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Comments of the Governments and of the International Organisations on the preliminary draft Convention on jurisdiction and foreign judgments in civil and commercial matters adopted by the Special Commission on 30 October 1999 and on the Explanatory Report by Peter Nygh and Fausto Pocar

JAPAN

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Comments by the Japanese Government on Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters

I General Remarks

The Japanese Government presents its compliments to all the members of the Hague Conference on Private International Law for their active involvement in the preparation of a new Convention on the question of jurisdiction, and recognition and enforcement of foreign judgments in civil and commercial matters.

We fully recognize the importance of this project, which, if successfully concluded, will have far-reaching effects on the lives of the people throughout the world. With the irreversible trend of ever expanding international commerce, the question of predictability in the field of international jurisdiction has become more important than ever. Thus, it is essential for the new Convention to establish a legal structure practically acceptable to as many countries as possible.

We believe that the preliminary draft Convention, with the structure of the so-called "mixed Convention", is pointing to the right direction in this regard and that the rules of jurisdiction, consisting of “white list", "black list” and “gray area", are, in general, well-balanced and acceptable.

However, we are of the opinion that there still remain some problems to be solved with respect to certain articles. We are ready to cooperate with other participating states at the Diplomatic Conference in searching for common solutions to these problems without damaging each state’s interest. It may turn out, however, that no solution is found during the Diplomatic Conference on these issues. If that is the case, efforts should be made to draft a smaller Convention with limited scope of application that covers only those areas on which there is agreement rather than to have a grand Convention that covers everything but has little prospect of attracting Contracting States. To this end, we feel that it might become necessary at some stage of the Diplomatic Conference to remove controversial bases of jurisdiction from the white list, leaving them to the gray area, while maintaining the basic policy of restricting the exercise of excessive national

jurisdiction by way of the black list.

The following comments are offered without prejudice to our final position at the Diplomatic Conference.

II Specific comments

Article 1

Claims related to nuclear damages should be excluded from the scope of application of the Convention. This matter had better be left to other international instruments.

In case that paragraph 2 of Article 10 is deleted, claims for damages caused by anti-trust violations should be excluded as well.

Article 3

For the purpose of this Convention, the notion of "habitual residence" should be clarified further. We observe that this notion as used in other conventions has resulted in different interpretations by different Contracting States. In addition, should this notion be used in this Convention, it would be inevitably affected by the interpretation taken in respect of the same words in other conventions, most of which are on family matters. It is therefore advisable to avoid such a situation in this Convention. If a different concept is to be adopted instead of "habitual residence" in this article, it would become necessary to examine whether or not "habitual residence" as used in other articles should be maintained in light of a specific purpose of each article.

Article 6

It is our understanding that the place where the performance of payment obligation took place does not constitute the basis for jurisdiction under this Article, although the present text of Article 6 is not clear on this point. According to the report of the Special Commission, however, the jurisdiction under this article is granted only to the place where the main obligation of the contract was performed, and not to any place where each and every contractual obligation took place. It follows that, for

example, in case of a claim for the performance of payment obligation arising from a contract of sale of goods, the jurisdiction under article 6 is available only to the place where the goods were supplied, and not to the place where the payment was made.

On the other hand, it might be argued that the place of payment could become the basis for Article 6 jurisdiction in such instances as a loan contract on the ground that the supply of money itself is considered as the supply of services within the meaning of Article 6. This argument must be addressed in an unequivocal way in the text of this article so that there shall be no doubt about the interpretation that under no circumstances the place of payment alone will constitute the basis for jurisdiction under Article 6.

Article 7

With respect to the words " directed to" in sub-paragraph 1(a) of Article 7, it might be appropriate to make it clear that, in such cases where a company engaged in consumer trade via the Internet has taken certain measures to limit the consumers to contract with by posting the disclaimer clause on its web site indicating that the web site is only for those consumers in specified countries as well as by taking such technologically reasonable steps as appropriate to avoid entering into a contract with consumers in the countries not specified in the disclaimer clause, the company should not be considered to conduct the activity directed to such countries as not specified in the disclaimer clause.

As regards the interpretation of sub-paragraph 3(b) of this article, it is not clear from the text whether a choice of court agreement in consumer trade entered before the dispute has arisen shall be valid only when the agreement provides for additional jurisdiction for the consumer, or, it can be valid, even where the agreement itself provides for exclusive jurisdiction of the court of choice, to the extent that it enables the consumer to bring proceedings in a court specified in the agreement. Also, the meaning of "another court" in this paragraph should be clarified in comparison with the words "courts other than those indicated in this Article or in Article 3 of this Convention" in paragraph 2 of Article 8.

It has been suggested that an agreement on exclusive jurisdiction should be given some legal effect under such conditions that the law of habitual residence of the consumer permits such agreement and that the disclaimer clause is validly employed. However, we consider this approach inappropriate because, in consideration of the fact that this issue has not been definitely settled under some domestic laws, it would create the problem of unpredictability on the part of parties to such agreement as well as the problem of difficulty on the part of the court in ascertaining the legal status of such agreement under foreign domestic laws.

The definition of "consumers" in paragraph 1 should be understood that only natural persons are considered as consumers under this Convention.

Article 8

As mentioned above with respect to sub-paragraph 3(b) of Article 7, sub-paragraph 2(b) of this article needs to be clarified as to whether a choice of court agreement between an employee and an employer shall be valid only when the agreement provides for additional jurisdiction for an employee, or, it can be valid, even when the agreement itself provides for exclusive jurisdiction of the court of choice, to the extent that it enables the employee to bring proceedings in a court specified in the agreement.

Article 9

The words contained in square brackets should be deleted. In case that they were retained, the notion of "regular commercial activity" must be defined as clearly as possible. In particular, it should be drafted in such a way that such passive activities as the mere establishment of a web site do not fall within the scope of the definition of "regular commercial activity." At the same time, if some elements of activity based jurisdiction are introduced in Articles 6 and 10, the relationship between this article and Articles 6 and 10 must be reconsidered.

Irrespective of the retention of the words in square brackets, it is more appropriate to use the words more restrictive than "relates directly to" as in the present text. As regards "branch, agency or any other establishment," it

must be clarified that subsidiaries or affiliated companies are not considered as branch, agency nor establishment under this article. In other words, apart from a branch itself, this article should apply only to those agencies or other establishments that can be equated with a branch of the defendant.

Article 10

The word "injury" in sub-paragraph 1(b) needs careful examination from the viewpoint of whether or not this word is sufficiently clear to indicate that the place of injury does not include the place where only economic loss or consequential damages such as the loss of profit arose. As regards the foreseeability test in the proviso of the same sub-paragraph, it would be necessary to have a common understanding as to the circumstances under which it is considered that there is a reasonable foreseeability on the part of the person claimed to be responsible.

As regards paragraph 3, we fear that the jurisdictional basis under this paragraph might be too broad, because this paragraph enables the plaintiff to bring an action in the courts of the State even in the cases where there is only a possibility that the act or omission, or the injury may occur in that State. Therefore we are of the view that this paragraph should either be deleted or be redrafted so that it would require more than the mere possibility of the occurrence of such act or omission, or injury in that State as a pre-requisite for the plaintiff to take an action in that State.

According to paragraph 4, the State of habitual residence of the injured party will have the jurisdiction of adjudicating all the damages suffered in every part of the world on account of the "unless" clause in this paragraph, which might be considered too broad as well.

Article 12

Given the fact that the question of governing law of a legal person is not settled uniformly among national legal systems, the jurisdictional rule contained in paragraph 2 of this article might create a problem of more than one state exercising "exclusive jurisdiction."

Square brackets in paragraph 4 should be removed so that the exclusive jurisdiction of the courts of the State in which registration has taken place is extended to proceedings for infringement of patents or other similar rights required to be registered. Exceptions to this exclusive jurisdiction, if any, should be limited to those based upon Articles 3, 4 and 5.

Article 13

The rule of jurisdiction in paragraph 3 of this article, which does not entail the obligatory recognition and enforcement of provisional measures, would be of some legal significance in a mix convention only if it were understood that there is a "black list" hidden under this paragraph, whereby all the grounds for jurisdiction for provisional measures other than as contained in this article are prohibited under this Convention. However, this interpretation clearly runs counter to our reading of this paragraph. Also, we do not believe that there has been a consensus to that effect reached by the Special Commission.

As mentioned below with reference to Article 23, we consider that it would not be appropriate for this convention, which is global in terms of its geographical scope of application and is general in terms of its material scope of application, to provide for the recognition and enforcement of provisional measures, because such measures could be of various kinds and there would be no way of committing ourselves to the assumption that all such measures categorized as provisional measures in other jurisdictions are enforceable under our national legal system.

Therefore, sub-paragraph 1（b）of Article 23 should be deleted and, consequently, there would be no reason to retain paragraph 1 of Article 13 as " a white list jurisdiction" because Article 13 would no longer have any connection with the treaty obligation of recognition and enforcement. By the same token, there would be no need to retain paragraph 2, as this paragraph is not linked to the recognition or enforcement of provisional measures in any way.

For the reasons mentioned above, we consider that this article be deleted in its entirety and, consequently, the reference to this article in Article 17 should also be deleted.

On the other hand, if the deletion of Article 13 is not accepted, paragraph 3 should be deleted and paragraphs 1 and 2 be included in a new independent Chapter which contains only new Article 13, on the understanding that the new article provides only for a rule of direct jurisdiction without preventing a Contracting State from exercising its domestic jurisdiction for provisional measures and there is no treaty obligation being imposed on a Contracting State to recognize or enforce such provisional measures as based upon the new article.

Article 14

This article should be deleted. In the context of deciding on international jurisdiction, it is not appropriate to deprive the defendant, by virtue of this article, of his legitimate interest in jurisdiction which otherwise would have been granted to him under this Convention. The rationale behind this article, as cited in the Report, is to avoid inconsistent judgments. However, the benefit of avoiding inconsistent judgments should not prevail over the interests of the defendant unless the subject matter in dispute is such issues as family relations, organizational aspects of corporations, or co-ownership. As these issues could be dealt with under this Convention by the exclusion of certain types of litigation from the scope of application of this Convention (Paragraph 2 of Article 1) or provisions on exclusive jurisdiction (Paragraphs 1 and 2 of Article 12), there would be no need for this Convention to have a special rule for jurisdiction such as Article 14 where multiple defendants are involved.

Article 16

This article should be deleted. Japan is one of those States whose domestic laws do not permit the type of jurisdictional basis as stipulated in this article. This type of jurisdiction would be detrimental to the interests of the third party involved and, from the viewpoint of procedural fairness, could not always be justified. Therefore, the situation addressed by this article should not be on the "white list" but be left to a "gray area".

Article 18

We are of the view that sub-paragraph 2(e) of this article needs to be retained in order for Japan to consider becoming a party to this Convention. Moreover, we consider that mere existence of a subsidiary or other affiliated entity of the defendant in the territory of a State should not constitute a jurisdictional basis for that State to exercise jurisdiction over a claim against the defendant unless there is substantial connection between that State and the claim. Accordingly, the following new sub-paragraph should be added to paragraph 2: "k) the location of a subsidiary or other related entity of the defendant in that State."

With respect to paragraph 3, such exceptions to the black list as contained in this paragraph should be permitted only to those cases where the plaintiff has its habitual residence in a Contracting State.

Article 21

We are fully aware that, as this article was adopted as a compromise solution after an intensive discussion in the Special Commission, further elaboration of this article would be difficult. However, for the purpose of effective application of the rules of this article, it would be worth undertaking for the Diplomatic Conference to explore common understandings on such matters as the level of expectation required for the application of paragraph 1 of this article, or the meaning of "a reasonable time" (ex. a few months, one year or a few years etc.) in paragraph 4 of this article.

With respect to paragraph 2, there might be instances where the court second seized should render a judgment according to the effect of *res judicata* of a judgment rendered by the court first seized instead of declining jurisdiction as stipulated in the present text. Such instances would occur when claims before the respective courts are not identical but related to each other.

There is an ambiguity as to what kinds of measures the court first seized should take when the court second seized has proceeded with the case under paragraph 3 and has rendered a judgment that complies with the requirements for recognition or enforcement under the Convention.

Article 22

Although we understand the necessity of retaining this article, it might be argued that this article could be abused in certain cases for the purpose of prolonging litigation by allowing one of the parties to a dispute to apply for the suspension of the proceedings that have been instituted in the court of the State which has a legitimate jurisdictional basis under this Convention.

Article 23

Sub-paragraph 1（b） of Article 23 should be deleted so that provisional measures are excluded from the scope of the provisions on recognition and enforcement in this Convention. Given the diversity of such measures that might exist in various domestic laws of different states, it would be premature for this Convention to treat these measures as foreign judgments capable of being recognized and enforced among Contracting States. Also, there seem to be few benefits to be gained by such treatment, because, even if provisional measures as such are to be enforced in another state, their enforcement would normally require the commencement of the enforcement proceedings in that state, the procedural burden of which would not be so different from applying for provisional measures in that state from the outset. Moreover, there is always a possibility that provisional measures are overturned by the subsequent order, which creates another problem as to the treatment of such measures that have once been provisinally enforced.

Article 25

The treatment of a foreign judgment which has not become final in the State of origin would differ from one jurisdiction to another.We are against the approach in this article of obliging contracting states to recognize or enforce a foreign judgment which is still the subject of review in the State of origin, as we doubt that this approach is viable in an international situation to which this convention is expected to apply. As in the case of provisional measures, a foreign

judgment pending appeal can be overturned subsequently by the appeal court and, if that happens, difficult legal issues would arise concerning the legal effect of the foreign judgment that has already been recognized and enforced in that state.

Accordingly, we believe that only those foreign judgments that are no longer the subject of ordinary review in the State of origin should be the subject of obligatory enforcement and recognition provisions under this convention, without prohibiting those States that have no difficulty in recognizing or enforcing such judgments to do so. Postponement of recognition or enforcement in such circumstances, as the present text provides, would not be appropriate, because a literal interpretation of the word "postponement" suggests that it does not allow the State addressed to refuse the recognition or enforcement of such foreign judgments. In order to make this point clear, the following amendment to paragraph 4 is suggested: "Notwithstanding preceding paragraphs 2 and 3, recognition or enforcement may be refused if the judgment is the subject of review in the State of origin or the time limit for seeking a review has not expired"

Article 28

It is not clear from sub-paragraphs c), d) and f) of paragraph 1 whether or not the court of the State addressed is entitled to refuse the recognition or enforcement of a foreign judgment where the document which instituted the proceedings was served on the defendant in such a way that it gave the defendant a sufficient time to arrange for his defense but the service itself was in violation of either rules of international law or the law of the State where such service took place. It is our view that any service of documents that infringes the sovereignty of a State should not be given legal effects in the context of recognition or enforcement of judgments deriving from such service, regardless of whether or not the defendant was in fact given an opportunity to prepare for his defense. This article should be re-drafted so as to make it clear that, should such infringement of the sovereignty occur, the court of the State addressed may refuse the recognition or enforcement of the foreign judgment.

As regards other grounds for refusal of recognition or

enforcement, it might be worth considering whether or not a judgment rendered by a court of a Contracting State that should have suspended the proceedings in accordance with Article 21 should also be covered by this Article.

We understand that the word "notified" in sub-paragraph 1(d) should be construed as a factual concept. In other words, when the notification of the document to the defendant took place by way of notice by publication in such cases as where the defendant's whereabout was unknown to the plaintiff, it should not be considered that the defendant was notified within the meaning of this sub-paragraph, even if such notification is authorized under the law of the state where it took place. We believe that the text of this sub-paragraph should more clearly address this point.

Article 31

We believe that this article should be drafted so as to make it clear that the "costs or expenses" in this article refers only to those of the proceedings for recognition or enforcement. Apart from that, it might be worth considering to add some provisions similar to those contained in articles 17 and 18 of the Civil Procedure Convention or articles 14 and 15 of the Access to Justice Convention to this article.

Article 33

Since sub-paragraph 2(a) makes an exception of the rule that there shall be no review of the merits of the judgment rendered by the court of origin, "the circumstances" in light of which damages awarded are considered "grossly excessive" must be more clearly defined. Also, as we understand that sub-paragraphs 2 (a) and (b) should apply not only to recognition but also to enforcement, the text should reflect more precisely the substance in this respect.

Article 36

The meaning of the words " a court has given its authority" needs further clarification. In particular, the required degree of involvement of the court in the settlement process must be made clear.

Articles 38 to 40

We fully understand the importance of ensuring the uniform application of this Convention among Contracting States. However, we are not in favor of the approach currently contained in these articles. In particular, it is difficult to go along with the idea of establishing a committee of experts to make recommendations on a request of the parties to a dispute under Article 40, because it would not only conflict with the basic structure of the Japanese civil procedure but also cause a serious problem of unconstituonality with respect to the notion of judicial independence under the Constitution of Japan.

Therefore, the question of what kinds of mechanisms should be employed to achieve the uniformity of interpretation of this Convention needs more careful deliberation at the Diplomatic Conference, taking account of differences of legal systems among participating States and, if necessary, exploring the possibility of making this part of the Convention optional.