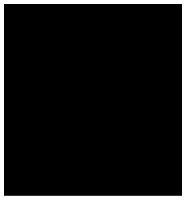

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Agenda Item 79: Report of the International Law Commission on the Work of its Seventy-fourth Session (Cluster Two)
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United States Department of State
October 25, 2024

Thank you, Chair.

The United States is pleased to address the issue of **subsidiary means for the determination of rules of international law**. We would like to reiterate our support for this important project. And we thank Special Rapporteur Charles Jalloh for his detailed and useful second report on the nature and function of subsidiary means, the relationship between Articles 38(1)(d) and 59 of the ICJ Statute, and the lack of legally binding precedent in international law.

Today we would like to offer just a few observations and suggestions in the spirit of further clarifying draft conclusions 6 through 8.

Turning first to **draft conclusion 6**, the United States is generally supportive of subparagraph 1, as provisionally adopted by the Drafting Committee. We do not believe that subparagraph 2's "without prejudice" clause concerning other appropriate uses for subsidiary means, however, is necessary. If retained, we think it may be useful to set some parameters on it. In this respect, given that subsidiary means are not sources of international law, we concur with members of the Commission who cautioned that it would not be appropriate to use subsidiary means to fill gaps in international law.

Turning next to **draft conclusion 7** concerning the absence of legally binding precedent in international law, we understand the Commission's desire to frame the first sentence in a positive manner. Nonetheless we remain concerned that the phrase "Decisions … may be followed on points of law" does not adequately reflect the general rule of a lack of precedent in international law. Given also that the commentary as provisionally adopted suggests that it is the **legal reasoning and legal conclusions** of such decisions that may be taken into account, we respectfully suggest that it would be clearer to start draft conclusion 7 with the general rule concerning the lack of legally binding precedent and its exception, followed by a sentence explaining that the legal reasoning or legal conclusions of such decisions may be **taken into account** in certain circumstances rather than stating that such decisions may be "**followed** on points of law." And we suggest that it may be helpful for the commentary to further detail what

those circumstances may be, such as what constitute the "same or similar issues." Finally, on this draft conclusion, footnote 140 of the commentary notes that "some caution is warranted," citing an abstract that appears to reference a tendency for ISDS cases in particular to perpetuate past mistakes in earlier decisions. The United States thinks it may be worthwhile to expand on this point.

I turn now to **draft conclusion 8** on the weight of decisions of courts and tribunals. The United States agrees that it is useful to set out specific criteria that should guide the assessment of such decisions, in addition to the general criteria in draft conclusion 3 for the assessment of all kinds of subsidiary means.

In this connection, the United States recalls draft conclusion 3(b) concerning the quality of the reasoning, which we view as of paramount importance in the assessment of the weight to be afforded decisions of international courts and tribunals. And other criteria such as expertise noted in draft conclusion 3(c) are also relevant. The United States believes these criteria to be equally important to the issue of competence, which is included in both draft conclusion 3(f) and 8(a) and would not want their W*nBTr W*nBTr2g0G[8()2(a)7vant. The8612792reW*nBT( )0012-62(n1(t)-34c)7(