



**PERMANENT MISSION OF JAMAICA
TO THE UNITED NATIONS**

STATEMENT BY

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SIXTH COMMITTEE AGENDA ITEM 83:

**REPORT OF THE INTERNATIONAL LAW COMMISSION
ON THE WORK OF ITS SIXTY-SEVENTH SESSION**

**UNITED NATIONS HEADQUARTERS
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STATEMENT BY JAMAICA

My delegation would like to congratulate you on your election as Chairman and your able conduct of the affairs of the Sixth Committee. We would also like to thank the International Law Commission for their Report on the Sixty-Seventh Session and the significant contribution that body continues to make to the codification and progressive development of international law.

The perception of a loss of influence of the International Law Commission and the lessening significance of the role of the Sixth Committee is a matter of concern to my delegation. The International Law Commission consists of eminent legal practitioners and academicians representative of all legal systems, cultures and geographical regions. It is therefore ably positioned to develop and identify emerging and crystallized rules of international law.

My delegation notes with interest the recommendation of the Commission that the preparatory work and estimates proceed on the basis that the first segment of its seventieth session (2018) would be convened at the UN Headquarters in New York. We believe that adopting this practice would allow for more fruitful in-depth exchanges between the Commission and the Sixth Committee and heighten the prominence given to the important work of the International Law Commission in capitals, thereby promoting the legitimacy of international law.

The rule of international law and respect for its binding nature will only be preserved through a coherent body of rules which promotes equity, predictability and security in the relations between States and other actors on the international stage. The fragmentation of international law undermines its very existence. Where there is incoherence and inconsistency in the decisions of tribunals on the interpretation of fundamental concepts of international law the Rule of Law may be seen as an anathema.

Insecurity and instability rather muddy the waters for developing countries attempting to send positive signals to investors through the negotiation of bilateral investment treaties. There are also difficulties attendant to attempting to renegotiate existing bilateral investment agreements and concerns may arise

from changing the wording of new agreements to meet with the critical interpretation questions now manifest in this area of the law.

Chapter 4 of the Report of the International Law Commission addresses the Most-Favoured-Nation clause. My delegation wishes to thank the Chairman of the Study Group, Professor McRae and his former co-chair Mr. Perera, as well as Mr. Forteau who acted in Professor McRae's absence for the leading role they have played in the ILC's work programme on this subject. My delegation noted with interest the insights provided by the distinguished Ambassador of Sri Lanka on the hesitancy with which the ILC initiated its review of this issue. Investment is admittedly a specialized area of international law with public and private international law dimensions. However, the International Law Commission cannot shy away from treating with treaties between States which govern the commercial relations of States and transnational corporations – some of which account for a greater share of global income than many small developing countries.

Note is taken of the statement in paragraph 8 of the ILC's Study Group's report that

“The Commission does not have an authoritative role in relation to the decisions of investment tribunals, and to conclude that one tribunal was right and another wrong would simply insert the Commission as just another voice in an ongoing debate.”

Chairman, my delegation does not view the International Law Commission as just another voice in any debate on matters concerning international law.

Nonetheless, we appreciate the reluctance of the Commission to venture into such a vexed topic and to tread cautiously in addressing such matters. In this regard the approach of the Study Group in underscoring the fundamental principles of treaty interpretation as embodied in Articles 31 and 32 of the Vienna Convention of the Law of Treaties is an important contribution. As the Study Group has observed, far too frequently “Tribunals assert that they are seeking to ascertain the intention of the parties. Yet there is no systematic approach to

interpretation and different factors, sometimes unrelated to the words used in the treaties before them, appear to have been given weight.” (paragraph 91)

The Report of the Working Group notes that it considered but decided against revisiting the 1978 Draft Articles even though it recognized that the circumstances that existed when the ILC dealt with the MFN clause in relation to the 1978 draft articles have changed significantly. The Working Group’s Report consolidates its analysis of the jurisprudence. Could it have done more?

The Report of the Study Group usefully highlights the variety of ways in which MFN clauses are incorporated into bilateral investment treaties. It notes, for example, the marrying of the MFN clause, which is a relative concept measuring the relationship between two or more investors, and the provision for fair and equitable treatment which is generally seen as an objective standard or measure. The linkage of the MFN clause to the fair and equitable treatment standard has been described by some jurists as incongruous. Yet the Study Group fails to provide further insights into the application of the MFN clause in this way and in so doing fails to provide the sort of guidance which would have been useful to legal officials advising their governments in the negotiation and application of bilateral investment treaties.

The application of the MFN clause to substantive and procedural provisions is addressed somewhat more fully in the Working Group’s Report. The Report aptly describes this area as “one of the most vexed interpretative issues under international investment agreements.” (paragraph 80). Could the Study Group have taken the matter beyond the discursive analysis presented in the Report?

The existence of the WTO Appellate Body provides a mechanism for achieving coherence in the interpretation of the MFN clause in the trade sphere – whether concerning trade in goods, services or trade-related aspects of intellectual property rights. In so far as the MFN clause in article II of the General Agreement of Trade in Services (GATS) has implications for the provisions of BITs relevant to investment in services sectors the jurisprudence of the WTO Appellate Body could develop in unexpected ways and assist in clarifying somewhat this area of the law.

The ILC Study Group observes that “[t]he particular nature of the WTO system, with its own set of agreements and a dispute settlement process to interpret and apply these agreements, means that there is limited direct relevance of the interpretation of MFN provisions under the WTO for MFN clauses in other agreements. The interpretation of MFN treatment can continue within the WTO system regardless of how MFN clauses are treated in other contexts.” (paragraph 48)

My delegation concurs with the view that there is no need to examine the MFN clause in the trade context given the pivotal role played by the Appellate Body in the WTO dispute settlement system.

My delegation also supports the conclusion of the Study Group that the key question of *ejusdem generis* – what is the scope of the treatment that can be claimed – has to be determined on a case-by-case basis.

The Report of the Study Group serves to highlight the growing uncertainty in this area of the law and provides a very useful analysis of the jurisprudence directing the attention of legal advisers to certain key decisions meriting further reflection. Nevertheless, Mr. Chairman, my delegation hopes that the ILC and the Sixth Committee will do more to address some of the critical legal questions of interpretation in international investment law with the potential to significantly impact the sustainable development of developing countries.

Chairman, my delegation would also wish to express its interest in the work being done by the International Law Commission on the protection of the atmosphere as a pressing concern of the international community as a whole, that which we see as the common concern of all humankind. My delegation will submit in writing our comments on this subject and the proposed work programme of the Commission.

Thank you for your attention.