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### 69<sup>th</sup> United Nations General Assembly Sixth Committee Agenda item 78 (Part 3): Report of the International Law Commission

#### Statement by the Micronesia Delegation

New York, 3 November 2014

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Mr. Chairman,

This statement deals only with the topic of the provisional application of treaties, as contained in Chapter XII of Document A/69/10. Micronesia is grateful to Special Rapporteur Mr. Manuel Gomez-Robledo for leading the work of the Commission and producing two reports to date on this important topic.

Mr. Chairman,

The act of entering into a treaty is a momentous affair in international law. When two or more States agree to bind themselves to the terms of a treaty, they place their national interests, their aspirations, and potentially their sovereignties at the mercy of their treaty partners. Whether it is for peace, defense, trade, economic union, or some other weighty matter, a treaty injects a measure of stability and predictability into international relations and provides a fertile source for rules and principles of international law. Given the far-reaching ramifications of validly concluded treaties, it is very important that Parties to a treaty know when the treaty actually applies and binds them, particularly if that occurs before the treaty enters into force. The Commission's examination of the provisional application of treaties is thus a critical one.

Indeed, Micronesia attaches such great importance to the Commission's work that it submitted Comments to the Commission earlier this year discussing Micronesia's views on the provisional application of treaties, marking the first time that Micronesia has ever submitted Comments to the Commission. As discussed in our Comments to the Commission, Micronesia has a long history with the mechanism of provisional application. When Micronesia emerged from the trusteeship system, Micronesia made sure to notify the United Nations that it intended to provisionally apply a number of treaties that the United States had extended to Micronesia as its administering power during the trusteeship, until such time that Micronesia had completed a thorough review of whether to formally enter into those treaties as an independent sovereign. The provisional application of treaties was therefore one of the first acts undertaken by Micronesia under international law and as part of the international community, and it remains a matter of great interest for Micronesia.

Micronesia is not a Party to the 1969 Vienna Convention on the Law of Treaties, whose article 25 is a major focus of Mr. Gomez-Robledo's work. Nevertheless, Micronesia asserts that article 25 of the Convention is now part of customary international law, even though its specific content and parameters remain to be established in an authoritative manner. Although the drafters of the Convention grappled with the appropriateness of article 25 in light of the questionable legal status of the mechanism of provisional

application at that time, the usefulness of the mechanism cannot be questioned, particularly with regard to jumpstarting treaty implementation and ensuring the continuity of functions in successive treaty regimes; and neither can the widespread use of the mechanism by States before and after article 25 was enshrined in the Convention.

Micronesia welcomes the decision by Mr. Gomez-Robledo to focus his current work on the legal effects of the provisional application of treaties. This practical approach will enhance States' understanding of the actual functions of the mechanism of provisional application and hopefully lead to broader utilization of the mechanism. In that regard, it is Micronesia's view that the mechanism, when utilized, does produce legal rights and generate legal obligations for the State utilizing the mechanism as if the treaty has entered into force for that State, but the exercise and discharge of those rights and obligations can be limited either by the terms of the treaty being provisionally applied or by a separate agreement struck by the treaty Parties that allows for the provisional application of the treaty. In no way can the provisional application of a treaty lead to a modification of the rights and obligations themselves, even though the exercise and discharge of those rights and obligations may be limited during the treaty's provisional application. As a necessary corollary, if a State fails to discharge a treaty obligation that it provisionally applies, then that is an internationally wrongful act that triggers the international responsibility of the State. As another necessary corollary, and in line with article 27 of the Convention, a State Party to a treaty that validly opts to provisionally apply the treaty but then fails to discharge its obligations under the treaty cannot use domestic law as an excuse for its failure. Indeed, because provisional application is a tool designed to hasten treaty implementation and ensure treaty continuity, States must make sure that they can actually use such a tool from the outset, or else the exercise is for naught.

Going forward, Micronesia encourages Mr. Gomez-Robledo and the Commission to consider the legal distinctions (if any) between, on the one hand, a State's provisional application of a treaty that has not yet entered into force internationally but which the State has ratified according to domestic constitutional requirements; and, on the other hand, a State's provisional application of a treaty that has entered into force internationally but which has not entered into force for the State due to delays in the State's ratification of the treaty in accordance with its domestic constitutional requirements. In the latter scenario, assuming that the State can indeed provisionally apply a treaty that has not entered into force for the State despite entering into force internationally, what are the international legal consequences (if any) for the State if it fails to discharge the treaty obligations that it provisionally applies?

Mr. Chairman,

Perhaps realizing the expansive effects of treaties, the international community has shied away from concluding multilateral treaties in recent years, while those multilateral treaties that have been concluded struggle to attain sufficient ratifications in order to enter into force. In this climate, the mechanism of provisional application is a vital tool for triggering and sustaining treaty obligations in an expeditious and continuous manner. The Commission's work on this topic is thus important and timely.

I thank you, Mr. Chairman.