



## UNITED STATES MISSION TO THE UNITED NATIONS

799 UNITED NATIONS PLAZA  
NEW YORK, N.Y. 10017-3505

Statement by the United States of America  
69<sup>th</sup> General Assembly Sixth Committee  
Agenda Item 78 – November 3-5, 2014  
Report of the International Law Commission  
on the Work of its 66<sup>th</sup> Session

Identification of Customary International Law, Provisional Application of Treaties,  
Protection of the Environment in Relation to Armed Conflicts, the Most-Favoured-  
Nation Clause

---

Mr. Chairman, once again, I would like to thank the chairman of the Commission for his introduction of the Commission's report.

### Identification of customary international law

Mr. Chairman, with respect to the topic "Identification of customary international law," the United States thanks the Special Rapporteur, Sir Michael Wood, for his very impressive second report. That report reflects a tremendous amount of research and careful analysis, and is therefore a very significant contribution to the understanding of this important topic. We also appreciate the Draft Conclusions provisionally adopted by the Drafting Committee in July based upon Sir Michael's work.

We particularly welcome the clear and unambiguous incorporation into Draft Conclusion 2 of the "two-element approach" for identifying a rule of customary international law. We hope the commentary eventually developed will underscore both the importance of identifying actual practice (as distinct, for example, from statements about practice) and the fact that the two-element approach applies across all fields, as was done in the Special Rapporteur's second report.

While we believe that the Special Rapporteur and Drafting Committee have very successfully addressed a number of the key issues, we would like to raise a few concerns

in the hope that we can contribute to improvement of the Commission's work on this important topic.

The United States is particularly concerned about the possible implications of the language in Draft Conclusion 4 that "it is primarily<sup>1</sup> the practice of States that contributes to the formation...of rules of customary international law." We are concerned that the inclusion of the word "primarily" may be interpreted as meaning that the practice of non-state actors, including non-governmental organizations, corporations, and even natural persons, may be of relevance to a customary international law analysis. If the intent is to include such actors, we believe such an approach is misguided and unsustainable under any fair reading of customary international law. If the intent is to indicate that, in addition to the practice of States, in some circumstances the practice of international organizations may contribute to the formation of custom, we believe it would be helpful to state this much more clearly, as the current language is too ambiguous and open-ended. The Drafting Committee could consider re-drafting Paragraph 1 of Conclusion 4 to state that "The practice of States may constitute a general practice that, as one element, contributes to the formation, or expression, of rules of customary international law." Such a formulation properly emphasizes the centrality of States in the formation of this source of law, without creating confusion as to the relevance of other actors.

In addition, we are concerned that the treatment of international organizations together with States in Draft Conclusion 4 may be taken to suggest that these actors play the same roles with respect to the formation of custom, obscuring, in particular, significant limitations on the role of international organizations in this regard. For these reasons, we welcome the recognition by the Special Rapporteur and the Drafting Committee that more work needs to be done on the subject of the role of international organizations in the formation of custom.

In that regard, Paragraph 2 could be rephrased to provide that, in addition to State practice, the practice of international organizations may contribute -- in some defined circumstances -- to the formation of customary international law, perhaps with a cross-reference to a later Draft Conclusion that addresses the issue in greater detail. While we are not persuaded as yet that the practice of international organizations is of general relevance to the identification of custom, we are open to the possibility that there may be circumstances in which some activities of international organizations may contribute to the formation of customary international law. We, therefore, look forward to the Special Rapporteur's future work on this issue.

---

<sup>1</sup> Emphasis added.

Mr. Chairman, the United States notes that the Special Rapporteur and the Drafting Committee decided that the issue of “specially affected States” would not be addressed at this stage in the process. We believe that the role of the practice of such States in the identification of customary international law should be recognized and addressed in the final product of this exercise, so as to reflect accurately international law, given the well-established jurisprudence on this point. For similar reasons, we welcome the Special Rapporteur’s indication that he intends to cover the issue of “persistent objectors” in his third report and we look forward to that topic being addressed in the draft conclusions.

Mr. Chairman, with regard to question of what acts may constitute practice, the United States agrees that “[p]ractice may take a wide range of forms,” including physical acts, verbal acts and -- in some circumstances -- inaction, as stated in Draft Conclusion 6. However, we believe that this conclusion could be strengthened by clarifying that whether any of the listed acts constitute State practice that would contribute to the formation of customary international law in any particular case would depend on the rule at issue and the context involved.

Mr. Chairman, that leads me to two final points of a more general nature. The first is that we understand that no definitive decision has yet been made as to whether this project should be in the form of draft conclusions and commentary and we support waiting until the end of the process before any such decision is made. If the final product of this exercise is to be conclusions and commentary, it will be important that the conclusions themselves be stated with sufficient clarity and completeness that they accurately reflect the relevant rule, since leaving important qualifications to the commentary risks them being far less accessible for practitioners and decision-makers.

An example is Draft Conclusion 8, which provides that “[t]o establish a rule of customary international law, the relevant practice must be general, meaning that it must be sufficiently widespread and representative, as well as consistent.” The Draft Conclusion contains no sense of what is meant by “sufficiently” widespread and representative; indeed, someone might take the view that the practice of just a few States from different regions of the world is “sufficient.” We believe that so important a question as the extent of practice that is required for a customary rule to form should be addressed in the body of the conclusion and not simply left to the commentary. Moreover, we would suggest that consideration be given to incorporating the standard articulated by the International Court of Justice in the *North Sea Continental Shelf* judgment of “extensive and virtually uniform” practice, as that provides much greater guidance regarding the international law requirement.

Our second point of a general nature relates to the broader context in which customary international law is formed. Most cooperation and interaction among States – even when it produces similar patterns of conduct – does *not* result in practice of sufficient density and extent, or of appropriate character, to give rise to rules of customary international law. Only when the strict requirements for extensive and virtually uniform practice of States, including that of any specially affected States, in conjunction with *opinio juris* are met is customary international law formed. As such, the creation of customary international law is not to be inferred lightly, a point that may be lost in the current formulation of these Draft Conclusions. Satisfying such requirements, and recognizing the rule on the persistent objector, are critical to give effect to a central foundation of international law, which is that States generally may not be bound to legal obligations without their consent. In this connection, we believe that the Commission’s work on this topic would benefit from further analysis of the cases in which a customary rule was found not to have developed due to the absence of the requisite practice or *opinio juris*, to help better illustrate the relatively high threshold required to establish that a rule of customary law has been formed.

Once again, we heartily thank Sir Michael Wood and the Drafting Committee for their important work on this topic. We have taken note of the Special Rapporteur’s invitation to States to provide further information and look forward to engaging with him on these and other issues.

#### Provisional application of treaties

Mr. Chairman, turning to the topic of “Provisional application of treaties,” the United States thanks Special Rapporteur Juan Manuel Gómez-Robledo for his second report and appreciates the many ways in which it reflects the views from States during the past year, as well as substantial additional work on the subject. That said, we think that the Special Rapporteur was correct in not proposing draft conclusions or guidelines at this stage, as a number of issues covered by the report require additional views and study by States and within the Commission, as reflected in the many and varying views expressed during the debate within the Commission this summer.

As the United States has indicated previously, we believe the meaning of “provisional application” is well-settled – “provisional application” means that States agree to apply a treaty, or certain provisions, as legally binding prior to the treaty’s entry into force, with the distinction being that these obligations can be more easily terminated. Therefore, we were pleased with the repeated recognition in the second report that “the provisional application of a treaty undoubtedly creates a legal relationship and

therefore has legal effects” and that these effects go beyond the obligation not to defeat the object and purpose of a treaty.

The United States also believes that – whatever the final form of the ILC’s work on this topic – it should be fully consistent with Article 25 of the Vienna Convention on the Law of Treaties, in order to provide useful guidance on the use and consequences of provisional application. For this reason, we would like a more thorough explanation of report’s suggestion that a party seeking to terminate provisional application of a treaty may not do so arbitrarily and must explain its decision, as Article 25 does not include those requirements.

Mr. Chairman, the United States disagrees with certain aspects of the second report, including the suggestion that international law rules regarding the unilateral acts of States (and the Commission’s work on the subject) have general relevance to the subject of provisional application of treaties. While the United States agrees that States may in some, limited cases unilaterally undertake to apply a treaty provisionally, we disagree that that is the appropriate framework for analyzing the vast majority of cases of provisional application. In most cases, provisional application creates a treaty-based regime between or among States, not just obligations for one State.

On a related point, the second report asserts that “the form in which the intention to apply a treaty provisionally is expressed will have direct impact on the scope of the rights and obligations assumed by the State in question.” That statement is not correct as a general matter; the form by which the State’s intention is expressed does not have an impact on the scope of the rights and obligations, any more than the form by which a State ratifies or accedes to a treaty. Rather, what may affect those rights and obligations is the text of the treaty or other instrument that allows for provisional application, as well as any text associated with a State’s acceptance of provisional application. The one exception would appear to be the unusual circumstance where provisional application is truly the result of a unilateral act. However, in that case, the State’s obligations would not be altered, but only the rights it would have vis-à-vis other States.

The United States also doubts the conclusion that “the intention to apply a treaty provisionally may be communicated ... tacitly.” The practice cited by the Special Rapporteur for this assertion does not involve “tacit” acceptance of provisional application of a treaty as we would understand it. Rather, it involves a treaty in which States expressly agreed that its provisions would be applied provisionally as of a specified date, but which allowed States to opt out of that provisional application obligation by notifying the depositary in writing. As a general proposition, the same

requirements that apply to a State's consent to a treaty, including those reflected in Article 11 of the Vienna Convention of the Law of Treaties, also apply to its consent to apply a treaty provisionally.

Mr. Chairman, again, we thank the Special Rapporteur for his work thus far, and look forward to engaging further with him on these and the many other challenging issues presented by this topic.

### Protection of the Environment in Relation to Armed Conflicts

On the topic of "Protection of the environment in relation to armed conflicts," the United States notes with interest Special Rapporteur Marie Jacobsson's completion of the first report addressing the first temporal phase, the period before an armed conflict. The United States recognizes the deleterious effects armed conflict can have on the environment, and we believe this is an issue of great importance. Indeed, we reaffirm that protection of the environment during armed conflict is important for a broad range of reasons, including civilian health, economic welfare, and ecology. We also reaffirm the importance of applicable rules of armed conflict that have the effect of protecting the environment.

However, we are concerned with the first report's effort to determine "principles and concepts" of international law that may continue to apply during an armed conflict. As a threshold matter, we view efforts to identify, extract, and apply broad concepts from international environmental law as less useful to the topic than assessing the provisions within the law of armed conflict related to the protection of the environment. In addition, it seems inevitable that this approach would unnecessarily draw the Commission into issues regarding the concurrent application of bodies of law other than the law of armed conflict during armed conflict that will be very difficult to navigate successfully. Further, the manner in which the first report characterizes some of these concepts, including the so-called "principles of prevention and precaution," do not in our view reflect international law. Moreover, the first report invokes the concept of "sustainable development" and addresses several issues – such as indigenous peoples and environmental rights – that appear less useful for identifying legal protections of the environment with respect to armed conflict.

Notwithstanding such concerns, we welcome the Special Rapporteur's decision to focus her second report on identifying existing rules and principles of the law of armed conflict related to the protection of the environment, which may reflect how concepts and principles relevant in peacetime have been adapted to circumstances of armed conflict. We note, however, that the task of identifying existing rules could prove less

helpful for the topic should the ILC attempt to determine whether provisions of certain treaties reflect customary international law. We welcome the Special Rapporteur's recognition that it is "not the task of the Commission to modify . . . existing legal regimes" and believe this is an important principle for it to follow as it pursues its work on this topic.

#### Most-Favoured-Nation clause

Mr. Chairman, with respect to the "Most-Favoured-Nation clause" topic, we appreciate the extensive research and analysis undertaken by the Study Group, and wish to recognize Professor Donald McRae in particular for his stewardship of this project as Chair of the Study Group, as well as the other members of the Commission who have made important contributions in helping to illuminate the underlying issues. We support the Study Group's decision not to prepare new draft articles or revise the 1978 draft articles, and instead to summarize its study and description of current jurisprudence in a final report. Most favored nation clauses are a product of specific treaty negotiation and tend to differ considerably in their language, structure, and scope. They also are dependent on other provisions in the specific treaty in which they are located, and thus resist a uniform approach. We continue to encourage the Study Group in its endeavors to study and describe current jurisprudence on questions related to the scope of most favored nation clauses in the context of dispute resolution, while heeding the distinctions between the investment and trade contexts. This research can serve as a useful resource for governments and practitioners who have an interest in this area. We look forward to seeing the final report.

Thank you, Mr. Chairman.