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U.S. Remarks at a Meeting of the Sixth Committee on Agenda Item 77:
Report of the International Law Commission on the Work of its Seventy-Third Session.
Cluster Three
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Thank you, Mr. Chairman. The United States is pleased to address both topics in this cluster, State succession in respect of State responsibility, and general principles of law.

State Succession in respect of State Responsibility

On the succession of States in respect of State responsibility, we warmly thank Mr. Pavel Šturma, the Special Rapporteur, for his thoughtful contributions on this topic.

At the outset, the United States applauds the ILC's decision to move toward draft guidelines on this topic. Guidelines such as this can assist in the progressive development of international law. The exercise of developing guidelines can also allow for the collection of State practice on the topic—where it might exist—without creating new rules and responsibilities.

In particular, the United States is pleased to see that more prescriptive text, such as the words "shall be," has been replaced by "is" or "should" in the draft guidelines. As previously noted in our submission for Cluster One, the United States remains concerned that certain ILC work products that are not intended to be treaties, like the draft principles on the environment in relation to armed conflict, nonetheless couch proposals for the progressive development of international law in binding terms like "shall" and "must."

With respect to the draft guidelines that were provisionally adopted in the last session, the United States agrees with the principle that the guidelines, where possible, should track the 2001 draft articles on State responsibility. Similarly, using formulations that track multilateral conventions where possible is also encouraged, as in draft guideline 14's utilization of the definition of "dissolution of a State" in terms used by article 18 of the 1983 Vienna Convention on Succession of States in respect of State Property, Archives and Debts.

The United States looks forward to further reviewing the draft guidelines at the conclusion of the work on first reading.

General Principles of Law

I turn now to the topic "General Principles of Law." The United States joins others in thanking ILC Special Rapporteur Marcelo Vazquez-Bermudez for his clear exposition of the topic and thoughtful, well-researched work. We have three points with respect to this topic.

First, we would like to address transposition of a general principle of law derived from national legal systems. Draft conclusion 6 allows for transposition when the principle is "compatible" with the international legal system. While the United States believes a determination of compatibility is necessary, we are not persuaded that it is sufficient. As the United States stressed last year, a critical element that should be maintained is a role for recognition by States that a rule has transposed to the international plane. We do not agree that State recognition can be deemed "implicit" if a domestic rule is compatible with international law.

As for compatibility on its own terms, we are persuaded that a conflict-based model is best; that is, there should be a determination that the proposed general principle is not in conflict with relevant existing rules of international law. A conflicts analysis is appropriate given the high bar that should exist for the finding and application of a new general principle, commensurate with the application of any new rule of customary international law. A conflict-based model is also consistent with draft conclusion 12, which incorporates the *lex specialis* principle.

Second, we would like to address draft conclusion 7, governing general principles of law formed within the international legal system. The United States thanks the Special Rapporteur for the caution applied to draft conclusion 7. However, we are not persuaded thus far that general principles as referenced in Article 38(1)(c) of the Statute of the International Court of Justice are formed on the international plane alone. The U.S. view in this regard is supported by the negotiating history of the Statute. Moreover, the lack of sufficient State practice, jurisprudence, or teachings to support the existence of this second category of general principles makes it difficult to determine a methodology for their identification. Draft conclusion 7 also proposes a means for determining international law binding on States in a way that falls short of the sovereign consent expressly required for treaties and inherent in the development of customary international law. Keeping in mind that under Article 38(1) there is no hierarchy between treaties, customary international law, and general principles as sources of binding law, it is critical that the state consent required to find a general principle is on par with that required for treaties and customary international law, even if it is not identical.

For example, referring to the *Sempra v. Argentina* decision, the Third Report on this topic notes how the tribunal applied a general principle of international law to find a "legitimate expectations" protection within the content of the applicable treaty's fair and equitable treatment standard. That standard was intended by both parties to that treaty to be limited to the minimum standard of treatment under customary international law. However, rather than examining State practice and *opinio juris*, the tribunal in the *Sempra* case interpreted the provision based on a handful of other investment tribunals that had recognized the same protection – in other words, the tribunal performed its analysis relying on subsidiary means. Far from being a good example to show how general principles of law are formed, this arbitral award instead may instead serve as a cautionary tale of the risks of too loose a standard for identifying a principle of law. A number of states have made clear their view that "legitimate expectations" are not included in the minimum standard of treatment under customary international law, and yet by the analysis

proposed here, it would nonetheless be accepted as a binding "general principle," with no evidence that either treaty party had that intention or belief.

In summary, there is real risk that enshrining requirements through a foggier general principles analysis could make it easier for parties to determine that certain principles bind States without first obtaining the necessary consent.

Our third point provides a procedural proposal for the particular sub-topic addressed in draft conclusion 7. Given the differing views on the question of whether general principles may be formed within the international legal system, even within the ILC itself, the better course of action may be to include a "without prejudice" article, so that the issue can be addressed in the future if state practice were ever to support it more conclusively. We also recommend avoiding using the term "**general** principles" for this subtopic, and instead refer to this topic using the term "principles formed within the international legal system." Such a separate topic might be appropriate for international criminal procedures, for example, or other *sui generis* topics.

We look forward to the future work on these issues.

Thank you, Mr. Chairman.