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Agenda item 80: Report of the International Law Commission on the work of its seventy-sixth session [Cluster II]

Statement by: Delegation of the Federated States of Micronesia

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Chair,

For this Cluster, Micronesia will address the topic on “subsidiary means for the determination of rules of international law” and its intersection with the topic on “non-legally binding international agreements.” We will conclude with comments on various decisions of the Commission on its programme of work.

For small island developing States like Micronesia that are at the front-lines of the triple planetary crisis of climate change, biodiversity loss, and pollution, these topics are not merely abstract. Legal clarity and further development of these topics are critical to determining whether efforts by the international community to tackle that triple planetary crisis are truly effective.

To that end, Micronesia will advance four main points.

First, Micronesia welcomes the Commission’s progress on the topic of subsidiary means, and the provisional adoption of the draft conclusions by the Drafting Committee. In particular, we welcome Draft Conclusion 12, which provides that a resolution adopted by an international organization or at an intergovernmental conference can serve as a subsidiary means for determining the existence and content of the rules of international law. This reflects the reality of contemporary practice, where resolutions often synthesize extensive State engagement, present considered legal analysis, and structure common understandings in a manner that assists the identification and clarification of applicable law.

Second, Micronesia reiterates that the resolutions of international organizations and intergovernmental conferences, including COP decisions and decisions by similar bodies established under multilateral environmental agreements, have normative value. Their legal significance is not exhausted by an evidentiary role in customary international law, nor by their occasional function as supplementary means of treaty interpretation. Micronesia highlights the findings of Special Rapporteur Jalloh in his third report that resolutions can contribute to the development of international law, and may be part of the process of rule creation, particularly by contributing to the formation of new customary rules. Micronesia also echoes the statements of Commission members at the 76th session, emphasizing that certain resolutions such as those created at COPs can create legal obligations. Micronesia supports the Commission's present efforts to codify a structured approach for treating resolutions and COP decisions as subsidiary means, without diminishing the distinct status of sources. We also encourage the Commission, in its commentary to the draft conclusion on resolutions, to explain how the general weight criteria apply to resolutions and COP decisions in practice.

Third, Micronesia appreciates Special Rapporteur Forteau's careful delineation of scope and analysis of how to distinguish treaties from non-legally binding agreements. We acknowledge the complexity of characterizing the normative value of COP decisions. We also welcome the report's focus on indicators of intention and legal nature. However, we reiterate that even if COP decisions are deemed to be "non-legally binding international agreements" for purposes of the ILC topic, they nevertheless could possess and generate normative value and legal effects. We also support a flexible, practice grounded approach to scope that does not exclude acts adopted within institutional frameworks lacking separate legal personality.

Fourth, we draw attention to the evolving jurisprudence affirming the determinative role of COP decisions. In its recent advisory opinion on climate change, the International Court of Justice treated the UNFCCC and Paris Agreement COP and CMA decisions as legally salient to the Parties' obligations. This development is the product of methodical judicial reasoning in line with the Commission's work on subsidiary means. The third report on subsidiary means further identified three decisions of the International Court of Justice where resolutions were considered as a means of determining the content and scope of an existing rule of customary international law. The work of the ICJ exemplifies the timeliness of a draft conclusion on resolutions and decisions.

Finally, to conclude, we wish to make some brief comments on the Commission's decisions to include the topic of "Compensation for the damage caused by internationally wrongful acts" as well as the topic of "Due diligence in international law" in its current programme of work.

Micronesia welcomes these decisions. Recent advisory opinions on climate change from the International Tribunal for the Law of the Sea, the Inter-American Court of Human Rights, and the International Court of Justice underscore, among other things, that both topics are interlinked, in that the violation of the obligation of due diligence is an internationally wrongful act for which some form of reparation can be demanded, including compensation. The advisory opinions also stress that the obligation of due diligence has evolved in international law, to the extent that the line between an obligation of conduct and an obligation of result is not necessarily a fixed one depending on the circumstances, such as the severity of potential harm that could be inflicted by climate change and related phenomena as a result of acts or omissions of a State with such a due diligence obligation.

Micronesia notes that Ms. Penelope Ridings, as Special Rapporteur for the topic on due diligence, has indicated that she will examine the topic of due diligence in terms of obligations of States but not in terms of due diligence obligations of multinational corporations, business operators, private investors, or other non-State actors. Micronesia emphasizes, however, that this should not preclude Ms. Ridings and the broader Commission from examining the due diligence obligations of States with respect to the activities of non-State actors under their respective jurisdictions or control, including the non-State actors just mentioned. The recent advisory opinions on climate change acknowledge these types of obligations, and the Commission should not shy away from addressing them under this topic.

I thank you.