

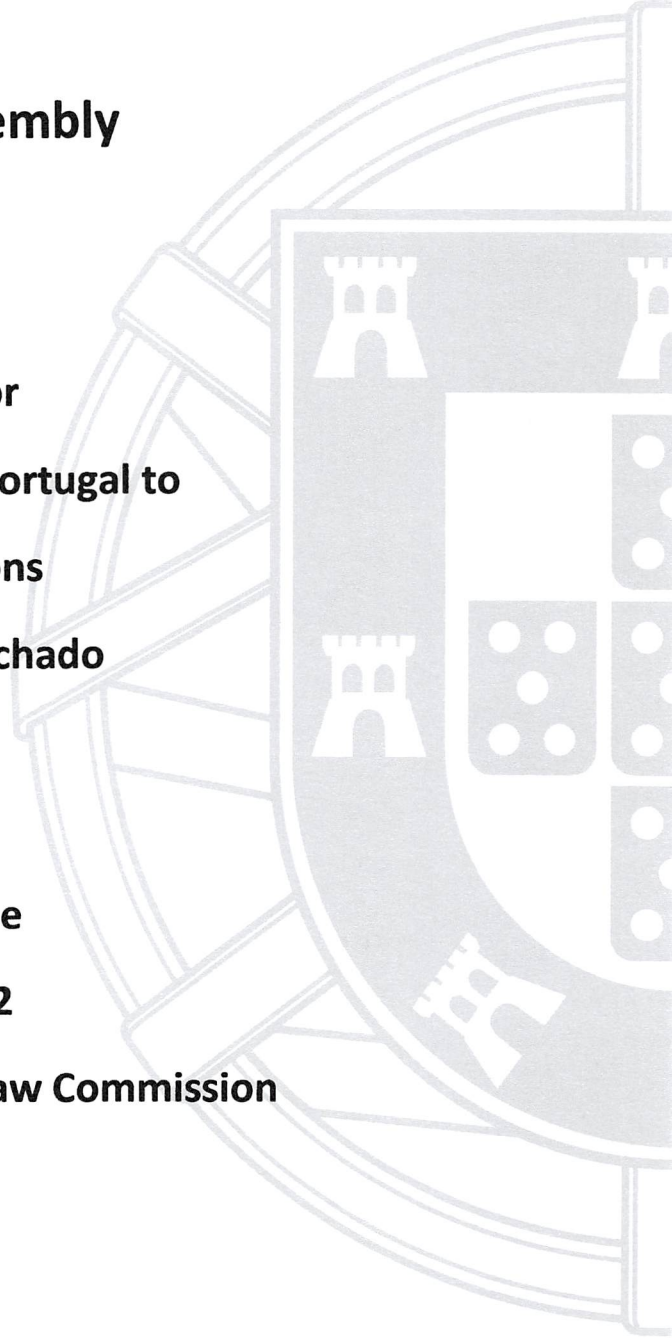


# PORTUGAL

## 73<sup>rd</sup> General Assembly

**Statement by  
Legal Counsellor  
Permanent Mission of Portugal to  
the United Nations  
Mr. Paulo Pinto Machado**

**Sixth Committee  
Agenda item 82  
Report of the International Law Commission  
Cluster II**



Mr. Chairman,

I will start my intervention by addressing the topic of **“Protection of Atmosphere”** and by commending the Special Rapporteur, Mr. Murase, not only for the report he presented this year, but also for his work during the past years, which allowed the Commission to progress in the study of this pressing matter.

Mr. Chairman,

As we have had the opportunity to state in previous years, this is a topic to which Portugal has attached great importance. It has been our understanding that studying the protection of the atmosphere from a legal perspective could be a good contribution to finding solutions at a broader diplomatic setting.

As so, we believe that, overall, the twelve draft guidelines submitted by the Commission reflect a balanced and positive approach to this topic, as Portugal has supported, and we would like to recall that, throughout the years, we have also underlined that there should be a methodological approach based on the ‘cause and effect’ double element while addressing this problematic.

I would like, nevertheless, to briefly refer to the three new draft guidelines adopted by the Commission that address implementation, compliance and dispute settlement and which complement the already existing draft guidelines. We support the wording adopted for draft guideline 12, establishing that disputes should be settled by peaceful means, which in our view should always be the preferred mean.

Mr. Chairman,

I would like once again to commend the Commission on its study of this topic, which we recognize was difficult and complex, and, in our view, as we mentioned last year, it is an important opportunity to develop guidelines and promote mechanisms that could lead States to consider adopting common norms, standards and recommended practices that promote the protection of the atmosphere, in connection with trade and investment law, law of the sea and human rights law.

Mr. Chairman,

I will now turn to the topic **‘Provisional application of treaties’**. Allow me to start by congratulating the Special Rapporteur, Mr. Gomez Robledo, for the work conducted on this topic over the last years. I wish to underline that this is an important topic for my country and a topic to which we pay much attention, since the provisional application of a treaty is not compatible with our Constitution.

Mr. Chairman,

Portugal welcomes the revised text of the draft guidelines, as it addresses the majority of the concerns expressed in our previous interventions. We would like to stress that both the text of Guideline 3 and of the General Commentary affirm beyond doubt the voluntary nature of the provisional application mechanism. Also, we welcome that the commentary to Guideline 3 explains clearly the reasons that led the Commission not to use the language of Article 25 of the Vienna Convention on the Law of Treaties as to what must be understood by “negotiating States”.

We also welcome the changes in the text of Guideline 6 as the new wording leaves less room for confusion and doubts. However, the text of the new Guideline 7 uses the term “legal effect” again, re-introducing the uncertainty that previously hovered over Guideline 6.

Even though the expression “legal effect” comes from the definition of reservation found in the Vienna Convention on the Law of Treaties, we consider that it would be preferable to use a less ambiguous wording. In our view, the explanation given in paragraph 5 of guideline 7 is not sufficient to re-enact the Commission’s rationale to choose this expression. In particular, the idea of a reservation to the “legal effect arising from the provision application” itself seems quite unlikely, as a State can obtain the same effect through the provisional application of parts of a treaty.

Given the lack of state practice on this matter, Portugal suggests that the Commission reflects more carefully on the issue of reservations.

Mr. Chairman,

Even if Guideline 12 (previous Guideline 11) has not been redrafted, the strengthening of the references to the voluntary nature of the provisional application of treaties has softened the idea that the provisional application can be considered as a default rule or a general practice. In any case, the Commission might consider changing the systematic position of this particular guideline, placing it as a new Guideline 10, in order to give it more prominence.

Portugal also welcomes the Model Clauses presented by the Special Rapporteur, and considers that they will be an excellent complement to the text of the guidelines. Therefore, we hope that the Commission may work on the text of the Model Clauses, so that they can become part of the Guide to the provisional application of treaties.

Finally, we would like to convey that Portugal will continue to follow with interest the work of the Commission on this topic.

Mr. Chairman,

Allow me now to address the topic of ‘**Peremptory norms of general international law (jus cogens)**’.

I wish to begin by congratulating the Special Rapporteur, Mr. Dire Tadli, on his third report and on the 13 Draft Conclusions drawn from his thorough analysis on the consequences and effects of jus cogens.

By making existing international norms more understandable, this discussion is upholding the stability of the international legal system. Reflecting on the consequences and effects of jus cogens provides clarification on the basis for State compliance with peremptory norms of international law.

Mr. Chairman,

Since the topic of jus cogens is complex in itself, the procedure being followed by the Commission may demand additional efforts from the point of view of the interpreter. However, the critical reading of the Reports of the Special Rapporteur and of the Commission allows for a diverse and in-depth analysis of the Draft Conclusions on this subject.

On methodology, we believe that the procedure adopted by the Commission is compatible with a final and systematic revision of the conclusions, if need be, at the end of the discussion. States are being given an opportunity to comment on positions considered by the Commission. Nonetheless, the Commission could reconsider its methodology for this topic. In particular, we would very much welcome having all reports and other relevant elements – including the comments by the rapporteur and the Commission – made available in a consolidated and up to date form, for States to comment on.

It is our belief that such measures would greatly benefit transparency and would make it easier for States to make comments on positions considered by the Commission.

Mr. Chairman,

We commend the Commission on the good balance it has struck between theory and practice during this session. The Commission has highlighted that States and international organizations have positive obligations with regards to peremptory norms of general international law.

We believe that assuring an ongoing implementation of treaties is essential for international legal certainty. The implementation of a treaty whose norms are invalid due to a conflict with a jus cogens norm should therefore be safeguarded when its essential basis is not at stake, as provided for in Draft Conclusion 11 (2). Nonetheless, we suggest that a more detailed explanation on the different legal consequences to the situations mentioned on Draft Conclusion 11 is given.

Portugal also welcomes a clarification concerning Draft Conclusion 18, on the relationship between jus cogens norms and erga omnes obligations. Even though all the obligations arising from a jus cogens norm are erga omnes obligations, it cannot be argued that all erga omnes obligations derive from jus cogens. It cannot also be stated

beyond doubt that the erga omnes nature of the obligation at stake comes only from the fact that it has its origin in a jus cogens norm. In this point, we share the view of the members of the Commission who consider that the relationship between jus cogens and obligation erga omnes needs a thorough and in-depth consideration.

We agree with the ideas expressed in Draft Conclusions 20 to 22: that States are not merely obliged to refrain from acting in a way that violates jus cogens. In reality, States have a duty to actively cooperate to disseminate and uphold these norms, which derive from fundamental values of the international society.

Mr. Chairman,

Portugal is grateful for the Special Rapporteur's efforts on expanding the discussion on jus cogens beyond classical matters such as treaty law and State responsibility. We also commend the Special Rapporteur on his decision to settle for a more consensual formulation for Draft Conclusions 22 and 23 by introducing a "without prejudice" reference.

Mr. Chairman,

As Portugal has stated previously, an illustrative list would not impair the progressive development of jus cogens. Nevertheless, it is likely that a debate on that list would be a time-consuming and complex task.

We maintain that if the Commission focuses on identifying the criteria for jus cogens and the consequences and effects of its norms, this exercise will be successful enough. Making jus cogens norms more detectable to more States is possible, even without an illustrative list of norms.

Even though the identification of regional jus cogens could be an appealing exercise from the intellectual point of view, such debate should be held in a careful way. The integrity of peremptory norms of general international law, as norms that are universally recognizable and applicable should not be jeopardized by this exercise.

Mr. Chairman,

Given the complexity of the topic, the Commission should take the necessary time to reflect and develop the Draft Conclusions and my delegation will continue to follow the work of the Commission on this topic with attention.