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

Immunity of State Officials from Foreign Criminal Jurisdiction
(Chapter VI of the Report)

Provisional Application of Treaties
(Chapter VII of the Report)

Formation and Evidence of Customary International Law
(Chapter VIII of the Report)

The Obligation to Extradite or Prosecute
(Chapter IX of the Report)

Treaties Over Time
(Chapter X of the Report)

Most-Favoured-Nation Clause
(Chapter XI of the Report)

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Immunity of State Officials from Foreign Criminal Jurisdiction (Chapter VI of the Report)

Mr. Chairman,

Allow us to begin by addressing Chapter VI of the Commission's Report concerning the topic "Immunity of State Officials from Foreign Criminal Jurisdiction".

Portugal wishes, first of all, to compliment Ms. Escobar for being appointed as Special Rapporteur for this topic. We would also like to thank her for her report offering an overview of the work by the previous Special Rapporteur, which includes the many issues on which no consensus was yet reached at the Commission.

We would like to contribute to the debate by offering our views on some of the issues discussed this year. In doing so, we will also comment on specific issues, as requested by the Commission (Chapter III of the Report).

Mr. Chairman,

In respect to the methodological approach, and contrary to what is argued by some, we do not consider the issue of immunity to be a question only for the State (and its officials): the rights of individuals must also be approached in this exercise. Serving the interests of the international society means, in this case, a balance between State sovereignty, the rights of individuals and the need to avoid impunity for serious crimes under International Law.

It is our belief that the Commission will only achieve this balance if it seeks to identify existing rules of International Law, but also embarks on an exercise of progressive development. It may be difficult to distinguish between them in certain cases, of which the *North Sea Continental Shelf Cases* before the ICJ[1] are good examples. However, and although the Statute of the Commission seems to establish a divide between codification and progressive development, it is clear for us that the work of the Commission on a given topic may engage these two methodological dimensions.

[1] *North Sea Continental Shelf* (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands), *Judgment, I.C.J. Reports 1969, p. 3.*

Methodology has to be at the service of established objectives based on sociological analysis. That means taking into consideration existing International Law and the one that has yet to be developed in order to fulfill those established objectives.

Mr. Chairman,

We believe that there is in fact a general trend in International Law conferring some limits to immunities before national jurisdictions. The ICJ, in its recent judgment regarding the *Jurisdictional Immunities of the State case*, stated that "the Court notes that many States (...) now distinguish between *acta jure gestionis*, in respect of which they have limited the immunity which they claim for themselves and which they accord to others, and *acta jure imperii*"[2]. Even in a somewhat conservative approach, the Court has noted a trend of limiting immunities when concerning *acta jure gestionis*. That may well include criminal acts. On this we concur with much of the dissident opinion of Judge Cançado Trindade: immunities are a prerogative or a privilege that should be interpreted and applied in the context of the current evolution in what concerns fundamental human values[3]. Furthermore, in our view, immunities are imminently functional.

Therefore, immunities have to take into account human dignity as a common value of the international society as whole. Law is not neutral. It is ideological in the sense that has to reflect the values of a given society. However complex it may be, a value driven method is certainly a good ethical approach to the topic, as mentioned by the Commission. Therefore, we agree it would be relevant for the Commission to take a restrictive approach to the topic taking the latter considerations into account.

Mr. Chairman,

Regarding the substantive consideration of the topic, we would like to underline that the distinction between the scope *ratione personae* and *ratione materiae* is indeed relevant mainly for analytical purposes. However, there should be some caution to not overrate it beyond the methodological angle. From a substantive point of view, they both have the

[2] *Jurisdictional Immunities of the State* (Germany v. Italy: Greece Intervening), Judgment, ICJ, www.icj-cij.org/docket/files/143/16883.pdf, at 25.
[3] *Jurisdictional Immunities of the State* (Germany v. Italy: Greece Intervening), Dissenting Opinion of Judge Cançado Trindade, ICJ, www.icj-cij.org/docket/files/143/16891.pdf

same purpose, that is, to preserve principles, values and interests of the international society as a whole, as was rightly pointed out by the Special Rapporteur.

Having said this, and in what concerns the scope of immunity *ratione personae*, when considering the immunity from this perspective, the overall objective is, in our view, to preserve the stability of international relations in cases where the official has a high degree of immediate identification with the State as a whole. Following this criterion, the officials to be considered for purposes of the immunity *ratione personae* include, in Portugal's opinion, heads of State and Government and ministers of foreign affairs. Furthermore, we deem that there are sufficient legal arguments to sustain that they enjoy the immunity *de lege lata*, including in the case of ministers of foreign affairs. As an example, the ministers of foreign affairs enjoy *ipso facto* powers of representation to perform international acts required for the purposes of expressing a State's consent to be bound by a treaty. The *Arrest Warrant case* judgment[4] makes a good argument for this line of reasoning.

For the time being, Portugal does not exclude the possibility of other high State officials enjoying immunity *ratione personae*. Nevertheless, due to the different systems of government and constitutional frameworks, those may fail to comply with the criteria of having a high degree of immediate identification with the State as a whole.

As to the scope of the immunity *ratione materiae*, we tend to agree that the criterion for attribution of the responsibility of the State for a wrongful act may be one relevant element to determine whether a person is a State official. However, such conclusion will also require the Commission to shed light on the question of the control test. It is worth recalling that the ICJ, in its 2007 judgment regarding the *Application of the Genocide Convention* case[5], applied the "effective control" test enunciated in the *Nicaragua* case, thus rejecting the "overall control" test put forward previously in the *Tadić* decision[6]. In contrast, case law and practice seem to favour the reasoning followed by the *Tadić* decision.

[4] *Arrest Warrant of 11 April 2002* (Democratic Republic of Congo v. Belgium), Judgment, I.C.J. Reports 2002, p. 3.
[5] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007, p. 43.
[6] *Prosecutor v. Duško Tadić* (case n.º IT-94-1-A), ICTY Appeals Chamber, Judgment, 15 October 1999.

Mr. Chairman,

Turning now to the question of exceptions to immunities, one other important aspect which does not have an easy answer is to determine the acts of a State exercising jurisdiction which are precluded by the immunity of an official. The *Certain Questions of Mutual Assistance* case[7] provides a relevant criterion: the acts so precluded would be all those subjecting the official to a 'constraining act of authority'. This may be a good starting point.

The abundant jurisprudence and doctrine existing on the subject of immunity from criminal jurisdiction of diplomatic or consular agents as well as on special missions may be of particular interest and address some issues that are relevant to the study of this matter.

Mr. Chairman,

Portugal does not share the view that immunity *ratione personae* is absolute and without exceptions or that immunity *ratione materiae* may not be automatically waived in certain cases. Nor do we find that it is sufficient in all cases to accept an exhaust valve merely anchored in the moral obligation of States to waive the immunity of its officials, as seems to be the approach adopted by the *Institut de Droit International* in its Resolution on the subject[8]. There is a trend in International Law that supports the existence of exceptions, or perhaps even more accurately, the inexistence of immunity in certain cases. Hence, we reiterate our view that, from a methodological perspective, to take up this study from the principle of a 'general rule of immunity' could bias the conclusions.

There is a level of non-compliance with International Law that cannot ever be exceeded. Furthermore, the corresponding sanctions cannot be set aside in all situations. This is particularly true in the case of *jus cogens*. We will not delve into the question of whether exceptions to immunity are *de lege lata* or not.

In either case, Portugal strongly believes that the most serious crimes of international concern should be an exception. In some cases such crimes are committed as an "official

[7] *Certain Questions of Mutual Assistance in Criminal Matters* (Djibouti v. France), Judgment, I.C.J. Reports 2008, p.177.
[8] *Resolution on the Immunity from Jurisdiction of the State and of Persons Who Act on Behalf of the State in case of International Crimes*, Institute of International Law, Napoli session, 2009.

act". Nevertheless, the quality of "official act" is irrelevant in these circumstances. Furthermore, as already stipulated in the *draft Code of Crimes against the Peace and Security of Mankind*, the official position of the perpetrator does not confer him any immunity.

Therefore, the movement of limiting immunity at a "vertical" level – at the level of the international criminal justice system – has to be followed by a harmonization with the "horizontal" perspective at the relations between States and with the individuals under their jurisdiction. There is a recognizable ethical movement in International Law to limit immunity. Hence, the two dimensions – vertical and horizontal – being in reality part of the same system, should be harmonized towards the limitation of both immunity and, thus, impunity.

Having said this, we encourage the Commission to continue its work on the exceptions without any anxieties about embarking on an exercise of progressive development of International Law.

Mr. Chairman,

In what concerns the final form of the work produced by the Commission on this topic, we agree at this stage that it is important to envisage the outcome most legally sound for this matter. That will have influence on the method to be followed. In this regard, we support the Special Rapporteur's intention to prepare a set of draft articles with commentaries.

To conclude, we encourage the Commission to develop such a relevant topic according to a value-laden approach following the nature of contemporary International Law. The classical concept of sovereignty and the new legal humanism are not two sides of the same coin: the latter is more valuable.

Provisional Application of Treaties (Chapter VII of the Report)

Mr. Chairman,

Turning now to the topic "Provisional Application of Treaties", Portugal would like to applaud the Commission for including this topic in its programme of work. This reflects the increasing need to further study classical International Law matters in a world in constant and fast evolution. We would also like to take this opportunity to congratulate Mr. Gómez-Robledo for being appointed Special Rapporteur for the topic.

The provisional application of treaties may have different reasonings, as Mr. Waldock pointed out at the Vienna Conference in 1969[9]: the need for urgency in the application of a treaty; or when the content of a treaty seems highly desirable and its entry into force is not doubtful.

However, being provisional in nature, such provisions have a transitory application in a reasonable time-frame. The GATT is a good example, albeit an atypical one, of a transitory application being provisionally applied for decades, clearly exceeding the character of the provisional application regime.

Mr. Chairman,

We know, from the *travaux preparatoires* of the 1969 Vienna Convention, that there was some dispute concerning the acceptance of the provisional application regime[10]. At the end, it was adopted as Article 25. The big questions in 1969 remain the same today: how can a treaty be applicable if it is not yet in force? And, how can a treaty be applicable without passing through the domestic democratic controls? Through the lens of International Law, it can. In the *Yukos* case the arbitral tribunal recognized that such provision is binding and enforceable. Hence, once the signatory accepts the provisional application, the non provisional application of the treaty as agreed may trigger international responsibility.

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[9] United Nations Conference on the Law of Treaties (1970) *Official Records of the Second Session:* Vienna, 9 April-22 May 1969. New York: United Nations.
[10] *Ibidem.*

However, the consent of the Parties providing strength to the *pact sunt servanda* principle, implies that a provisional application of treaties also depends on the consent of the Parties regarding a given treaty. This means that the provisional application of a treaty is always dependent on the consent of a signatory State or International Organization. Clauses should be carefully designed in order to offer a clear opportunity to signatories to express, or not, their consent to the provisional application of a treaty.

In this regard, it is frequent that after the treaty is closed for signature it is still not in force. That leads us to the question if an acceding State or International Organization will be bound by a provisional application clause of the signed treaty or if it can make a declaration excluding it from the scope of such clause. If it cannot waive the provisional application obligation, its domestic laws can compromise its participation in the treaty and, thus, risk the number of Parties to such treaty.

Mr. Chairman,

In what concerns the obligation not to defeat the object and purpose of a treaty prior to its entry into force (Article 18 of the 1969 Vienna Convention), we find that both this obligation and the provisional application are related and have the same scope *ratione temporis*. Nevertheless, they lead to two different legal regimes.

Mr. Chairman,

Turning now to the significance of the legal situation created by the provisional application for the purpose of identifying rules of customary International Law, we find that there is indeed some relevance. Provisional application of substantive treaty norms indicates the existence of reiterated practice and of *opinio juris*. The *opinion juris* may even be revealed before the existence of reiterated practice. The signatory's intention to apply such norms provisionally clearly translates an already existing conviction that such norms are mandatory.

Nevertheless, and despite its relevance, we think that this matter has no place within this topic. Perhaps it could find some room for analysis in the topic "Formation and Evidence of Customary International Law", also on the agenda of the Commission.

Mr. Chairman,

The practice of States is extremely relevant. There are significant differences in domestic law from State to State regarding the possibility of accepting the provisional application of a treaty. Hence, the Commission should adopt a broad approach to this matter in order to respect the diversity of solutions taken by the domestic law of different States.

From the perspective of the States' domestic laws, there are different legal approaches that have to be respected. The first one would be that the domestic law does not allow the provisional application of any treaty. In other States, the legal approach is that the provisional application is accepted but only after passing all the required internal democratic controls. Finally, another possibility is the acceptance of provisional application without any other requirement than those vested in Article 25 of the 1969 Vienna Convention.

Even in domestic law, the acceptance of one of these options may be highly controversial. In what concerns Portugal, practice is based on a restrictive interpretation of Article 8(2) of the Portuguese Constitution. According to such interpretation, Portugal is only bound by a treaty after it has been internally approved and published in the official gazette, and the treaty itself enters into force in the international legal order. Hence, in the case of Portugal, the provisional application of a treaty is not admissible.

Mr. Chairman,

To conclude our intervention on the topic, we deem it is still premature to have a decision on the final form of the work of the Commission. However, being a topic that cannot go further than what is already provided for in the 1969 and 1986 Vienna Conventions, there is no room for progressive development, as the Special Rapporteur himself has observed.

The work of the Commission is to clarify the legal regime of provisional application of treaties. Therefore, for the moment, Portugal is inclined to consider that a guide with model clauses would be the best outcome to the topic.

Formation and Evidence of Customary International Law (Chapter VIII of the Report)

Mr. Chairman,

Allow us now to address Chapter VIII of the Commission's Report regarding the topic "Formation and Evidence of Customary International Law".

Portugal would like to praise the Commission for including this topic in its programme of work. It is a classical topic which has for a long time been identified in literature as needing further guidance regarding its formation and evidence. This is thus a good opportunity for the Commission to delve into it.

We would also like take this opportunity to congratulate Mr. Wood for being appointed as Special Rapporteur for the topic.

Mr. Chairman,

It may indeed be difficult to identify customary international norms and also the process of its formation. The *North Sea Continental Shelf Cases* before the ICJ[11] are good examples.

We encourage the Commission to proceed in this endeavour with a wide approach regarding the research to be done. In our view, all relevant case-law of different courts and tribunals should be appraised critically and not as a final revelation of existing law – we have some reservations as to whether there is consistency in judicial pronouncements.

Doctrine, from different theoretical backgrounds, is also a most relevant element of research. Moreover, we agree that the practice to be analyzed should be contemporary, paying attention to the different practices and cultural backgrounds from the various regions of the world. The *London Statement of the International Law Association* and the study by the ICRC are indeed also important elements for research.

[11] *North Sea Continental Shelf* (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands), *Judgment, I.C.J. Reports 1969, p. 3.*

Mr. Chairman,

We are in the context of a spontaneous form of emerging legal norms. Its specific meaning can only become visible through an empirical social process.

The *opinio juris sive necessitates*, being the psychological or subjective element of customary International Law, is not easily inferred. But without this element what remains is a mere practice and not a legal norm. We strongly encourage the Commission to also focus on this element without any post-modern anxieties about the "mysteries of subjectivity". The conviction that the non-compliance with a certain practice will result in international responsibility is one good indicator of the existence of *opinio juris*.

The view that a reiterated practice implies, almost necessarily, the existence of *opinio juris* is a presumption *juris tantum* without a credible scientific basis. Therefore, we do not agree with the view expressed by the International Law Association that the subjective element is not in fact usually a necessary ingredient in the formation of customary International Law[12].

Mr. Chairman,

In what relates to the balance between "formation" and "evidence", we are of the opinion that despite the fact that both elements are important to the topic, a particular emphasis should be given to "formation". Through the description of how customary Law was formed one will be able to better set up a methodology which will allow us to identify current and future norms of customary International Law. Therefore, a study on "formation" should precede the more practical issue of how the evidence of a customary rule is to be established.

Mr. Chairman,

Regarding the points to be covered as identified by the Commission, we would like to suggest that a reference should also be made to the *coutume sauvage*. Those are unusual

[12] International Law Association (2000) *London Statement of Principles Applicable to the Formation of General Customary International Law*. Conference Report of 29 July 2000.

cases where the formation of customary law begins with a "need for law" – meaning that in such cases the *opinio juris* precedes a reiterated practice.

The *Continental Shelf case*[13], as well as other case-law, touch upon this problematic matter highly debated in doctrine. We believe this is an issue where the Commission could offer its expertise and shed light on this grey area of customary International Law.

In what concerns *jus cogens*, we feel it will be difficult for the Commission to not consider this subject in its analysis. It is not a question of studying *jus cogens per se*, but to study it as an expression of peremptory norms which have its source in customary International Law.

Mr. Chairman,

To conclude, we would like to encourage the Commission to proceed as proposed. Regarding the final form to be given to the work of the Commission, we agree that the most useful outcome would be a set of clear conclusions with commentaries.

The obligation to extradite or prosecute *(aut dedere aut judicare)* (Chapter IX of the Report)

Mr. Chairman,

Let me now turn to Chapter IX of the Commission's Report on the topic "The obligation to extradite or prosecute *(aut dedere aut judicare)*".

Following the fact that Mr. Galicki – who was the Special Rapporteur for this topic – was not re-elected, the Commission is now faced with the need to decide on how to proceed with its study of the obligation to extradite or prosecute.

Mr. Chairman,

[13] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Judgment, I.C.J. Reports 1982, p. 18.

As the debate surrounding the obligation to extradite or prosecute progressed over the past years, important questions were raised, such as what are its sources and its relationship with the surrender of an alleged offender to a competent international court and tribunal.
These and other questions have yet to be provided with clear answers and continue standing as proof that this topic is not only complex but that its study can be laborious.

Furthermore, the judgement recently rendered by the International Court of Justice in the *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* case – where the Court states that "the purpose of these treaty provisions is to prevent alleged perpetrators of acts of torture from going unpunished, by ensuring that they cannot find refuge in any State Party"[14] – brings new elements to the debate and evidences the importance and relevance of this topic.

Mr. Chairman,

Portugal has always stressed the importance of this topic, considering that the main purpose of this obligation is to prevent the impunity of offenders and the creation of safe havens for them.

In fact, one should bear in mind that, along with the topics "immunity of State officials from foreign criminal jurisdiction" and "the scope and application of the principle of universal jurisdiction" – which are currently under discussion – this obligation rises from the general pursuit of these objectives by States.

Therefore, while continuing to acknowledge the difficulties encountered while studying this topic, we believe the Commission still has valid contributions to make and, therefore, we urge the Commission to continue its study of the obligation to extradite or prosecute, working towards reaching harmonized rules.

[14] *Questions relating to the Obligation to Prosecute or Extradite* (Belgium v. Senegal), Judgment, ICJ, http://www.icj-cij.org/docket/files/144/17064.pdf, at 37.

This also seems to be the understanding of the General Assembly, who, in the Resolution adopted on the Report of the International Law Commission on the work of its sixty-third session[15], invited the Commission to give priority to this topic, and work towards its conclusion.

Treaties over Time (Chapter X of the Report)

Mr. Chairman,

Kindly allow us to address the topic "Treaties over Time".

Portugal would like, first of all, to commend the Study Group for successfully achieving its purpose. We would also like to congratulate Mr. Nolte for being appointed Special Rapporteur for the topic.

Moreover, as we had the occasion to mention last year, Portugal agrees with the International Law Commission on the change of the work format. We have confidence that it will represent a boost to the study of the topic.

Mr. Chairman,

Portugal reaffirms its belief in the dynamic character of treaties as instruments of International Law. We stand by the belief that, in principle, context evolution does not kill the treaty. Still, a treaty is worthless if its interpretation does not follow the transformation of the social context.

This legal trend is reflected in jurisprudence. In the *Gabcikovo-Nagymaros* case, the International Court of Justice made a well-known legal assertion in relation to the 1977 Treaty between Hungary and Slovakia, stating that "the treaty is not static"[16]. Also, in the 2005 *Mamatkulov and Askarov* case, the European Court of Human Rights noted that the

[15] Resolution A/RES/66/98.
[16] *Gabčíkovo-Nagymaros Project* (Hungary v. Slovakia), Judgment, I.C.J. Reports 1997, p. 7 – para. 11.

European Convention on Human Rights "is a living instrument which must be interpreted in the light of present-day conditions"[17].

With this in mind, subsequent agreements and subsequent practice mirror the understanding of the treaty by the parties in a specific legal and social context. This idea is well established in the *travaux preparatoires* of 1969 Vienna Convention on the Law of Treaties. It is stated that interpretation by means of subsequent agreements and subsequent practice provides, respectively, "an authentic interpretation by the parties"[18] and an "objective evidence of the understanding of the parties as to the meaning of the treaty. [19]"

Still, as we had the opportunity of pointing out in the last session, these means of interpretation, namely subsequent practice, tend to be neglected in the legitimizing discourse.

Mr. Chairman,

Regarding the debate within the Study Group, we agree with the need to address the level of resolve of the draft conclusions, preserving both the normative content and the flexibility that is inherent to the concepts of subsequent agreements and subsequent practice. Thus, we urge the Commission and the Special Rapporteur to take this reasoning into account in the next session.

Addressing the debate on the relevance of conferences of the parties and treaty monitoring bodies, we sustain that they hold an import role in the emergence or consolidation of subsequent agreements and subsequent practice. We would like to invite the Commission to consider already available examples, including the Assembly of State Parties to the Rome Statute or the Committee against Torture, amid other relevant *fora*. This may be a good starting point.

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[17] *Mamatkulov and Askarov v. Turkey* (Applications 46827/99 and 46951/99), European Court of Human Rights, Judgment, 4 February 2005, p. 36.
[18] United Nations Conference on the Law of Treaties (1971) *Official Records of the First and Second Sessions.* Vienna, 26 March-24 May 1968 and 9 April-22 May 1969. New York: United Nations, p. 41.
[19] *Ibidem.*

Furthermore, Portugal supports the submission of further reports on the jurisprudence of national courts and on the practice of international organizations, taking into account both the 1969 and the 1986 Vienna Conventions on the Law of Treaties, as well as the 1978 Vienna Convention on Succession of States in respect of Treaties. We consider that insightful findings may be drawn from surveying the application of the 1978 Vienna Convention and, therefore, we encourage the Special Rapporteur to also focus his research on the succession of States in respect of treaties.

Mr. Chairman,

Article 31 of the 1969 and 1986 Vienna Conventions was crucial for the first nine draft conclusions of the Study Group as the general rule for interpretation. Regarding this, and in accordance with the general comments made during the last year's session of the Sixth Committee, Portugal believes the Commission should not be tempted to develop International Law beyond these conventions.

Therefore, its efforts should follow a cautious path leading first and foremost to the clarification and guidance of States, International Organizations and other relevant actors of international social relations.

Most-Favoured-Nation Clause (Chapter XI)

Mr. Chairman,

Allow us to turn now to the topic Most-Favoured-Nation clause.

We would like to begin by congratulating the Co-Chairmen, Mr. Forteau and Mr. McRae, for their valuable work. Both papers produced by the Co-Chairmen have helped to shed some light on the topic.

It is our opinion that the working paper on Mixed Arbitration represents a significant contribution to the study of this matter. We consider this type of arbitration to be relevant to

the settlement of disputes between a State and a natural or legal person from a different jurisdiction. Foreign natural or legal persons are sometimes denied their investment rights. We find that it would be useful if the Commission could develop this particular subject and possibly make some suggestions of model clauses to be incorporated in future Bilateral Investment Treaties.

Furthermore, the study on the interpretation of Most-Favoured-Nation clauses has also proved to be useful, mainly because it accesses the trends and factors that influence investment tribunals in the interpretation of this topic.

Mr. Chairman,

Despite the good work done, Portugal still has some doubts as to whether the Most-Favoured-Nation clause has been sufficiently debated in order to construe concrete guidance on this matter. The Commission should study the real economic relevance held by the Most-Favoured-Nation clauses today so as to clearly uphold the necessity of the work on the subject.

As you might be aware, a significant percentage of world trade is exempt from Most-Favoured-Nation clauses. There is even some economical quantitative research suggesting a relative degree of unimportance of these type of clauses. This is an issue that the Commission has not yet awarded greater depth. . However, we believe that it should have been settled from the outset.

Mr. Chairman,

In what regards the subject of the "Interpretation of the MFN Clauses by Investment Tribunals" in particular, we would like to offer some views on the issues concerning dispute settlement.

In relation to the application of the Most-Favoured-Nation clauses in dispute settlement provisions, we agree that, when no reference is made as to the inclusion or exclusion of the clauses, tribunals should consider them as applicable. Moreover, in what concerns the issue of whether the jurisdiction could be undermined by some treaty provisions, it is clear

to us that Bilateral Investment Treaties are regulated and bound by International Law. Finally, we would like to compliment the Study Group for its commitment in assessing the factors that are relevant to establish whether a BIT's Most-Favoured-Nation clause applies to the conditions for invoking dispute settlement. In our view, the interpretation of Most-Favoured-Nation clauses is a cornerstone of this topic, particularly in what concerns aspects yet to be settled after the *Maffezini case*.

Mr. Chairman,

Another issue that we would like to raise is the necessity to proceed with some caution due to the large number of treaties that have Most-Favoured-Nation provisions. This fact presents a risk that could possibly threaten the applicability of a guide of practice or model clauses.

As we are all aware, this particular topic is a matter with a high degree of complexity, and to carry out work that may lead to a forced uniformization of practice and jurisprudence, may prove to be lacking in practical consequences.

Portugal is looking forward to the study scheduled to be done by the Commission in the following sessions. We stress the importance we attach to the Commission's efforts to safeguard against the fragmentation of International Law. In this regard we encourage the Commission to produce a coherent guide of practice, as well as model clauses, directed at the interpretation and application of the Most-Favoured-Nation clause.

Thank you, Mr. Chairman.