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Sixth Committee of the General Assembly

Report of the International Law Commission on the work of its 65th session
Cluster III

Statement by Ms Julia O'Brien
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(Check against delivery)

Mr Chair and distinguished members of the International Law Commission,

Australia would like to comment briefly on some of the Cluster III topics, namely the protection of persons in the event of disasters, the formation and evidence of customary international law, the provisional application of treaties, the obligation to extradite or prosecute and the most-favoured-nation clause.

Protection of persons in the event of disasters

Mr Chair

Australia welcomes the continued discussions of the Commission and the sixth report of the Special Rapporteur, Mr. Eduardo Valencia-Ospina relating to the protection of persons in the event of disasters.

Protecting people from serious harm during disasters is both a challenge and a core responsibility for all humanitarian actors. Australia has a long-standing commitment to the protection of affected populations, recognising that delivering humanitarian assistance in the absence of safety and security has a limited or even detrimental effect. To this end, we continue to encourage humanitarian agencies to adopt an anticipatory approach to managing risks that are inherent in crisis situations. Accordingly, Australia believes that the draft articles provide useful guidance to both affected and assisting States on responding effectively to the significant protection challenges posed by disasters.

Australia continues to support the IFRC's International Disaster Response Law (IDRL) Guidelines and draft Model Act for the Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance. This includes through the IFRC Asia Pacific Disaster Law program which builds the capacity of National Societies on legal issues in disaster response.

The Commission's work in this area continues to contribute to the development of a normative legislative framework for humanitarian action in disaster-affected communities, and Australia is encouraged by the ongoing development and provisional adoption of the draft articles.

Formation and Evidence of customary international law

Australia welcomes the first report of the Special Rapporteur, Mr Michael Wood, on the formation and evidence of customary international law. Australia also notes the Commission's decision to change the title of the topic to the 'identification of customary international law'. However, despite this new title, Australia encourages the Commission to maintain a broad scope, and to continue to explore both the formation of customary international law and evidence of its existence.

Australia agrees with the Commission's view that the development of a set of conclusions with commentaries would be the most appropriate outcome arising from the consideration of this topic. In Australia's view, the practical utility and guidance provided by the Commission's work will be significant.

Australia looks forward to considering the continued work of the Commission on this topic in its subsequent sessions.

Provisional application of treaties

Mr Chair

Australia welcomes the first report of the Special Rapporteur, Mr Juan Manual Gomez-Robledo, on the provisional application of treaties, and the memorandum by the Secretariat examining the negotiating history of Article 25 of the Vienna Convention.

Australia shares the Special Rapporteur's view that the topic of 'Provisional application of treaties' is best suited for the development of guidelines or model clauses aimed at providing guidance to States. Such an approach reflects the divergent domestic positions of States regarding provisional application, and the fact that States are free to establish rules under their respective legal systems on how to engage with the provisional application of treaties. In Australia, for example, there is a two-step domestic process before Australia formally consents to be bound at international law. Accordingly, Australia's practice is *not* to provisionally apply treaties. Guidelines or model clauses could provide States with significant and useful guidance on this issue, without impinging on the relevant domestic and constitutional requirements of States.

Australia supports the position that the Commission should be guided by the practice of States during the negotiation, implementation and interpretation of treaties being provisionally applied. The Commission need not come to a view on whether provisional application should be encouraged or discouraged. Individuals States will be best placed to consent to provisional application in light of the purpose, scope and content of the specific treaty, as well as domestic legal and political considerations. Instead, the Commission should strive to provide clarity to States when negotiating and implementing provisional application clauses.

Australia welcomes the Special Rapporteur's continued work on this topic, and looks forward to the consideration of the relationship between Article 25 and other provisions of the Vienna Convention, and the temporal component of provisional application.

Finally, Australia notes the Commission's request for information on the practice of States concerning the provisional application of treaties and looks forward to contributing to this discussion.

Obligation to extradite or prosecute

Mr Chair

Australia welcomes the report of the open-ended Working Group on the obligation to extradite or prosecute, under the chairmanship of Mr Kriangsak Kittichaisaree.

Australia is firmly committed to ensuring that impunity is not tolerated for crimes of international concern. In Australia's view, the obligation to extradite or prosecute is an important tool in the fight against impunity. Such a view is reinforced by the increasing number of multilateral treaties which seek to apply the obligation to extradite or prosecute to a growing range of crimes. As such, it remains a practical topic for the Commission's consideration, and Australia supports the Commission's ongoing examination of the topic.

Australia notes the Working Group's consideration of various conventional formulas on the obligation to extradite or prosecute. Recognising the divergent views of States regarding the obligation to extradite or prosecute, and the need for flexible approaches to reflect the differing purpose, objective and scope of treaties employing the obligation to extradite or prosecute, Australia welcomes the exploration of existing formulas. The Commission's work on this issue will provide a useful resource for States to draw upon in the drafting of future treaties.

Australia also notes the Commission's consideration of the ICJ's judgment in the Questions relating to the Obligation to Prosecute or Extradite (*Belgium v. Senegal*) case

and welcomes the Commission's consideration of the implementation of the obligation to extradite or prosecute. Australia considers this work helpful in guiding the practice of States.

Australia looks forward to considering the continued work of the Commission on this topic in its subsequent sessions.

Most-favoured-nation clause

Mr Chair

Australia continues to support the work of the Study Group on the Most-Favoured-Nation (MFN) clause. In particular, Australia welcomes the Study Group's efforts in assuring greater certainty and stability in the field of investment law. Accordingly, we support the Study Group's emphasis on the importance of greater coherence to approaches taken by arbitral tribunals in relation to MFN provisions.

Australia notes that the final report of the Study Group will likely address the question of the interpretation of MFN provisions in investment agreements in respect of dispute settlement. Australia's view regarding MFN provisions and dispute settlement remains unchanged. In interpreting a treaty where the ambit of the MFN obligation with respect to dispute settlement is not specified, it is not appropriate to presume that MFN obligations apply broadly in a manner that would negate the negotiated procedural requirements. Australia considers the inclusion of both an MFN obligation and procedural requirements in a treaty including dispute settlement procedures as evidence that the Parties did not intend MFN principles to apply to those dispute settlement procedures.

Australia encourages the Study Group to undertake further work on this topic. In particular, the Study Group should examine whether "less favourable treatment" could be defined with greater clarity in the context of investment treaties. In its consideration, the Study Group could look to answer the question of whether the MFN principle requires treatment on exactly the same terms and conditions as it is extended to investors and

investments of the treaty partner, or substantively the same treatment. Or is the phrase "less favourable treatment" to be accorded some other understanding?

Australia notes the Study Group's consideration of an informal paper on model MFN clauses post the *Maffezini* case, and further notes the possibility that the Study Group may develop guidelines and model clauses. Australia broadly supports such work, noting that it would be helpful in promoting greater clarity and stability in the field of investment law.

Australia looks forward to reviewing further reports on this issue and applauds the Study Group's efforts thus far.

Thank you.