



THE REPUBLIC OF KOREA

PERMANENT MISSION TO THE UNITED NATIONS

335 East 45th Street, New York, N.Y. 10017
Tel (212) 439-4000, Fax (212) 986-1083

Statement by Mr. KIM Saeng

Counsellor

The Permanent Mission of the Republic of Korea to the United Nations

Agenda item 81 (ILC report: Part 3)

4 November 2013

New York

<Check against Delivery>

Thank you Mr. Chairman,

1. Since the ILC's adoption of the topic of "Protection of Persons in the Event of Disasters" at the 59th session in 2007, my delegation has shown keen interest in this issue. My delegation would like to take this opportunity to express our gratitude for the Special Rapporteur Mr. **Eduardo Valencia-Ospina**, for having prepared the 6th report. Taking into consideration the fact that the number and scale of disasters occurring each year is growing rapidly, my delegation believes that this topic has a great significance. The ILC adopted in total 18 draft articles, including article 5 ter and article 16 adopted during this session. My delegation applauds such smooth progress and hopes for the adoption of the first reading draft articles during the next session.

2. It has been confirmed at the initial stage of the work of the ILC that the topic *ratione temporis* should include not only the disaster response but also pre- and post-disaster phases, in order to be able to establish a comprehensive framework on the issue. Against this backdrop, we appreciate that the ILC has in this session for the first time actually dealt with prevention during the pre-disaster phase and draft articles 5 ter and 16 have been adopted. My delegation would like to take this chance to convey our views on the work of the ILC.

3. The draft articles 5 ter and 16 regarding prevention of disasters have been adopted without making a distinction between natural and industrial disasters. Although it is admittedly true that both categories of disasters do have a lot in common, at the same time they have numerous dissimilarities, which especially stand out in the phase of pre-disaster prevention. Industrial disasters often show more obvious causal links which can easily point to “perpetrators” and therefore the responsibility for prevention may be more significant. Natural disasters, on the other hand, tend to take place unexpectedly and even randomly and may not be possible to prevent even with the sovereign State’s utmost efforts.

4. Regarding the legal nature of the duty to prevent, it goes far beyond the current public international legal regime to deem the duty to prevent as one of the general principles of public international law, other than in certain specific fields such as environmental law. The attempt to stretch the notion of duty to prevent so that it is generally applicable in relations to disasters is somewhat worrisome, in that it may bring about the reduction of State sovereignty.

5. Finally, my delegation would like to express some concerns on the ‘post-disaster phase’ which will be discussed during the next session of the ILC. The ‘Post-disaster phase’ comprises not only legal issues, but also economic, political and world-wide international cooperation mechanisms including the UN system. We consider those efforts necessary for humanitarian aspects but they should not overlap with the existing mechanism.

Now I would like to turn to the **formation and evidence of customary international law.**

6. My delegation would like to first extend our appreciation for the work undertaken by the International Law Commission in providing this remarkable report. Allow us to express our sincere appreciation to Special Rapporteur, Sir **Michael Wood**, on his first report concerning the topic "Formation and evidence of customary international law" and also to the Secretariat for its excellent Memorandum on this topic. My delegation noticed that the title of this topic was changed, during this session, to the ‘**Identification of customary international law.**’ We hope that this change will permit the ILC to focus on the more operational question of its identification, i.e., how the evidence of a customary rule was to be established.

7. This topic has inherently strong academic aspects in our opinion. Accordingly my delegation requests that the ILC have a reasonable balance between practical needs, on one hand and academic research, on the other hand. We would like to especially emphasize that the results should make all efforts to avoid abstract and ambiguous expressions. In this context the ‘London Statement of Principles applicable to the Formation of General Customary Law’ adopted by the International Law Association is not a good precedent.

8. My delegation would like to mention some specific aspects of this topic. First, we consider that the question of 'Jus cogens' should be dealt within this topic because 'jus cogens' and 'customary international law' relate to each other very closely; secondly conducting this work, we recommend that the ILC and the Special Rapporteur collect extensive relevant reference, academic results, national jurisprudence and other documents not only from European countries but also from around the world.

Next I would like to address **the Provisional Application of Treaties.**

9. My delegation appreciates the Special Rapporteur **Juan Manuel Gomez-Robledo** and also the members of the ILC who have researched and developed the topic, and to the Secretariat for its excellent Memorandum. This is another topic of great interest to my delegation as we have had an incident of provisional application of a treaty. 'The Free Trade Agreement between the ROK and the EU' signed in 2010 and applied provisionally from 1st July 2011, is an example.

10. The question of the legal effects of provisional application should be clarified as long as it is one of the central issues. Therefore, we consider that there should be an in-depth review by the Special Rapporteur and the ILC members into whether the legal regime of the 1969 Vienna Convention (i.e. the observance, application, and interpretation of treaties) should be directly applied to the case of provisional application. In particular, in relation to the provisional application, besides Article 25, the issues including the application of pacta sunt servanda (Article 26), Internal law and observance of treaties (Article 27), Provisions of internal law regarding competence to conclude treaties (Article 46), and treaties and the third States should be reviewed.

11. As long as the binding force of the provisional application is accepted, when there is a violation of the relevant rule, the issue of State responsibility arises. Certainly, as the case of provisional application is an exception, the probability of the breach of obligation would be substantially low in comparison to the breach of an obligation arising from a treaty entered into force. Since the legal effect of the provisional application is not different from that of a treaty entered into force, the breach of the obligation of the provisional application could be considered in the realm of the general rules of State responsibility for internationally wrongful acts. Therefore, it is not necessary to discuss the issue of State responsibility in the breach of the obligation of the provisional application separately.

12. Similar to the stance of the Commission, my delegation considers that a practical guide is necessary in order to legislate, interpret, and apply rules of provisional application on the part of the State. We also believe that a guide is sufficient for the final outcome.

13. My delegation believe that this topic will be an important contribution to the field of the law of treaties, and we hope for discussion inside the ILC on this topic.

To conclude regarding **Aut dedere aut judicare**,

14. My delegation would like to extend our appreciation to the Working Group of the ILC for the final report on this subject. The UN General Assembly already invited the Commission to continue to give priority to, and work towards the conclusion of, inter alia, this topic. (Resolution 66/89 of December 2011) In this context, my delegation considers the final results satisfying and wishes to terminate this topic.

Thank you Mr. Chairman.