



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 Advisor**

on the occasion of

**the 69th Session of the
United Nations General Assembly**

6th Committee

Agenda Item 79

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

New York, October 31, 2014

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

Until 2012: Treaties over Time

Special Rapporteur: Georg Nolte

Madam Chairwoman/Mr Chairman,

Germany welcomes the impressive and highly informative second report by Special Rapporteur Georg Nolte on “*Subsequent agreements and subsequent practice in relation to the interpretation of treaties*”. We also welcome and support the Draft Conclusions. In our view, they provide excellent orientation for interpretation when confronted with subsequent agreements or subsequent practice without unduly restraining State practice.

I would like to point out two examples to demonstrate their well-balanced approach:

First, Draft Conclusion 7 para. 3 establishes the presumption that by a subsequent agreement or subsequent practice, parties intend to interpret the treaty, rather than to amend or modify it. In our view this is realistic. This presumption reflects both an accurate assessment of State practice and provides an excellent guideline for interpretation. The same can be said about the following sentence of the Draft Conclusion. Without excluding the possibility that subsequent practice may, in very specific cases, amend or modify a treaty, it accurately points out that this possibility has not been generally recognized.

The second example is Draft Conclusion 10 para. 3, which deals with the question under which circumstances decisions adopted within the framework of a Conference of States Parties embody a relevant subsequent agreement or subsequent practice. There we agree that in order to answer this question, it must be established whether a decision actually amounts to an agreement of the Parties in substance or not. The form and the procedure by which a decision was adopted are not decisive. Notably, the practice of multilateral fora provides abundant examples of decisions adopted by consensus despite remaining disagreement in substance. Hence, the adoption of a decision by consensus must not automatically be equated with an agreement in substance.

Madam Chair/Mr Chairman,

Germany continues to follow this project with great interest. Thank you!



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Protection of the Atmosphere

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Protection of the Atmosphere
Special Rapporteur: Shinya Murase (JAP)

Madam Chairwoman/Mr Chairman,

Germany welcomes the work of the ILC on this highly relevant topic. We thank the Special Rapporteur Shinya Murase for his highly informative first report on the “protection of the atmosphere”, which is based on broad and in-depth research.

The protection of the atmosphere is a topic of utmost and rising importance for humanity as a whole. It is also an area where much further work is still needed, also from a legal point of view. The long-term work of the ILC on this topic will hopefully be able not only to raise the visibility of this issue, but also counteract the increasing fragmentation of international environmental law through horizontal analysis and cross-cutting approaches which look beyond individual environmental regimes.

Just a short general remark from the German side:

In our view, the understanding reached within the Commission prior to the start of this project is highly pertinent. We have to prevent any interference with political negotiations. This is an essential prerequisite to ensure the successful outcome of the project and to preserve the Commission’s outstanding authority. Identifying norms of international law is the legitimate function of the Commission and cannot therefore constitute unwarranted interference with political negotiations. On the other hand, it is essential at this stage for the Commission to focus on the identification of general principles of international environmental law and to clarify whether or not they are applicable, in order to avoid any appearance of such interference.

We will follow with interest the further work of the ILC on this issue. Germany will support it by providing relevant information and we would like to encourage other States to do likewise.

Thank you!



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Immunity of State officials from foreign criminal jurisdiction

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Immunity of State officials from foreign criminal jurisdiction
Special Rapporteur: Concepción Escobar Hernández (ESP)

Madam Chairwoman/Mr Chairman,

We thank Special Rapporteur Ms Concepción Escobar Hernández for her third report on the “Immunity of State officials from foreign criminal jurisdiction”.

We welcome the two draft articles provisionally adopted by the Commission.

Just one point and a general remark:

One might ask whether the definition of “state official” in Draft Article 2 lit. e is not perhaps overly broad. In Germany for instance, teachers and professors in state-run schools and universities may also exercise state functions, e.g. in examining students. Is it really appropriate to include them in a definition of “state officials” qualifying for immunity? We look forward to next year’s report, which will focus *inter alia* on the concept of “acts performed in an official capacity”, to provide further clarification on this question.

We have to remind ourselves that the subject at hand – as all questions of immunity – enjoys special significance in international relations. Questions of immunity necessarily refer to the delimitation and mutual respect of the sovereign powers of States and are therefore politically highly sensitive. We should always bear in mind that the functional necessities of inter-State relations lie at the heart of the established rules on immunity. Hence, we would like to reiterate once again the need to proceed carefully, especially where changes to the scope of immunity are contemplated, and in this context the paramount importance of specifically identified *opinio iuris* and relevant state practice for the subject at hand.

Germany continues to follow this project closely.

Thank you!