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
Identification of customary international law

New York, November 3, 2014

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Federal Republic of Germany Statement 66th ILC Report (2014)

Identification of customary international law
Special Rapporteur: Michael Wood

Madam Chairwoman/Mr Chairman,

We welcome and support the impressive second report on "Identification of customary international law" by Sir Michael Wood, and I should like to thank him. We also support the Draft Conclusions, which have been presented for information to the plenum.

Germany fully supports the two-element approach to the identification of rules of customary international law. We share the unequivocal adherence to "general practice" and "*opinion juris*" as the two constituent elements for any rule of customary international law. Hence, we welcome the insertion of the term "*opinio juris*" in Draft Conclusions 2 and 3. In our view, this combination better evokes the necessity of positive conviction on the part of the state. Such guidance seems useful for those legal practitioners who may not be very familiar with public international law.

Germany also supports the wording of Draft Conclusion 4 para. 1, which confirms that States are and remain the primary subjects of international law. Other subjects of international law, such as international organizations or the ICRC, may have a role to play in setting practice and expressing opinion juris, but the most important sources for both continue to be the States themselves.

Finally, Draft Conclusion 7 para. 2: We certainly agree that practice should be unequivocal and consistent. However, the wording used here may lead to less weight being given to the practice of countries with an open and pluralistic society, where the independence of the judiciary and the juxtaposition of government and parliament may lead to different views, or at least different nuances being expressed. The fact that this is so should not automatically detract from the influence of the practice and opinion juris of such States and grant a "bonus" to autocratically organized States. Although we are aware that consistency of practice is an important aspect, this point merits attention and should be discussed further.

Madam Chairwoman/Mr Chairman,

Germany will follow this project closely. We have already provided information on relevant practice and we would like to encourage other States and international organizations to do likewise.

Thank you.

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Comments and Observations regarding "Provisional Application of Treaties"

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Comments and Observations regarding "Provisional Application of Treaties"
Special Rapporteur: Juan Manuel Gómez-Robledo

Madam Chairwoman/Mr Chairman,

Germany would like to thank the ILC and Special Rapporteur Gómez-Robledo for the Second Report on the important topic of provisional application of treaties. The Special Rapporteur's analysis on the legal effects of provisional application provides most valuable insight.

At this point, we tend to support his conclusions regarding the legal effect of the provisional application of a treaty as a matter of public international law. States agreeing to the provisional application of a treaty do so in the expectation that the treaty's rules will be put into practice and will govern the relations between the treaty's parties. Their mutual expectation is that they can rely on the treaty's provisions to be applied; that they may exercise the rights granted therein and that they will be expected to abide by the obligations spelled out in the treaty, in short: that they will be held to the treaty's terms.

On the other hand, the domestic requirements and repercussions of provisional application of treaties are - as the Special Rapporteur pointed out - a matter of domestic law. The response to the question whether, under which conditions, and to which extent the provisional application of a treaty may be agreed to, varies from country to country. Here, we would agree with the Special Rapporteur that a comparative study on national regulations in this regard need not be part of the ILC's work. It is up to each and every State to ensure that its constitutional provisions are respected and applied.

That having been said, Germany would like to stress that the legal effect of provisional application of a treaty and the possible domestic and international legal consequences are closely intertwined, especially in case of failure to meet the treaty's terms while it is applied provisionally. If domestic law does not allow for the provisional application of specific rules or of the treaty as a whole, due to, e.g. the lack of parliamentary approval, the international obligation cannot be fulfilled. As a consequence, the provisional application of a treaty should not be taken upon lightly. Parties intending to apply a treaty provisionally should first consider carefully:

- if their domestic legal situation permits provisional application of a treaty
- if it enables them to comply with the provisionally applied treaty as a binding obligation,
- and if they are determined to do so (i.e. comply with the treaty).

That means that in some cases, provisional application may turn out not be an option at all because the constitutional or other legal requirements of the Party concerned make it impossible.

If the treaty's negotiators reach the decision that provisional application is to be included in a treaty's terms, careful wording of the respective clauses is required, which allow the fulfilment of necessary national procedures or limits the provisional application to certain parts of the treaty. "Opt-out" clauses might be needed in multilateral treaties as the necessary safeguard for those state parties who for reasons of domestic law cannot agree to provisional application so easily.

One more aspect: In Germany's view the intention of a State to apply a treaty provisionally needs to be clearly communicated.
Insofar we would question whether such intention can be communicated tacitly or implicitly as suggested by the Special Rapporteur. The case quoted for tacit communication is that of the UNCLOS which provided for provisional application for all States "that had consented to its adoption", if the Convention had not entered into force by a certain date. The provision included an "opt-out-clause". A state's obligation to apply UNCLOS provisionally thus already arose from participation in adopting the Convention - not from its remaining silent at a later date. Insofar the construction chosen for provisional application of UNCLOS does not appear to be so different from those clauses providing for provisional application of a treaty from the time of its adoption and quite removed from the idea of a "tacit or implicit agreement". Therefore, based on the fact that agreement to provisional application was expressed upon adoption, such clauses provide for an "opt-out" instead of an "opt-in".

It is with continued interest, that we are following the ILC's contribution to this important topic in international treaty relations.

Thank you.