PERMANENT MISSION OF JAMAICA TO THE UNITED NATIONS

STATEMENT BY

DR. KATHY-ANN BROWN
DEPUTY SOLICITOR GENERAL
ATTORNEY GENERAL'S DEPARTMENT

SIXTH COMMITTEE AGENDA ITEM 83:

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

UNITED NATIONS HEADQUARTERS
5TH NOVEMBER 2015

Please check against delivery

Mr. Chairman, it was not the intention of my delegation to take the floor on this cluster of issues. The text of conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties provisionally adopted so far by the Commission however has prompted this brief intervention.

The text of the draft conclusions are most useful in drawing attention to the importance of subsequent agreements and subsequent practice as authentic means of interpreting the constituent instruments of international organizations under article 31(1) of the Vienna Convention on the Law of Treaties and as supplementary means of interpretation under article 32. The analysis presented in the Commission's Report rests predominantly on the decisions of the International Court of Justice (contentious cases and advisory opinions), with additional references to decisions of the Appellate Body of the World Trade Organization, the Court of Justice of the European Union, and the views of writers. We note that the Commission has requested that States provide it with examples of decisions of national courts in which a subsequent agreement or subsequent practice has contributed to the interpretation of a treaty.

Mr. Chairman, my delegation would very briefly draw attention to the jurisprudence from our own region; we refer not to our national courts but to the regional court, that is, the Caribbean Court of Justice.

CARICOM Member States in the 2003 Revised Treaty of Chaguaramas have conferred *ipso facto* a compulsory and exclusive jurisdiction on the Caribbean Court of Justice to hear and determine disputes concerning the interpretation and

application of the Revised Treaty. Significantly, the Caribbean Court of Justice has relied heavily on the practice of CARICOM organs in its decisions under the Court's Original Jurisdiction in interpreting the Treaty.

In *Trinidad Cement Limited v. The Caribbean Community* [2009] CCJ 4 (OJ) the Court relied on 1992 and 1993 documents predating the entry into force of the 2003 Revised CARICOM Treaty to interpret its provisions based on evidence that the former practices which existed under the original treaty had been maintained. The Court held that these documents continued to reflect the policies of the Community and until disavowed by the Community or disapproved by the Court, the guidelines and prescriptions contained in them should be taken as being still in force so far as they are not inconsistent with the provisions of the 2003 Revised Treaty. The Court saw no need to explicitly justify its finding by reference to articles 31(1) or 32 of the Vienna Convention on the Law of Treaties, although the arguments presented to the Court relied on these provisions.

Similarly in the *Shanique Myrie case* [2013] CCJ 3 (OJ) the Caribbean Court of Justice relied heavily on the practice of the Conference of Heads of Government, the supreme organ of the Caribbean Community, with regard to abstentions and reservations and the language generally used in Conference decisions as a means of determining the nature of the relevant decision of the Conference which was central to the Claimant's case. Here again the Court saw no need to expound on the reasons for having recourse to institutional practice as a means of interpretation.

Institutional practice is of signal importance in facilitating the deepening and strengthening – the metamorphosis so to speak - of fragile institutional frameworks into strong vibrant integration entities. The inherent flaws of the treaty-making process built on a desire to achieve the broadest possible consensus, leave many details unscripted. Institutional practice is accepted as a mechanism through which ambiguous texts may be clarified. Of course, where there is a need to modify or amend the treaty recourse must appropriately be had to the formal amendment procedures.

It is recognized that constituent instruments of international organizations are treaties of a particular type which need to be interpreted in a specific way as such treaties can raise specific problems of interpretation owing, *inter alia*, to their character which is conventional and at the same time institutional. Nevertheless, as the Report of the Commission observes in paragraph 35 of the commentary in Chapter VIII:

> *"Article 5 of the Vienna Convention allows for the application of the rules of interpretation in articles 31 and 32 in a way which takes account of the practice of an international organization, in the interpretation of its constituent instrument, including taking into account its institutional character. Such elements may thereby also contribute to identifying whether, and if so how, the meaning of a provision of a constituent instrument of an international organization is capable of evolving over time."*

Mr. Chairman, my delegation looks forward to the Commission's further work in this area and would welcome discussion on the jurisprudence of other regional courts.

Mr. Chairman, my delegation further notes the request of the Commission for information on practice, in particular judicial practice, related to limits and exceptions to the immunity of State officials from foreign criminal jurisdiction and information on practice concerning the provisional application of treaties. These topics fall within the third cluster to be addressed next week when, unfortunately, I am unable to be present. I hope that you would allow my delegation to signal that there is relevant national jurisprudence on the former topic - I refer to that concerning the immunity of State officials; and there have been extensive regional discussions on the latter – that concerning the provisional application of treaties.

Some CARICOM countries are unable to provisionally apply regional agreements due to legislation requiring the ratification of treaties before their application. Nevertheless there continues to be extensive use of the facility for provisional application within CARICOM to allow for the timely implementation of agreements given the delays associated with formal ratification procedures. Countries with legislation precluding provisional application within the domestic sphere have had to accelerate formal acceptance procedures to facilitate this.

Mr. Chairman, my delegation draws attention to the practices of the CARICOM region as we see this and indeed the practices of all regions and States as

important in defining the rules of international law. We hope that the International Law Commission will pay due regard to the practices of all regions and thereby promote an informed exchange on the differing legal perspectives and approaches to the significant issues addressed in the ILC's work programme.

I thank you.