



# THE REPUBLIC OF KOREA

PERMANENT MISSION TO THE UNITED NATIONS

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**Statement by Mr. KIM, In-chul**

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**Sixth Committee of the 68<sup>th</sup> Session of the UN General Assembly**

**Agenda item 81 (ILC report)**

29 October 2013

New York

<Check against Delivery>

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Mr. Chairman,

At the outset, my delegation would like to extend its deep appreciation for the work undertaken by the International Law Commission. Today, my comments will be confined to the substantive issues introduced by the chairman of the ILC. Our thanks go to Special Rapporteurs, Mr. Georg Nolte and Madame Concepcion Escobar Hernande for their remarkable work on the topics "Subsequent agreements and subsequent practice in relation to the interpretation of treaties", and "immunity of state officials from foreign criminal jurisdiction, respectively.

As we know, the work on the interpretation of treaties has been evolving since 2008 based on the topic of "Treaties over time." The work of the ILC merits special attention given the practical difficulties involving articles 31 and 32 of the Vienna Convention on the Law of Treaties. This work would provide States with appropriate guidelines on the interpretation of treaties by identifying and clarifying the scope and role of various agreements and practices related to the interpretation of treaties.

Having said that, I would like to comment on several issues related to the five draft conclusions provisionally adopted by the ILC.

Draft conclusion 1 states that "all means of interpretation in article 31 are part of a single integrated rule" (ILC Report 2013, p. 16 (7)). Questions have been lingering as to whether there exists a hierarchy among the means of interpretation provided for in Article 31. The commentary on draft conclusion 1, by affirming the absence of such a hierarchy, contributes to the resolution of such long-standing questions.

We take particular note of the comment that, “the obligation to place appropriate emphasis on the various means of interpretation (ILC Report 2013, pp. 18-19 (15)) is not to suggest that a court or any other interpreter is more or less free to choose how to use and apply the different means of interpretation but to require interpreters to carry out the evaluation which consists in identifying the relevance of different means of interpretation in a specific case and in taking into account their interaction (ILC Report 2013, pp. 18-19 (15)).

At the same time, my delegation would like to recall that in the first instance interpretation of a treaty falls upon each State’s own authority. Thus, it belongs to individual States the identification of the different means of interpretation.

Second, the ILC referred to its commentary of 1966 to conclude that subsequent agreements and subsequent practice constitute authentic means of treaty interpretation (ILC Report 2013, p. 20 (1)). Considering that discussion has continued as to the meaning of the term “authentic”, draft conclusion 2 and its commentary would play an important role in elucidating what this term indicates. The commentary states that subsequent agreements include non-binding agreements of all States parties to a treaty after its conclusion. On this point, further deliberation will be helpful for instances where most but not all parties agree on a decision.

My delegation agrees with draft conclusion 3 of the ILC which states that subsequent agreements and subsequent practice can be used to apply intertemporal law or evolutive interpretation. There is little doubt on the necessity of evolutive interpretation according to social and other developments. However, it also remains clear that it should not be forced beyond the extent intended by the original drafters of a treaty.

The fourth point regards the definition of subsequent agreements and subsequent practice (draft conclusion 4). Draft conclusion 4 specifies three different subsequent means of interpretation, including subsequent practice under Article 32 (ILC Report 2013, p. 31 (1)). Draft conclusion 4 is expected to provide a guideline in identifying the difficult issue of the precise scope of subsequent practice in terms of Article 31 (3)(b) of the Vienna Convention.

The fifth point concerns attribution of subsequent practice (draft conclusion 5). In the opinion of my delegation, like the ILC, subsequent practice that shall or may be taken into account is limited to practice of States parties to treaties. Interpretation by dispute settlement bodies although helpful in identifying what subsequent practice consists of, does not constitute *ipso facto* subsequent practice in terms of the Vienna Convention.

Lastly, regarding the future ILC workplan, my delegation hopes that the Special Rapporteur submits, as he plans to, the second report at the next session of the Commission. We also look forward to an in-depth discussion of the ILC on what was previously studied by its Study Group under the topic “Treaties over time”

Now moving on to Immunity of State officials from foreign criminal jurisdiction, Since the ILC determined to study it at its 57th session in 2007, the topic has undergone extensive deliberation. The topic is directly related to the principal rules of international law such as the sovereign equality of States, and the protection of essential values of the international community such as the fight against impunity. It will be indispensable for the ILC to work for the codification and progressive development of international rules related to this topic.

This year, the Special Rapporteur submitted the second report and six draft articles regarding the topic on the basis of last year's debates on her preliminary report in the ILC and this committee. Debates at the ILC focused mainly on the scope of the draft articles and provisionally adopted three draft articles. We would like to comment on some of the issues raised by these draft articles.

We concur with the three parameters formulated in draft article 1. At the same time, we hope that the ILC carries on further work, especially on the definition of State officials as holders of immunity and the scope of criminal jurisdiction so that workable answers can be given.

I also would like to state that my delegation supports the view of the ILC that immunity from foreign criminal jurisdiction is strictly a procedural factor as affirmed by the ICJ in the *Arrest Warrant case*.

Regarding Draft Article 3 (persons enjoying immunity *ratione personae*), my delegation expressed, at the last Committee its doubt concerning an eventual extension of immunity *ratione personae*, because of the difficulties that would incur in identifying holders of this immunity in the event of such an extension. We believe that the restriction of this scope to the troika will bring more clarity to the regime of immunity.

My delegation expresses its support on the subjective, material and temporal scopes of immunity *ratione personae* provided for in draft article 4 of the ILC. Immunity *ratione personae* of the draft article covers all acts of its beneficiaries regardless of whether these acts are official or performed in their official capacity. Thus, the difference in terminology on these acts would not raise a practical problem regarding immunity *ratione personae*. On the other hand, distinction between 'official acts' and 'acts performed in official capacity' will have a different consequence on the scope of immunity *ratione materiae*. My delegation hopes that the ILC carries in-depth discussions on this terminological issue when it deals with immunity *ratione materiae*.

Furthermore, it was mentioned in the commentary (ILC Report 2013, p. 68 (4)) that possible exceptions to immunity were not considered when adopting draft article 4 (2). My delegation would like to recall that there are concerns that a kind of all-encompassing immunity would likely be an obstacle to international efforts against impunity. Though immunity is a well-established system under international law to protect the equality of States and guarantee the functions of States at the international level, there may be exceptions regarding international crimes which threaten common values of the international community. My delegation hopes that the ILC contributes to identifying such possible exceptions.

In this vein, my delegation supports the proposal by the Special Rapporteur, to focus the next report on immunity *ratione materiae* and possible exceptions to immunity and hopes that the third report provides clear guidelines on the matter.

Thank you,