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Report of the International Law Commission on the work of its sixty-ninth session

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Mr. Chairman,

As this is the first time that Micronesia is taking the floor this session, please allow me to congratulate you and your Bureau on your elections to your posts. Micronesia has full confidence in your abilities to lead this Committee and stands ready to assist you in the discharge of our work.

Mr. Chairman,

Micronesia is grateful to the International Law Commission for producing an instructive and comprehensive report of its sixty-ninth session. The Commission remains a crucial forum for addressing the sprawling nature of international law and fostering its codification and progressive development. Micronesia values the role that the Commission plays in allowing all States to contribute to the refinement of an international order that respects State sovereignty while advancing key principles of common interest for humanity. Micronesia welcomes every opportunity to engage with the Commission on its important work.

In this Cluster, Micronesia wishes to address two matters. First, Micronesia will comment on the Commission's consideration of the topic of provisional application of treaties. Second, Micronesia will take up the Commission's invitation to States to suggest topics for inclusion on the Commission's long-term programme of work.

Mr. Chairman,

Micronesia appreciates the efforts of Mr. Juan Manuel Gomez Robledo, the Special Rapporteur for the topic on provisional application of treaties, who has shepherded the Commission's consideration of the topic for half a decade and produced four important reports on the topic. Micronesia also notes the Commission's provisional adoption of 11 draft guidelines on the topic as well as the assertion of the Commission in its general commentary to the draft guidelines that

the draft guidelines reflect existing rules of international law. Micronesia submitted national Comments to the Commission for this topic in 2014, which underscored the importance of the topic for Micronesia. Today, Micronesia wishes to comment on a number of the draft guidelines provisionally adopted by the Commission.

As a general note, Micronesia appreciates the relative brevity of the draft guidelines as a whole and notes that the Commission has avoided producing draft guidelines that are overly prescriptive, so as to acknowledge the flexibility of States to modify by mutual agreement the normal practice of provisional application. From the outset of the Commission's consideration of this topic, Micronesia has stressed the importance of provisional application as a means to an end—namely, as a method for fostering the speedy implementation of treaties. Micronesia feels that the draft guidelines provisionally adopted by the Commission rightfully encourage this approach, as the general commentary to the draft guidelines attests.

Micronesia notes draft guideline 3 with appreciation. As the commentary for draft guideline 3 makes clear, a State or international organization may provisionally apply a treaty or a part of a treaty that has not entered into force for that particular State or international organization even if the treaty itself has entered into force. Micronesia previously raised this matter as one of importance for the Commission to consider, and Micronesia appreciates the Commission's work in response.

In connection with draft guideline 3, Micronesia notes that draft guideline 6 underscores that when a State or international organization provisionally applies a treaty, that provisional application produces the same legal effects as if the treaty were in force between the State or international organization and the other party or parties to the treaty. Micronesia is of the view that the phrase "in force" used in draft guideline 6 has the same meaning as the same phrase in draft guideline 3—namely, when a State or international organization provisionally applies a treaty that has itself entered into force but which has not entered into force for that State or international organization, that provisional application produces the same legal effects as if that treaty had entered into force for that State or international organization. Such legal effects necessarily include rights as well as obligations for the party provisionally applying the treaty.

In line with the discussion on draft guidelines 3 and 6, Micronesia notes draft guideline 7, which indicates that when a State or international organization provisionally applies a treaty or part of a treaty and subsequently breaches one of its obligations arising from that provisional application, that State or international organization incurs international responsibility for that breach. The tool of provisional application should not be used to enjoy certain rights under a treaty while avoiding the obligations that come with those rights. It is Micronesia's view that this important principle applies even when the treaty being provisionally applied has not entered into force for the State or international organization provisionally applying that treaty.

Finally, Micronesia notes the careful balance struck in draft guideline 11 and its commentary, which acknowledge that while a treaty may allow for its provisional application in a manner that is without prejudice to the internal laws or rules of a potential party to the treaty, such qualifications on the provisional application of the treaty must be sufficiently clear to all relevant parties from the outset. This will avoid the undesirable situation of a State or international

organization invoking heretofore undisclosed internal laws or rules to negate its failure to discharge its obligations under a treaty it provisionally applies or to negate such a provisional application outright. Micronesia notes, however, that it is possible for the court of a State provisionally applying a treaty to render a decision invalidating the ability of that State to carry out its obligations arising from its provisional application of the treaty, if not to invalidate the provisional application as a whole. In that situation, it is unclear as to whether such a judicial decision would be considered an "internal law" for purposes of the draft guidelines. It is Micronesia's view that draft guideline 11 provides a possible way to account for such a judicial decision, insofar as the potential parties to a treaty can allow for its provisional application to be subject to internal judicial review. Draft guideline 10 might provide another option, insofar as the judicial decision holds that the State's provisional application of the treaty is a manifest violation of the internal law of the State regarding its competence to provisionally apply the treaty and concerns a matter of fundamental importance for the State.

Micronesia expresses its appreciation once again to Mr. Gomez Robledo for his diligent work on this topic and looks forward to putting the draft guidelines to full use in its engagements with the international community.

Mr. Chairman,

Micronesia notes that paragraph 33 of the Commission's annual report invites States to submit proposals concerning possible topics for inclusion in the Commission's long-term programme of work. Micronesia is grateful for this invitation, as it fosters positive and productive interactions between the Commission and States.

Toward that end, Micronesia hereby signals its intent to submit, at a later date, a written proposal to the Commission for the inclusion of the topic of the legal implications of sea-level rise in the Commission's long-term programme of work. That written proposal will highlight the concrete relevance of the topic to the international community as a whole, suggest the extent to which international instruments and other sources of international law have shaped the topic, and discuss how the Commission's study of the topic can contribute to the progressive development or codification of relevant aspects of the topic.

It is Micronesia's understanding that the Pacific Small Island Developing States ("PSIDS") will deliver an intervention later this week in this Committee with a similar proposal on the legal implications of sea-level rise. Micronesia associates itself with that intervention. At the present stage, as a preview of the written proposal that Micronesia will submit to the Commission as well as an expansion on the PSIDS intervention, Micronesia wishes to note the following.

First, sea-level rise impacts virtually all States. Sea-level rise has the potential to shrink the maritime entitlements of coastal States due to receding coastal baselines. This impacts the food security, national defense, and other important interests of those States as well as of landlocked States that depend on resources extracted from those maritime areas. Receding baselines also potentially impact the drawing and permanence of maritime boundaries, which has implications for international relations as well as the orderly use of the Ocean by public and private actors in the international community.

Second, sea-level rise poses an existential threat to island States, particularly those with low-lying islands and atolls like Micronesia and its many fellow island States in the Pacific. Sea-level rise has already been blamed for the disappearance of a number of low-lying islands in the Pacific. The implications of this phenomenon for the ability of a State to persist as a State under international law are clear: When a State loses its geographical territory, can it still be considered a State under international law? This is not merely an academic exercise; for Micronesia and other small island developing States, this strikes at the core of our ability to participate as full members of the international community.

Third, although there appear to be no treaties or other international instruments that directly address the legal implications of sea-level rise, it is Micronesia's view that the Commission can conduct a fruitful study of those implications by examining a large number of international instruments with relevance to sea-level rise, including major multilateral instruments with widespread acceptance by the international community. Instruments include, but are not limited to, the 1982 United Nations Convention on the Law of the Sea and numerous instruments arising under or in relation to the Convention; the United Nations Framework Convention on Climate Change, along with its Kyoto Protocol, Doha Amendment, and the Paris Agreement; human rights instruments protecting the rights of indigenous peoples and local communities to enjoy their coastal and maritime areas, particularly for sustenance, shelter, and cultural purposes; instruments regulating the migration of people across international borders; the World Heritage Convention and the designation of World Heritage Sites in coastal and maritime areas; bilateral and regional resource-sharing agreements for coastal and maritime areas potentially affected by sea-level rise; instruments of the International Maritime Organization; instruments regulating the transport of nuclear materials and other hazardous substances on the Ocean; the Montevideo Convention on the Rights and Duties of States; and instruments regulating the trade in endangered species in coastal and maritime areas potentially affected by sea-level rise. Mention should also be made about the current negotiations for a new international legally binding instrument to regulate the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction; the sizes of those areas will likely be impacted by the receding of coastal baselines due to sea-level rise.

Finally, Micronesia acknowledges that the topic of the legal implications of sea-level rise might not be the sort of topic traditionally considered by the Commission. However, the Commission has explicitly stated that it shall not be restricted to traditional topics, but can consider topics that "reflect new developments in international law and pressing concerns of the international community as a whole." The topic of the legal implications of sea-level rise fits squarely in that rubric. Sea-level rise has emerged as a natural phenomenon commanding international attention within the last couple or three decades. With that emergence has come an appreciation of the urgent need to address the causes of sea-level rise as well as account for its implications, including those of a legal nature. The Commission's study of this topic will be a valuable contribution to this international discourse. In that light, Micronesia calls on the Commission to include the topic in its long-term programme of work as soon as possible.

Thank you, Mr. Chairman.