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Convention on jurisdictional immunities of States and their property

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Report of the Secretary-General

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Japan

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1. Japan highly appreciates the work of the open-ended Working Group on Jurisdictional Immunities of States and Their Property under the strong leadership of its chairman, Gerhard Hafner. Also, the Working Group would not have been able to make as much progress as it has without the valuable contribution of the International Law Commission (ILC).

2. Establishing a convention in the area of jurisdictional immunities of States and their property is significant in the context of advancing the codification of international law, and even more so in providing stability and predictability in transactions between States and private parties. Much progress has been achieved towards this goal since the draft was submitted to the Sixth Committee in 1991, and the remaining points of contention are indeed very few. Japan is of the view that by having intensive discussions during the session of the Ad Hoc Committee to be held in February 2002, further progress can be achieved on these points. Japan hopes that all the efforts put into this topic will finally bear fruit in the form of a convention.

3. In the following paragraphs, Japan limits its specific comments to three of the five outstanding substantive issues: item 2 (definition of commercial character of a contract or transaction), item 3 (concept of a State enterprise or other entity in relation to commercial transactions) and item 5 (measures of constraint against State property) as the differences in the other two items are now very narrow. It may make further comments on the draft on other occasions.

Definition of commercial character of a contract or transaction

4. Much progress has been made on this item, although there still remain some differences regarding what is to be taken into consideration in determining whether a certain contract or transaction is a "commercial transaction". The Working Group succeeded in narrowing down the differences to two main alternatives: one is to leave it entirely up to the discretion of national courts to decide what to be taken into consideration in making such determination, and the other is to indicate the points of reference in making such determination which allows, one way or another, for the introduction of the "purpose" test in addition to the "nature" test.

5. Japan questions the sufficiency of the "nature" test in determining whether a certain contract or transaction is a "commercial transaction". Precedents in national legislations and court decisions also seem to indicate that there is little convergence on national practices on this issue. At this point, it seems most appropriate to leave it up to the discretion of national courts to decide what should be understood as a "commercial transaction".

6. Therefore, Japan is of the view that among the three alternatives indicated by the Chairman in chapter V of his report (A/C.6/55/L.12), alternative I would be most preferable. However, it is prepared to consider other alternatives as well in order to facilitate an early conclusion of the item, as both alternatives II and III still leave some room for the discretion of national courts.

Concept of a State enterprise or other entity in relation to commercial transactions

7. The initial draft submitted by the ILC in 1991 contained a provision on State enterprises reflecting the existence of a special form of "segregated property" of State enterprises at the time the draft was being drawn up. However, such a provision bears the danger of States hiding behind State enterprises so that they might be exempt from responsibility in relation to those enterprises. As the situation in the international community has changed drastically since then, Japan, as it stated during the discussions in the Working Group, continues to doubt the necessity of retaining a provision on this issue in the current version of the draft. Japan's preference would therefore be to delete the paragraph.

8. However, Japan is ready to consider alternative II indicated by the Chairman. Regarding that alternative, Japan appreciates the efforts of the Chairman to eliminate the concern expressed by some Member States, including Japan, that the formulation discussed in the Working Group presented the possibility of an a contrario interpretation being applied to it to the extent that if the State enterprise or other entity did not have independent legal capacity it would automatically

enjoy State immunity in respect of commercial transactions, by adding the words "Without prejudice to the other provisions". Nevertheless, some work would be necessary on this alternative, particularly to clarify exactly to what extent the phrase "Without prejudice to the other provisions" affects the extent to which a State enterprise or other entity established by a State enjoys State immunity.

State immunity from measures of constraint

9. Japan supports the basic idea behind the Chairman's proposal indicated in chapter V of his report to have separate articles (or separate paragraphs in one article if that is preferable) for pre- and post-judgement measures of constraint, and allow greater restriction on the imposition of measures of constraint for the former. Japan holds this view because pre-judgement measures of constraint contain the risk of abuse, as the decision to impose such measures will inevitably be made without any substantial consideration of the matter in question.

10. It is the understanding of Japan that one of the substantial points of contention that still remains on this issue is whether or not to grant a grace period in imposing post-judgement measures of constraint against State property in cases other than those in paragraph 1 (a) and (b) in both alternatives, although there are still some Member States that do not support separating pre- and post-judgement measures of constraint. Japan supports the idea that implementation of a judgement should in principle be conducted voluntarily by the State. Japan therefore is more in favour of alternative II than alternative I. It is also flexible on the length of such grace period. The phrase "unless the applicable rules of international law provide otherwise" in paragraph 2 of alternative II lacks clarity and seems to allow for an unduly wide interpretation. Therefore, Japan suggests that it be rephrased to read "unless the international agreements to which the State is a party provide otherwise".

11. Japan is also prepared to opt for not having any provision on measures of constraint if it turns out that no solution on this issue is envisaged even after further discussion in the Ad Hoc Committee. After all, there does not seem to be an established rule of international law on this issue. However, it would be better to have some kind of provision on this point, preferably along the lines described in paragraph 10 above.