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Sixth Committee of the General Assembly

Item 78: Report of the ILC on the work of its 66th Session – Part II

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Mr. Chairman,

Today, my delegation will address each of following topics in Part II of the suggested work program: The obligation to extradite or prosecute; Subsequent agreements and subsequent practice in relation to the interpretation of treaties; Protection of the atmosphere; and Immunity of State officials from foreign criminal jurisdiction.

Obligation to extradite or prosecute

Mr. Chairman,

The Korean Government welcomes the adoption of final report of the Working Group on the topic “Obligation to extradite or prosecute (*aut dedere aut judicare*)”.

No one denies the important function performed by this obligation to extradite or prosecute offenders seeking for impunity, in particular offenders of serious crimes prescribed to be punishable by the international community. This obligation also contributes to establishing of rule of law at an international level. The clause of ‘extradite or prosecute’ has been included in almost all important international conventions and agreements concerning criminal matters, especially international terrorism.

The Korean Government fully understands the importance of this topic. However, my delegation views that a clear scope of application of the obligation to extradite or prosecute cannot be identified in a general or abstract manner, but it should be determined and analyzed according to the specific case, especially through a careful evaluation of the relevant provisions stipulated in an international convention or agreement.

This 2014 final report of the Working Group closely examines the ICJ’s Judgment concerning *Belgium v. Senegal* case and evaluates various legal aspects of the obligation to extradite or prosecute, for example: gaps in the existing conventional regime; the transfer of a suspect to an international or special court or tribunal as a potential third alternative to extradition or prosecution; the relationship between the obligation to extradite or prosecute and *erga omnes* obligations or *jus cogens* norms; the customary international law status of the obligation to extradite or prosecute, and other matters of continued relevance in the 2009 General Framework.

The 2014 final report of the Working Group explains in particular the key elements to keep in mind when a State enacts its national laws and also points out the deficiencies of the existing international treaty system. We believe the final report will provide useful guidance for States. We also hope this topic will be envisaged further in a new topic "Crimes against humanity".

My delegation would like to express our sincere gratitude to the President and all members of the Working Group for this excellent outcome.

Subsequent agreements and subsequent practice in relation to the interpretation of treaties

Mr. Chairman,

The Korean Government would like to express our deepest gratitude to the ILC for having this remarkable report prepared. Allow me to express our sincere appreciation to Special Rapporteur, Mr. Georg Nolte, for his second report concerning the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties".

My delegation has been interested in 'Subsequent agreements and subsequent practice in relation to the interpretation of treaties' since this topic was included as a topic of program of work in 2008, primarily under the title "Treaties over time." The topic will serve as a guideline for the interpretation of treaties by helping States identify and clarify the scope and the role of various agreements, and practices related to the interpretation of treaties.

My delegation would like to make five comments on issues related to the draft conclusions.

The first point concerns the identification of subsequent agreements and subsequent practice (draft conclusion 6): Draft conclusion 6 explains agreement and practice that belong to 'subsequent agreements and subsequent practice' in terms of Article 31 (3) of the Vienna Convention on the Law of Treaties. In my delegation's view, this draft conclusion is more clearly improved by the Drafting Committee, by dividing its contents into three paragraphs.

The second point pertains to the possible effects of subsequent agreements and subsequent practice in interpretation (draft conclusion 7): My delegation considers it necessary to distinguish treaty interpretation from treaty amendment or modification. My delegation would express concern if amendment or modification of treaties were allowed by subsequent agreements. If it were permitted, this would make useless an official amendment or modification procedure in accordance with provisions of a treaty. Therefore, our Government agrees with the view of the ILC that "The possibility of amending or modifying a treaty by subsequent practice of the parties has not been generally recognized" (see, ILC Report 2014, p. 187(22)). However, my delegation would like to request the ILC to pay attention to this issue continuously in order to reflect eventual development of relevant international rules because some international courts and tribunals have accepted the possibility of amending or modifying a treaty by subsequent agreement or practice.

The third point is interested in the weight of subsequent agreements and subsequent practice as a means of interpretation (draft conclusion 8): The ILC accepted this draft conclusion 8 proposed by the Special Rapporteur while adding, in its paragraph 3, a distinction between subsequent practice under Article 31(3)(b) of the Vienna Convention on the Law of Treaties and one under Article 32. My delegation considers it appropriate to make such a distinction. In addition, our Government agrees with the ILC's draft conclusion 8 that differentiates between weights of subsequent agreement and subsequent practice.

The fourth point concerns the agreement of the parties regarding the interpretation of a treaty (draft conclusion 9): Draft conclusion 9 was adopted by the ILC with modifications of paragraphs 1 and 2 of the draft conclusion

proposed by the Special Rapporteur. My delegation supports the ILC's draft conclusion. In particular, we would like to emphasize that the question of whether silence can be considered a subsequent practice in terms of treaty interpretation requires case-by-case examinations. Furthermore, we believe that silence cannot be recognized as a subsequent practice in interpreting treaties delimiting a boundary.

The fifth point concerns the Decisions adopted within the framework of a Conference of States Parties (draft conclusion 10): My delegation has acknowledged the important role of conferences of states parties to treaties such as those relating to environmental issues. In this regard, our Government holds the view that draft conclusion 10 contributes to clarifying the legal effect that the decisions adopted by a conference of state parties has on treaty interpretation, and such legal effect should be assessed case by case.

Lastly, regarding the future ILC work plan, my delegation hopes that the Special Rapporteur will propose interim conclusions considering the particularities of the constituent treaties of international organizations.

Protection of the atmosphere

Mr. Chairman,

The Korean Government would like to extend our sincere appreciation to Special Rapporteur Mr. Shinya Murase and members of the ILC for having conducted the discussion concerning the topic "Protection of the atmosphere"

It is our understanding that the three draft guidelines proposed by the Special rapporteur, namely the definition of the atmosphere, scope of the guideline, and legal status of the atmosphere, have been voluntarily withdrawn following the general discussions at the ILC. As intended by the Special Rapporteur and mentioned by several members in the process of discussion, it should be brought to attention that imposing a scientific definition on 'atmosphere' is an extremely difficult task.

Our Government is looking forward to see constructive discussions through a careful approach of the Special Rapporteur and as well as a new proposal on the definition of 'atmosphere'. Furthermore, the Korean Government hopes that a clear distinction will be drawn between 'territorial air' and 'atmosphere', given that the former pertains to national sovereignty while the latter does not.

We affirm the narrowing of the scope of this topic subsequent to the internal discussion between the Special Rapporteur and the long-term program of work enhancing the likelihood of its realization. My delegation notes that attention must be paid so that future discussions concerning this topic do not influence topics which have been discussed in other fora on such topics as climate change, ozone layer, or other existing relevant legal principles which had been applied, and we hereby express our desire that the ILC discussions concerning the protection of the atmosphere will evolve into a guideline concerning the mechanism and procedure to strengthen the transnational and global capability for the protection of the atmosphere.

My delegation supports the position of the Special Rapporteur to exclude political and policy-driven discussions and his insistence on a legal approach. Our Government would like to further express its desire that discussions concerning this topic will be conducted in coordination with existing relevant treaties.

My delegation hopes that the Special Rapporteur will propose guidelines in his next report which reflect and sufficiently incorporate the discussions carried out at this session of the ILC and consequently enjoy a wide support of the international community.

Immunity of State officials from foreign criminal jurisdiction

Mr. Chairman,

The Korean Government would like to express our deepest gratitude to the ILC for having this comprehensive report prepared. My delegation would also like to thank

the Special Rapporteur, Madame Concepción Escobar Hernández, for the third report concerning the topic "Immunity of State officials from foreign criminal jurisdiction".

Since the ILC determined to study the "immunity of State officials from foreign criminal jurisdiction" at its 57th session in 2007, the topic has drawn a great deal of attention. The topic is directly related to the principle rules of international law such as the sovereign equality of States, and the protection of essential values of the international community. Given that the United Nations and the international community put a great emphasis on the fight against impunity, it is vital for the ILC to work for the codification and progressive development of international rules related to this topic.

In this regard, my delegation would like to make two comments on issues raised by the draft articles adopted by the ILC.

The first observation concerns the definition of State official under draft article 2 (e): The ILC considered that the important factor in identifying State officials is to link between the official and the State, allowing for sufficient account to be taken that immunity is granted to the individual for the benefit of the State. This link is representation of the State or the exercise of State functions. This broad definition of State official would be an inevitable consequence given the fact that States have different concepts of a State official.

In this regard, my delegation agrees with the view of the ILC that the identification of State officials has to rely on case-by-case examinations. However, as the majority of members of the ILC did, my delegation considers that the definition of State officials should not extend to include all *de facto* officials. My delegation supports the use of current term 'State official' because what is important in this topic is not the choice of a specific term but how to define a chosen term.

The second comment corresponds to the persons enjoying immunity *ratione materiae* (draft article 5): Draft article 5 determines the scope of persons enjoying immunity *ratione materiae*. My delegation supports the ILC's view that distinguishes immunity *ratione materiae* from immunity *ratione personae*.

However, my delegation would like to stress that those who belong to 'troika' are beneficiaries of immunity *ratione personae* during their term of office, while they enjoy immunity *ratione materiae* after the termination of their term. The ILC mentioned at the paragraph 3 of page 236 of its report 2014 that "There is no need to mention this in draft article 5" and that beneficiaries of immunity do not have to continue to be state officials when immunity is claimed.

Nevertheless, to be precise, the former troika are no longer "State officials acting as such enjoy" that draft article 5 provides for when they enjoy immunity *ratione materiae*. Therefore, my delegation considers that it would be better to explicitly refer to the former troika mentioned in Commentary 4 of Draft Article 5 as beneficiaries of immunity *ratione materiae* in the body text of Draft Article 5. My delegation requests the ILC to take this into account when the ILC adopts draft articles regarding immunity *ratione materiae*.

Lastly, regarding the future ILC work plan, our Government supports the proposal of the Special Rapporteur in which the next report will focus on immunity *ratione materiae* and temporal scope of the immunity. Our Government is deeply interested in defining 'official acts' which constitute the core element of immunity *ratione materiae*. My delegation requests the Special Rapporteur to continue to find out *lex lata* on the basis of state practice without nevertheless excluding *lex ferenda*.

I thank you, Mr. Chairman.