



THE REPUBLIC OF KOREA

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

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Mr. Chairman,

Today, my delegation will address each of the following topics in Part III of the suggested clusters, namely, “Identification of customary international law”, “Protection of the environment in relation to armed conflicts”, “Provisional application of treaties”, and “The Most-Favoured-Nation clause”. Before entering in detail, the Korean Government would like to offer our gratitude for the work carried out by the ILC in providing this comprehensive report.

Identification of customary international law

Regarding the topic of “Identification of customary international law”, please allow me to express our sincere thanks to Special Rapporteur, Sir, Michael Wood, for the second report concerning this topic.

As “Customary International Law” is one of the most important sources of international law, my Delegation believes that this topic will be used as a practical guidance to the judges of domestic courts who are not familiar with international law but have to decide on the rules of customary international law.

The ILC provisionally adopted a total of 8 drafts out of the 11 draft Conclusions proposed in the second report by the Special Rapporteur. My delegation understands that, because of lack of time, the ILC will deliberate remaining draft conclusions on “accepted as law(*opinio juris*)” and the “issues concerning international organizations and the relationship between the two constituent elements” in the next session. My delegation sincerely congratulates all the parties concerned, especially the ILC Drafting Committee, on such a smooth progress.

My delegation supports the two constituent elements approach as the basic approach to this topic. My delegation considers that on one hand, the final draft conclusions of this topic should ensure clarity to be used as a practical

guidance for national and international legal practitioners who do not have backgrounds in international law, and on the other hand require balance without prejudice of the inherent flexibility of customary international law. My delegation views that parallel indication of “*opinio juris*” as the term more often commonly used with “accepted as law” will improve the clarity of this topic.

My delegation considers that it would be appropriate that “Conduct of the State as State Practice” in the provisionally adopted Conclusion 5 replaces “Attribution of conduct” in the draft Conclusion 6 proposed by the Special Rapporteur. The Special Rapporteur’s draft Conclusion based on the ‘2001 Draft Articles on State Responsibility’ would raise unnecessary complexity as the revision on whether the practice can be attributed to the State was not included in the process of identifying customary international law. In addition, in the ‘2001 Draft Articles on State Responsibility’, there is also the conduct attributed as the State conduct not related to the State practice for the purpose of the formation of customary international law.

My delegation suggests that it is necessary to study ‘inaction’ in detail and include the detailed explanation of the result in the commentary, because ‘inaction’ as a form of State Practice in the provisionally adopted Conclusion 6 should be determined according to the relevant circumstances. It is necessary to provide practical guidance concerning ‘inaction’ recognized as State practice by the ILC as inactions of every State is not recognized necessarily as State Practice in the formation of customary international law and certain circumstances that may be recognized as the State practice vary.

My delegation acknowledges that the consideration of “specially affected States” in determining general practice in the Special Rapporteur’s draft Conclusion 9 was taken off from the draft Conclusion due to concerns raised by several ILC members on its irreconcilability with the sovereign equality of States.

Nevertheless, my delegation views that the concept of “specially affected States” should be considered in certain rules of customary international law, particularly in identifying the regional custom. Of course, my delegation understands that all States are interested in the formation and development of general international law. However, as recognized in the North Sea Continental Shelf cases, “specially affected States” can be identified in certain fields or circumstances of rules of customary international law such as the regional custom to be applied to a few States. For example, in the field of international humanitarian law, although the content regulates on all States, there still exist “specially affected States” among these States. Therefore, in evaluating the State practice, focusing on the conducts of these States may well promote the convenience for identifying customary international law and ease the unnecessary strictness in the field where the formation of customary international law is required.

Lastly, concerning the issues to be included in the Special Rapporteur’s third report during the next year, my delegation believes that in identifying the rules of customary international law, international organizations take actions with important meaning, and play a significant role in the development of modern customary international law. In addition, the third report should be examined carefully on the interplay and temporality of the relationship between the two elements of customary international law. And also the procedural question of ‘burden of proof’ regarding the existence of customary international law should be explored in greater detail in the third report.

Again, my delegation appreciates the excellent work of the Special Rapporteur and the ILC.

Protection of the environment in relation to armed conflicts

Turning to the topic of "Protection of the environment in relation to armed conflicts", the Korean Government would like to extend our sincere appreciation to Special Rapporteur Madame Marie G. Jacobsson and members of the ILC for having conducted the discussion concerning this topic. My delegation would like to express our desire that the discussion concerning this topic will heighten the awareness of the international community about the vulnerable nature of the environment which can easily be damaged under the situation of armed conflicts. The works of the ILC will contribute to producing more constructive discussions regarding the prevention of environmental degradation.

The Special Rapporteur has divided her discussion concerning the topic "Protection of the environment in relation to armed conflicts" into three stages, namely, the pre-armed conflict stage, the actual armed conflict stage, and the post-armed conflict stage.

My delegation concurs to the Special Rapporteur's view that different problems arise out of each stage, and different rules are applicable to the three different stages. My delegation, however, would like to express some concerns that it may prove difficult, in fact, to define the exact temporal distinction between the actual armed conflict stage and the periods immediately preceding and following. Such an approach would be logical in principle, yet in reality, it would be difficult to distinguish such mutually exclusive stages with desirable precision.

My delegation notes the discussion between the Special Rapporteur and the ILC members pertaining to the concepts of "armed conflict" and "environment" set forth at this session by the Special Rapporteur. My delegation understands that the aforementioned concepts are based on prior discussions and positively evaluates the inclusion of various contemporaneous armed groups based on the definition which was adopted in the previous work done by the ILC, namely, the "Effects of armed conflict on treaties".

It was for further understanding of my delegation that the definition of "environment" was adopted from previous ILC discussions on the "Principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities".

My delegation would like to note that the Korean Government requested a careful examination of the concept of environment. In that regard, "Environment" as a concept must be defined within a context, and it is the firm opinion of my delegation that the environment contemplated within the context of "hazardous activities" is clearly distinct from the environment considered within the context of "armed conflicts". The Korean Government requests that there be a careful examination of the appropriateness of the concept of "environment" as proposed, and hereby expresses our desire that there be constructive discussions within the ILC regarding such issues.

My delegation notes that the next session is expected to include discussions concerning protection of the environment during the actual armed conflict stage, and it is the opinion of my delegation that at that point a theoretical examination over existing principles with respect to protection of the environment will be necessary. Furthermore, my delegation hopes that discussions concerning more actionable aspects of the topic such as preventive measures and international cooperation as well as more concrete and detailed discussions via actual guidelines may be conducted.

Provisional application of treaties

The Korean Government welcomes the second report of Special Rapporteur Mr. Juan Manuel Gomez-Robledo

on the provisional application of treaties. My delegation sincerely appreciates his hard work. My delegation would also like to express our gratitude to the members of the ILC who have developed this topic throughout their discussion.

The Korean Government have expressed a deep interest in this topic and made comments in the previous session of the 6th Committee. My delegation would like to present our stance and to make two comments in regard to the Special Rapporteur's second report and the result of the ILC discussions.

Firstly, my delegation agrees with the opinion that the provisional application of treaties would produce certain legal effects. However, we believe that the legal effects of the provisional application of the treaty should be distinguished from those of the entry into force of the treaty because the nature of provisional application is "provisional" in a strict sense.

If the provisional application of treaties would create certain legal effects, it should be considered whether the articles of the 1969 Vienna Convention on the Law of Treaties which pertains to the entry into force of treaties could apply *mutatis mutandis* to the provisional application of treaties (for example article 46, article 54, article 60 and article 70).

Secondly, The Special Rapporteur took a position in principle that comparative studies of domestic laws are not necessarily needed to this topic 'provisional application of treaties'. However, considering that a treaty or a part of treaty can be applied provisionally only on the basis of internal law, we believe that a systematic evaluation on domestic law and the related articles of the Vienna Convention on the Law of Treaties, for example article 46 might be done as a preliminary research.

The Korean Government believes this topic will contribute to the development of the area of the law of treaties. A practical guideline is necessary in order to legislate, interpret, and apply rules of provisional application on the part of State. The Korean Government will cooperate for the further discussion of this topic as well.

Most-Favoured-Nation clause

The Korean Government would like to extend its appreciation for the work undertaken by the Study Group, concerning the topic "The Most-Favoured Nation clause (hereinafter referred to as 'the MFN clause')". Since 2008, when the subject of MFN clause was first included in the work program of the ILC, the Study Group has examined various working papers and other informal documents. And now, the Study Group has embarked on the final report from this session. Allow me to express sincere appreciation to the Study Group's constant effort.

The Study Group highlighted the need to streamline the final report and update some elements of the report in view of more recent international arbitral awards. The Study Group is also expected to present a revised final report for consideration at the sixty-seventh session of the ILC in 2015.

My delegation hopes the Study Group will present an outcome that would be practically useful to those who are involved in the area of international investment and to policy makers

I thank you, Mr. Chairman.