconcile economic development with protection of the environment is aptly expressed in the *concept of sustainable development.*
>
> For the purposes of the present case, this means that the Parties together should look afresh at the effects on the environment of the operation of the Gabčíkovo power plant.

Thus in the view of the Court, sustainable development was a concept central to the ongoing rights and obligations of the parties — a concept that it considered crucial to the reconciliation of the legitimate, yet potentially conflicting developmental and environmental objectives and impacts of the project. The ICJ, however, stopped short of declaring or referring to sustainable development as a norm of customary international law. Such restraint in the field of international environmental law is typical of the present Court, as evident in the rather

21 *Case*, para 78. Note, however, the Court's determination that Slovakia's material breach (ie, putting Variant C into operation in October 1992) occurred after May 1992, the date of Hungary's notice of termination. Thus Hungary's termination was too premature to be a legitimate termination of the Treaty; *Case*, para 108. An "internationally wrongful act" gives rise to an obligation to compensate. As both committed such acts, both were found to be under an obligation to pay, and to claim, compensation. As a consequence the Court suggested that the parties renounce or cancel financial claims and counterclaims. *Case*, paras 148–153.

22 *Case*, paras 116 and 131. The modalities of which the parties agreed to negotiate.

23 *Case*, para 140, emphasis added. The Parties agreed to the relevance of sustainable development, but not its manner of implementation. The Court did not assist in this matter, but referred to the agreement of the parties to negotiate the modalities of their particular case.

conservative judgments in both the *1995 Nuclear Tests Case*[24] and the *1996 Advisory Opinion.*[25] It is this persistent conservative approach that spurred Judge Weeramantry, in his separate comments, to proclaim sustainable development to be much more than a *concept.* In his view it has achieved the status of a modern principle or norm of customary international law, which was crucial to the determination of the case.[26]

Much can be said about the case from the perspective of international environmental law. However, as the focus of this article is primarily on implications for New Zealand domestic law, the following comments are kept brief.[27]

First, in terms of the outcome of the case, it did not represent success for either party. They were effectively sent back to negotiations without any clear directive on what environmental norms and standards to apply. As mentioned above, Hungary had argued that the development of new norms of international environmental law were grounds for its termination. Specifically, Hungary argued that the obligation not to cause substantive harm to the territory of another state had evolved into an *erga omnes* obligation of prevention of damage. Slovakia's breach of this obligation occurred because of its refusal to suspend work on Variant C, which in turn "forced" Hungary's termination.[28] As one commentator points out, many had hoped that the excellent opportunity afforded by Hungary's argument would result in the ICJ addressing the development of customary international environmental law, thereby adding to its strength and clarity.[29] They were to be disappointed. The Court avoided the need to decide which principles of customary international law had evolved into norms of law, by pointing out that the environmental articles in the 1977 Treaty were themselves general and

24 *Request for the Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgement of 20 December 1974 in the Nuclear Tests Case (N.Z. v Fr.)*, 1995 I.C.J. 288. For a critique of the Court's approach, see Taylor, P., "Testing Times for the World Court: Judicial Process and the 1995 French Nuclear Tests Case" (1997) 8 *Colo.J.Int'l.L.&Pol'y*, 199.

25 *Advisory Opinion on the Legality of Nuclear Weapons*, 1996 I.C.J. Gen. List No. 95, 35 I.L.M. 809 (1996).

26 Separate Opinion of Vice-President Weeramantry, p 19 and p 1.

27 For a fuller discussion of the international environmental law ramifications, see Bostian, I., "Flushing the Danube: The World Court's Decision Concerning the Gabčíkovo Dam" (1998) 9 *Colo.J.Int'l.L.&Pol'y*, 401.

28 *Case,* para 97.

29 Bostian, supra note 27, at 420–421. On the basis of a comment made in the *ICJ Advisory Opinion on the Legality of Nuclear Weapons*, it would have been relatively easy for the Court to reach a decision on the legal status of the obligation to prevent harm. In the Advisory Opinion the majority opined that: "The existence of the general obligation of States to ensure that activities within their jurisdiction of control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment." *ICJ Advisory Opinion on the Legality of Nuclear Weapons* 35 I.L.M. 809 (1996), para 29.

flexible enough for the parties to adapt the project to accommodate emerging norms.[30] Thus in the view of the Court, the parties were under a joint responsibility to determine the new environmental norms for themselves, and to adapt their continuing Treaty accordingly.[31]

The Court's decision also "sets an exceptionally high standard for future claims where environmental dangers are invoked as a justification for avoiding environmentally harmful treaty obligations".[32] This remark refers to the Court's requirement that an environmental danger must pose a "grave and imminent peril" before a state of ecological necessity will be considered to exist. Given the nature of ecosystem damage, this is indeed a high and somewhat retrograde standard to set. Often the full and real impact of activities, such as those in the present case, cannot be established with scientific certainty until several years later, by which stage the damage is often irreversible and irreparable. To apply the same high standards as traditionally applied to a state of necessity, and to a state of *ecological necessity*, demonstrates a lack of appreciation and understanding of the particularities of ecological systems. Rather this seems to be a classic case of the ICJ attempting to apply established and traditional rules of the "law of nations", to the biosphere. Such a response can only perpetuate ecological damage.[33]

The Court's findings in relation to the concept of a state of ecological necessity also run counter to the developing "precautionary principle", which provides that "where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental harm".[34] This evolving principle could have been used constructively by the ICJ to mitigate against the need for "imminent peril". As one commentator points out, the Court's decision may "foreshadow a bleak future for the precautionary principle, at least with respect to its application in the context of pre-existing agreements".[35] This may well be the case; alternatively the Court may have merely failed, deliberately or otherwise, to appreciate the relevance of the principle to the case before it. At the least, this omission is consistent with its very restrained and conservative approach, and its apparent desire to leave it to the parties to resolve the dispute by negotiation.

30 In the opinion of Bostian, the Court took this weak stance because of its objective to get parties to settle the dispute themselves. This approach may well backfire, as one or other of the parties may need to return to the Court for further adjudication. Bostian, supra note 27, at 420–424.

31 *Case*, paras 112–113.

32 Bostian, supra note 27, at 425.

33 Taylor, P., *An Ecological Approach to International Law: Responding to challenges of climate change* (1998).

34 The *Rio Declaration on Environment and Development* 31 I.L.M. 881 (1992), principle 15.

35 Bostian, supra note 27, at 425.

2. Opinion of Judge Weeramantry

As mentioned above, the ICJ's persistent conservative approach to international environmental law spurred Judge Weeramantry, in his separate comments, to proclaim sustainable development to be much more than a *concept*. In his view, it has achieved the status of a modern principle or norm of customary international law, which was crucial to the determination of the case. Before considering the Judge's observations in more detail, it is important to consider why the Judge chose this case as a vehicle for his comments.

Judge Weeramantry identified sustainable development as a principle fundamental to the determination of competing considerations in the case, and as a principle that is likely to "play a major role in determining important environmental disputes of the future".[36] Furthermore, this case is the first occasion on which sustainable development has received attention in the jurisprudence of the Court.[37] The Judge obviously saw this as an opportunity to go further than the majority of the Court was prepared to go, in considering the status of sustainable development as a principle of international law.

Judge Weeramantry begins his comments by stating that sustainable development is a legal principle that is necessary to reconcile and harmonise the competing needs and interests of the law of development and the law of the environment. To hold that no such legal principle exists to reconcile these two fields is to hold that international law sanctions a state of "normative anarchy".[38]

He then proceeds to examine whether one of the constituting elements of customary international law is present, ie, evidence of general acceptance of sustainable development as a principle of international law. He finds ample evidence of general acceptance in a large number of international treaties, international declarations, the foundation documents of international organisations, the practices of financial institutions, regional declarations and planning documents, and state practice.[39] He concludes that the principle of sustainable development is "a part of modern international law not only in its inescapable logical necessity, but also by reason of its wide and general acceptance by the global community".[40] Strangely he did not expressly reflect on one of the

36 Supra note 26, at 1.

37 The Court has considered other cases that raise environmental issues, as in the case of pollution from nuclear explosions, but "[t]he present case focuses attention, as no other case has done in the jurisprudence of this Court, on the question of harmonization of developmental and environmental concepts": ibid, 3.

38 Ibid, 2.

39 Ibid, 6–7. These sources are extensively listed in the footnotes of the Separate Opinion.

40 Ibid, 6. Components of the principle come from well-established areas of international law: human rights, state responsibility, environmental law, economic and industrial law, equity, territorial sovereignty, abuse of rights, and good neighbourliness: ibid, 6.

other crucial constituting elements of customary international law: *opinio juris et necessitatis* (an acceptance by states that a rule creates legally binding obligations, as distinguished from rules of international comity). The absence of discussion on this point may be explained by a belief that *opinio juris* is sometimes responsible for delaying the development of international environmental law in a negative sense.[41] Alternatively, the Judge may also be suggesting that sustainable development is a norm of international law because it is considered to be a "general principle of law recognized by all civilised nations", as provided in the Statute of the International Court of Justice, Article 38(1)(c).[42]

The Vice-President's judgment then took an interesting turn. He proceeded to consider a diverse range of ancient cultural wisdom for the purpose of inspiring and enriching our understanding of sustainable development and revitalising international law. A large part of his comment discussed the ancient irrigation and attendant legal systems of Sri Lanka, Africa, Iran, China, and of the Inca civilisation. Reference was also made to the value systems of various cultures, which revealed a universal love of nature, a desire for its preservation, and the "need for human activity to respect the requisites for its maintenance and continuance ...".[43]

The primary purpose of this compelling traverse of ancient practices (which have sustained civilisations for millennia), legal systems, and culturally diverse value systems, was to remind us that the "formalism" of modern legal systems (including international environmental law) has caused us to lose sight of a rich source of principles and values. In his words, "the time has come when they [modern legal systems] must once more be integrated into the corpus of the living law".[44] In reading this part of the judgment one gets the distinct impression that modern engineering and legal systems are, in some important respects, more primitive than ancient predecessors. Progress toward reconciling developmental needs and environmental concerns lies in acknowledging the wisdom of varied and often ancient civilisations. And for those formalists amongst us who need express permission before breaching intellectual bastions, Weeramantry offers

41 See, eg, the comments in *Advisory Opinion on the Legality of Nuclear Weapons*, 35 I.L.M. 809 (1996), para 72 & 73, where the suggestion is that practice develops faster than *opinio juris*.

42 General principles, in the sense intended by Article 38(1)(c), can be drawn from either international law or municipal law. It is not uncommon for comments of the ICJ to be ambiguous: "Even when apparently relying on this source of law, the Court has not infrequently either referred also to customary law or left it ambiguous as to whether it was speaking of a general principle or national or international law." Waldock, *General Course on Public International Law*, extracts reprinted in Harris, D. J., *Cases and Materials on International Law* (4th ed, 1991) 48.

43 Weeramantry, supra note 26, at 18.

44 Weeramantry, supra note 26, at 18.

us the comfort of Article 38(1)(c) of the Statute of the International Court of Justice, which acknowledges the "general principles of law *recognised by civilised nations*"[45] as a source of international law. He also reminds us that Grotius, the much loved (and at times reviled) father of many modern international law principles, looked to both the past, and to a variety of cultures, for his inspiration.[46]

III. IMPLICATIONS FOR NEW ZEALAND'S DOMESTIC ENVIRONMENTAL LAW

1. Sustainable Development as a Binding Rule of Customary International Law

What are the implications and possible relevance of Judge Weeramantry's comments on sustainable development, for New Zealand's environmental law?

In future cases before the ICJ it would not be possible to use his comments as evidence that sustainable development has achieved the status of a binding rule of customary international law. A majority, preferably unanimous, decision of the full Court would be required.[47] His observations may, however, serve to promote state acceptance of sustainable development as a principle of law directly relevant and applicable to environmental disputes, and state relations. More specifically, states will be encouraged, in future ICJ cases, to argue the significance of sustainable development. The Vice-President is well aware of these potential implications. In fact it is probably his clear intention that they be used in this manner.[48]

The primary significance of his comments is found in the relationship between customary international law and domestic law. Once an evolving principle "crystallises" into a rule of customary international law, it automatically becomes part of New Zealand domestic law, provided it is not inconsistent with Acts of

45 Emphasis added.

46 Weeramantry, supra note 26, at 7.

47 Even these circumstances would not be conclusive evidence that sustainable development had achieved the status of a rule of customary international law.

48 Vice-President Weeramantry takes a very proactive judicial approach to the development of international environmental law in *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests Case (N.Z. v. Fr.)* 1995 I.C.J. 288, 362 (dissenting opinion of Judge Weeramantry). See also Taylor, supra note 24, at 210.

the New Zealand Parliament or authoritative judicial decisions.[49] Unlike treaty obligations, customary international law does not need to be incorporated via implementing legislation. Traditionally it was easy for common law judges to be relaxed about this aspect of the relationship between international and domestic law, as the corpus of international law was small, and its rules often indeterminate and of questionable binding character. At the end of the 20th century, however, the situation is dramatically different. The corpus of international law is now immense, covering most aspects of modern life. This rapid growth is attributable to both the proliferation of treaties, and to the accelerated pace of customary legal development.

What would be the consequence of a judicial finding that the principle of sustainable development had crystallised into a binding rule of customary international law?[50] The first and most direct consequence would be the requirement that the New Zealand Government make provision for its implementation via domestic law. Putting aside the question of what sustainable development actually means in any given context,[51] a number of important questions will emerge for New Zealand policy- and law-makers. With respect to management of "natural and physical resources" and "the environment" (as these terms are defined by the RMA), these questions include:

(a) To what extent does the concept of "sustainable management" already incorporate aspects of sustainable development? Back in 1991 the Ministry for the Environment made an early attempt to differentiate the two concepts.[52] However, there have been ongoing debates focusing on the reference to economic and social factors in the definition of "environment", which have demonstrated the lack of consensus on this point;[53]

(b) To what extent should the concept of "sustainable management" incorporate the broader social and economic aspects of sustainable development? This

49 *Trendex Trading Corporation v Central Bank of Nigeria* [1977] QB 529. This "automatic adoption" is often referred to as the theory of incorporation, and should be contrasted with the theory of transformation, which requires treaties and conventions to be adopted by legislative process before they can become part of the body of domestic law. The Bangalore Principles suggest that judicial action is required for a norm of international law to be incorporated into domestic law. See the principles as reproduced in *Khan v Branch Manager of the New Zealand Immigration Services*, High Court, Hamilton M335/94, 11 April 1995, in Williams, D.A.R. (ed), *Environmental and Resource Management Law* (2nd ed, 1997), para 2.24.

50 It was mentioned above that in the alternative Judge Weeramantry could have been suggesting that sustainable development was a generally accepted principle of international law in the sense of Article 38(1)(c) of the Statute of the International Court of Justice. If so, the consequence would also be that it would automatically become part of New Zealand domestic law.

51 Ebbesson, supra note 5, at 240–243.

52 Ministry for the Environment, *Information Sheet, No 6* (December 1991).

53 For an overview of the literature see Williams, supra note 49, at para 3.28.

question raises, in part, issues surrounding current government proposals to amend the definition of environment, to exclude reference to broader economic and social factors.[54] In the view of one commentator, this amendment is recognition of the failure of the Act to implement sustainable development. Furthermore, the "proposal that the definition of environment exclude social and economic matters when considering environmental impacts of activities effectively prevents the public from taking account of social and economic factors which negatively (or positively) affect ecosystems, natural and physical resources and amenity values. In terms of sustainable development this is ridiculous. In terms of honesty, it is an entirely accurate description of what the act has become."[55] In defence of this amendment the government claims that it will prevent abuse of RMA processes. In the view of the Minister for the Environment, the inclusion of these matters "allows absolutely any consideration through the door" resulting in an Act without limits, and depriving citizens of the degree of certainty that makes for "good" law.

The Minister also opines that the social and economic issues central to resolving ecological problems raise fundamental philosophical disagreements and debated values. In such circumstances he prefers an approach in which law does not lead, but rather follows societal resolution of these debates.[56] This comment would suggest that the RMA is ahead of its time and that it should now be retro-fitted to conform with prevailing values, until the debates have been resolved. The Minister's view is likely to be highly contentious. As one commentator has recently pointed out, the RMA seems to be a victim of economic anxieties in New Zealand, not the reason for them.[57]

54 The current definition of "environment" is: "Environment" includes — (a) Ecosystems and their constituent parts, including people, and communities; and (b) All natural and physical resources; and (c) Amenity values; and (d) The social, economic, aesthetic, and cultural conditions which affect the matters stated in paragraphs (a) to (c) of this definition or which are affected by those matters. The proposed amendment deletes paragraph (d) and amends the definition to: "(a) Ecosystems and their constituent parts; and (b) All natural and physical resources; and (c) The health, safety, amenity values, and cultural values of people and communities.": Resource Management Amendment Bill 1999, cl 2.

55 Knight. S., "Pragmatism wins in environmental debate" *National Business Review*, 4 Dec 1998, 35.

56 Upton. S., "Why the law cannot dictate debated values" *National Business Review*, 11 Dec 1998, 19.

57 Palmer. K. A., "The McShane Report — A think piece on the Resource Management Act 1991" (1998) 2 *Butterworths Resource Management Bulletin* 157, 161. See also more recent editorial commentary on the Amendment Bill in (1998) 2 *Butterworths Resource Management Bulletin* 169 (Brabant), (1999) 3 *Butterworths Resource Management Bulletin* 13 (Somerville), and (1999) 3 *Butterworths Resource Management Bulletin* 49 (Grinlinton).

Given that commentators are identifying this proposed amendment as a retrograde step, moving New Zealand further away from achieving its international commitment to the objectives of sustainable development,[58] a full and robust public debate is required in New Zealand — one that will clarify "where and how sustainable development will be pursued. Or whether, indeed, this was ever intended."[59] The Minister laments that this has not occurred in response to the proposed amendment of "environment".[60] Perhaps this is because there is a mistrust of the public consultation process. More likely it is because the Ministry for the Environment's stated rationale for the amendment is to clarify a previously ambiguous definition. Ministry publications do note that this amendment relates to the scope and philosophy of the Act, but do not fully discuss or justify the amendment in these terms.[61]

Whatever the justifications behind the proposed amendment — a response to economic anxieties, clarification of an ambiguity, and/or the retro-fit mentioned above — it is questionable whether they meet the standard set by Cooke P in *van Gorkom v Attorney General*: "The introduction of a policy conflicting with the spirit of international standards should not be allowed without compelling reasons."[62]

The prospect of sustainable development becoming a binding principle of customary international law also has implications for New Zealand domestic law and policy well beyond the scope of the RMA. A brief scan of the thirty-two subject chapters of Agenda 21 reveals the enormous scope of the principle's application. Leaving aside the issue of New Zealand's current international treaty obligations, which refer to the objective of sustainable development in a variety of identified sectors such as climate change and biodiversity, New Zealand would also have to confront application of the principle to its broader energy, transport, and agricultural policies, to name but a few.

What would be the consequence of government failure to make provision in domestic law for sustainable development? In addition to being in violation of its international legal obligations, it could become subject to legal action by individuals seeking to force legislative implementation of the principle, or judicial pronouncement on its relevance to domestic environmental law. Violation at the

58 Palmer, supra note 57, at 161: "The removal of social and economic objectives would be contrary to New Zealand's commitment internationally to the Rio Convention and Agenda 21 prescriptions. ... The globalisation of environmental objectives and obligations would not be enhanced by a downsizing of the Act objectives. New Zealand could lose credibility at an international and local level as a consequence."

59 Knight, supra note 55.

60 Upton, supra note 56.

61 Ministry for the Environment, *Proposals for Amendment to the Resource Management Act* (1998) 11–12.

62 [1977] 1 NZLR 535, 543.

international level is unlikely to result in any kind of enforcement action. It is much more likely that New Zealand's record would merely be noted and commented upon at fora such as the United Nations Commission on Sustainable Development.[63] Legal action by individuals in New Zealand's municipal courts is likely to encounter two difficult problems: establishing standing (ie, citizens as subjects of international environmental law), and what actually constitutes sustainable development in any particular case. Given these limitations, at both the international and domestic levels, it is unlikely that legal procedures will greatly advance the effective implementation of sustainable development. Rather this will depend upon the commitment of the New Zealand Government. In assessing its commitment, the government would do well to remember that a number of international environmental obligations now drive our domestic policy.[64] We derive great benefit from entering into and supporting these international treaties and agreements, but we have also reduced our independence accordingly.

2. Sustainable Development as a Non-obligatory Standard of "Soft International Law"

The above discussion has focused on the consequences for New Zealand domestic law, of sustainable development becoming a binding rule of customary international law. The implications of an alternative scenario — that sustainable development be treated as a non-obligatory standard of "soft international law" — will now be considered.

A non-obligatory standard will not normally be treated as creating binding legal obligations. However, it may be of important legal effect. This approach has recently been explored by the Court of Appeal. In *Wellington Legal Services v Tangiora*[65] the Court stated that international standards *that do not have obligatory force* may be relevant to the interpretation of New Zealand legislation. They may, for example, provide part of the context in which legislation is to be read.[66] This approach to interpretation was affirmed in the recent case of *Nicholls v Registrar of the Court of Appeal* in which Tipping J opined:[67]

63 The CSD was established at the 1992 United Nations Earth Summit. It has been described as a UN watchdog agency for the implementation and achievement of sustainable development. "International Environmental Issues: A New Zealand Perspective" (Ministry of Foreign Affairs and Trade, *Information Bulletin No. 50* (1994)), 59.

64 See generally Keith, K., Address to the New Zealand Bar Association Conference, Queenstown, 21–22 July 1995.

65 [1998] 1 NZLR 129.

66 Ibid, 139.

67 [1998] 2 NZLR 385, 439. See also *New Zealand Airline Pilots Association Inc v Attorney General* [1997] 3 NZLR 269.

> Where domestic legislation is genuinely open to more than one interpretation, our Courts should adopt the interpretation which best fulfills New Zealand's international obligations. The same can generally be said of non-binding international standards, to the extent it is possible to discern them; albeit greater policy issues may arise in how far New Zealand wishes to conform with those so-called standards as opposed to obligations.

In these statements the Court of Appeal is recognising the increasing influence of international law and standards, but the Court has also been careful to point to the democratic limits of this interpretative process: [68]

> International law is available to clarify Parliament's intent, not to reshape it.

Judicial statements, such as those quoted above, have most often been made in the context of cases involving human rights norms and standards. They can also be readily applied to the environmental context. It is now commonly accepted that there are considerable parallels and linkages between environmental and human rights issues.[69] How then would the statutory concept of "sustainable management" be interpreted in the context of sustainable development, a legally relevant but non-binding international standard?

The first step in answering this question is crucial. Sustainable development would only be relevant to the interpretative process if there is a genuine ambiguity or uncertainty regarding Parliament's intent. Thus, if it can, for example, be proven that Parliament clearly intended to exclude sustainable development from the ambit of the RMA, then the matter could not progress further. As previously mentioned, in 1991 the Ministry for the Environment attempted to distinguish sustainable management and sustainable development, via an informal publication.[70] Since then, however, RMA practice has placed greater emphasis on the social and economic factors, which are currently part of the definition of environment, than was perhaps initially expected. Other parts of the Act relevant to sustainable management, such as respect for the concerns and interests of Maori, also blur the line between the two principles. Furthermore, records of public submissions on the RMA Bill indicate a clear choice in favour of promoting the human and social objectives of sustainable management, which suggests that they were an important part of the 1991 reform.[71]

68 *Nicholls v Registrar of the Court of Appeal* [1998] 2 NZLR 385, 439 per Tipping J.

69 For a comprehensive discussion of this development see Taylor, P., "From Environmental to Ecological Human Rights: A New Dynamic in International Law?" (1998) *Geo. Int. Env LR*, 309.

70 Supra note 52.

71 Palmer, supra note 57, 161. This evidence would seem to refute the opinion of the Minister that New Zealand lacks societal agreement on the importance of taking into account social and economic considerations, supra note 56.

In the event that the RMA is amended to exclude consideration of economic and social factors, it would be more difficult for a court to identify any ambiguity in interpretation of sustainable management. A court would not, for example, use sustainable development to read back into the definition of sustainable management what Parliament had deliberately removed. This would be the case, irrespective of the argument that such an amendment would be directly contrary to international legal developments. To do so would be to usurp the prerogative of Parliament.

IV. CONCLUSION

The above discussion has demonstrated that the evolution of sustainable development, as a binding legal obligation or as a non-obligatory standard, can not easily be reconciled with current domestic environmental law. This is a condemning anomaly in a country that prides itself on being a good international citizen, a supporter of international environmental law, and a leader in the development of municipal environmental law. Resolution of this anomaly lies in the hands of our policy- and law-makers. They must be convinced that "sustainable development" is not an empty international slogan. Despite the difficulties of determining its meaning in a given context, and the complexities of its implementation, it is a principle that the international community and judiciary alike now identify as pivotal to reconciling the collision between human society and ecology.

New Zealand cannot ignore the growing international endorsement of sustainable development. Nor should it await final resolution of its legal status. As the Legislative Advisory Committee itself notes: "In a very wide range of areas, New Zealand is committed by its treaty obligations or by customary international law to make particular provision in its domestic laws." The government may, however, go further than its international obligations require: "Even when there is no direct obligation, there might be an international standard, ... *which is relevant to the preparation of new legislation and the replacement and amendment of the old.*"[72]

The Case Concerning the Gabčíkovo-Nagymaros Project reminds us that our sources of domestic law are much broader than we sometimes assume. International environmental law, in the form of customary international law, soft international law, and treaty law, is advancing at a rapid pace. We need to keep a constant eye on these developments and assess their impacts for New Zealand.

72 Report of the Legislative Committee, "Legislative Change: Guidelines on Process and Content" (rev ed, 1991) para 44 (emphasis added).

Judge Weeramantry's opinion also challenges us to remember that the discipline of law is not hermetically sealed. It has much to gain by drawing from across the perceived boundaries of time, culture, and between disciplines. Of equal importance is acknowledgment that "[t]he ingrained values of any civilisation are the source from which its legal concepts derive, and the ultimate yardstick and touchstone of their validity".[73]

The Vice-President is rapidly making a name for himself as a jurist who recognises the urgency of our environmental problems, and the poverty of modern international legal responses. His judgments are, in part, designed to inspire, enlighten and expand the jurisprudence of the ICJ. In doing so he is making a unique contribution to international *and* national environmental law and policy. New Zealand would do well to follow his lead in its preparation of new legislation and its amendment of the old.

73 Weeramantry, supra note 26, at 18.