



**Report of the International Law Commission on the work of its
seventy-second session
(Agenda item 82)
*Statement by Portugal***

Cluster 1

**Chapters: I, II, III and X (General comments and Other Decisions), IV
(Protection of the Atmosphere) and V (Provisional Application of
Treaties)**

Madam Chair,

It is good to be back to our discussions on the International Law Commission Report.

This being the first time that I am taking the floor in this session, let me congratulate you on your election as Chair of the Sixth Committee.

Allow me also to thank the Chair of the International Law Commission, Mr. Mahmoud D. Hmoud for presenting the Report on the work carried out by the Commission during its seventy-second session.

In today's statement, my delegation will begin by making a few general comments on the Commission's work, including on Chapter X of the report, "*Other Decisions*". We will then address the topics "*Protection of the Atmosphere*" and "*Provisional Application of Treaties*".

We will address the other chapters of the Report in the coming days, according to the clusters proposed.



Due to time restrictions, my delegation will deliver an abridged version of its statement. The full statement will be submitted to the Secretariat.

General comments, incl. "Other Decisions" – Chapter X of the ILC Report

Madam Chair,

For decades, the Commission has critically supported the General Assembly in carrying out its mandate under the Charter of the United Nations to encourage the progressive development of international law and its codification.

In 2020, the session of the International Law Commission regrettably had to be postponed, due to the COVID-19 pandemic. Portugal is happy to note that this year the Commission was able to hold its Seventy-Second Session despite still facing significant limitations. We would like to commend the Commission and the Secretariat for this achievement. The adoption of new methods of work facilitated by technology, such as holding meetings in a hybrid format, was decisive for the successful outcome of this year's session.

Great efforts had to be made by Members of the Commission, the Secretariat, as well as the interpreters and other UN staff, to minimise the negative impact of the many challenges encountered in this session and that are identified in the report. These challenges compromised the capacity of the Commission, as well as a detailed negotiation of texts.

Last year, Portugal said it was confident that this Seventy-Second session of the Commission would be a testimony of the resilience and resourcefulness of all its Members. The Commission succeeded in delivering on this expectation, mitigating delays and making remarkable progress in its programme of work.



Madam Chair,

Portugal welcomes how committed the Commission remained to cooperation with other bodies during the reporting period, despite limitations brought about by the COVID-19 pandemic.

Some of the usual exchanges of views with groups and institutions specialising in international law and international justice were impossible.

Even so, The Commission was able to hold a meeting with the President of the International Court of Justice and an informal exchange of views with the International Committee of the Red Cross.

Madam Chair,

My country supports the recommendation of the Commission to include in its long-term programme of work the topic "*Subsidiary means for the determination of rules of international law*".

The Commission has devoted much of its work to the classical topic of sources of international law, departing from the authoritative statement of said sources that is contained in Article 38, paragraph 1, of the Statute of the International Court of Justice (ICJ).

However, its sub-paragraph (d) remains largely unaddressed by the Commission. We welcome further clarification by the Commission regarding the role of judicial decisions and teachings of the most highly qualified publicists in the determining of existing rules of international law.

A comprehensive study of such subsidiary means would actively contribute to the codification and progressive development of international law.



Furthermore, it could provide a useful panacea to certain negative consequences of the fragmentation of international law.

Judicial decisions and teachings of the highly qualified publicists are a form of evidence of international law which are routinely referred to by international and national courts and tribunals. Yet, those references are far from coherent in interpretation in courts and tribunals, which can lead to fragmentation of international law.

And, as stated in the introduction to the conclusions of the Commission's the Study Group on the "Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law" in 2006, fragmentation of international law "(...) does create the danger of conflicting and incompatible rules, principles, rule-systems and institutional practices."

Portugal will therefore follow the consideration of this topic by the Commission with attention and interest.

"Protection of the Atmosphere" – Chapter IV of the ILC Report

Madam Chair,

I will now address the topic of **"Protection of Atmosphere"**, whose Draft Guidelines were adopted in second reading by the Commission this Summer.

Firstly, Portugal commends the Special Rapporteur, Mr. Shinya Murase for his sixth report. Like the Commission, we voice our sincere appreciation to Mr. Murase, congratulating him on this outstanding contribution in the preparation of the *Draft Guidelines on the Protection of the Atmosphere*.



Madam Chair,

It has been the understanding of Portugal that studying the protection of the atmosphere from a legal perspective would be a good contribution to finding solutions at a broader diplomatic setting.

We therefore commend the Commission for successfully creating guidelines that reflect a balanced and positive approach to this topic. The Draft Guidelines, we believe, will effectively assist the international community in addressing critical questions relating to transboundary and global protection of the atmosphere.

Portugal would like to highlight a few aspects in the Draft Guidelines.

Madam Chair,

During the discussion of this topic the Sixth Committee and also in the written comments submitted to the International Law Commission, my delegation underlined that legal analysis by the Commission should address the problematic of the protection of the atmosphere from a "cause and effect" perspective.

Portugal is hence very pleased to see that the preambular paragraphs of the Draft Guidelines acknowledge the essential role of the atmosphere in protecting and sustaining life in our planet. We appreciate the acknowledgement of the atmosphere as a natural resource with a limited assimilation capacity, in Preambular Paragraph 1 and in Draft Guideline 5.

We are deeply thankful to the Special Rapporteur for having considered the Portuguese proposals and for recommending some of them. A number of such recommendations came to be included in the final version of the draft guidelines – for example, in Preambular Paragraph 4, the acknowledgement that



"(...) atmospheric pollution and atmospheric degradation are a "common concern of humankind".

Madam Chair,

Scientific evidence shows that atmospheric degradation has a profound and long-term negative impact on the sustainability of ecosystems, with prejudice to the full enjoyment of human rights and to the environment as a common good of humankind.

Portugal supports the doctrine recognising that a human right to environment, as encompassing a sustainable atmosphere, is becoming a staple in International Human Rights Law.

Since we argue that a human right to environment must correspond to clear and enforceable State obligations on preventing, reducing, and controlling atmospheric degradation, Portugal salutes the clear statement thereof in Draft Guideline 3.

My delegation argued in this Committee that the interrelationship between the rules of international law relating the atmosphere and human rights raises many problems, such as the interpretation of jurisdiction, identification, and implementation.

Moreover, in Draft Guideline 9, the Commission also successfully delivered guidance on one of its greatest challenges on this topic: to clarify the interrelationship between relevant rules of different areas of international law.

Madam Chair,



In conclusion, my delegation views these Draft Guidelines as an important inspiration States to consider adopting common norms, standards and recommended practices that promote the protection of the atmosphere while taking into consideration relevant areas of international law – namely those of international trade and investment law, law of the sea and international human rights law.

“Provisional Application of Treaties” – Chapter V of the ILC Report

Madam Chair,

I will now turn to the topic ‘**Provisional application of treaties.**’, starting by thanking the Special Rapporteur, Mr. Gómez Robledo, for his sixth report on this topic.

My delegation joins the International Law Commission in its tribute to the Special Rapporteur for his noteworthy contribution in preparing the Guide to Provisional Application of Treaties.

Portugal welcomes this Guide, along with its accompanying commentaries, seeing it as a comprehensive and useful document dealing with the topic of current practices with respect to the provisional application of treaties.

Madam Chair,

The importance of this guide is even more evident because, as noted in Guideline 8, the breach of an obligation arising under a treaty or a part of a treaty that is applied provisionally entails international responsibility – and that of States and international organisations alike.



Accordingly, any effort to improve current practices and to clarify the use and application of the provisional application mechanism must be celebrated. *With this Guide, States, international organisations, and other users now have at their disposal a "one-stop document" that reflects existing rules of international law in light of contemporary practice and addresses topical questions on the matter – including the form of the agreement to apply provisionally a treaty or a part of a treaty, the commencement and termination of such provisional application, and its legal effects.*

What is more, it is commendable that, while recognising the need for flexibility in this respect, the Guide builds upon the legal regimes provided by the 1969 Vienna Convention on the Law of Treaties, and the 1986 Vienna Convention on the Law of Treaties between States and international organizations and international organizations. In doing so, the guide contributes to the harmony and consistency of public international law.

Madam Chair,

Portugal once again emphasises the voluntary nature of the provisional application mechanism, as highlighted throughout the Guide and the general commentary.

In this respect, it is worth noting, inter alia, that Guideline 7 – which deals with the question of reservations – leaves open the possibility of States or international organisations to submit a reservation relating to the provisional application of a treaty or a part of a treaty, including for the purpose of opting out from its legal effects.

Furthermore, the solution contained in Guideline 4(b)(ii) is equally relevant. According to this Guideline, while States and international organisations



may declare they wish to apply provisionally a treaty or a part of a treaty in cases where the treaty remains silent or when it is not otherwise agreed, the legal effects of such declarations depend entirely on the express acceptance of the other States or international organisations involved.

For my delegation, the special relevance of this Guide also stems from the fact that Portugal, in accordance with its constitutional framework, is prevented from applying treaties provisionally.

Therefore, Portugal welcomes the acknowledgement that States and international organisations retain the right (i) to submit a reservation concerning the provisional application of the treaties which they have signed; and (ii) to oppose the provisional application of a treaty by means of a unilateral declaration by other State or international organisation.

Madam Chair,

My delegation also notes gladly that Guideline 3 does not refer to 'negotiating States' or 'negotiating States and negotiating organisations.' That is the correct legal solution since, as noted by the International Law Commission, and I quote, "provisional application may be undertaken by States or international organizations that are not negotiating States or negotiating organizations of the treaty in question but that have subsequently consented to provisional application of the treaty" (end quote).

A final word of appreciation is due to the Special Rapporteur for compiling a useful list of model-clauses, which in Portugal's view complements the text of the guidelines and serves as additional guidance on a better and broader perspective on the existing international practice.



Madam Chair,

This concludes the statement of the Portuguese delegation under Cluster 1 of this agenda item.

Thank you, Madam Chair.