

Comments and Observations on the ILC Topic "Identification of Customary International Law"

December 22, 2017

Republic of Korea

1. The Republic of Korea welcomes the adoption of the draft conclusions on the identification of customary international law, on first reading, by the International Law Commission at its sixty-eighth session. The Government of the Republic of Korea assesses that the draft conclusions are well organized overall, properly reflecting the current state of international law on the topic. Our government expresses its deepest gratitude for the efforts of the Special Rapporteur, Sir Michael Wood, and ILC members who have completed the first reading of the draft conclusions in a relatively short period of time.
2. The draft conclusions are expected to provide authoritative guidelines on the identification and confirmation of customary international law to practitioners in various domestic legal fora. In order for these conclusions to serve as more effective guidelines, a proper balance is required between the clarity of rules and the inherent flexibility of customary international law.

3. In this respect, the Government of the Republic of Korea wishes to comment on the relation between paragraph 2 of conclusion 6 and paragraph 2 of conclusion 10. It is only natural that the form of state practice listed in paragraph 2 of conclusion 6 and the evidence of acceptance as law listed in paragraph 2 of conclusion 10 overlap to a considerable degree, since in most cases acceptance as law should be identified through state behavior or relevant documentation. Hence, to avoid any possible confusion, it may be necessary to seek consistency in the use of terms as well as the order in which they are listed in both conclusions. An explanation may also be needed to clarify discrepancies, where they exist.
4. For example, paragraph 2 of conclusion 10 does not include “legislative and administrative acts” which could serve as evidence of the acceptance of law, while paragraph 2 of conclusion 6 does not include “public statements made on behalf of States” which could be regarded as a form of state practice; paragraph 2 of conclusion 10 does not list diplomatic acts, while in paragraph 2 of conclusion 6 lists “diplomatic acts and correspondence.”
5. Regarding conclusion 15 which deals with the so-called “persistent objector,” the Government of the Republic of Korea notes that the doctrine of the persistent objector is one of the most controversial issues in the theory of customary international law. Our government considers that this

doctrine has substantial implications for the norm-creating process in international law, therefore requiring further review with great caution.

End.