STATEMENT BY MR. YUSUKE NAKAYAMA
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AT THE MEETING OF THE SIXTH COMMITTEE
ON THE REPORT OF THE INTERNATIONAL LAW COMMISSION
ON THE WORK OF ITS SEVENTIETH SESSION (CLUSTER ONE)

Introduction Parts/Commemoration and Other Decisions

Thank you, Mr. Chairman.

At the outset, the delegation of Japan would like to extend its wholehearted congratulations on your assumption of the Chairmanship of the Sixth Committee. Our agenda includes several important subjects this year, and the Report of the International Law Commission raises significant points for consideration. We assure you of Japan's full support and active contribution to the discussions.

We are gratified by the successful ILC sessions and all the commemorative sessions that have taken place both in New York and Geneva during the 70th anniversary of the ILC this year, which provided opportunities for greater interaction between the ILC and UN Member States.

Japan would like to commend the President of the ILC this year, Dr. Valencia-Ospina, for his able guidance, as well as all the Special Rapporteurs and the ILC members for their excellent contributions to the work of the Commission, which made it possible to complete the second reading of the topics of "Subsequent agreements and subsequent practice in relation to interpretation of treaties" and "Identification of customary international law", and the first reading of the topics of "Protection of the atmosphere" and "Provisional application of treaties".

Mr. Chairman,

As Article 13 of the UN Charter stipulates, the General Assembly is mandated to encourage the progressive development of international law and its codification, which is a foundation of the role of the Sixth Committee and the ILC. Indeed, for the past seven decades, these two organs have played major roles in the development of international law by drafting articles and conventions.

While some have suggested that the ILC has exhausted deliberations on most fields of international law and that other multilateral fora now play a larger role in law-making, the ILC maintains a unique and important role. One function that we deem particularly important is the clarification of the basic principles of international law in order to avoid fragmentation. In today's world, rules are created almost daily, which accelerates the fragmentation of international law. In order to maintain consistency in the international legal framework, the Commission can identify and codify established and emerging principles of international law deriving from individual norms. In this sense, it was noteworthy to hear at the commemorative panel discussions that the ILC nowadays has much more active discussions than it did 10 years ago.

It is of course important for the Commission to select practical topics that reflect actual international concerns. It is therefore essential that States give adequate guidance on possible topics to be discussed by the ILC. It would be useful, for example, to have a session at the Sixth Committee devoted solely to the exploration of new topics to be addressed by the ILC. Also, we would like to suggest that the process of selecting topics should be more transparent.

Mr. Chairman,

In the seventieth session, the Commission decided to include a new topic in its programme of work: "*General principles of law*". It is important that the Commission identify the nature and function of this notion through careful examination of State practice, including international and domestic judicial decisions, as well as the development of relevant legal theories. It would be useful for courts, tribunals, and practitioners of international law if the Commission could provide an illustrative list of such principles in the course of its consideration of this topic.

Regarding one of two topics newly incorporated in the long-term programme of work, several countries have supported the topic "Sea-level rise in relation to international law" to be undertaken by the Commission. Japan is of the view that careful consideration on this topic may respond to the needs of Member States and contribute to broader interaction between the Commission and Member States.

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

Mr. Chairman,

Now, I would like to turn to the topic of "Subsequent agreements and subsequent practice in relation to the interpretation of treaties." Japan appreciates the work of the Special Rapporteur, Professor Georg Nolte, in his fifth report, and congratulates the Special Rapporteur and the Commission on the adoption of the draft conclusions on the second reading.

Articles 31 and 32 of the Vienna Convention on the Law of Treaties set forth various means of interpretation, the process of which consists of "a single combined operation"[1]. At the same time, "subsequent agreements" and "subsequent practice" within the meaning of paragraph 3 (a) and (b) of Article 31, in particular, are given an important role in the interpretation of treaties because they constitute "objective evidence of the understanding of the parties as to the meaning of the treaty", as indicated by the Commission in its 1966 commentary and confirmed in the present Draft Conclusion 3. Japan considers that various issues addressed by the current draft conclusions should be understood in light of this fundamental nature of "subsequent agreements" and "subsequent practice".

[1] See Draft Conclusion 2.

In this connection, with regard to Draft Conclusion 11, "Decisions adopted within the framework of a Conference of States Parties", paragraph 3 is particularly important. A decision of a Conference of States Parties embodies a "subsequent agreement" or "subsequent practice" within the meaning of paragraph 3 (a) and (b) of Article 31 only insofar as it expresses "agreement in substance" between the parties "regarding the interpretation of the treaty". In other words, a decision of a Conference of States Parties should not be used, under the name of "subsequent agreement" or "subsequent practice", as a means to impose a view of the majority upon a dissenting minority.

Furthermore, Japan acknowledges the active debate, on the second reading, in the Commission on Draft Conclusion 13, concerning the legal significance of "pronouncements of expert treaty bodies". In light of what I said earlier, Japan is of the view that the current formulations as expressed in the Draft Conclusion 13 strike a proper balance, as the pronouncements of expert treaty bodies are not, in themselves, objective evidence of the understanding of the parties as to the meaning of the treaty.

On a separate note, Draft Conclusion 10, paragraph 1 states that an "agreement" under Article 31 paragraph 3 (a) and (b) "may, but need not, be legally binding for it to be taken into account". What constitutes an agreement of a legally binding nature on its own and what is a subsequent agreement for the purpose of treaty interpretation need to be distinguished. While acknowledging the possibilities of an agreement entailing both characters, Japan recalls the importance of Article 39.

Finally, Japan acknowledges that the Commission noted in its commentary in 1966 that it "did not consider it necessary to make ... a distinction" between law-making and other treaties for the purpose of formulating the general rules of interpretation[2]. Japan notes and respects that the present draft conclusions follow the same understanding. On the other hand, Japan feels that there may still be some room to discuss whether the nature of treaties could have any bearing on the role of subsequent agreements and subsequent practices.

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[2] *Yearbook of the International Law Commission*, 1966, Vol. II, p. 220.

In conclusion, Japan would like to reiterate its appreciation to the Special Rapporteur and the Commission for the adoption of the draft conclusions.

Identification of customary international law

Mr. Chairman,

Now, I would like to address the topic of "Identification of customary international law". The delegation of Japan commends the Special Rapporteur, Sir Michael Wood, for his fifth report and also congratulates the Special Rapporteur and the Commission on the adoption of the draft conclusions on the second reading.

Japan highly values the draft conclusions adopted by the Commission and believes that they serve as a practical guide for the identification of rules of customary international law. Japan also commends the Secretariat for its work on elaborating the memorandum on ways and means for making the evidence of customary international law more readily available, although Japan notices a certain regional imbalance on materials collected by the Secretariat. Japan hopes that these valuable materials for the identification of customary international law will be updated in the future.

Japan understands that some members of the Commission expressed their views again on the rule of the persistent objector on the second reading. As the delegation of Japan pointed out in the Sixth Committee in 2016, this rule is a controversial theory as substantial questions are not clearly answered yet, such as whether the existence of the persistent objector thwarts the establishment of a rule in question as customary international law, or whether this rule simply hampers the application of a customary rule to the persistent objector. In our view, further deliberation was required on this matter with concrete examples of general practice in order to substantiate the rule, because we have doubts whether this issue was discussed sufficiently on the second reading.

In any event, Japan would like to reiterate its appreciation to the Special Rapporteur and to the Commission for the adoption of the draft conclusions. We look forward to fruitful discussions on these topics in the General Assembly.