



**The *Gabcikovo-Nagymaros* Case:
The Influence of the International Court of
Justice on the Law of Sustainable Development**

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Abstract

"Sustainable development" has emerged in recent years as a principle of international law which embodies the need to balance development with environmental protection. This article addresses the impact of the Case Concerning the Gabcikovo-Nagymaros Project, the first case before the International Court of Justice to consider the question of sustainable development, on the development and understanding of the principle at customary international law. The article analyses three interrelated aspects of the principle: the concept of sustainable development, the precautionary principle and the principle of Environmental Impact Assessments. It concludes that both the majority opinion and the separate opinion of Vice-President Weeramantry have had an influence on developing international environmental law in this area. However, that influence has not been entirely positive.

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1. Introduction

The *Case Concerning the Gabčíkovo-Nagymaros Project*¹ was enthusiastically anticipated as the first contentious case before the International Court of Justice (ICJ) to directly raise questions of international environmental law.² In particular, expectations ran high that the Court would use the concept of sustainable development to balance the traditional law of treaties with emerging norms of environmental protection.³ However, while the Court did, for the first time, make reference to the concept of sustainable development,⁴ for the most part, the parties' extensive environmental submissions were barely acknowledged in the majority reasons.⁵ In contrast, the separate opinion of Vice-President Weeramantry is widely lauded for discussing in significant detail the environmental aspects of the case.

Over a decade has passed since the *Gabčíkovo* decision was handed down in 1997. This article examines the extent to which the opinions of the majority and of Weeramantry have influenced and shaped the development of international environmental law over that ten year period. The focus is on examining developments in customary international law, being the aspect of international law developed through state practice, as opposed to treaty-based developments. The impact of the case is determined through an examination of the available material sources of state practice, with particular emphasis placed on government policy and the practice of international organisations as key areas from which progress in the development of international environmental law may be judged.⁶ The subsidiary sources of international law, in the form of judicial decisions and the writings of eminent publicists, are also addressed as indicative of developments in the field of custom.⁷ Particular attention is paid to the decisions of domestic tribunals, in recognition of the blurring of international and national law that inevitably results from the inherently transboundary nature of international environmental protection.⁸

This article ultimately contends that, despite their differing emphases, both the majority opinion and Weeramantry's separate opinion have had a considerable, though not always positive,

¹ *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* [1997] ICJ Rep. 7.

² Afshin A-Khavari and Donald Rothwell, 'The ICJ and the Danube Case: A Missed Opportunity for International Environmental Law?' (1998) 22 *Melbourne University Law Review* 507, 508; Stephen Stec and Gabriel Eckstein, 'Of Solemn Oaths and Obligations: The Environmental Impact of the ICJ's Decision in the *Case Concerning the Gabčíkovo-Nagymaros Project*' (1997) 8 *Yearbook of International Environmental Law* 41, 41.

³ Stephen Stec, 'Do Two Wrongs Make a Right? Adjudicating Sustainable Development in the Danube Dam Case' (1999) 29 *Golden Gate University Law Review* 317, 319.

⁴ *Gabčíkovo-Nagymaros Project (Hungary v Slovakia) (Separate Opinion of Vice-President Weeramantry)* [1997] ICJ Rep. 7, 88 [Separate Opinion]; Stec, above n 3, 319; Sumudu Atapattu, *Emerging Principles of International Environmental Law* (2006) 150; Rosalyn Higgins, 'Natural Resources in the Case Law of the International Court' in A. Boyle and D. Freestone (eds), *International Law and Sustainable Development: Past Achievements and Future Challenges* (1999) 87, 111.

⁵ Erika Preiss, 'The International Obligation to Conduct an Environmental Impact Assessment: the ICJ Case Concerning the Gabčíkovo-Nagymaros Project' (1999) 7 *New York University Environmental Law Journal* 307, 308.

⁶ With respect to state practice, see Ian Brownlie, *Principles of Public International Law* (5th ed, 1998) 5.

⁷ See *Statute of the International Court of Justice* (1945) 33 UNTS 993, Article 38 [Statute].

⁸ Stec, above n 3, 325.

influence on the development of international environmental law. This impact arises in three emerging and intricately interrelated aspects of sustainable development: the concept of sustainable development itself; the precautionary principle;⁹ and the law of Environmental Impact Assessments.

2. The Case

The *Gabcikovo Case* arose out of a Treaty signed in 1977 between Hungary and Czechoslovakia.¹⁰ This Treaty concerned the construction of a 'System of Locks' on the Danube River, to be operated jointly by the parties and designed for the production of hydroelectricity, improved navigation and protection from flooding.¹¹ Construction began in 1978.¹² In the face of growing domestic ecological concern and criticism, the Hungarian Government suspended works on its part of the Project in 1989, ultimately terminating the Treaty in 1992.¹³ It argued that the ecological risks of the Project, including reduction in water flows, damage to water quality, and the consequential loss of 'fluvial fauna and flora', were unacceptable.¹⁴ Czechoslovakia subsequently initiated a 'unilateral diversion of the Danube' on its territory known as Variant C as an alternative to the original Project.¹⁵ This resulted in a major reduction in the flow of the Danube downstream into Hungary.¹⁶

The Court was asked to decide first, whether Hungary was entitled to abandon the Project; secondly, whether Czechoslovakia was then entitled to proceed with Variant C and thirdly, whether Hungary was entitled to terminate the Treaty.¹⁷ In relation to the first claim, the Court held that Hungary had breached the Treaty by abandoning works on the Project and that it could not rely on an argued 'state of ecological necessity' justifying that breach.¹⁸ Secondly, Czechoslovakia was found to have acted unlawfully in depriving Hungary of its rightful 'equitable and reasonable share' of the Danube by putting Variant C into operation.¹⁹ Finally, the Court determined that Hungary's purported termination of the Treaty was invalid.²⁰ Various treaty-based arguments on the part of Hungary, including that new norms of international environmental law precluded Treaty performance, were rejected.²¹

⁹ There is some dispute as to whether this should more appropriately be described as an 'approach' than a principle: see Ellen Hey, 'The Precautionary Concept in Environmental Policy and Law: Institutionalizing Caution' (1992) 4 *Georgetown International Environmental Law Review* 303, 304. However, in accordance with general practice, the term 'precautionary principle' will be adopted throughout.

¹⁰ In 1993, the Slovak Republic became the Successor State to the Treaty after the division of Czechoslovakia.

¹¹ *Gabcikovo-Nagymaros Project (Hungary v Slovakia) (Judgment)* [1997] ICJ Rep. 7, 17-18 [Judgment]. One series of locks was to be located in Gabcikovo, then in Czechoslovakia, and one in Nagymaros in Hungary, hence the name of the case.

¹² Judgment, above n 11, 25.

¹³ *Ibid.*, 25, 27.

¹⁴ *Ibid.*, 35.

¹⁵ *Ibid.*, 25.

¹⁶ *Ibid.*, 27.

¹⁷ *Ibid.*, 11-12.

¹⁸ *Ibid.*, 46.

¹⁹ *Ibid.*, 56.

²⁰ *Ibid.*, 69.

²¹ *Ibid.*, 63-68.

3. Analysis

3.1 Sustainable Development

Despite the fact that sustainable development has become one of the most discussed principles in international and domestic legal discourse, its meaning remains contested.²² Nonetheless, it is commonly defined as ‘development that meets the needs of the present without compromising the ability of future generations to meet their own needs’.²³ Generally understood, it requires environmental protection to be an ‘integral part of the development process’.²⁴

The concept of sustainable development was acknowledged in the opinions of both the majority and Weeramantry in *Gabcikovo*. In accepting Hungary’s argument that new environmental norms were relevant to the interpretation of the Treaty, the Court emphasised the importance of the environment, not as an abstraction, but as representing ‘the living space, the quality of life and the very health of human beings, including generations unborn.’²⁵ In what has become the most frequently cited passage of the case, the Court noted that:

Throughout the ages, mankind has, for economic and other reasons, constantly interfered with nature. In the past, this was often done without consideration of the effects upon the environment. 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 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.²⁶

This passage reflects the sole reference to sustainable development in the eighty page majority decision. Nonetheless, it is important in two respects. First, while the Court did not elaborate on the definition of sustainable development,²⁷ it did recognise the utility of the notion as a useful tool in balancing environmental protection and economic development.²⁸

²² A-Khavari and Rothwell, above n 2, 518; Alhaji Marong, ‘From Rio to Johannesburg: The Role of International Legal Norms in Sustainable Development’, (2003) 16 *Georgetown International Environmental Law Review* 21, 29.

²³ World Commission on Environment and Development, *Our Common Future*, GAOR, 42nd Sess, Supp. No. 25, UN Doc. A/42/25 (1987), [27].

²⁴ *Rio Declaration on Environment and Development*, Report of the United Nations Conference on Environment and Development, UN Doc. A/CONF.151/26 (1992), Principle 4.

²⁵ Judgment, above n 11 at 68, quoting from *Legality of the Threat or Use of Nuclear Weapons Case (Advisory Opinion)* [1996] ICJ Rep 241, [29]. See also *Case Concerning Pulp Mills on the River Uruguay (Argentina v Uruguay) (Order of July 13)* [2006] ICJ Rep 1, [72].

²⁶ Judgment, above n 11, 78.

²⁷ Atapattu, above n 4, 155

²⁸ Alan Boyle and David Freestone, ‘Introduction’ in A. Boyle and D. Freestone (eds), *International Law and Sustainable Development: Past Achievements and Future Challenges* (1999) 1, 10. Many would add social development as a third aspect within the notion of sustainable development: Marong, above n 22, 31.

Secondly, the Court invoked sustainable development as a 'concept', inferring that while it has 'a certain status in international law',²⁹ it is not a binding international norm.³⁰ This interpretation is supported by noting that the respective states' actions were not judged against an international sustainable development standard.³¹ Rather, the parties were required, in the ultimate determination of the Court, merely to 'look afresh' at the environmental impact of the Gabčíkovo plant.³² Sustainable development was therefore recognised as being primarily procedural in nature, requiring a consideration of both environmental and development issues in decision-making, but not dictating a particular outcome.³³

The detailed opinion of Weeramantry gave significantly more attention to the question of sustainable development. It differed from that of the majority in two important respects. First, instead of characterising sustainable development as 'a mere concept', Weeramantry considered it to be a 'principle with normative value' which demands striking a balance between development and environmental protection.³⁴ He considered the principle to be 'an integral part of modern international law'³⁵ which, due to widespread state acceptance, forms part of custom.³⁶ Reviewing the historical experiences of the various cultures and legal systems of the world, Weeramantry drew the conclusion that the 'need for human activity to respect the environment' is a universal international value and, by implication, a general principle of law.³⁷

Secondly, Weeramantry framed sustainable development as a principle of reconciliation in the context of conflicting human rights. On the one hand is the human right to development, which attracts 'the overwhelming support of the international community.'³⁸ On the other hand, Weeramantry considered a human right to protection of the environment as a 'vital part' of the human rights discourse.³⁹ He considered that without such a right, other rights, including the right to life, would necessarily be impaired.⁴⁰ The principle of sustainable development acts as a

²⁹ ILA, *Fourth Report of the Committee on Legal Aspects of Sustainable Development*, Report of the Sixty-Ninth Conference, London (2000), 15. See also ILA, *International Law on Sustainable Development*, Report of the Seventy-Fifth Conference, Toronto (2006), 14; Philippe Sands, 'International Courts and the Application of the Concept of "Sustainable Development"' (1999) 3 *Max Planck Yearbook of United Nations Law* 389, 403.

³⁰ See Separate Opinion, above n 4, 88-89; A-Khavari and Rothwell, above n 2, 519.

³¹ Boyle and Freestone, above n 28, 16; J. B Ruhl, 'The Seven Degrees of Relevance: Why Should Real-World Environmental Attorneys Care Now About Sustainable Development Policy?' (1998) 8 *Duke Environmental Law & Policy Forum* 273, 291.

³² Judgment, above n 11, 78.

³³ Alan Boyle, 'The *Gabčíkovo-Nagymaros* Case: New Law in Old Bottles' (1997) 8 *Yearbook of International Environmental Law* 14, 18; Eisuke Suzuki and Suresh Nanwani, 'Responsibility of International Organizations: The Accountability Mechanisms of Multilateral Development Banks' (2005) 27 *Michigan Journal of International Law* 177, 198; Duncan French, *International law and policy of sustainable development* (2005), 48; Sands, above n 29, 393; A-Khavari and Rothwell, above n 2, 520.

³⁴ Separate Opinion, above n 4, 88-89, 90.

³⁵ *Ibid.*, 89, 95.

³⁶ *Ibid.*, 93, 95, 104.

³⁷ *Ibid.*, 96, 100-105, 109-110. See additionally Christopher Weeramantry, 'Environmental Law Symposium Foreword' (1998) 22 *Melbourne University Law Review* 503, 504-505.

³⁸ Separate Opinion, above n 4, 91.

³⁹ *Ibid.*, 91.

⁴⁰ *Ibid.*, 91.

means of reconciling these rights.⁴¹ It tempers the right to development by ensuring that it tolerates the 'reasonable demands of environmental protection.'⁴²

It is easy to join with commentators in criticising the majority for inadequately addressing the concept of sustainable development when one compares it to the comprehensive approach of Weeramantry.⁴³ Certainly, Weeramantry's opinion is widely praised and is 'frequently quoted by governments and nongovernmental organizations alike'⁴⁴ in promoting an expansive view of the principle. Thus, for example, the opinion was adopted in argument before the International Tribunal for the Law of the Sea (ITLOS) to promote a broad view of the interests involved in environmental sustainability cases.⁴⁵ One Australian judge has described the opinion as a 'masterpiece' which should be 'required reading' for judges throughout South-East Asia as an impetus for judicial action in the 'expansion of environmental law'.⁴⁶ Additionally, Weeramantry's opinion was reproduced in full in a United Nations Environment Program compendium of judicial decisions related to the environment, developed in response to requests from members of the judiciary in over 100 countries for guidance on emerging environmental norms.⁴⁷ These instances of adoption indicate that Weeramantry's opinion has been influential in promoting a progressive approach to sustainable development.

(a) Human Rights

Weeramantry's opinion as it relates to human rights has also been influential. His endorsement of sustainable development within the context of human rights is widely viewed as enhancing the credibility of arguments based on rights to the environment.⁴⁸ In Australia, this has been recognised by at least one member of the judiciary, writing extra-curially, who has emphasised the potential for international practice regarding the right to a clean environment to affect unsettled Australian law.⁴⁹

⁴¹ A-Khavari and Rothwell, above n 2, 524.

⁴² Separate Opinion, above n 4, 92.

⁴³ See, for example Vaughan Lowe, 'Sustainable Development and Unsustainable Arguments' in A. Boyle and D. Freestone, (eds), *International Law and Sustainable Development: Past Achievements and Future Challenges* (1999) 19, 21; Preiss, above n 5, 308; A-Khavari and Rothwell, above n 2, 527.

⁴⁴ Claudia Marques and Catherine Tinke, 'The Water Giant Awakes: An Overview of Water Law in Brazil' (2005) 83 *Texas Law Review* 2185, 2236. See further: Marie-Claire Segger, 'Governing and Reconciling Economic, Social and Environmental Regimes' in M. Segger and C. Weeramantry (eds) *Sustainable Justice: Reconciling Economic, Social and Environmental Law* (2005) 561, 578.

⁴⁵ Transcript of Proceedings, *Case Concerning Land Reclamation by Singapore (Malaysia v Singapore)* (ITLOS, 27 November 2003) 12, <<http://www.itlos.org>> at 26 February 2008.

⁴⁶ Justice Paul Stein, 'Major Issues Confronting the Judiciary in the Adjudication of Cases in the Area of Environment and Development' (Speech to the South-East Asian Regional Symposium on the Judiciary and the Law of Sustainable Development, March 6 1999) <http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_speech_stein_060399> at 26 February 2008.

⁴⁷ See UNEP, *Compendium of Summaries of Judicial Decisions in Environment Related Cases* (2004) i, ii and 275ff <<http://supremecourt.intnet.mu/entry/UNEP/UNEP%20Compendium%20of%20Summaries%20of%20Judgments%20in%20Environment-related%20Cases.pdf>> at 26 February 2008. The majority opinion was merely summarised.

⁴⁸ Jennifer Cassel, 'Enforcing Environmental Human Rights: Selected Strategies of US NGOs' (2007) 6 *Northwestern University Journal of International Human Rights* 1, [69]. See also John Lee, 'The Underlying Legal Theory to Support a Well-Defined Human Right to a Healthy Environment as a Principle of Customary International Law' (2000) 25 *Columbia Journal of Environmental Law* 283, 312.

⁴⁹ Justice Brian Preston, 'The Environment and its Influence on the Law' (Keynote Address to the Legal Aid New

On the judicial level, two courts in the United States have addressed Weeramantry's *Gabcikovo* opinion in response to its use in argument. In the first case, the opinion was used in argument to evidence the existence of a right to life which could be impaired by environmental degradation.⁵⁰ Similarly, in the second case, the opinion was used as a basis to argue for the recognition of a human right to a clean environment, incorporating the right to life, health and sustainable development.⁵¹ While in both cases the rights were considered insufficiently determinate at international law to have attained the status of custom,⁵² it is nonetheless significant that Weeramantry's opinion is being used in legal argument before domestic courts to support the existence of environmental rights. It indicates a growing, albeit not yet conventional, acceptance of the rights at the domestic level and a consequential development of international environmental law encouraged by Weeramantry's views.

(b) The Custom Debate

One would expect Weeramantry's extensive discussion of the status of sustainable development at international law to have been equally influential. However, while it has undoubtedly had an impact, this has been no greater than that occasioned by the far more limited discussion of the matter by the majority. Indeed, despite the two opinions appearing to differ significantly in their respective conceptions of sustainable development, both have had a similar ultimate effect when subsequently considered.

The two opinions agreed that sustainable development requires the integration of economic development with environmental protection. However, where the majority viewed it as a mere 'concept', Weeramantry explicitly identified the principle as one of customary international law.

While there is support for Weeramantry's view,⁵³ many criticise his perception of sustainable development as a part of customary international law.⁵⁴ For the most part, sustainable development is viewed as lacking sufficient normative value to be a principle of customary international law, at least insofar as it would oblige development to be sustainable.⁵⁵ This view

South Wales Civil Law Conference, 26 September 2007) 13
 <[http://www.lawlink.nsw.gov.au/lawlink/lec/ll Lec.nsf/vwFiles/Paper_Sept07_PrestonCJ_Environment_and_its_influence.doc/\\$file/Paper_Sept07_PrestonCJ_Environment_and_its_influence.doc](http://www.lawlink.nsw.gov.au/lawlink/lec/ll Lec.nsf/vwFiles/Paper_Sept07_PrestonCJ_Environment_and_its_influence.doc/$file/Paper_Sept07_PrestonCJ_Environment_and_its_influence.doc)> at 28 February 2008.

⁵⁰ *Sarei and Others v Rio Tinto Plc* (2002) 221 F. Supp 2d 1116, 1157 (Morrow DJ) [*Sarei*].

⁵¹ *Flores and Others v Southern Peru Copper Corporation* (2002) 253 F. Supp 2d 510, 520 (Haight SDJ) [*Flores*].

⁵² *Flores, supra* note 51 at 520; *Sarei, supra* note 50 at 1158.

⁵³ Philippe Sands, *Principles of International Environmental Law* (2nd ed, 2003), 254; Virginia Daile, 'Sustainable Development: Reevaluating the Trade vs. Turtles Conflict at the WTO' (2000) *Journal of Transnational Law & Policy* 331, 343; Mario Prost, 'Is European Law Becoming More Sustainable?' in M. Gehring and M. Segger (eds) *Sustainable Development in International Trade Law* (2005) 415, 418.

⁵⁴ Boyle and Freestone, above n 28, 16; Atapattu, above n 4, 158; Marong, above n 22, 48; Lowe, above n 43, 24; French, above n 33, 51; Segger, above n 44, 597; Günther Handl, 'Environmental Security and Global Change: The Challenge to International Law' (1990) 1 *Yearbook of International Environmental Law* 3, 25; Markus Gehring and Marie-Claire Cordonier Segger, 'Introduction' in M. Gehring and M. Segger (eds) *Sustainable Development in International Trade Law* (2005) 1, 5; Marie-Claire Cordonier Segger, 'Integrating Social and Economic Development and Environmental Protection in World Trade Law' in M. Gehring and M. Segger (eds) *Sustainable Development in International Trade Law* (2005) 133, 134.

⁵⁵ Atapattu, above n 4, 159; Lowe, above n 43, 23-24.

is given further credence by noting that sustainable development is never used as a standard to determine that states have acted unsustainably.⁵⁶

The principle of sustainable development is, however, procedurally important and is widely used in the evaluation of project decisions.⁵⁷ As such, it is reasonable to agree that 'although international law may not require development to be sustainable, it does require development decisions to be the outcome of a process which promotes sustainable development'.⁵⁸ In this sense, sustainable development may be seen as a binding norm of 'practical reasoning' which should be applied to resolve conflicts between the primary norms of development and environmental protection when they arise.⁵⁹ If Weeramantry's conception of sustainable development as a legal norm is interpreted in this light, it does not differ significantly in substance from that of the majority.⁶⁰ In a consistent interpretation, both opinions would use the principle of sustainable development, not as a standard, but as a tool for the integration of development and the environment in the decision-making process.

Whether or not this was Weeramantry's intention, this interpretation of the two opinions is supported by decisions of domestic and international tribunals invoking *Gabcikovo*. Consequently, regardless of whether the opinion of the majority or that of Weeramantry is relied upon, sustainable development is used as an approach to decision-making which necessitates consideration of environmental protection alongside economic development.

Thus, in two domestic cases, the opinion of Weeramantry has been invoked as supporting the status of sustainable development as a principle of custom. In the first, the Supreme Court of Sri Lanka referred to the need for environmental protection to 'constitute an integral part of the development process' and indicated that in relation to a proposed mining agreement: 'due regard should be had by the authorities concerned to the general principle encapsulated in the phrase "sustainable development"'.⁶¹

The Court drew extensively on the opinion of Weeramantry⁶² and, accepting the principle's normative status, proposed that sustainable development would become binding in Sri Lanka if adopted by the superior courts as a part of domestic law.⁶³

⁵⁶ Lowe, above n 43, 23; Boyle and Freestone, above n 28, 16.

⁵⁷ Atapattu, above n 4, 160.

⁵⁸ Boyle and Freestone, above n 28, 17.

⁵⁹ Marong, above n 22, 44; Lowe, above n 43, 31, 35.

⁶⁰ See Marong, above n 22, 44; Boyle and Freestone, above n 28, 17.

⁶¹ *Tikiri Banda Bulankulama and Others v Secretary, Ministry of Industrial Development* (2000) 3 SLR 243 at 274, 276 [Tikiri].

⁶² *Ibid.*, 278. The impact of Weeramantry's opinion on the judgment is discussed in Shyami Puvimanasinghe, 'Public Interest Litigation, Human Rights and the Environment in the Experience of Sri Lanka' in Nico Shrijver and Friedl Weiss (eds) *International Law and Sustainable Development: Principles and Practice* (2004) 671; Sumudu Atapattu, 'Sustainable Development, Myth or Reality? A Survey of Sustainable Development Under International and Sri Lankan Law' (2001) 14 *Georgetown International Environmental Law Review* 265, 295.

⁶³ *Tikiri*, above n 61, 274; Atapattu, above n 62, 296.

In the second case, the South African High Court⁶⁴ looked to *Gabcikovo* in determining whether administrative action in denying a development permit was unreasonable.⁶⁵ Referring to Weeramantry's opinion, the Court said that: 'sustainable development constitutes an integral part of modern international law and will balance the competing demands of development and environmental protection.'⁶⁶

In both of these cases, the respective Courts accepted that sustainable development is a principle of custom which requires the integration of the environment with development. However, sustainable development was used as an approach to decision-making, rather than a standard. In the first case, the requirement was one of 'due regard' by authorities to sustainable development principles.⁶⁷ In the second, administrative action was required to take 'cognisance of a wide spectrum of considerations' in the sustainable development paradigm.⁶⁸

Other cases at the domestic and international levels rely solely on the majority's reasoning, but to similar effect. Thus, in the *US-Shrimp Case*, the World Trade Organization (WTO) Appellate Body, acknowledged that the *concept* of sustainable development is generally accepted as integrating economic development and environmental protection.⁶⁹ Similarly, in a recent international arbitration, the Arbitral Panel invoked the *concept* of sustainable development, not to provide concrete answers as to 'what may or may not be done' in the context of the dispute, but rather to simply acknowledge that the environment and development were 'mutually reinforcing, integral concepts.'⁷⁰ In both cases then, sustainable development was seen as a procedural tool for integration, rather than a standard by which state action could be evaluated.

At the municipal level, the Hong Kong High Court has relied on the majority's reasoning in determining that a decision-maker did not adequately comply with the principle of sustainable development. The Court held that:

The concept enables the Court to hold a balance between environmental protection and development considerations [...]. The Board's approach towards reclamation ... seen in this light, is clearly inadequate.⁷¹

In similarity to the other discussed cases, the Court here views sustainable development as a procedural 'concept', which influences administrative decision-making by requiring proper consideration of the balance between environmental protection and development.

⁶⁴ Witwatersrand Local Division

⁶⁵ *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation, Environment and Land Affairs* [2004] JOL 12710, 1 (Claassen J) [BP].

⁶⁶ *BP*, above n 65, 25 [emphasis added].

⁶⁷ See Atapattu, above n 62, 296.

⁶⁸ *BP*, above n 65, 35.

⁶⁹ *United States – Import Prohibition of Certain Shrimp and Shrimp Products* (1998) AB-1998-4, WT/DS58/AB/R (Appellate Body), [129]; Sands, above n 29, 399.

⁷⁰ *Arbitration Regarding the Iron Rhine Railway (Belgium v Netherlands)* (2005), [59]-[60] <http://www.pca-cpa.org/showpage.asp?pag_id=1155> at 18 March 2008 [Railway].

⁷¹ *Society for the Protection of the Harbour Ltd v Town Planning Board* [2003] HKCU 793, [86]-[87] (Hon Chu J).

A review of the literature and judicial decisions which make use of *Gabcikovo* indicates that, in respect of sustainable development, the manner in which the opinion of the majority and that of Weeramantry have subsequently been utilised do not differ significantly. Both have been endorsed as recognising the aim of sustainable development to integrate economic considerations with environmental protection. Further, whether considered custom or not, sustainable development is used procedurally as an ‘interstitial norm’ to guide decision-makers in reaching an ‘integrated outcome’.⁷² The impact of sustainable development does not therefore depend on it being a part of custom.⁷³ Rather, explicit endorsement by either the majority or Weeramantry would have been sufficient to ensure that the concept was entrenched as central to international environmental law.⁷⁴

3.2 The Precautionary Principle

The precautionary principle, seen by most as an integral procedural aspect of achieving sustainable development,⁷⁵ did not play as large a role in *Gabcikovo* as had been anticipated.⁷⁶ The majority did not mention the principle in its reasons, and Weeramantry did so only incidentally.⁷⁷ It may come as a surprise therefore that despite this lack of attention, the decision has had a significant, though perhaps unintended, adverse effect on the principle.

Precaution was one of a number of emerging environmental norms argued by Hungary to evidence the lawfulness of its Treaty termination.⁷⁸ It relied on the precautionary principle, essentially in its traditionally articulated form, arguing that international law required States to:

[...] take precautionary measures to anticipate, prevent or minimise damage to their transboundary resources and mitigate adverse effects. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing such measures.⁷⁹

The majority decision did accept in general terms that new norms of international environmental law had developed.⁸⁰ The Court also accepted that ‘vigilance and prevention’ are needed in the ‘field of environmental protection’.⁸¹ Such statements might be taken as indicating

⁷² Segger, above n 54, 134, 135.

⁷³ Marong, above n 22, 60-61; French, above n 33, 52.

⁷⁴ A-Khavari and Rothwell, above n 2, 527. See also French, above n 33, 48; Higgins, above n 4, 110.

⁷⁵ See for example: Boyle and Freestone, above n 28, 9; Stec, above n 3, 324; Marong, above n 22, 59.

⁷⁶ Arie Trouwborst, *Evolution and Status of the Precautionary Principle in International Law* (2002) 162.

⁷⁷ See however, the discussion of the related concept of Environmental Impact Assessments *infra*.

⁷⁸ See *Gabcikovo-Nagymaros Project (Hungary v Slovakia)* ‘Memorial of Hungary’, Volume 1 [10.94] and “Counter-Memorial of Hungary” Volume 1 [4.24]; Judgment, above n 11, 62.

⁷⁹ *Application of the Republic of Hungary v The Czech and Slovak Republic on the Diversion of the Danube River*, partially reproduced in: Trouwborst, above n 76, 163. This is a similar articulation of the precautionary principle to that found in the *Bergen Declaration* which provides: ‘Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.’ See *Ministerial Declaration on Sustainable Development in the ECE Region*, UN Doc. A/CONF.151/PC10, Annex 1, [7], partially reproduced in: Atapattu, above n 4, 145.

⁸⁰ Judgment, above n 11, 78.

⁸¹ *Ibid.*, 78.

general support for the precautionary principle.⁸² However, despite Hungary's arguments, the majority failed to ever expressly mention, let alone address the status or possible application of the precautionary principle. This lack of consideration in the Court's reasons has had a negative effect on the precautionary principle in two key respects.

First, the very failure of the majority to adequately articulate the status of the precautionary principle has, in an instance of 'judicial deference to perceived institutional hierarchies',⁸³ caused uncertainty and obstructed the development of the principle at the international level. Thus, for example, in the *EC-Hormones Case*, when the European Communities argued that the precautionary principle was a part of custom, the WTO Appellate Body considered it 'imprudent' to recognise it as such, referring to the failure of the ICJ in *Gabcikovo* to do so.⁸⁴ This reasoning was repeated in the *EC-Biotech Case* in which the Panel noted the lack of any 'authoritative decision by an international court or tribunal' on the issue.⁸⁵ Similarly, in the *Southern Bluefin Tuna Case*, ITLOS did not rule on the status of the precautionary principle, one judge describing this as 'understandable' given that other international tribunals had 'avoided [giving] an answer'.⁸⁶

Academic commentary also reflects this confusion. For example, the International Law Commission (ILC), the primary international body responsible for the codification and development of international law,⁸⁷ while recently noting that the precautionary principle was 'embraced worldwide', was hesitant to declare it as custom, referring explicitly to the lack of pronouncement in *Gabcikovo*.⁸⁸

It is an appropriate inference that *Gabcikovo* has had a negative impact on the willingness of other international tribunals and bodies to use and develop the precautionary principle, and by extension, international environmental law generally.⁸⁹ While the ICJ need not have declared the principle as one of custom,⁹⁰ it should have made some attempt to clarify the status of the

⁸² Trouwborst, above n 76, 164.

⁸³ Philippe Sands, 'Sustainable Development: Treaty, Custom, and the Cross-fertilization of International Law' in A. Boyle and D. Freestone (eds) *International Law and Sustainable Development: Past Achievements and Future Challenges* (1999) 39, 56.

⁸⁴ *EC Measures Concerning Meat and Meat Products (Hormones)* (1998) AB-1997-4, WT/DS26/AB/R (Appellate Body) [121] – [123].

⁸⁵ *European Communities – Measures Affecting the Approval and Marketing of Biotech Products* (2006) WT/DS291/R (Panel) [7.87]-[7.88].

⁸⁶ *Southern Bluefin Tuna Cases (Requests for Provisional Measures) (New Zealand v Japan; Australia v Japan (Separate Opinion of Judge Treves))* (2001) ITLOS, [9] <http://www.itlos.org/case_documents/2001/document_en_126.pdf> at 25 March 2008.

⁸⁷ *Statute of the International Law Commission* (1947), GA Res 174(II) of 21 November 1947, Article 1 <http://untreaty.un.org/ilc/texts/instruments/english/statute/statute_e.pdf> at 31 March 2008.

⁸⁸ Pemmaraju Sreenivasa Rao (Special Rapporteur) *Third report on the legal regime for the allocation of loss in case of transboundary harm arising out of hazardous activities* (2006) 58th Session of the ILC, UN Doc. A/CN.4/566, [24].

⁸⁹ Helene Trudeau and Celine Negre, 'Precaution in Multilateral Environmental Agreements and its Impact on the World Trading System' in M. Gehring and M. Segger (eds) *Sustainable Development in International Trade Law* (2005) 695, 616.

⁹⁰ Though, as will be seen *infra*, there are strong arguments that this was the case.

principle when the opportunity was clearly provided.⁹¹ The failure of articulation is made all the more damaging because the ICJ, as the judicial organ of the United Nations, has a perceived authority on questions of public international law to which other international tribunals and bodies defer. Ironically considered valuable by some in reducing inconsistency between tribunals,⁹² the consequent 'chain reaction' of 'precautionary paralysis,' results in no other tribunal being willing to rule on the status and content of the precautionary principle.⁹³ It is foreseeable that until the ICJ takes the possibly distant opportunity to address the issue, tribunals, states and international lawyers will remain confused, and the precautionary principle's legitimate development will be hampered.

The second, more subtle impact of the majority decision on the precautionary principle is altogether more serious. Hungary relied on a 'defence of ecological necessity' as justifying its conduct in terminating the Treaty, arguing that the Project would seriously damage the Danube.⁹⁴ The Court recognised for the first time that the environment is an 'essential interest' of a State on which a customary defence of necessity might be grounded.⁹⁵ However, the Court found that for a defence of necessity to lie, the interest in question must be threatened by a 'grave and imminent peril'.⁹⁶ Such a 'peril' could not be demonstrated in circumstances, such as those existing in Hungary, where the future ecological harm was uncertain.⁹⁷ The 'mere apprehension of a possible peril' was considered insufficient.⁹⁸ Additionally, the risk was not considered sufficiently 'imminent'.⁹⁹ While the Court did not discount the possibility that a long term 'peril' might be considered 'imminent,' it would need to be established at the point in time at which necessity is invoked 'that the realisation of that peril, however far off it might be, is not thereby any less certain and inevitable.'¹⁰⁰

While appearing to deal solely with the law of state responsibility, this part of the decision, perhaps inadvertently, deals a blow to the precautionary principle. This is because the precautionary principle requires that action to prevent environmental damage be taken even 'before scientific proof of harm is provided'.¹⁰¹ However, when Hungary argued that its scientific

⁹¹ This is a common view in academic commentary. See for example, Trouwborst, above n 76, 164; Owen McIntyre, 'Case Law Analysis: Environmental Protection of International Rivers' (1998) 10(1) *Journal of Environmental Law* 79, 88.

⁹² Judge Gilbert Guillaume, 'The proliferation of international judicial bodies: The outlook for international legal order' (Speech to the Sixth Committee of the General Assembly of the United Nations, 27 October 2000) <<http://www.icj-cij.org/presscom/index.php?pr=85&p1=6&p2=1&search=%22gabcikovo%22>> at 8 February 2008.

⁹³ Trouwborst, above n 76, 177.

⁹⁴ Judgment, above n 11, 35.

⁹⁵ *Ibid.*, 41.

⁹⁶ *Ibid.*, 42.

⁹⁷ *Ibid.*, 42-44.

⁹⁸ *Ibid.*, 42.

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.* See on this point Daniel Dobos, 'The Necessity of Precaution: The Future of Ecological Necessity and the Precautionary Principle' (2002) 13 *Fordham Environmental Law Journal* 375, 381.

¹⁰¹ David Freestone and Ellen Hey, 'Origins and Development of the Precautionary Principle' in D. Freestone and E. Hey (eds) *The Precautionary Principle and International Law: The Challenge of Implementation* (1996) 1, 13.

evidence raised a serious threat of ecological harm, this risk was not considered sufficiently *certain* to establish the existence of a 'peril'.

The Court's conclusions on this point are challenging for environmental cases, where 'problems of proof are rampant'.¹⁰² In particular, where, as in *Gabcikovo*, the damage apprehended is the result of 'some relatively slow natural processes',¹⁰³ a defence of necessity would not appear to lie unless it can be shown with certainty that damage will occur.¹⁰⁴ Because scientific evidence of environmental harm is rarely conclusive, the opportunity for an ecological necessity defence to be used appears to be non-existent, even as regards a 'legitimate precautionary measure',¹⁰⁵ unless use of the precautionary principle is entertained.¹⁰⁶ However, despite the capacity of the precautionary principle to mitigate the harshness of this result, it did not warrant a mention in the decision. The capacity of the Court's unnecessarily strict approach to impair the use of the precautionary principle was recognised by the ILC in 1999. In reviewing the law of state responsibility, the body noted that necessity 'should not be formulated so stringently that the party relying on it would have to prove beyond the shadow of a doubt that the apprehended event would occur.'¹⁰⁷

Two objections may be anticipated at this point. The first is that, whatever its impact on the precautionary principle, the decision was a correct application of the strict law of state responsibility.¹⁰⁸ This is undoubtedly the case, and the majority decision is extensively cited as authority for the customary law of necessity.¹⁰⁹ However, rules of customary international law are to be applied with consideration of other, potentially relevant, customary principles.¹¹⁰ While its status is still disputed, there is no doubt that the precautionary principle was emerging at the time the dispute arose,¹¹¹ with significant academic commentary tending in favour of accepting the principle as custom.¹¹² This trend has only become more pronounced in the years

¹⁰² Stec, above n 3, 379. See also Freestone and Hey, above n 101, 13.

¹⁰³ Judgment, above n 11, 44.

¹⁰⁴ Atapattu, above n 4, 153; Dobos, above n 100, 381.

¹⁰⁵ Preiss, above n 5, 336.

¹⁰⁶ Dobos, above n 100, 382; A-Khavari and Rothwell, above n 2, 515.

¹⁰⁷ ILC, *Report of the ILC on the work of its fifty-first session*, GAOR, 54th Sess, Supp. No. 10, UN Doc. A/54/10 (1999), [377].

¹⁰⁸ A. Salman (ed) 'Groundwater: Legal and Policy Perspectives: Proceedings of a World Bank Seminar', *World Bank Technical Paper No. 456* (1999) 149 <http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/1999/12/30/000094946_99122006354976/Rendred/INDEX/multi_page.txt> at 28 February 2008.

¹⁰⁹ See, for example, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 136, 195; *CMS Gas Transmission Company v Argentina* (2005) 44 ILM 1205, [308], [313] (ICSID); *Patrick Mitchell v Democratic Republic of Congo (Annulment Proceedings Regarding the Award Rendered on February 9)* (2004) ICSID Case No. ARB/99/, 27.

¹¹⁰ See Hugh Thirlway, 'The Sources of International Law' in M. Evans (ed) *International Law* (2003) 117, 136. The potential for 'procedural linkage' between the law of state responsibility and the precautionary principle was recognised before the case was handed down: Catherine Tinker, 'State Responsibility and the Precautionary Principle' in D. Freestone and E. Hey (eds) *The Precautionary Principle and International Law: The Challenge of Implementation* (1996) 53, 54.

¹¹¹ Philippe Sands, 'Environmental Protection in the Twenty-First Century: Sustainable Development and International Law' in R. Revesz, P. Sands and R. Stewart (eds) *Environmental Law, the Economy and Sustainable Development* (2000) 369, 384.

¹¹² See for example: Owen McIntyre and Thomas Mosedale, 'The Precautionary Principle as a Norm of Customary

since the case.¹¹³ The Court, however, made no reference to the precautionary principle in an area where it was arguably relevant.¹¹⁴ Of course, concerns about the potential abuse of scientific uncertainty to avoid treaty obligations are understandable.¹¹⁵ However, given the strength of the contention that the precautionary principle was a part of custom, some consideration should have been given to it, both in the interests of certainty and of ensuring the case was correctly reasoned.

The second anticipated objection is that the precautionary principle is important primarily in domestic law. Given that in this sphere state responsibility is irrelevant, concern that the majority's decision will affect use of the precautionary principle might be argued to be unfounded. However, in at least one Australian case, the majority's views on ecological necessity have been cited in relation to the application of the precautionary principle under domestic law.¹¹⁶ While probably making no difference to the outcome of the case, the very fact that the majority's discussion of necessity was considered relevant is, for the reasons noted above, cause for concern.

Despite the fact that the precautionary principle was barely addressed, *Gabcikovo* is widely recognised as significant for its development.¹¹⁷ Its impact is essentially negative. First, the very failure of the Court to address the principle has hampered its international development. Secondly, the Court's conclusions in relation to the law of necessity have begun a dangerous trend towards allowing the law of state responsibility to override that of environmental protection.

3.3 Environmental Impact Assessments

Commonly viewed both as a necessary procedural element in achieving sustainable development¹¹⁸ and one of the substantive aspects of the implementation of precautionary measures,¹¹⁹ Environmental Impact Assessments (EIAs) were also addressed in *Gabcikovo*. Contrary to the negative impact of *Gabcikovo* on the precautionary principle, the discussion of EIAs has had a positive impact on the development of international environmental law in this area.

International Law' (1997) 9(2) *Journal of Environmental Law* 221, 235; James Cameron and Juli Abouchar, 'The Status of the Precautionary Principle in International Law' in D. Freestone and E. Hey (eds) *The Precautionary Principle and International Law: The Challenge of Implementation* (1996) 29, 30-31; Hey, above n 9, 307; Philippe Sands, *Principles of international environmental law I: Frameworks, standards and implementation* (1995), 212-213; McIntyre, above n 91, 89.

¹¹³ See the extensive literature review in Trouwborst, above n 76, particularly at 272-275.

¹¹⁴ Philippe Sands, 'International Environmental Litigation and its Future' (1999) 32 *University of Richmond Law Review* 1619, 1631; Russell Unger, 'Brandishing the Precautionary Principle Through the Alien Tort Claims Act' (2001) 9 *New York University Environmental Law Journal* 638, 655.

¹¹⁵ Dobos, above n 100, 397.

¹¹⁶ *Telstra Corporation Ltd v Hornsby Shire Council* (2006) 146 LGERA 10, 40 (Preston CJ and Brown C).

¹¹⁷ See Trudeau and Negre, above n 89, 611.

¹¹⁸ Boyle and Freestone, above n 28, 9; Marong, above n 22, 64; Atapattu, above n 62, 272-273.

¹¹⁹ McIntyre and Mosedale, above n 112, 238; Freestone and Hey, above n 101, 13.

Generally understood, EIA refers to a study addressing the environmentally adverse effects of a particular project.¹²⁰ The Court did not expressly address this principle. It noted that the Treaty in the case already contained provision for steps to be taken to avoid environmental damage and only added that:

'The awareness of the vulnerability of the environment and the recognition that environmental risks have to be assessed on a continuous basis have become much stronger in the years since the Treaty's conclusion.'¹²¹

While probably a reference to the EIA principle,¹²² the Court's statement couches it in vague language, without explanation of its legal basis.¹²³ However, while suffering from some uncertainty, the majority judgment has not had the same kind of negative impact on EIAs as on the precautionary principle. This is perhaps because the circumstances of the case did not warrant an extensive discussion of EIAs, meaning that its absence from the majority's reasons was not so striking. At worst, the Court's decision is considered unhelpful;¹²⁴ at best it has promoted the development of the EIA principle, rather than causing it lasting damage.

Weeramantry did, however, address EIA in some detail. He contended that treaties are to be interpreted in accordance with modern environmental obligations, regardless of the date of signature.¹²⁵ On this basis, he proposed that:

'Environmental law in its current state of development would read into treaties which may reasonably be considered to have a significant impact upon the environment, a duty of environmental impact assessment'.¹²⁶

There are two important aspects to this opinion. Firstly, Weeramantry framed the obligation to conduct an EIA as 'a specific application of the larger general principle of caution',¹²⁷ thereby indicating his understanding that both the principles of precaution and EIA possess legal status. Secondly, he made reference to the principle of Continuing Environmental Impact Assessment (CEIA)¹²⁸ as an important aspect of international law.¹²⁹ The requirement that Weeramantry imposed under this principle was more than assessment before a project commences: it is an

¹²⁰ Preiss, above n 5, 310.

¹²¹ Judgment, above n 11, 68.

¹²² Stec, above n 3, 364; Paulo de Castro, 'The Judgement in the *Case Concerning the Gabčíkovo-Nagymaros Project: Positive Signs for the Evolution of International Water Law*' (1997) 8 *Yearbook of International Environmental Law* 21, 28. It is also viewed by some as an indirect reference to the precautionary principle: Atapattu, above n 4, 251; and by others merely as an elucidation of the obligation to control transboundary risks: Boyle, above n 33, 17.

¹²³ Atapattu, above n 4, 341.

¹²⁴ Preiss, above n 5, 345.

¹²⁵ *Ibid.*, 348.

¹²⁶ Separate Opinion, above n 4, 112.

¹²⁷ *Ibid.*, 113.

¹²⁸ Commonly known as 'post-project monitoring': Atapattu, above n 4, 305.

¹²⁹ Separate Opinion, above n 4, 111.

ongoing assessment for the duration of the project's operation, in order to catch any unexpected environmental consequences.¹³⁰

The aspect of Weeramantry's opinion dealing with EIAs appears to have had less obvious impact than that relating more generally to sustainable development. It has not, for example, been expressly cited by any international or domestic tribunals except insofar as it deals with the need for treaties to be interpreted in light of modern norms and principles.¹³¹ It is worth noting however, that an Arbitral Panel, chaired by the current President of the ICJ, Dame Rosalyn Higgins, accepted in 2005 that there existed, as a general principle of law, a duty to mitigate environmental harm in relation to development projects which might have a significant adverse impact.¹³² With EIAs essential to the prevention and mitigation of harm, this decision implicitly endorses Weeramantry's opinion of the principle as a binding norm of international law. It is surprising then, that his opinion does not warrant a mention.

However, even without express judicial recognition, the two key aspects of Weeramantry's opinion have had an impact on government policy, the conduct of international bodies and academic commentary.

The impact of an opinion on state practice is inevitably difficult to assess, with governments rarely indicating the international legal basis for their policy decisions. It is certainly reasonable to expect that development of the EIA principle through pronouncement on its customary status will causally affect the national practice of those hundred or more countries with regulations for the conduct of EIAs.¹³³ This follows from practice showing that, while the obligation to conduct EIAs arose first in the domestic sphere, international EIA norms have 'filtered back' into national law.¹³⁴ Indeed, several governments have, since *Gabcikovo*, declared intentions to further expand their conduct of EIAs.¹³⁵ However, the causal link between the decision and these policy developments is generally difficult to establish.

Nonetheless, one example where *Gabcikovo* has had a demonstrable impact on state practice is in South Africa. A reference document released by the Department of Environmental Affairs and Tourism entitled 'Environmental Assessments for International Agreements' states its function as a 'guide to the environmental assessment requirements of international law' by which South African domestic law is influenced.¹³⁶ Weeramantry's opinion is cited in relation to the principle

¹³⁰ *Ibid.*

¹³¹ See in this respect two cases before the Supreme Court of India: *State of Punjab and Another v Devans Modern Breweries Ltd and Another* [2003] 4 LRI 647 [338] (Sinha J); *Liverpool & London SP & I Asson Ltd v MV Sea Success I & Another* [2003] 4 LRI 805 [93] (Sinha J). See also *Dispute Concerning Article 9 of the OSPAR Convention (Ireland v. United Kingdom)* (2003) 42 ILM 1118 [101] (Permanent Court of Arbitration) citing the majority opinion to similar effect.

¹³² *Railway*, *supra* note 56 at [59].

¹³³ Markus Gehring and Marie-Claire Cordonier Segger, 'Sustainable Development Through Process in World Trade Law' in M. Gehring and M. Segger (eds) *Sustainable Development in World Trade Law* (2005) 189, 195.

¹³⁴ *Ibid.*, 194.

¹³⁵ Marie-Claire Cordonier Segger, 'Negotiating Sustainable Development in the Free Trade Area of the Americas?' in M. Gehring and M. Segger (eds) *Sustainable Development in World Trade Law* (2005) 461, 483.

¹³⁶ James Cross and Reuben Heydenrych, (2005) *Environmental Assessments for International Agreements: Integrated Environmental Management Information Series 19* (Pretoria: DEAT) 4.

of CEIA, the report noting that the principle necessitates 'a duty of monitoring the environmental impacts of any substantial project during the scheme's operation, whether or not this is required explicitly by international environmental agreements.'¹³⁷ A rare example of government level endorsement of international judicial opinion, this report demonstrates that, at least in one case, Weeramantry's opinion has impacted upon the legal understanding and development of domestic government policy.

Gabcikovo has also had an impact on the practice of international bodies. Thus, for example, the ILC cites the majority decision, but is also undoubtedly impacted by Weeramantry's extended explanation, in noting the customary obligation of 'continuous monitoring of hazardous activities'.¹³⁸ The World Bank has also taken note of the decision, with its lead counsel in environmental and international law citing Weeramantry's opinion as evidencing the customary status of EIA.¹³⁹

Finally, academic commentary places importance on Weeramantry's opinion in two key respects. Firstly, his views regarding the obligation to conduct an EIA are cited as evidencing the customary status of the principle.¹⁴⁰ With the obligation to perform an EIA seen as 'ancillary to the precautionary principle',¹⁴¹ his opinion is also taken to evidence growing international acceptance of this related principle. Given that academic commentary is a subsidiary source of international law,¹⁴² the greater the reliance on Weeramantry's opinion in this respect, the greater the possibility that both principles will ultimately and conclusively be recognised as customary international law.

Secondly, Weeramantry's opinion is viewed as important in its elaboration of the concept of CEIA as requiring continuous monitoring of projects with significant potential environmental impact.¹⁴³ This commentary includes the extra-judicial writings of current members of domestic courts which describe the 'signal importance' of Weeramantry's views on CEIA in providing guidance for the application of ambiguous domestic law.¹⁴⁴ Thus, academic commentary, in addition to the conduct of states and organisations, confirms the importance of *Gabcikovo* to the development of the EIA principle in international environmental law.

¹³⁷ *Ibid.*, 7.

¹³⁸ Rao, above n 88, [31].

¹³⁹ Charles Di Leva, *Legal Foundation of SEA*, online: World Bank <http://info.worldbank.org/etools/docs/library/121380/m1_leva.pdf> at 14 March 2008.

¹⁴⁰ Preiss, above n 5, 351.

¹⁴¹ Gehring and Segger, above n 133, 192. See also Trouwborst, above n 76, 165; Preiss, above n 5, 341.

¹⁴² See *Statute* above n 7, Article 38(1)(d).

¹⁴³ Preiss, above n 5, 350-351; Stec, above n 3, 364.

¹⁴⁴ See Justice Paul Stein, 'Are Decision-Makers Too Cautious With the Precautionary Principle?' (Speech delivered to the Land and Environment Court of New South Wales Annual Conference, 14-15 October 1999) <http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_speech_stein_141099> at 28 February 2008.

4. Conclusion: The Impact of *Gabcikovo*

The *Gabcikovo* decision undoubtedly did not live up to the expectations of those seeking a strong endorsement of principles of international environmental law by the World Court. However, two important conclusions may be drawn from the preceding discussion. The first is that widespread use of *Gabcikovo* by domestic and international tribunals, states, organisations and academic commentary demonstrates that the case has had a significant impact on the development of international environmental law. The second is that despite initial appearances, both the majority opinion and that of Weeramantry have contributed to this impact. It is thus overly simplistic to describe the Court's judgment generally as a 'missed opportunity' for international environmental law.¹⁴⁵ One should be equally cautious about discounting the majority opinion in favour of a wholehearted endorsement of that of Weeramantry.¹⁴⁶

Contrary to common perception, even the majority's single reference to the 'concept' of sustainable development has been significantly influential within international and domestic judicial fora. On the other hand, Weeramantry's opinion, while lauded as progressive, has received at least as much criticism as praise. Indeed, while on an initial reading, the two opinions appear to differ extensively, their subsequent consideration is remarkably similar in ultimate effect. In what is perhaps an indication of tribunals reeling in the more extreme elements of Weeramantry's view, both the majority's 'concept' and Weeramantry's norm of sustainable development are used as an approach to decision-making which integrates environmental considerations with those of economic development.

Looking to the impact of the case on the precautionary principle, one is more justified in declaring the judgment of the Court as a damaging missed opportunity. The failure of the Court to address the status of the principle has caused confusion and uncertainty in international tribunals and academic circles alike. Moreover, the Court's reasoning in relation to the law of necessity has the potential to significantly erode the principle as it applies in the context of the law of state responsibility.

Finally, in relation to the law of EIAs, Weeramantry's opinion, assisted by that of the majority, has resulted in positive developments for the status and content of this aspect of international environmental law. This is reflected in government policy, the practice of international organisations and academic commentary.

Considering the impact of the ICJ's judgment in the *Gabcikovo-Nagymaros Case*, there is much cause for optimism. While some of the more damaging aspects of the decision require remedying, international environmental law has, for the most part, developed positively as a result of the case. Widespread consideration of *Gabcikovo* confirms that the ICJ retains its status at the apex of international tribunals. One can only hope that, in future, the Court will take the responsibility that such status engenders to take bolder steps in developing international environmental law for the better.

¹⁴⁵ A-Khavari and Rothwell, above n 2.

¹⁴⁶ See Preiss, above n 5, 351.