International Judiciary Practice in the Development of International Environmental Law: A Decade Review

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This year marks the tenth anniversary of the Xiamen Academy of International Law. The summer courses that the Academy runs have been generally recognized as a valuable forum for the dissemination and teaching of international law, attracting young lawyers and students of international law from all parts of the world, particularly from Asia, to interact and mingle, to exchange and share their views on contemporary issues of international law. This essay is dedicated to the young institution for its commendable achievement in the first decade of its establishment.

In the past ten years, there has been a discernible increase of international litigations concerning international environmental law, covering various areas on the environment, e.g. uses of shared water resources, protection of wildlife, land use. Through judicial practice, general principles and rules of international environmental law are further substantiated and contextually concretized for application. Notwithstanding its soft nature, international environmental law continues to influence economic and social development of States with a view to achieving sustainable development. Case law as evolved from juridical practice has made a positive contribution to this process.

The essay, given its limited space, will examine a few aspects of international environmental law in light of the recent jurisprudence of international courts and arbitral tribunals. It will first highlight some important judicial pronouncements on the principle of sustainable development in recent cases in the International Court of Justice (ICJ, or the Court). Following on that, it will review some procedural rules as applied by the courts in dealing with disputes arising from activities that pose a risk of transboundary environmental harm to other States. Although confined to specific cases, judicial rulings on these procedural duties will likely exert impact on the future conduct of States. The third section will discuss an issue of growing importance in international law: subsequent agreement and practice in the interpretation and application of international treaties. The issue is not necessarily limited to treaties on the environment, but persistently relevant in environmental cases. It has arisen in a number of cases
recently. The final part of the essay will briefly review the concept of “interests of the international community” as perceived by judicial organs.

I The Principle of Sustainable Development

From a mere philosophical concept to a general principle of law, sustainable development is now well placed in international law. In the last twenty-five years, the notion, upon reflection of generational equity and sustainability of natural resources for mankind, has gradually found its way into economic and social programs of States, and in the corpus of international law. After years of debate since the 1972 Stockholm Conference on the relationship between environment and development, States ultimately came to the consensus at the Rio Conference on Environment and Development in 1992 that,

The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.

In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.¹

In the wake of the Rio Conference, a series of world conferences and actions on environment and development reaffirmed the concept.²

The first case in which the ICJ has the occasion to discuss the concept of sustainable development is a dam project dispute between Hungary and Slovakia submitted to the Court for settlement by a Special Agreement concluded between the parties in 1993, one year after the Rio Conference.³ The parties held differences over the termination and implementation of the 1977 Treaty between Hungary and Czechoslovakia on the Construction and Operation of the Gabčíkovo-Nagymaros Barrage System of Locks. The project, located on the boundary river of Danube, was jointly invested by the parties under the said Treaty. Due to alleged environmental risks, Hungary in 1989 unilaterally suspended and subsequently abandoned the works of the Nagymaros Project