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Agenda item 82:

Report of the International Law Commission on the work of its seventieth session

Statement by: Mr. Jeem Lippwe, Deputy Permanent Representative of the Federated States of Micronesia to the United Nations

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Mr. Chair,

In this Cluster, Micronesia wishes to focus on the Commission's consideration of the topic of the protection of the atmosphere. In that connection, Micronesia welcomes Mr. Shinya Murase's fifth report on the topic and takes note of the Commission's adoption, on first reading, of a draft preamble and an entire set of draft guidelines on the protection of the atmosphere. Micronesia is grateful to Mr. Murase for his tireless dedication to his work as Special Rapporteur for this important topic. Micronesia remains deeply concerned that the Commission imposed stringent limits on the work that Mr. Murase could do on this topic. While it is beneficial to limit the scope of a topic in order to make the work manageable and useful, it is not appropriate to limit that scope for primarily (if not purely) political reasons, especially when those limits undercut much of the value that the work can provide to the international community.

Micronesia also takes note of the Commission's request to Governments and international organizations for comments and observations on the draft preamble and draft guidelines as a whole by 15 December 2019. Micronesia will endeavor to submit detailed comments and observations to the Commission by that deadline. For now, Micronesia would like to make three points on the fifth report produced by Mr. Murase as well as the Commission's handling of the draft guidelines proposed in that fifth report—specifically, draft guidelines 10, 11, and 12, as adopted by the Commission on first reading.

First, on draft guideline 10, as adopted by the Commission on first reading, Micronesia is disappointed that there is no reference in the draft guideline itself to the responsibility of States for failing to implement their obligations under international law relating to the protection of the atmosphere. It is indisputable under international law that a State incurs responsibility whenever

the State fails to implement any of its international law obligations. Mr. Murase's original draft guideline 10 acknowledges this truism as well as asserts that such responsibility is triggered only when the action or omission in question is attributable to the State and the damage or risk is proven by clear and convincing evidence. Micronesia acknowledges that the commentary for the draft guideline, as adopted by the Commission on first reading, states that the 2001 articles on responsibility of States for internationally wrongful acts "are equally applicable in relation to environmental obligations, including protection of the atmosphere from atmospheric pollution and atmospheric degradation." Despite the Drafting Committee's concerns, this language could have been included in the draft guideline itself without upsetting the balance of the draft guidelines, as the language states a core norm of international law that should be at the heart of efforts to protect the atmosphere.

Additionally, Micronesia is disappointed in the deletion of a reference in draft guideline 10 to damage. It is Micronesia's view that one of the values of Mr. Murase's original draft guideline 10 is that it addresses the relevance of damage to the determination of State responsibility, particularly in connection to the protection of the atmosphere. There is a lack of clarity in international law as to what constitutes an internationally wrongful act or omission that triggers State responsibility in connection with the protection of the atmosphere. Micronesia has issues with the clear-and-convincing standard for the attribution of damage that Mr. Murase proposes in his original draft guideline 10, but Micronesia appreciates that he makes an effort to identify and discuss a standard anyway.

Second, on draft guideline 11, as adopted by the Commission on first reading, Micronesia is satisfied for the most part with the language in draft guideline 11 and its commentary regarding the sort of facilitative and enforcement measures that could be used to bring a State into compliance with respect to the protection of the atmosphere. Micronesia is particularly pleased with the reference to the need to take into account the capabilities and special conditions of States when fostering their compliance. As the commentary notes, special conditions for a State can include a "general lack of capacity, which can sometimes be mitigated through the receipt of external support enabling capacity-building to facilitate compliance" with the State's obligations under international law. Micronesia is a small island developing State that is a Party to numerous major multilateral environmental agreements pertaining to the protection of the atmosphere, including the Montreal Protocol, the Kigali Amendment, the Kyoto Protocol, and the Paris Agreement. We are doing our part to aid in the protection of the atmosphere, but our success depends greatly on capacity-building and other forms of technical, programmatic, and financial assistance from our partners. Micronesia is pleased that the Commission acknowledges this core reality in the international legal regime for the protection of the atmosphere.

Third, on draft guideline 12, as adopted by the Commission on first reading, Micronesia supports the decision by the Drafting Committee to refine Mr. Murase's original draft guideline 12, particularly with respect to language on the use of experts by tribunals to assess evidence before them. In Micronesia's view, the original draft guideline 12 is too limited. In numerous domestic and regional systems around the world, the traditional knowledge of indigenous peoples and local communities plays a key role in dispute settlement, particularly with respect to disputes pertaining to environmental matters. It is well-documented that indigenous peoples and local communities throughout the world have close and long-standing ties to and knowledge about the

natural environments they inhabit. This is the case throughout the Pacific, in the Americas, and in Africa, among other regions. Such traditional knowledge can prove useful in, for example, understanding how the burning of certain trees can unleash certain atmospheric pollutants, or how certain flora and fauna react to the heavy presence of certain atmospheric particles, or how ecosystems on land and in the Ocean react to wild, unprecedented, and sustained alterations in the atmosphere. The traditional knowledge of indigenous peoples and local communities have been recognized in a large number of multilateral environmental agreements and processes as playing key roles, including in the Convention on Biological Diversity and its Nagoya Protocol, the International Treaty on Plant Genetic Resources for Food and Agriculture, and the Paris Agreement on climate change. To the extent that such traditional knowledge allows for a deeper understanding about the human activities that harm the atmosphere as well as the impacts of atmospheric pollution and atmospheric degradation, experts on such traditional knowledge should be consulted by tribunals in inter-State disputes in relation to such harm. The language in draft guideline 12, as adopted by the Commission on first reading, refers to “technical and scientific experts,” which is an appropriate broadening of the pool of expertise. Micronesia encourages the Commission to consider, during its second reading of the draft guidelines, language in either draft guideline 12 or its commentary that acknowledges the relevance of the traditional knowledge of indigenous peoples and local communities. Micronesia will discuss this point to a fuller extent in our written Comments to the Commission at a later date.

I thank you, Mr. Chair.