Permanent Mission
of the Federal Republic of Germany
to the United Nations
New York

Statement by

H.E. Ambassador Dr. Martin Ney
German Federal Foreign Office

The Legal Adviser

on the occasion of

the 68th Session of the

United Nations General Assembly

6th Committee

Part 1 of Agenda Item 81

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

New York, 29 October 2013

(please check against delivery)

Permanent Mission
of the Federal Republic of Germany
to the United Nations
New York

Madam Chairwoman/Mr Chairman,

Germany welcomes and supports the first report of Special Rapporteur Professor Georg Nolte on "*Subsequent agreements and subsequent practice in relation to the interpretation of treaties*". We also welcome the work undertaken by the drafting committee and the resulting draft conclusions. In our view, they provide excellent guidelines for the interpretation and application of treaty provisions. We welcome in particular their well-balanced approach.

A good example for this well-balanced approach is the differentiation between "subsequent practice" under Article 31 VCLT and "other subsequent practice". We support this differentiation, which is enshrined in draft conclusion 1 para. 3, 4 and draft conclusion 4, for two reasons: On the one hand it makes it possible to also use non-consensual practice in the implementation of a treaty, i.e. practice that is shared by a large number of states, but not by all states parties to a treaty. On the other hand draft conclusion 4 clarifies unequivocally that such non-consensual practice may only serve as supplementary means of interpretation under Article 32 VCLT.

We also welcome the formulation of draft conclusion 3. It takes into account the possibility of treaty provisions evolving over time. At the same time it makes it clear that subsequent agreements and practice may also argue for a static interpretation.

Draft conclusion 5 touches upon the question of whether the action of non-state actors may play any role in the interpretation of a treaty. It clarifies that it is the contracting states which are the "masters of the treaty". Consequently, it is their subsequent practice in implementing it which counts under Articles 31 and 32. Nevertheless, draft conclusion 5 does not close the door entirely to looking at non-state actors when assessing subsequent state action. This question will certainly be further discussed.

Madam Chairwoman/Mr Chairman,

Germany continues to follow this project with great interest.

Thank you.

Permanent Mission
of the Federal Republic of Germany
to the United Nations
New York

Statement by

H.E. Ambassador Dr. Martin Ney
German Federal Foreign Office

The Legal Adviser

on the occasion of

the 68th Session of the

United Nations General Assembly

6th Committee

Part 1 of Agenda Item 81

Immunity of State officials from foreign jurisdiction

New York, 29 October 2013

(please check against delivery)

Permanent Mission
of the Federal Republic of Germany
to the United Nations
New York

Madam Chairwoman/Mr Chairman,

We thank Special Rapporteur Ms Concepción Escobar Hernandez for her second report and the draft articles, focusing on the scope of the topic, the concepts of immunity and jurisdiction and the difference between immunity *ratione personae* and immunity *ratione materiae*.

Draft articles

We welcome and support the work. We welcome in particular the well-balanced approach.

Draft article 3 limits immunity *ratione personae* to the so-called *troika* of heads of state, heads of government and ministers of foreign affairs. There are good reasons for such a restrictive approach. However, there might be a very limited number of other high-ranking officials enjoying immunity *ratione personae.* Frequent travel as such would not be sufficient to include an official in this category, but particular exposure to judicial challenge might carry weight. In our view this question will certainly need further discussion.

Quite apart from the questions of the actual scope of immunity *ratione personae,* the latter must be seen together with the immunity enjoyed by other high-ranking officials when they are on official visits, based on the rules of international law relating to special missions. Both taken together ensure that States remain able to act. Hence, we welcome the respective clarification in the commentary to the draft article.

We also welcome the distinction made between immunity from foreign civil jurisdiction and immunity from foreign criminal jurisdiction and the ensuing focus of the project on the latter.

General considerations

In her report the Special Rapporteur has alluded that in her view the topic should be approached from the perspective of both *lex lata* and *lex ferenda*.

In this regard Germany reiterates its position that the Commission should base its work on *lex lata*. The rules of immunity are predominantly rooted in customary international law. This is not without reason. Questions of immunity are politically highly sensitive as they refer to the delimitation and mutual respect of sovereign powers of States. Hence, a fine balancing of the

sovereign rights of the States concerned is required. The rules of *lex lata* have proven to fulfil these prerequisites.

We look forward to the third report, which will focus on the normative elements of immunity *ratione materiae* and also on the issue of exceptions to immunity. In this regard we would like to underline the paramount importance of specifically identified *opinio iuris* and relevant state practice in any analyses of these issues.

Madam Chairwoman/Mr Chairman,

Let me conclude by stressing that Germany continues to follow this project closely and advocates an approach based on the relevant current and past practice. We are ready to support the work of the ILC by providing relevant German practice and would like to encourage other States to do likewise, as the analysis of state practice is of particular importance for a better understanding of the subject and the successful outcome of the project.

Thank you.